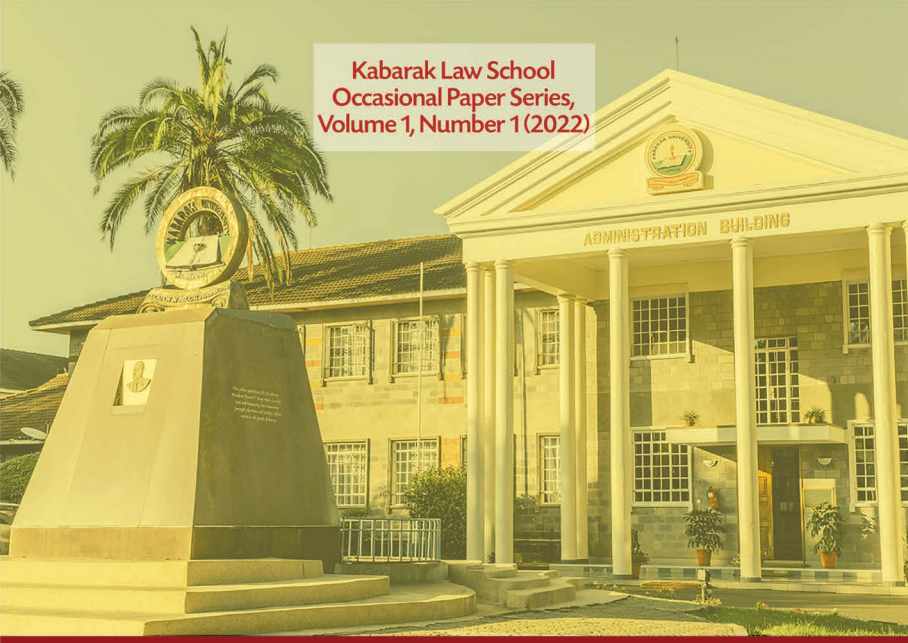
Kabarak Law School
Occasional Paper Series,
Volume 1, Number 1 (2022)



In search and defence of radical legal education: A personal footnote

INAUGURAL LECTURE OF
PROF JUSTICE WILLY MUTUNGA

KABARAK
UNIVERSITY PRESS

ISSN 2790-3842
eISSN 2790-3850

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28 JANUARY 2022

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Kabarak University Press is the academic publisher of
Kabarak University.

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A PERSONAL FOOTNOTE

Year of publication 2022

ISSN 2790-3842 (Print)
eISSN 2790-3850 (Digital)
Layout by John Agutu
Email: agutujo@gmail.com

Printed in Nairobi, KENYA

Editorial

An Inaugural Lecture is the pinnacle of one's scholarly journey, when a scholar is invited to present to the world, the sum total of their intellectual insights gleaned over the decades of their scholarly production. Inaugural lectures are accorded in high esteem in epistemic communities across the globe. It combines dexterity of thought, the skills of wordsmith tried and tested by decades of intellectual debate and controversy.

Professor Justice Willy Mutunga presents his Inaugural Lecture at Kabarak University in this very first issue of the *Kabarak Law School Occasional Paper Series.* Professor Justice Mutunga relays his thoughts in a beguilingly complex narrative that may be seen as a biographical account. He happily founds and cements his conviction of the type and ends of law he has practiced his entire life in the pivotal moments of his life, beginning with lucid recollection of the practice of law in his childhood milieu, his village in Kilonzo in the 1950s. His recollection seems to play out the discussions of despotic customary law and local power in Mahmood Mamdani's *Citizen and subject.*

His locations of legal theory convictions unsurprisingly also mark pivotal moments in the life of the society he has lived in. These locations are at once social, class conscious, and defined by the time and space

they occurred. They are, in a very real sense, concrete – imagining even the physically concrete spaces that were locations of colonial rule by law in his childhood village. In this sense, Professor Justice Mutunga remains true to the historical method, giving meaning to past events as they had at their time of occurrence while not losing sight of their implications across into the future. As he says, the past is not past but is still present and will be the future.

Professor Justice Mutunga is surely well located to dare assert a future for legal education from a past wrought in struggle. Having been successful in Bar and Bench, civil society and in development work, and always mysteriously succeeding to wring revolutionary success in every one of these sectors, his life's thoughts and practice are uniquely suited as locations of political, legal, socio-economic and cultural conceptualising.

It is rewarding that this Inaugural Lecture presented, in Professor Justice Mutunga's usual – he delivers his thoughts similarly in *Constitution-making from the middle* (1999; 2nd edition 2020) – double-entendre, multi-layered diplomatic narrative – a certain parable speech, we dare say – is nonetheless done in simple English, and in chronological order. It keeps alive scholarship and intellectual insights from jurisprudential trends that are at risk of being forgotten, and re-imbeds them in current debates in every space and time that is relevant to legal education. It is provocative, piercingly insightful and alas, an important record of past events.

We are proud to present to you this excellent summation of a lifetime of scholarly activity as our very first issue of the *Kabarak Law School Occasional*

Paper Series. This is Kabarak Law School's fourth and newest periodical. It will aim to publish single full-length treatments of precise questions in law and legal theory. These *Occasional Paper Series* aims to cement the culture of monographic scholarly production in Kenya. Aiming at 17000-20000 words, it seeks to reaffirm and celebrate erudition and most importantly, spark intellectual debate.

We could not have wished for a worthier start than the Inaugural Lecture of Professor Justice Willy Mutunga, with whom we are honoured to share the collegiality of the teaching of law at Kabarak University.

J Osogo Ambani and Humphrey Sipalla
Kabarak, January 2022

The structure of my Inaugural Lecture falls within the trajectory of my personal experiences in search and defence of radical legal education for over five decades. I will not dwell on what radical legal education is at this juncture. The elements of this education, rather than its definition, will be gleaned from the trajectory of the Inaugural Lecture. Indeed, I will come to this issue at the end when in a postscript I discuss what Kabarak Law School (Kabarak) can do in search and in defence of radical legal education.

I: The past is, indeed, never past. It is also the present and the future

Upon reflection we all get huge doses of legal education in communities we are brought up. I was brought up in the early 1950s in a community of about 1000 people at Kilonzo Central Division of Kitui District (now Kitui County). The community owned the land, grazing pastures, shared resources equitably, settled disputes peacefully with a keen eye on reparations, and the stability of the community. We practised traditional Akamba religion. Without a doubt there was traditional Akamba education touching on every aspect of the community's life. When it came to gender justice, as children, we were not only exposed to patriarchy but also to its resistance by our mothers who were always with us when our fathers were invariably away.

* Parts of this lecture have appeared previously under Willy Mutunga, 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?' *Transnational Human Rights Review,* Vol 8, 14 October 2021

This status quo was changing because of British colonialism. I went to a secular school but there was another run by the African Inland Mission in the next village. Education was not divorced from religion. Indeed, joining school meant joining a religion. I grew up experiencing and reflecting the tensions between colonial education, culture, religion, and authoritarianism, and its traditional nemeses including resistance.

In terms of law and order, I saw the brutality of chiefs and teachers that were in stark contrast with the values that the community brought us up in. All children take positions in such a situation. So perhaps unconsciously, I was socialised on the side of the rule of law (and not rule by law), justice, fairness, land and resources owned by my community, and village democracy of my community based on the participation of the villagers, the identification of leaders of integrity, including women, the identification of talents and expertise needed collectively by the community, humane treatment of criminals, including shielding them from colonial authorities when it was possible.

Right in the market close to my village were the offices of the colonial chief and a native court. One of my uncles was a 'judge' in that court. As children, we occasionally went there as part of our education. The settlement of disputes by the Akamba Kithitu Oath was known to me before I went to the Faculty of Law in the University of Dar-es-Salaam (Dar), a decade later.

One can say that I was introduced fully to some elements of law in its various fields, but the non-legal phenomena upon which law operated was reflected in the village I grew in.

So when we say the past, indeed, is not the past and that it is invariably the present and future I can see that the radical trajectory in my legal education started from my community and my village.

II: The reading of law

I do not believe I was seduced to read law by reading *A man for all seasons*[1] that many lawyers of my generation claim to have excited and incited their intellect to venture into the reading of law. I do not believe the visit by the then Attorney General, Charles Njonjo, to Strathmore College where I was doing my A Levels had anything to do with it. I do not believe either it was because Kitili Mwendwa was the Solicitor General and that he came from Kitui. I also knew about a few of my schoolmates in Kitui Secondary School who were reading law in Dar. I wanted to read history, a subject I loved. Well, I ended up going to Dar to read law because I wanted to travel outside Kenya, and read a discipline that was new. I also knew that there were not many Africans on the Bench and in the legal profession. The argument about a bright professional future in the law must have influenced me, too.

I arrived in Dar in July 1968 to start reading for my Bachelor of Laws (LLB) Degree. I was quickly introduced to the compulsory courses in the first year: Contracts, Legal Systems, Legal Method, Criminal Law. We had standard textbooks and materials developed

[1] First published in 1960. It was one of my set books for literature. Many of us admired the character Sir Thomas Moore, his legal and philosophical arguments.

by our lecturers. What captured my imagination immediately was a course named Social and Economic Problems of East Africa coordinated by Professor Sol Picciotto. The book edited by Professor Issa Shivji[2] tells part of this story. Indeed, Shivji's chapter in the book *Furthering constitutions, birthing peace: Liber amicorum Yash Pal Ghai*[3] has an outstanding treatment of Picciotto's brilliant contribution to radical legal education at Dar.[4] In this course, Picciotto brought lecturers from other disciplines to teach us. Professor Walter Rodney in his history lectures, demystified in a great measure, Contracts, Legal Systems, and Criminal Law.[5] There were political economists, political scientists, theologians, intellectuals from the freedom fighters based in Dar (African National Congress [ANC], South West Africa People's Organisation [SWAMPO], Frente de Libertacao de Mocambique [FRELIMO], Zimbabwe African People's Union [ZAPU], Zimbabwe African National Union [ZANU], People's Movement for the Liberation of Angola [MPLA], Movimiento Nacional de Liberación de Guinea Ecuatorial [MONALIGE], Palestine Liberation Organisation [PLO], Frente Popular de Liberación de Sagula el Hamra y Rio de Oro [POLISARIO], Black Power, Black Panthers) who we heard, either through public lectures at Nkrumah Hall, or directly in our lectures on this course. There were

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[2] *Limits of legal radicalism: Reflections on teaching law at the University of Dar-es-Salaam* (Dar-es-Salaam: University of Dar-es-Salaam Press, 1986).

[3] 'An intellectual journey with my teachers' in Humphrey Sipalla & J Osogo Ambani (eds), Strathmore University Press, 2021, 193-216.

[4] Shivji 'An intellectual journey with my teachers' 206-7.

[5] Shivji 'An intellectual journey with my teachers' 207-8. Professor Shivji at page 207 writes, 'For Walter, academic lecturing was as much an act of politics as delivering a speech at a rally.'

rumours then that Che Guevara had been in Tanzania. I confirmed this when I later read the biography of his Cuban wife, Aleida March.[6]

Tanzania was not called during this period 'the Mecca of Revolution' without reason. Dar attracted radical intellectuals from across the world. Students in the University participated, and in many instances, led this revolution.[7] I write about student activism and conservatism in Dar in the book celebrating the late Professor Hastings Okoth-Ogendo.[8]

In some courses, particularly Contracts and Criminal Law, the two American professors, William Whitford and Robert Siedman, used the socratic method that I loved. Since we had the materials, the professors simply assigned readings that were to be the basis of discussion. The lectures were study groups where the professor moderated the discussion. Every student had to read

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[6] *Remembering Che: My life with Che Guevara,* (Melbourne: Ocean Press, 2021). There is a photograph in this book of 'Aleida and Che disguised as Josefina and Ramon, during their meeting in Tanzania after Che had been in the Congo.' This was January 1966.

[7] Karim Hirji (ed.) *Cheche: Reminiscences of a radical magazine* (Dar-es Salaam: Mkuki na Nyota, 2010). This book narrates the activities of the University Students African Revolutionary Front (USARF) which Yoweri Kaguta Museveni chaired. Professors Issa Shivji, Karim Hirji, Kabiru Kinjanjui among others were members of USARF. In Shivji 'An intellectual journey with my teachers', 208-9, Professor Shivji confirms that the ideological classes in the University were convened by USARF and TANU Youth League at the campus. Students formed study groups and wrote scholarly articles as their contribution to the development of curriculum, participation in Faculty matters, and teaching approaches. The students also nurtured a culture of ruthlessly critiquing their lectures.

[8] Willy Mutunga, 'My memories of Hastings Wilfred Opinya Okoth-Ogendo from 1968-1982,' in Patricia Kameri-Mbote & Collins Odote (eds) *The gallant academic: Essays in honour of HWO Okoth-Ogendo* (Nairobi: University of Nairobi, 2017), 25-34.

these materials because the professors randomly picked students to start off and to continue the discussion. It was my first encounter with collective intellect that shunned individualism and competition for marks. In these two courses we had open-book examinations. There was no need to cram case law or provisions of statutes. All a student needed to do was to refer to their notes and materials. This methodology requires serious reading of the materials to be able to navigate through them for references in an examination that was three hours long.

Open-book examinations made sense to me because professors teach from their notes, as do practising lawyers who carry their notes and authorities to court. Crammers and those who prided themselves with photographic memories did not like this methodology. Sadly, in my second and third years not a single lecturer allowed this methodology. It seemed there was a clear tension between the liberal American system and the pulpit British system where the professor pontificated for 50 minutes without interruption warning students that questions would only be discussed in tutorials. This latter methodology encouraged what we then called 'academic terrorism devoid of democratic teaching'. Needless to say there was resistance to it.

A spectacular incident is still folklore in Dar in this quest for democratic teaching processes. One of our professors who taught international law came straight to Dar from Oxford University. He had just graduated and was awarded a doctorate in law. This professor expected students to clean the board and when it was not done he demanded it be cleaned if he was going to teach. Some students reported him to

the University Students African Revolutionary Front (USARF)[9] chaired by Yoweri Museveni. In one of the lectures Museveni and two of his bodyguards (even at this early age Museveni believed his life was in danger!) walked in the lecture hall. They warned the students not to clean the board and that anyone who did it 'would be visited with revolutionary violence'. The professor walked in. Since he had not bothered to know who his students were he did not notice there were three students who were not studying international law. He also noticed the board was not cleaned. This time he proceeded to teach and write citations of articles and cases on an uncleaned board. It became difficult for students to write down those citations. There was murmuring all-round the class which infuriated the professor. Museveni and his bodyguards timed their intervention to perfection. Museveni stood up and asked the professor who was seated why he could not clean the board 'instead of warming the chair with your buttocks'. The professor was then lectured on how to treat students as intellectual equals and how his teaching should be democratic. He was reminded he was in Dar in a country seeking to build socialism. In fairness to the professor he did see the point and took the criticism to heart and changed. So, when you check the trajectory of the lives of our African dictators you will always find redeeming contributions. Museveni and USARF helped democratise the teaching of law in Dar.

The course coordinated by Professor Piciotto was a welcome distraction from the staunch legal positivism that was the mainstay of our courses. I knew I had to

[9] See note 7.

master law, rules, procedure, study cases and quote them. I also knew that I could not critique legal rules if I did not master them. I did not have much time to spend pursuing some of the great insights I got from this course. If I had done so I would surely have failed my examinations. The course opened my mind to interrogate these insights when I would get time and opportunity to do so. This opportunity arrived when, after getting admitted on the Roll of Advocates, and practising law in Kitui for a year, I was able to raise fees to go back to Dar and read for my Master of Laws (LLM) Degree.[10]

I chose my two courses quite quickly when I arrived in the University in July 1973. I attended a course of Jurisprudence that is now taught to third year students. This course was not offered when I was an undergraduate. Professor David Williams, a New Zealander taught this course. Our main text book was by Lord Lloyd of Hampstead.[11] The edition we used had added the Marxist Theory of State and Law. I wrote a paper on Prescription and Limitation of Actions in my Land law course. I then researched and wrote a dissertation titled *The Rent Acts and the housing problem in Kenya.*[12]

I was able to read widely during this period. I attended virtually every workshop that took place

[10] In Kitui I did mainly land cases. Many cases were settled through the administration of the Akamba Kithitu Oath. Apart from the quick time these settlements took I continued to appreciate that traditional dispute resolution mechanisms that Article 259 of our 2010 Constitution has restored.

[11] *Introduction to jurisprudence* (London: Stevens & Sons, 1972).

[12] Unpublished LLM Thesis, University of Dar es Salaam, 1974.

on issues relevant to my courses and my dissertation area. I talked to economists and read their works on landlord and tenant. I discussed my dissertation topic with professors in and outside the Law Faculty. My supervisor, the late Professor Dani Nabudere, made sure I could see any professor he or I thought would help in writing my dissertation. He was also working on a manuscript of his book published in 1977.[13] I met many of these scholars in what were called Rodney's Classes on Sundays. These classes were great workshops for students and lecturers. In all of them someone would read a paper that would be ruthlessly critiqued. It was a site for a student to get comprehensive reading lists on all manner of topics. Let me hasten to add that these classes were convened by USARF and the Tanganyika African National Union (TANU) Youth League.

Rodney was still around. He had published *How Europe underdeveloped Africa* in 1972.[14] I read this book several times. It gave me a firm intellectual, ideological, and political foundation for studying, researching, teaching, practising, and publishing scholarly articles on law within its historical, economic, social, cultural, spiritual, and political contexts. I applied this methodology effectively in my dissertation.[15]

I have always found this methodology easily understood by an example I picked from Adam Hochschild, the author of *King Leopold's ghost: A story of*

[13] *The political economy of imperialism: Its theoretical and polemical treatment from mercantilist to multilateral imperialism* (London: Zed Press, 1977).

[14] Dar-es-Salaam: Tanzania Publishing House, 1972.

[15] Mutunga, 'The Rent Acts and the housing problem in Kenya'.

greed, terror, and heroism in Africa[16] where he concedes he read Joseph Conrad's *Heart of darkness* in the vacuum of the real facts in the early history of the Congo. This is what he writes:

> It was several decades later that I encountered that footnote, and with it my own ignorance of the Congo's early history. Then it occurred to me that, like millions of other people, I had read something about that time and place after all: Joseph Conrad's Heart of darkness**.** However, with my college lecture notes on the novel filled with scribbles about Freudian overtones, mythic echoes, and inward vision, I had mentally filed away the book under fiction, not fact.[17]

In a nutshell that is a good example from another discipline on how law can be taught, practiced, and researched devoid of the non-legal phenomena critical to its holistic understanding and analysis.

Shivji[18] warns of the dangers of reversals where the radical paradigms in legal education hold sway. Indeed, they hold sway after contesting liberal (law in context, law and development, for example) schools.[19]

Professor Yash Ghai's chapter in Shivji's book[20] reflects the influence of Dar in the following words:

> *The Faculty of Law was pioneering in many ways, and its influence, in terms of the philosophy of teaching and the orientation of research, spread to other parts of Africa [Kenya, Uganda, Zambia, Zimbabwe, Ghana] and beyond* (e.g. Warwick and Papua New Guinea). Many of us who turned out to be birds of passage were pro-

[16] New York: Houghton Mifflin Company, 1999.

[17] Hochschild, *King Leopold's ghost,* 3.

[18] Shivji, 'An intellectual journey with my teachers', 213-14.

[19] Shivji, 'An intellectual journey with my teachers', 211.

[20] Ghai, 'Legal radicalism, professionalism and social action,' in IG Shivji (eds) *Limits of legal radicalism: Reflections on teaching law at the University of Dar-es-Salaam,* 26.

> foundly influenced by insights obtained in Dar, but the fuller working out of these insights took place elsewhere. But these flowerings are also part of the history of Dar.

As one who also 'turned out to be [one of the] birds of passage' I headed back to my Motherland to teach law. I did not leave Dar behind. I came back home with a continuously developing intellectual, ideological, and political mindset.

III: Teaching law at the University of Nairobi

University of Nairobi (Nairobi) was closed when I was hired in October 1974 to teach two courses in commercial law, namely, Sale of Goods and Hire Purchase Law. This history of struggles in Nairobi, their see-sawing interventions, underground activities, eruptions, is yet to be documented and analysed. The history involves struggles by the faculty, students, and staff. When the classes began in January 1975, the University was yet again closed when demonstrations against the State for the murder of JM Kariuki took place on 2 March 1975.

When classes resumed after a month I had already prepared my teaching materials. I had applied the Dar methodology to the letter. I could see there was some resistance, which I expected, but also some intellectual incitement and excitement over the new approach. After all, the approach entailed a battle of ideas about the teaching of law. I allowed students to interrupt me and ask questions during lectures. My thought process was not interrupted as conservative lecturers invariably say to avoid exposing their intellectual laziness and

arrogance. When I did not have answers I said so and went to do research on the issue and gave my answers. When students critiqued me I welcomed the criticism and debates ensued. The participation by students enriched our collective intellect in the study of the law. I believe I wrote my think pieces with a lot of input from the students.[21] Two of the think pieces were published by a student journal, *Nairobi Law Journal*, edited by a law student, Gitobu Imanyara.[22]

Tutorials were conducted in smaller study groups of 15 students. Improving on the methodology of Dar, I allowed students to moderate the sessions. That required them to work much harder to challenge their colleagues. In one of the sessions I vividly recall a student, who was later to become a judge, looking at the students and asking them 'why are you not taking down notes!' This comment triggered a debate on what is really the democratic way to teach law. Should the students take down notes of what they thought was

[21] 'The demystification of the Kenya Law of Hire-Purchase', *Eastern Africa Law Journal,* vol. xi, No. 2 (1975); 'Judicial attitude towards the Rent Acts', *East Africa Law Journal*, vol. xi, no. 2 (1975); 'The role of law in development', *Nairobi Law Journal,* no. 1 (1976); 'The political economy of *nemo dat quod non habet* principle under the sale of goods law and hire-purchase law in Kenya', *Nairobi Law Journal,* no. 1 (1976); 'The impact of housing shortage on the implementation of the Rent Acts in Kenya' in MacAuslan and Kenyaiamba (eds), *Urban legal problems in East Africa,* Scandinavian Institute of African Studies (1978); 'Commercial law and development in Kenya', *International Journal of the Sociology of Law,* vol. 8, 1 (1980); 'On the so-called indigenous bourgeoisie, accumulation of capital and imperialist domination in Kenya: The case of ICDC of Kenya', *UFAHAMU,* vol. xii, No. 1 (Los Angeles: University of California Press, 1982).

[22] 'The role of law in development'; and 'The political economy of *nemo dat quod non habet* principle under the sale of goods law and hire-purchase law in Kenya'.

important? Could they not simply listen to the jokes of lecturers who had wry sense of humour as they sat back and relaxed?

I also volunteered my legal services pro bono to Kituo Cha Sheria. I gave legal advice and aid to tenants who had disputes under the Rent Acts both in residential and business premises.[23] Some students joined me thereby enriching the experience they gained when they undertook a program that took them to the various courts in Kenya. Lecturers visited the students in their respective courts during the implementation of the programme.

I kept the system of open-book examinations. Some students hated it arguing that it gave great advantage to students who did not prepare in advance. I had heard that argument in Dar and I demolished it the way it was done in Dar. No student was going to walk in an examination and read their notes and textbooks to answer questions. They would definitely answer only one question which would earn a low mark. As the system of open-book examination was implemented it gained credence and support. In the examination I invariably asked five questions. Three of the questions tested the mastery of the law, cases, and the answering of strictly legal problems. The other two questions would cover the critique of law. I was generous with choices of questions although there were caps to how many questions could be asked.

In teaching law courses in the second year, I believe I did not think through what my colleagues in other

[23] Rent Restriction Act and Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

courses (agency, bankruptcy law, evidence, and land law) were going through. Students would ask them questions about the origin of certain rules, the background to the so-called landmark common law cases, and proceed to critique the answers given by my colleagues. It did not surprise me one bit when the issue of how to teach law came up and a decision made to have a seminar to discuss it. That debate has been captured in a book on Law curriculum development.[24] My contribution is in Chapter 2 and it captured the spirit and word of my teaching approach.[25]

Our approach of teaching law within its historical, economic, social, and cultural contexts emerged successful. For me, this meant I could invoke the radical schools of jurisprudence, radical philosophies, and radical ideologies in my teaching. I was determined not to use these radical texts dogmatically, but creatively. I confess I started from the somewhat dogmatic persuasion because in the 1970s the ideological battles in Dar and Nairobi were clearly marked, and no ideological fences existed even for the liberal scholars.[26] Committed to the intellectualism, ideology, and politics of the Marxist School of State and Law I was aware that the trajectory of radical legal education was broad and had contending ideas that I was to think through as I waded my scholarship in that trajectory.

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[24] Kivutha Kibwana, Emilius M Ndiritu, George K Rukwaro (eds), *Law curriculum development in an African context: The Kenyan experience,* (Nairobi: Faculty of Law University of Nairobi, 1991).

[25] 'Notes on teaching commercial law' in Kibwana, Ndiritu, Rukwaro (eds), *Law curriculum development in an African context.*

[26] See Yash Tandon (ed), *The debate on class, state and imperialism* (Dar es Salaam, Tanzania Publishing House, 1982).

There were various reasons for this success. The Law Faculty did not exist in a vacuum at the University. The radicalism of students from the departments of Literature, Political Science, Sociology, History, and Engineering was reflected in the radicalism of law students. The students had their own study groups that discussed the politics of Kenya, organised demonstrations, and held their lecturers and the University administration to account. The University Staff Union (USU), born out the University Academic Staff Union (UASU) to include University staff, was resurrected in 1979 and the University of Nairobi became the main site of dissent and resistance in the country. The December Twelve Movement was born and operated underground with above ground institutions like the University Staff Union doing the Movement's bidding.

We expected a political backlash from the State and the ruling class. It started with the passports of radical scholars being withdrawn on regular basis. They were also returned on regular basis that involved going to retrieve them from the Principal Immigration Officer. On the occasions I went to retrieve my passport I had to resist the open intimidation that I was subjected to. Then the surveillance followed. The Special Branch (now National Intelligence Service) was behind it helped by lecturers and students who were recruited to the cause of intimidating those students and lecturers that were deemed to be radical in the eyes of the system. Blatant and open intimidation happened before the crackdown when Special Branch officers sat in lectures without registration as students! Some got student cards from the Administration when lecturers and students challenged their presence in classes!

One of the radical professors in the Faculty of Law, a Canadian, Professor Robert Martin was charged in court after the JM Kariuki demonstrations in the University in 1975. His charge was that he had behaved in a manner likely to cause a breach of the peace. This was the first attempt to intimidate the radical faculty.[27] Professor Ngugi wa Thiong'o was detained in January 1978. After he was released on 12 December 1978 we resurrected the University Academic Staff Union for the sole purpose of struggles to have him resume his duties at the University.[28] We turned this union into one for all the staff in the University and renamed it University Staff Union (USU). President Daniel Moi banned the Union on 19 July 1980. He also banned the Civil Servants Union. This ban took place in the happy occasion of a marriage of the son of the Commander of the Kenya Defence Forces, the late General Jackson Mulinge. We immediately resurrected the University Academic Staff Association that was allowed in the University of Nairobi statutes and continued our struggles. In May 1982 the crackdown started. The leadership of University Staff Union was detained, imprisoned, and exiled before the 1 August 1982 coup happened. University students were jailed after the coup. Their leader, Tito Adungosi, died in prison on 27 December 1988.

It is true that Nairobi has not been the same again. The State, the ruling class, and the University administration will forever bear the blame for this. It is

[27] Mutunga, 'My memories of Hastings Wilfred Opinya Okoth-Ogendo from 1968-1982,' where I tell this story on page 31.

[28] Ngugi wa Thiong'o, *Detained: A writer's prison diary* (Nairobi: East African Educational Publishers, 1981), pages 219-226 where this struggle is chronicled.

my hope that both public and private universities will be different and reflect the vision Professor Mahmood Mamdani on the role of universities:

> Universities, I hope we all agree, are about the pursuit of excellence, the reason why universities like to recognise, honour and encourage expertise. That, in my view, does not rule out democracy in an intellectual setting, for democracy combines acknowledging expertise alongside keeping it open to question, professorships along with peer review. This is why scholarship needs to go hand in hand with humility. Expertise is never final. Debate is never closed. This is why vice-chancellors should resist the temptation to close debates administratively, and why – … – intellectual leadership is not the same thing as intellectual hegemony.[29]

In this vision of Mamdani is the basic tenet of protecting academic freedom in which ideas contend and struggle. Sadly, Nairobi did not allow those of us who searched and defended radical legal education that intellectual space in its University. Sadly, the University administration was complicit in what the State and the ruling class wanted.

Let me pause here and briefly reflect on the experiences of Makerere University (Makerere) as recorded in a new book of chapters penned by brilliant legal academics at the University.[30] These academics locate radical legal education within broad issues of the role of education at Makerere.[31] These issues include under-education as reflected in curriculum development, privati-

[29] Mahmood Mamdani, 'Is African studies to be turned into a new home for Bantu education at UCT?' in *Social Dynamics* 24.2 (1998), 63-75, at 73. On page 63 he states that 'Debate is the lifeblood of intellectual activity.'

[30] J Oloka-Onyango (ed.), *Politics, democratization and academia in Uganda: The case of Makerere University* (Montreal: Daraja Press, 2021).

[31] Oloka-Onyango (ed.), *Politics, democratization and academia in Uganda*, 16-17, 344-49.

sation of education, neoliberalism, and the role played by the State, University administration, and political ruling classes. They also discuss struggles by faculty and students against Makerere as a neoliberal university.

As for the School of Law at Makerere, the academics chronicle struggles between and among the faculty of women and men and the University administration, State, and the ruling classes in Uganda. The role played by the faculty union in these struggles is of great comparative importance with similar struggles that took place in Dar and Nairobi. The role of the students in these struggles is also discussed as is the role female academics in these struggles. The School of Law, like the ones in Dar and Nairobi, engage in debates about teaching approaches in law, academic freedom, and reversals on gains made in radical legal education. These eminent scholars come up with solutions on how radical legal education has to be resurrected and the struggles that have to be waged.[32]

IV: In the trenches of constitutionalism, human rights and social justice activism

My detention in remand prison and in actual detention facilities lasted 16 months (10 June 1982–20 October 1983). Prison strengthened my resolve to resist everywhere, and at all times, any attempts of my freedom of thought, opinion, politics, and ideology. Nairobi had fired me after my detention. Luckily, I was able to renew my Advocates' practising certificate for

[32] Oloka-Onyango (ed.), *Politics, democratization and academia in Uganda*, 31, 261-263, 320-322, 352-353.

the year 1983 and started my practice in January 1984. I had a lucrative criminal practice, thanks to meeting many Kenyans who were in remand prison and who I helped craft petitions of appeal. I found myself defending Kenyans charged with robbing banks. I got most of them off by challenging the legality of their alleged confessions. It is also during this period that I witnessed the extrajudicial killings of my clients when the police could not get them convicted. By 1989 all my clients had been killed. It was time to go and do my doctorate. As I did this I was also able to serve as Chair (now President) of the Law Society of Kenya.

My criminal practice was not without a debate on law and morals. Some counsel whose practice was lucrative because he represented banks and corporations thought I should not defend bank robbers. So, we had a debate on the morality of who we represented. Locating the debate on bank robbers I was able to argue that he represented the big legalised bank robbers while I represented the poor ones! It was clear to me that where individuals, including legal ones have rights, they must be defended. However reprehensible their business or occupation are, we must make sure they have due process as decreed by the Constitution and law. I am sure there is an ongoing debate on whether lawyers should respond positively to applications under Article 35 (access to information) of the Constitution on their clients' accounts. The debate on law and morality has never been closed.

I arrived at Osgoode Hall Law School of York University, in Toronto, Canada in September 1989. I enrolled to read for my Doctor of Jurisprudence. The collapse of the Soviet Union happened that year. Now

we were in a global context where two major paradigms, socialism and capitalism (neoliberalism) were locked up in ideological and political battles. As a student I was aware that my study would not avoid these intellectual, ideological, and political battles. I chose contracts as my area of study to continue my radical scholarship in Dar and Nairobi.[33]

In 1989, Shivji, a Tanzanian Marxist and revolutionary intellectual published a book on human rights.[34] Shivji argued that 'human rights talk constitutes one of the main elements in the ideological armory of imperialism'.[35] He also noted the limitations of human rights as an ideology of resistance.[36] Nabudere, another Marxist and revolutionary intellectual from Uganda, completed a manuscript, that has not been published, just before the collapse of the Soviet Union.[37] In the manuscript, Nabudere helped us understand what had collapsed in the Soviet Union. It was not socialism, but social imperialism. He warned against accepting 'unthinkingly' the argument that radical and revolutionary paradigms of Marxism-Leninism-Mao thought that had given us the tools of critiquing the status quo of neoliberalism, had collapsed. Indeed, after the great debate among radi-

[33] 'Relational contract theory outside national jurisdictions,' Doctor of Jurisprudence dissertation, York University, 1993.

[34] *The concept of human rights in Africa* (Dakar: CODESRIA, 1989).

[35] Shivji, *The concept of human rights in Africa,* 5.

[36] Issa Shivji argues that if not properly handled human rights may not serve as an ideology of resistance. Human rights discourse could be a discourse of exposure and demystification of oppression and nothing else. See Issa Shivji, 'The life and times of Babu: The age of liberation and revolution,' Keynote Address delivered at the International Conference to celebrate the life of Comrade Abdulrahman Babu, 21-22 September 2001, University of Dar-es-Salaam (mimeo).

[37] Nabudere, *A critique of the political economy of social imperialism.*

cals[38] in Dar, Lucas Khamisi wrote on social imperialism.[39] In his second memoir, Professor Samir Amin has written how the ruling class in the Soviet Union had abandoned the cause for socialism:

> For thirty years, I said and wrote that if the [Soviet] system did not engage in leftist reforms (democratization and real socialisation of public property), it was condemned to hasten the evolution – even if it were disastrous (which actually happened) – towards the pure and simple restoration of 'normal' capitalism to which the ruling class had completely rallied.[40]

This was the intellectual, ideological, and political context I was to write my thesis. Having contracts as my area of study I chose to study relational contract theory and critique it. After a critique of relational contract theory (also posing the question whether it was a theory) through the lens of Critical Legal Studies[41] and the Marxist Theory of State and Law (both transformative and anti-status quo) I was able to theorise *a jurisprudence of basic needs for all people*. I did this through the merger of the radical elements in both transformative and anti-status quo schools of jurisprudence.[42] Looking back I believe I started by

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[38] Tandon (ed.) *The debate on class, state and imperialism*.

[39] *Imperialism Today* (Dar-es-Salaam: TPH, 1983).

[40] *The long revolution of the Global South: Toward a new anti-imperialist international* (New York: Monthly Review Press, 2019), 351.

[41] Rightly called an 'amalgam of various strains of thought' by Andrew Lyall in his 'The critique of law,' in Shivji, *Limits of legal radicalism*, note 2, 63, at 67, Critical Legal Studies was influenced by Marxism, radical versions of liberalism, realist critique, Foucault's discourse and Derrida's deconstructionism.

[42] Mutunga, 'Relational contract theory outside national jurisdictions,' 467-8: 'A jurisprudence of basic needs for all people has a *juridical* and a *political* component and in the interaction of the two the latter *guides* the former. The juridical component interrogates all legal theories and identifies their positiveness. The positiveness of a legal theory is utilised by the political component which reflects organized resistance politics.'

being somewhat eclectic, but I discovered there were many scholars who were researching and analyzing the burning question of the time, namely, how to creatively, undogmatically, and with radical innovation adapt the radical and revolutionary paradigms to the historical, economic, social, and cultural contexts of countries of the Global South.

After submitting my thesis and defending it in 1992 I graduated in May 1993. While in Canada, and with four Kenyans who were based in the US, we registered the Kenya Human Rights Commission (KHRC) in Washington DC in 1991.[43] The repeal, in 1991, of Section 2A of the Repealed Constitution that had decreed the Kenya African National Union (KANU) to be the only political party gave us an opportunity to open the office in Kenya. The now christened 'Second Liberation' was on the march as Forum for the Restoration of Democracy (FORD) was formed. In 1991, I was elected the Vice-Chair of the Law Society of Kenya. Paul Muite was the Chair. With the International Commission of Jurists (Kenya Chapter), the three organisations became strong supporters of the movement of a new democracy in Kenya. We became an active think tank for the Second Liberation as well acting as mobilisers and organisers for critical political and civil rights that the new movement required. I will not repeat here what I have written in my book[44] as the great contribution of the civil society in the Second Liberation. In agitating for a new constitution we had

[43] The others were Professor Makau Mutua, Professor Peter Kareithi, Kiraitu Murungi and Maina Kiai.

[44] *Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997,* 2nd edition (Nairobi: Strathmore University Press, 2020).

drafted a Model Constitution in 1994. We used the Model as a critical resource in civic education and mobilisation for a new constitution. We emphasised the importance of a people-driven process in the making of a constitution. We contributed in laying the early pillars for the 2010 Constitution. The value and principle of participation of the people now adorning Article 10 of Constitution was born among other rights and freedoms immortalised in Chapter 4 of the Constitution.

In the case of constitution-making in Kenya, there was robust public participation. Although led by liberal and progressive middle class groups (lawyers, human rights activists, progressive clergy, media, and opposition politicians) the process was consultative and the drafts reflected the integrity of what the Kenyan people wanted in their overall economic, social, and cultural developments; and the fulfillment of the promise of democracy.[45] The class struggles occurred among the elite (intra-class struggles), the middle classes, and the working class. The consensus reached reflected class concessions made in a status quo that was unacceptable and unsustainable. Although the 2010 Constitution addressed issues of governance, social justice, national values, gender, and equitable distribution of resources, it still left intact capitalistic relations of production (including in international law) pertaining to the protection of private property (national and foreign). However, it brought class antagonisms into the surface as the implementation of the 2010 Constitution started and continued. There was the issue of whether the Kenyan elite could implement a progressive, social and

[45] Mutunga, *Constitution-making from the middle.*

democratic constitution raising sharply the issue of the development of alternative political leadership.[46] There still remains the issue whether in the hands of progressive alternative political leadership, be it progressive, radical or revolutionary, the implementation will lay a firm foundation for fundamental transformation out of the grasp of capitalism and imperialism. I see this as involving the mobilisation and organisation of the Kenyan people around the centrality of their will in the 2010 Constitution and struggles against the limitations of the 2010 Constitution in the quest to build a new society. All these questions are located and reflected in various arenas of struggle.

I regard my involvement and experiences in the movements that law sees as non-legal phenomena as critical to the search and the defence of radical legal education. If we agree that constitutions and law are instruments of economic, social, cultural, and political transformation then such involvement can either enhance the status quo or bring about radical transformation of society. There is consensus that constitutions are not just legal documents. They are ideological and political texts.

[46] Professor Kivutha Kibwana, the Governor of the Makueni County that is a beacon of progressive implementation of the Constitution, used the metaphor of the birth of a beautiful baby to describe the birth of the 2010 Constitution of Kenya. He went on to say it was tragic that we handed over the baby to a Kenyan elite that traffics in babies and baby parts to oversee the baby's upbringing! The current Kenyan elite cannot implement the Constitution. Indeed, it has been involved in destroying the major pillars of the Constitution. The good news is that we continue to resist continuously and consistently these unpatriotic machinations by this ruling class.

V: Funding constitutionalism, human rights, and social justice

Social justice philanthropy was an ingredient of welfare capitalism after the Second World War. Britain and Europe faced resistance within their borders and the growth of the Soviet Union externally. Even the emerging empire of the US was not spared the spectre of socialism and communism.[47] Welfare capitalism funded by warfare and exploitation of the colonies mitigated the harshness of capitalism in Britain and Europe. The so-called 'golden years' lasted until 1975 when neoliberalism took root and consolidated during the reigns of Margaret Thatcher and Ronald Reagan. However, social justice continued as the existing club of 'robber barons' expanded to include more foundations. Between 2004 and 2011, I worked for the Ford Foundation. This was a new frontier for me to search and defend radical legal education.

The Ford Foundation was an entity that integrated university, civil society,[48] and corporate pursuits. As a programme officer making grants in human rights and social justice in East Africa, I continued the work I had been engaged in, in East African civil society. This time round I had the money to support these activities. By the time I left the Ford Foundation in 2011, I had prioritised my funding on women's rights bringing in also sexual minorities and feminist masculinity.[49]

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[47] Sidney Lens, *Unrepentant radical: An American activist's account of five turbulent decades* (Boston: Beacon Press, 1980) 36-51.

[48] I use the term in a wider sense of public intellectuals, secular and religious sectors, trade unions, think tanks, social movements, NGOs, INGOs, and community based organisations.

[49] Willy Mutunga, 'Feminist masculinity: Advocacy for gender equality,'

I believe transformation can be funded on condition that those who seek grants have a transformative agenda, understand the politics and interests of donors which are not homogeneous. In East Africa the struggles for social justice, constitutionalism, and human rights owe a lot first to the activists themselves, but also to them for knowing which political doors they were going to knock at to have their activism funded. Without the Nordic countries and Holland (their missions in Nairobi and the organisations the governments funded to give grants to international organisations), the Ford Foundation, Rights and Democracy, Canada, the social justice and human rights movements would not have grown as quickly as they did. Without local funding, and facing hostility from our governments, this foreign funding also gave us protection. Activists need a global view of where transformative forces are and where global solidarities can be forged.

The Ford Foundation had offices in Africa, Asia, and Latin and South America when I worked there. There were program officers in these offices who were also in search of transformation and global solidarities. We collectively lobbied for more funds for our programs while the various convening by the Ford Foundation allowed us to travel to various locations on the globe. Such travel gave us glimpses of what was going on in the world. Where we could not visit we got books, trinkets,[50] t-shirts, and a wealth

in Makau Mutua (ed.) *Human rights NGOs in East Africa: Political and normative tensions* (Philadelphia: University of Philadelphia Press, 2008) Chapter 5.

[50] Sadly, I never visited the China Office of the Ford Foundation. Colleagues gifted me with trinkets of Mao Zedong that convinced me that

of outcomes of the work of the grantees from the foundation archives.

The lessons I learnt by working at the Ford Foundation were many. I was able to sharpen my managerial skills that were embryonic at Kenya Human Rights Commission. I was able to interrogate grants, which are contracts. These contracts could be negotiated and varied. They also had elements of accountability, respect, and transparency that bound both parties. I also sharpened my skills of negotiation, mediation, persuasion, and learnt from the grantees tools of mobilisation and organisation from across the various places where the foundation was operating. I also built great contacts, friendships, comradeships with activists in various areas of the globe. I believe I broadened my search and defence of radical legal education through a lot of reading that helped my creativity in reading radical and revolutionary texts.

VI: The Judiciary experience

The induction of my colleagues and I at the Supreme Court of Kenya by a group of eminent jurists and judges from Canada, Hong Kong, Kenya, South Africa, and the US convinced me that the development of progressive and transformative jurisprudence under the 2010 Constitution was fundamental and a priority for me and the Supreme Court. Making the Judiciary Training Institute the institution of higher learning for the Judiciary was going to be critical in this task

revolutionaries can also be commodified. I have seen similar parallels in the cases of Malcolm X and Che Guevara.

of developing our progressive and transformative jurisprudence by all courts. This task would also enrich the implementation of the *Judiciary transformation framework, 2012-2016*. I had the broad outline of the development of this jurisprudence. It is a story told in the first scholarly article on the issue.[51]

At the Supreme Court we all acknowledged that the 2010 Constitution is transformative and progressive. It was the basis of transformative and progressive constitutionalism. So, what is a transformative constitution and its constitutionalism? Both a South African scholar[52] and a former Chief Justice[53] of South Africa have defined and written on the transformative constitution and constitutionalism of South Africa. Transformative constitutions and their jurisprudence/constitutionalism collectively capture the idea of fundamental societal change through the instrumentality of law.[54]

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[51] Willy Mutunga, 'The 2010 Constitution of Kenya and its interpretation: Reflections from Supreme Court decisions' in *Speculum Juris* Vol. 29, Part 1 (2015), 1. See also Maxwell Miyawa, 'The genesis of mainstreaming the theory of interpreting the Constitution of Kenya, 2010: An analysis' *The Platform* No 15, February 2016, 36-46.

[52] See Karl E Klare, 'Legal culture and transformative constitutionalism,' (1998) 14 *South African Journal on Human Rights* 146. Klare describes transformative constitutionalism as 'an enterprise of inducing large-scale social change through non-violent political processes grounded in law… [deploying a constitution which is] social, redistributive, caring, positive, at least partly horizontal, participatory, multi-cultural and self-conscious about its historical setting and transformative role and mission.' See also, the BBI case para. 396.

[53] Pius Langa, 'Transformative constitutionalism' [2006] 17 *Stellenbosch Law Review* 351.

[54] Sandra Liebenberg, *Socio-economic rights: Adjudication under a transformative constitution* (JUTA, 2010), 24-25. See also, A von Bogdandy, René Urueña, 'International transformative constitutionalism in Latin America,' *American Journal of International Law*, Vol.114:3 (2020), 403 at 405-8 and 440-442.

Transformative constitutions depend fundamentally on which political leadership will implement it. That leadership's intellectual, ideological, social, cultural, spiritual, and political positions become crucially important. That leadership can either consolidate the main pillars of the constitution while it seeks to rescue its weaknesses going forward, or destroy, overthrow or systematically subvert it over time. In terms of the development of jurisprudence, the idea of transformative judicial politics under a constitution that is transformative is also important. Social struggles even within the judiciary impact the objectives of transformative constitutions either negatively or positively. Ultimately, the core question to be interrogated is whether transformative constitutions under the implementation of a radical transformative political leadership can be the basis of a quest for a society that rescues the limitations of transformative constitutions. In other words, are these constitutions continuities of radical struggles,[55] 'small revolutions'[56] that herald better societies? Such questions are important in the context of our planet where the search for a paradigm that will liberate it from forces that dominate, exploit, and oppress the majority of the global citizens is an ongoing debate and reflection.

[55] Walter Rodney, 'The African Revolution' in *Urgent Tasks* [Sojourner Truth Organization, Chicago] 12 (1981), 5-13. On page 8 Rodney writes: '…, it is worth pointing out that a perception of links and continuity between popular resistance over a long period of time is not something unique to an African nationalist historian. This is the approach adopted by Vietnamese scholars, by progressive Philippine scholars, and by Cuban scholars.'

[56] Samir Amin, *The world we wish to see: Revolutionary objectives in the Twenty-First century* (New York: Monthly Review Press, 2008) 17.

The role of constitutions and the law as instruments of transformation, and the agency for developing transformative constitutionalism (judicial officers, the bar, the public and organic intellectuals from various disciplines, traditional systems, and religions), its politics and ideology, continue to engage us in debates about its interrogations, and demystifications. With the resurrection of radical Pan Africanism, the question of a progressive Pan African jurisprudence for the liberation of Africa has also been discussed in the academy, Pan African institutions, civil society and its various social movements.[57]

In the case of Kenya it is important to note that the apex court has described the transformative nature of the Constitution *In the Matter of the Speaker of the Senate & Another [2013] eKLR 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 legitimation 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 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 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.

[57] Willy Mutunga, 'Pan-African jurisprudence for the liberation of Africa', Lecture delivered at the Institute of African Studies, University of Ghana, in Accra on 27 June 2018 [Document on file with Author].

> [52] The transformative concept, in operational terms, reconfigures the interplays between the State's majoritarian and non-majoritarian institutions, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved.

Constitutions are legal, ideological, and political documents. I believe our 2010 Constitution is no different. In terms of ideology, I believe it has a merger of liberal, radical, social, democratic, and socialist elements. In its politics it puts the Kenyan citizen as the core of its supremacy, sovereignty, and centrality. It seeks to transform a status quo that is neither sustainable nor desirable. It lays a trajectory of transformation of all aspects of society by a political leadership that has integrity and is incorruptible. It seeks equitable distribution of resources and political power through devolution, independent institutions, decentralised, democratised, and accountable arms of government. It seeks to mitigate the harshness and stark inequality of the ownership of land and natural resources while focusing on nation and state-building based on the country's diversity. Our Constitution has the most modern Bill of Rights in the world that reflects the whole gamut of civil, political, economic, social, and cultural rights.[58]

[58] Willy Mutunga, 'Human rights states and societies: A reflection from Kenya', in Eunice N Sahle (ed.), *Human rights in Africa: Contemporary debates and struggles* (New York: Palgrave Macmillan, 2019) 19-57. If The Gambia promulgates its transformative constitution its Bill of Rights will perhaps be the most progressive. The Draft Constitution of The Gambia has sought to rescue weaknesses of our Bill of Rights by paying attention to our progressive jurisprudence and issues raised by scholars on the implementation of our Constitution.

I have published elsewhere[59] 12 specific elements or pillars that make the 2010 Constitution of Kenya transformative and progressive. These elements include:

- independent and resourced institutions;
- history of our past struggles against colonialism and neocolonialism;
- integration of formal[60] African justice systems (AJS) with the transformed informal colonial justice system;
- integration of international and regional law as part of law of Kenya;
- independence of the judiciary and judicial integrity;
- social class struggles in constitution-making;
- the sovereignty, supremacy, and centrality of the Kenyan people in the Constitution;
- the new jurisprudence under the Constitution;
- the Constitution sets out its own theory of interpretation;
- the contested paradigmatic terrain under the Constitution;
- new Judiciary and transformative judicial politics; and
- that our Constitution is not insular but operates within the context of a world system.

[59] Willy Mutunga, 'Transformative constitutions and constitutionalism: A new theory and school of jurisprudence from the Global South?' *Transnational Human Rights Review* Vol 8 (2021), 30-60.

[60] Below I explain why African justice systems (AJS) are the formal justice systems because they affect 90% of the population.

In this lecture I will reiterate my views in the said publication[61] the last six of these twelve elements or pillars.

A: The sovereignty, supremacy, and centrality of Kenyan people

The sovereignty of the Kenyan people becomes supreme and central[62] in the implementation of the 2010 Constitution. Executive, legislative, and judicial authorities are derived from the people. The 2010 Constitution provides for national values and principles of governance. They include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, popular participation in politics, integrity, transparency

[61] Mutunga, 'Transformative constitutions and constitutionalism'.

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

and accountability, and sustainable development. The fundamental values that ungird all these values and principles are human dignity,[63] inclusiveness, equity, equality, non-discrimination, democracy, protection of the marginalised, and participation of the people. Our democracy and the participation of the people are both fundamental pillars of our development. The courts have ruled on what participation of the people entails.[64] This jurisprudence of the participation of the people

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

[64] *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others* [2015] eKLR (Supreme Court). The landmark 5 judge decision of the High Court of Kenya in *David Ndii & Others vs the Attorney-General and Others* delivered on 13 May 2021 goes further than the Supreme Court in its clarity on the participation of the people as part of their sovereign will under the Constitution. This landmark decision has been praised by renown Indian and Kenyan constitutional law professors: Upendra Baxi, "'Hooks", "pillars" and "foundations" of constitutionalism: Basic structure in Kenyan jurisprudence' *India Legal* (21 May 2021), https://www.indialegallive.com/hooks-pillars-and-foundations-of-constitutionalism-basic-stature-in-kenyan-jurisprudence/ accessed 24 January 2022; Gautam Bhatia, 'Notes from a foreign field: An instant classic - The Kenyan High Court's BBI judgement' *Indian Constitutional Law and Philosophy* (14 May 2021); Makau Mutua, 'Kenya and the BBI Five', *VerfBlog* (11 June 2021); Ambreena Manji, 'The BBI judgment and the invention of Kenya', *VerfbBlog* (22 May 2021).

in development has called for robust involvement on the basis that the people think and know of their material needs. The courts have demanded full disclosures of critical information and knowledge on development projects. The 'sweetheart deals' of our corrupt elite are being subjected to this participation of the people. Coupled with devolution of political power and equitable distribution of resources, the ordinary people have begun to benefit from the results of devolved political and State power to the grassroots. This participation of the people is also integrated in what we call below 'without the law jurisprudence'.

There can be no doubt in the provisions of the 2010 Constitution about the centrality of the Kenyan people in its implementation. It is this centrality and supremacy that provides the various entry points for robust public interest litigation as well as strategic impact litigation. This litigation is provided for in the Constitution under the Articles 22 and 258 of the 2010 Constitution. It is one of the great pillars of participation of the people in the struggle for the implementation of the 2010 Constitution and its transformation.[65]

[65] See MM Ogeto & W Wanyoike, 'Judiciary and public interest litigation in protecting the right of assembly in Kenya', in Mutuma Ruteere, Patrick Mutahi (eds) *Policing protests in Kenya* (Nairobi: Centre for Human Rights and Policy Studies, 2019), 55-72. Public interest litigation (PIL) has its challenges and limitations: insufficient funding for the many tasks that have to be undertaken because of the forces bent on subverting the constitution; Bar association not doing much; lack of clarity in the role of *amici curiae* and interested parties; weak solidarities between PIL organisations and social movements and the citizens generally; few citizens taking up PIL on their own; PIL being used by national and foreign interests in their economic disputes; dearth of public intellectuals in PIL; and above failure by the state, its institutions, and the ruling class to commit to a culture of obeying court orders, a subversion of the Constitution and the rule of law.

B: *The new Judiciary*[66] *and transformative judicial politics under the 2010 Constitution*

Upendra Baxi (a distinguished Indian radical scholar who is also a progressive organic intellectual) argues that all judges are *active* but not all judges are *activist.*[67] He makes the following distinction:

> An active judge regards herself, as it were, a trustee of state regime power and authority. Accordingly, she usually defers to the executive and legislature; shuns appearance of policy making; supports patriarchy and other forms of violent exclusion; and overall 'stability' over 'change'. In contrast, an *activist* judge regards herself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially disadvantaged, dispossessed, and deprived. She does not regard adjudicatory power as repository of the reason of state; she constantly reworks the distinction between the *legal* and *political* sovereign, in ways that legitimate judicial action as an articulator of the popular sovereign. This opposition implies at least one irreducible characteristic of activist adjudication: namely, that a judge remains possessed of *inherent* powers to mould the greater good of the society as a whole.[68]

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

[67] Upendra Baxi, 'The avatars of Indian judicial activism: Exploration in the geographies of [in]justice', in SK Verma Kasum (ed.) *Fifty years of the Supreme Court of India: Its grasp and reach* (New Delhi: OUP, 2000), 156-209.

[68] Baxi, 'The avatars of Indian judicial activism' 166. Is the term 'activism' really the appropriate one for the kinds of liberatory concerns we are engaging here? In our quest to change colonial judicial culture pertaining to dress and address we talked of cultural revolution. We knew it was not that but a form of judicial activism necessary in a trajectory

Indeed, this is a context of demystifying decisional independence of judicial officers as well the institutional independence of Judiciary as a whole. I believe that active judges in Baxi's categorisation are also *activist* for the status quo while the *activist* judges in his categorisation are very active against the *status quo*. Given societal responsibilities that Baxi correctly imposes on them, they surely must work very hard by refusing to be legal centric in their approaches. These are contradictory processes because society is comprised of conflicting interests. There are, therefore, political struggles in the judiciary itself based on each judicial officer's intellectual, ideological, political, social, and cultural position. Judicial officers should stop deluding themselves that they are not doing politics. Whether their politics emerges from their judgments or their extra-judicial scholarly writings and speeches, judicial officers have consigned the judiciary to what Baxi calls 'an institutional *political actor*'.[69]

Baxi writes:

> I believe it is time to take stock and say what judges regard as unsayable: that the Supreme Court [of India] is a centre of political power. I believe that the recognition of this fact, howsoever belated, is worthwhile as it would be conducive to the clarification of the political role of the Court. And, such

of transformation that could be a basis of fundamental revolutionary change going forward. We were also aware of the limitations of this jurisprudence given the lack of progressive political leadership in the country. This analysis also signals class struggles within the Judiciary itself in quest for either progressive or regressive implementation of transformative constitutions. The judicial class struggles are part of the class struggles in the Kenyan society itself.

[69] Upendra Baxi, 'Demosprudence versus jurisprudence: The Indian judicial experience in the context of comparative constitutional studies,' (2014) *Macquarie Law Journal*, Vol. 14, 3 at 10.

> a recognition will impel us to ask more relevant questions as to what kind of political role the Court ought to play in a changing India.[70]

In his book, Joe Oloka-Onyango[71] quotes Prafullachandra Bagwati, the former Chief Justice of the Supreme Court of India, as saying that the 'Indian Constitution is a document of social revolution … [t]he Judiciary has therefore a socio-economic destination and a creative function'.[72] Within the title of Oloka-Onyango's book, *When courts do politics: Public interest law and litigation in East Africa*,[73] are two express questions, namely, 'Do courts do politics?' and 'when do they do politics?' He answers these questions in the affirmative as seen in the title of the sixth chapter of his book: 'At the pinnacle of politics: Deciding a presidential election'.[74] I agree with him. Courts do politics and do politics all the time.

In election petitions, including the presidential election petition cases, judiciaries and judicial officers come face to face with the politics of the elites and their political successions. In the case of Kenya, the two decisions on the two presidential election petitions in 2017[75] resulted in the Supreme Court being attacked

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

[71] *When courts do politics: Public interest law and litigation in East Africa* (Cambridge: Scholars Publishing, 2017).

[72] Oloka-Onyango, *When courts do politics,* 94.

[73] Oloka-Onyango, *When courts do politics,* 94.

[74] Oloka-Onyango, *When courts do politics,* 216.

[75] *Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others*, Presidential Petition 1 of 2017, [2017] eKLR; and *John Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & 3 Others*, Petitions 2 & 4 Consolidated, [2017] eKLR; See also

brutally by the two factions of the elite political parties. These attacks have not abated. One thing is very clear though. By deciding against both elite factions in both petitions, the Supreme Court, in my view, signaled its independence. It also made a clear statement that it will uphold the Constitution without regard to the pressures the factions will impose on it.

How the Supreme Court sustains this position will be critical to the development of jurisprudence, its independence, the independence of the entire Judiciary, and judicial politics going forward. As the apex court, the Supreme Court will have to give leadership on judicial politics so that the Judiciary ceases, once and for all, to be perceived as an appendage of the two arms of Government, particularly the Executive. The Supreme Court will also have to give leadership against all the pressures and influences that can compromise the institutional and decisional independence of the Judiciary and its judicial officers. Indeed, the Kenyan Judiciary is at a crossroads. It either accepts its historical trajectory of a captured institution by the pressures and influences or becomes the major voice of the vision of the Constitution and the aspirations of the Kenyan people reflected in that vision.

In the case of Kenya, my view has been that the Constitution is *activist* and I believe our judges and other judicial officers are all expected to be *activist in their quest to implement an activist Constitution.* Indeed, the Constitution's political vision is not wholly liberal but has some radical ingredients of social democracy

Willy Mutunga 'Will the Kenyan elite ever grow up?' *The Star* 16 September 2017, republished in *JusticeLeaders.org* https://justiceleaders.org/news/will-the-kenyan-elite-ever-grow-up/ accessed 24 January 2022.

and socialism as the ingredients of its objective and purpose.

The Kenyan Constitution has a vision for the institutional independence of the Judiciary and the decisional independence of judicial officers. This vision is found in the provisions on qualifications for appointment, the recruitment process, the chapter on integrity and leadership, and the constitutional decree that judicial power is derived from the people. Judicial independence is for all people. Judicial officers should constantly and consistently ask themselves in whose interest the independence of the judiciary is for. They should also accept they have differing visions of this independence on the basis of their differing intellectual, ideological, political, social, and cultural positions. This is the essence of Baxi's contribution to this issue. As such, independence of the judiciary is a contested terrain among the judicial officers that gives rise to its own political struggles. This also means that after judicial officers' struggle against the various pressures inimical to their independence (executive, parliament, corporate, civil society, cartels, ethnic communities, religion, region, family, relatives, and friends)[76] to achieve their individual independence, a further struggle ensues that is addressed to the question: 'in whose interest this independence is exercised?'

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

I believe the political cause that we are calling upon the judiciaries to perform goes beyond judicial activism and encompasses political activism itself. I addressed this issue in a Lecture I gave to the Law Society of Malawi.[77] I expressed the view that if the ruling elites in Africa, political parties, the bureaucratic elite, the military, the church and even international capital have had their say in decisively but ruinously shaping Africa's governance and development trajectory in the years past, it would appear that the natural evolution of Africa's constitutional and political order has created this historical moment for the judiciary to have its turn and say in determining Africa's democratic path. Indeed, this is a purpose and objective of all transformative constitutions and their jurisprudence. It is an opportunity for the judiciary, acting as an agent for societal transformation, to fortify Africa's democracy, rule of law and accountability, and, to markedly improve on the governance record of other state institutions and actors that have sometimes, unconstitutionally, intervened in electoral processes and other pillars of transformation. The judiciary has a historic obligation to acquit itself well and earn public respect as the last frontier or custodian of Africa's democratic development. It is the judiciary's tryst with Africa's democratic and developmental destiny.

The judiciary, then, can in the interest of the working classes become part of the last frontier between

[77] Willy Mutunga 'Africa's electoral condition: The Judiciary as an institutional and political actor for democracies in transition,' Keynote Address at the Malawi Law Society Annual Conference, Nkopola, Mangochi, Malawi, 23 February 2019. Republished in *The Africanists*, 18 March 2019 [Document on file with Author].

a united, democratic, and peaceful Africa and a violent, unstable, conflict-wracked Africa.

If the judiciary fails in this transformative task, then very ripe conditions for conflict, military coups, and hegemonic international interventions that may even acquire a regional character – and which may lead ineluctably and inexorably to the dismemberment of African states – may be created. That is why the judiciary and judges need to take their work seriously, recognise that they are institutional political actors with a capacity to reinforce forces that are struggling to put Africa on the right path.[78] Hence, the words of Nyerere on the role of judges in preserving democracy, are quite apt:

> Unless judges perform their work properly, none of the objectives of a democratic society can be met.[79]

The judiciary and the bar are judicial twins joined at the hip. The independence of the bar is as important as the independence of the judiciary. The role I have given the judiciary is premised on a bar that shuns politics of division in favour of politics of democracy and humanity. The bar must help in the development of jurisprudence and democracy that is envisioned here. The judiciary, the bar, and public intellectuals in all disciplines in the academy are collectively the crucible

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

[79] Julius Nyerere, *Freedom and socialism*, Oxford University Press, Dar-es-Salaam, 1968, 110.

for progressive Pan African jurisprudence that can liberate Africa.[80] But the bar needs to be professional and guide their clients properly.

C: The new jurisprudence under the 2010 Constitution

This categorisation of the development of Kenya's robust (rich),[81] decolonised,[82] de-imperialised,[83] de-racialised,[84] de-ethnicised,[85] gender just,[86] patriotic,[87] progressive,[88] indigenous,[89] pro-people,[90] and transformative[91] jurisprudence is derived from the interpretation

[80] Willy Mutunga, 'Pan-African jurisprudence for the liberation of Africa'.

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

[82] See Article 20 of the Constitution.

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

[84] See Article 27 of the Constitution.

[85] See Articles 27 and 91 of the Constitution.

[86] See Article 27 of the Constitution.

[87] Article 10 of the Constitution.

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

[89] Section 3 of the Supreme Court Act, 2011.

[90] This categorisation is based on the sovereignty, supremacy, and centrality of the Kenyan people under the Constitution which is discussed herein. The relevant articles have been given in notes 62 and 92. See Lin Chun 'Mass Line' in Christian Sorace, Ivan Franceschini, Nicholas Loubere (eds), *Afterlives of Chinese Communism* (ANU Press & Verso, 2019), 121. While states, parties, and ruling groups constitute themselves into the people and not their representatives, there is in this article great analysis on how real participation of the people can be achieved in the sharing of political power. Makueni county in Kenya has robustly experimented our own 'mass line'. There is, in practice, a democratic integration of bottom-top and top-bottom in the participation of the people.

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

of specific provisions, the entirety of the 2010 Constitution,[92] and the provisions of the Supreme Court Act, 2011.[93]

The development of jurisprudence under transformative constitutions tests the commitment of judges and other judicial officers to the supremacy of the constitution and the rule of law, and the respective loyalty to their oaths of office. This commitment and loyalty is the transformative politics of a transformative constitution. My writings,[94] my dissenting and concur-

[92] The Preamble and Articles 1, 2(5) and (6), 10, 20 (3) (a) and (b), 20(4), 159(2), 258, 259, particularly sub-Articles 1, 2 and 3 all anchored under the supremacy and centrality of the Kenyan people in the Constitution. See note 62 for this supremacy and centrality.

[93] Section 3 of the Act.

[94] 'Dressing and addressing the Kenyan judiciary: Reflecting on the history and politics of judicial attire and address' in *Buffalo Human Rights Law Review* Vol. 20 (2013-2014) 102; Republished in Eunice N Sahle (ed.) *Democracy, constitutionalism, and politics in Africa: Historical contexts, developments and dilemmas* (Palgrave/Macmillan, 2017), 131-166; 'The 2010 Constitution of Kenya: Its vision of a new Bench-Bar relationship' in Yash Pal Ghai & Jill Cottrell Ghai (eds), *The legal profession and the new constitutional order in Kenya* (Nairobi: Strathmore University Press, 2014), 59; 'Transforming judiciaries in the Global South' Keynote Address delivered at the Annual General Conference of the Nigerian Bar Association, International Conference Centre, Africa Hall, Abuja, 23 August 2015; 'The 2010 Constitution of Kenya and its interpretation' (2015); 'Devolution: The politics and jurisprudence of equitable distribution of national resources,' Lecture delivered at the British Institute of East Africa in Nairobi on 18 February 2017; 'Developing progressive African jurisprudence: Reflections from Kenya's 2010 transformative constitution,' Lameck Goma Annual Lecture, Lusaka, Zambia, 27 July 2017; 'Politics, the media and independence of the judiciary: A personal footnote' 4th Annual ACME Lecture on Politics and the Media, Kampala, Uganda, 8 November 2017; 'Pan-African jurisprudence for the liberation of Africa' (2018); 'The many accents of law, language, and justice,' 4th Neville Alexander Lecture, USIU-A, Nairobi, 23 August 2018; 'Kenya's Constitution 2010: A reflection of its history and implications for the future,' Public lecture delivered at Kabarak University, Nakuru County, Kenya, on 21 November 2018; 'Human rights states and societies' (2019); 'Africa's electoral condition' (2019).

ring decisions[95] as well as my contribution while on the bench reflect the development of this jurisprudence.

D: The 2010 Constitution sets out its own theory of interpretation

The Kenyan 2010 Constitution is unusual in setting out a theory of its interpretation.[96] What is this theory? I believe it is a theory that shuns staunch positivism and thus is not legal-centric. It accepts judges make law. By invoking non-legal phenomena in its interpretation, it decrees the 'judiciary as an institutional political actor'.[97] It is a theory that is a merger of paradigms and that problematises, interrogates, historicises all paradigms in building a radical democratic content that is transformative of state and society. It is a theory that values and understands both multi-disciplinary and interdisciplinary approaches[98] to the implementation of the Constitution. This theory is neither insular nor inward looking and seeks its place in global comparative jurisprudence; and seeks equality of participation, development, and influence. It seeks to reinforce those strengths in foreign jurisprudence that fit Kenyan needs (the criterion for determining those needs is based on the discussion of values, vision, objectives, purposes, and Bill of Rights). It denies resort by judicial officers

[95] *Re. the Speaker of the Senate & Another v Attorney General & 4 Others*, Supreme Court Advisory Opinion No 2 of 2013 [2013] eKLR para 155-157.

[96] Willy Mutunga, 'The 2010 Constitution of Kenya and its interpretation'.

[97] Baxi, 'Demosprudence versus jurisprudence' 10.

[98] See Karim Hirji, *Under-education in Africa: From colonialism to neoliberalism* (Daraja Press, 2019), 155.

to the common law canons of interpreting statutes and constitutions that allow judicial officers, in so doing, to routinely reflect their intellectual, ideological, and political biases.[99] In the same vein, the Kenya Parliament, in enacting the Supreme Court Act, has in the provisions of Section 3 reinforced this aspect of the constitutional pre-occupation in its theory of interpretation. That section urges judicial officers to take account of non-legal phenomena (such as Kenya's historical,[100] social, economic, cultural, religious, theological, philosophical, technological, and political contexts) in interpreting the Constitution.

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

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

There is no doubt that this theory of the interpretation of the Constitution reflects judicial politics as is anchored on the centrality and supremacy of the Kenyan people in the transformation of their country. Therefore, the Judiciary finds itself at a crossroads daily: Does it support the status quo that the Constitution seeks to transform or the will of the people that is the vision of the Constitution? This is how the Judiciary in its role as an institutional political actor is caught up in the class struggles within itself and within the Kenyan society broadly.[101]

E: The contested paradigmatic terrain under the 2010 Constitution

Karl Marx's *Preface to a contribution to the critique of political economy* teaches us as follows:

> The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure … The mode of production of material life conditions the social, political and intellectual life process in general.[102]

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

[102] Karl Marx and Frederick Engels, *Selected works in one-volume* (London: Lawrence and Wishart) 1998, reprinted in Yash Pal Ghai, Robin Luckham and Francis Snyder, *The political economy of law: A Third World Reader* (Delhi: OUP, 1987) 40.

Friedrich Engels wrote that:

> [t]he economic situation is the basis, but various elements of the superstructure… political forms of the class struggle and its results, to wit: constitutions established by the victorious class after successful battle etc. juridical forms, and even reflexes of all actual struggle in the brains of the participants, political, juristic, philosophical theories, religious views and their further development into systems of dogmas… also exercise their influence upon the cause of historical struggles and in many cases preponderate in determining their form. There is an interaction of all these elements …[103]

Engels intervention is authority for two facts: that constitutions and law have a class content; and that the superstructure does not merely conform to the economic base passively.[104] This must be borne in mind in so far as this analysis did not grasp the importance of race and racism in the superstructure of capitalism. As Cyril James had noted:

> [t]he race question is subsidiary to the class question in politics, and to think of imperialism in terms of race is disastrous. But to neglect the racial factor as merely incidental is an error only less grave than to make it fundamental.[105]

Antonio Gramsci (the Italian school teacher, jailed for ten years in fascist Mussolini's jail) developed the theory of the organic intellectual as 'the intellectual

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[103] Ghai, Luckham and Snyder, *The political economy of law*, 41.

[104] Samir Amin, *Only people make their own history: Writings on capitalism, imperialism and revolution* (Monthly Review Press, 2019). At page 231 he writes: 'Dialectic relation of infrastructure [base] and superstructure is also proper to society and has no equivalent to nature. This relation is not unilateral. The superstructure is not the reflection of the needs of the infrastructure. If this was the case, society would always be alienated, and it would not be possible to see how it could succeed in liberating itself.'

[105] CLR James, *The Black Jacobins: Toussaint L'Ouverture and the San Domingo Revolution*, 2nd edition, Vintage Books, 1963, 283.

who, through his [her] analyses, [her] his visions become an indispensable auxiliary of social movements'.[106] He moved the focus from economic relations in society and discussed the essence of politics, culture and ideology. His analysis has given the whole debate on base and superstructure a different dynamic. His construct of 'ideological hegemony' bears his creativity. In this construct, the super-structural features like law, religion, education, racism, mass culture assume a new role; their role is to reinforce class domination so that this domination is not based solely on the state's control and use of the machinery of violence.

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

Issues of base and superstructure need creative and undogmatic re-analyses given the changing contexts and circumstances of the world. It should be argued that the dialectical relationship between the base and superstructure will need creativity, innovation, and lack of dogma in the varying economic, political, social, ideological, cultural, and intellectual contexts without

[106] Jean Ziegler 'Foreword' in Yash Tandon, *Trade is war: The West's war against the world*, (New York/London: OR Books, 2015), xx-xxi.

losing sight of the original revolutionary messages and expected revolutionary outcomes. Amin could not have said it better:

> According to this perspective, it seems to me necessary to think of renewal of a creative Marxism. Marx has never been more useful and necessary in order to understand and transform the world than he is today. Being Marxist in this spirit is to begin with Marx and not stop with him, or Lenin or Mao, as conceived and practiced by the historical Marxists of the previous century. It is to render unto Marx that which is owed to him: the intelligence to begin a modern critical thinking, a critique of capitalist reality and a critique of its political, ideological and cultural representations. A creative Marxism must pursue the goal of enriching this critical thinking *par excellence*. It must not fear to integrate all the input of reflection, in all areas, including those which have wrongly been considered to be 'foreign' by the dogmas of historical Marxisms of the past.[107]

While still on the issue of relations between base and superstructure, the constitution and law are part of the superstructure as is politics. The base determines the long movement of history. Most African states were governed by laws that did not recognise Africans as citizens. In my view these vital aspects of the superstructure are significant forces in the short to immediate term. However, I would add that they play *either a progressive or a retrogressive role* depending on the way they are used to fight the base (in our day and age imperialism)

[107] Samir Amin, 'Long road to socialism' Distinguished Nyerere Lecture, 2010 (Dar: Mkuki na Nyota, 2011), 24-25. Mao Zedong also called for the application of Marxism-Leninism creatively. See Matthew Galway, 'Permanent revolution' in Sorace, Franceschini, and Loubere (eds), *Afterlives of Chinese Communism* (ANU Press & Verso, 2019), 181-188 at 185. See also, Willy Mutunga, 'The revolutionary spirit of Amin lives' *Pambazuka.org* 23 August 2018, https://www.pambazuka.org/global-south/revolutionary-spirit-samir-amin-lives accessed 24 January 2022.

or reinforce it. Whether these aspects play a progressive role, whether they have transformative potential depends on who uses them and how; and also depends on the quality of political leadership and authentic opposition in all countries. Judicial leadership is integrated in such leadership. I believe progressive forces in the judiciary can use the constitution and law in moving society towards fundamental transformation. They will do that by developing progressive jurisprudence out of the constitution and the law, accepting that judicial officers do politics, and that their institution, the judiciary, is an institutional political actor. They will also have to be conscious of the limitations of the constitution and the law that still has its basis in the capitalist system under imperialism.[108]

I am not fetishising the 2010 Constitution of Kenya. No constitution should be fetishised. Indeed, the 2010 Constitution needs to be unmade by the masses of the Kenya people from below. On the 10th Anniversary of 2010 Constitution, Shivji gave a Keynote Address in a webinar in which the second edition of my book was launched.[109] The title of his keynote address was 'Do constitutions matter? The dilemma of a radical lawyer'.[110] Shivji's opening paragraph of his Keynote Address had this reflection:

> Constitutions don't make revolutions. Revolutions make constitutions. No constitution envisages its own death for that is

[108] Roberto Gargarella, *Latin American constitutionalism 1820-2010: The engine room of the constitution* (New York: OUP, 2013): '…the limits set by the past, the difficulties in overcoming them, and the need to continue to address the issue today.' at page x.

[109] Mutunga, *Constitution-making from the middle.*

[110] The speech is published in Issa Shivji 'Do constitutions matter: The dilemma of a radical lawyer' 5(1) *Strathmore Law Review,* 2020, 157-161.

> what a revolution entails. But constitutions matter. Some of the finest constitutions have been erected on ugly socio-economic formations wrought with extreme inequalities and inequities. South Africa and Kenya are examples. But constitutions do matter. Constitutions rarely herald fundamental transformations. They are the product of major transformations to consolidate the new status quo. Yet constitutions do matter. Why do constitutions matter? Why do we need constitutions?

Shivji sought to address radical lawyers – the 'sincere, well-intentioned and self-sacrificing lawyers who are motivated by their passion for social justice and fight for the rights, dignity and livelihoods of the working people'.[111] He instructs radical lawyers that 'a constitution is as much a political as it is a legal document. It is a power map'.[112] He also adds that a constitution is an ideological document. He pleads with radical lawyers 'to recognise the limits of bourgeois law and constitutions'.[113]

Shivji argues that while a constitution is a terrain of struggle, its implementation entails going beyond that assertion to identify the sites of struggle. And in transformative constitutions, which have rights as abstract demands, they can be made political demands; for the right to live with dignity and the right to decent livelihood. Demands should be made of the state for commons (land, water, underground and over ground natural resources, education, health and sanitation, housing, energy, communications and finance) to be de-commodified and de-privatised. 'In other words, for

[111] Shivji, 'Do constitutions matter' 158.

[112] Shivji, 'Do constitutions matter' 157.

[113] Shivji, 'Do constitutions matter' 158.

the working people to reclaim the commons and liberate themselves from the clutches of monopoly finance capital assisted by our comprador states.'[114]

Shivji's uses and limitations of transformative constitutions dovetail to the discussion of 'ordinary revolutions' by Amin. Amin[115] writes:

> The 'great revolutions' are distinguished by the fact that they project themselves far in front of the present, towards the future, in opposition to the others (the 'ordinary revolutions') which are content to respond to the necessity for transformation that are on the agenda of the moment.[116]

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

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[114] Shivji, 'Do constitutions matter' 160.

[115] Amin, *The world we wish to see,* 17.

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

strengths of the Constitution and be one to audit its weaknesses for future amendments.[117]

Shivji sees constitutions as products of major transformations to consolidate the status quo. There is also another side to this coin. If they consolidate the status quo through concessions and mitigation of the evils of the status quo (as history records this does happen), is this a great opportunity for radical political leaderships and their radical political parties, backed by radical and revolutionary movements of the people, to use these concessions subversively as a basis of further moments toward 'great revolution?' I have always found Rosa Luxemburg's brilliant essay,[118] *Reform or revolution,* insightful in this regard.

So, the 2010 Constitution matters because we are locked up in struggle for its implementation during the last 10 years. It allows us to organise and mobilise in the sites that Shivji identifies. It is the one that has breathed life into the robust public interest litigation in the constitutional and legal struggles. It has allowed us to make a clarion call for the contestation of political power that is different and alternative to that of the comprador bourgeoisie. It matters because it is the basis of various struggles by the youth and women that it has decreed. In providing for devolution, it matters because it has captured the imagination of Kenyans that

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

[118] 'Reform or revolution' in Helen Scott (ed.), *The essential Rosa Luxemburg* (Chicago: Haymarket Books, 2008), 41-104.

land and natural resources, and political power, can be equitably shared in a better democratic society. It allows us to debate how our new politics should be organised, how to build integrity in the various leaderships of our society. It matters because its implementation will usher in further struggles for an even better society.

F: The Constitution is not insular but operates within the context of a world system

The jurisprudence that is developed and its attendant judicial politics operates within the context of current world systems undergirding the entire planet. Transformative constitutions and constitutionalism also operate within these world systems – the imperialism of the West and the East. The transformation of the planet is entwined with these transformations that come from the Global South.[119] In my view, transformative constitutions and constitutionalism provide a terrain of struggle that interrogates, historicises, problematises,

[119] Hirji, *Under-education in Africa*, 253-254: 'The fundamental root of the major problems people everywhere face is neoliberal, imperial capitalism, a system characterized by corporate domination of the economy and society, a vast wealth gap between those at the top and the broad majority, the division of the world between affluent and poverty-stricken nations, a plutocratic or symbolic form of democracy and, of recent, trends toward fascism. Integral to them are imperialistic conduct by the rich nations and entrenchment of social and economic dependency in the poor nations… The transformative strategy has to [be] systemic, namely to organize to overturn, nationally and globally, the capitalist, imperial domination and work towards attaining a society based on social and economic equality, grassroots democracy, social justice, mutual trust and cooperation, full accountability and total non-violence. In its place, we need to strive for a society based on respect for the dignity and rights of all minority and majority groups. And their struggles ought to be integrated within the overall transformative strategy. It is not a question of fighting capitalism first and

and debates other schools of jurisprudence. These transformative constitutions and constitutionalism, I argue, have their own unique and enriching niche in those developments.

Let me now conclude by sketching the world within which our Constitution and its jurisprudence and transformative judicial politics operates.

VII: Conclusion: The new world, new politics

Let me begin with Eric Hobsbawm's conclusion that:

> Our world risks both explosion and implosion. It must change … We do not know where we are going. We only know that history has brought us to this point and – if readers share the argument of this book – why. However, one thing is plain. If humanity is to have a recognisable future, it cannot by prolonging the past or the present. If we try to build the third millennium on that basis, we shall fail. And the price of failure, that is to say, the alternative to a changed society, is darkness.[120]

Amin signals how we will build the third millennium and the consequences of failure in the following words:

> … humanity will be able to undertake the construction of a socialist alternative to capitalism only if things change in

then dealing with racism but of the recognizing the two problems as sides of the same coin, and confronting both simultaneously… The struggles against capitalism and imperialism need a broad based united front of the commoners, the working people, the exploited and the disadvantaged, that is, the 99% who presently are divided into disparate groups and subgroups. The process of attaining a peaceful, just coalition between these groups and the majority should be a democratic, consultative process based on mutual respect.'

120 *The Age of Extremes: A history of the world, 1914-1991* (New York: Vintage Books, 1996), 585.

> the developed West too. That does not mean the countries in the periphery must wait for this change, and until it happens, be content to 'adjust' to the possibilities offered by capitalist globalisation. On the contrary, it is more likely that when things begin to change in the peripheries, societies in the West would be forced to change as well, and they could be led to move in the direction required for the progress of all humanity. Without that, the worst – that is, barbarism and the suicide of human civilisation – remains the most probable outcome.[121]

For centuries, the world has debated the content and consequences of this change. In the last quarter of the 20th Century the Cold War ended, the Soviet Empire collapsed, and neoliberalism did not fare well and continues to fare badly after the financial meltdown of 2007-2008 that shook the notion that neoliberalism was the end of history. So, the paradigms of neoliberalism (imperialism of the West and East), socialism, and communism, still robustly engage our intellectualism, ideology, politics, and economics; our social, cultural, ecological, and spiritual humanities. When operational, the World Social Forum (WSF) was convinced since its inception that a new world was possible. The WSF invoked radical paradigms in its mobilisation, organisation, and its broad radical intellectual pursuits.[122]

At some point, particularly after the collapse of the Soviet Union, radical social democracy anchored in the paradigms of human rights and social justice, was viewed as the basis of debating fundamental restruc-

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121 Amin, *The long revolution of the Global South*, 407.

122 Tom Mertes (ed.) *A movement of movements: Is another world really possible?* (New York: Verso, 2004). See also Amin, *The long revolution of the Global South*, Cap 7 and Samir Amin, *Manifesto of the World Forum for Alternatives*, 433-36.

turing of societies. Quickly, we found the limitations of these paradigms. Revolutionary change rather reformist transformation, the latter in effect reinforcing the status quo, has never been discarded in these debates. For example, is it possible to argue that such transformation can be a basis of revolutionary change? These debates have their long historical roots that have rich sources.[123]

The broad consensus to this question is clearly in the affirmative.

[123] See for example, Amin, 'Long road to socialism'; Samir Amin, *Russia and the long transition from capitalism to socialism* (New York: Monthly Review Press, 2016); Tandon, *Trade is war*; Tariq Ali, *The Dilemmas of Lenin: Terrorism, war, empire, love, revolution* (London: Verso, 2017, 2018); Eric Hobsbawm, *How to change the world: Tales of Marx, and Marxism* (London: Abacus, 2012); Paul D'Amato, *The meaning of Marxism* (Chicago: Haymarket Books, 2014): Walter Rodney [edited by Robin DG Kelley and Jesse Benjamin), *The Russian Revolution: A view from the Third World* (London: Verso, 2018); Rosa Luxemburg, 'Reform or revolution', 41-104; Tamas Krausz, *Reconstructing Lenin: An intellectual biography* (New York: Monthly Review Press, 2015); Sorace, Franceschini & Loubere (eds), *Afterlives of Chinese Communism*; Dani Nabudere, *A critique of the political economy of social imperialism* (mimeo), Hensinghor, Denmark, 1989; and Albert Einstein, 'Why socialism?' Monthly Review, May 1949/May 1998. Einstein wrote: 'I am convinced there is one way to eliminate these grave evils [of capitalism], namely through the establishment of a socialist economy, accompanied by an educational system which would be oriented toward social goals. In such an economy, the means of production are owned by society itself and are utilized in a planned fashion. A planned economy, which adjusts production to the needs of the community, would distribute the work to be done by among all those able to work and would guarantee a livelihood to every man, woman, and child. The education of the individual, in addition to promoting his own innate abilities, would attempt to develop in him a sense of responsibility for his fellow men in place of the glorification of power and success in our present society.' p. 7. Einstein warned that a planned economy was not yet socialism; that the centralization of political and economy power in the bureaucracy could make it a class for itself and endanger the rights of the individual. The former Soviet Union fell into this trap.

Therefore, transformation, change or revolution is fundamentally a political problem borne out of systems that ruling political classes create. A system that puts property and profits before the people, as indeed, the capitalist system does, can never be bereft of inhuman inequalities, poverty, and the denial of material needs of the majority. The existing self-claimed socialist systems also face similar problems within their systems because they do not operate outside the current imperialist systems. This is the reason there exists today consistent and continuous debates over the world about what will replace the current unacceptable and unsustainable global status quo. I believe that global citizens must seek to build a free, just, humane, peaceful, non-militaristic, non-violent, non-racist, non-ethnic, gender just, non-sexist, equitable, ecologically safe, and a prosperous democratic socialist society on the planet. This global socialist commonwealth can only be realised through solidarity struggles of global citizens[124] under

[124] One of Africa's organic and public revolutionary intellectuals Karim Hirji has placed this responsibility of the shoulders of the African youth in the following words: 'African liberation has to be founded on three basic principles: socialism, regional cooperation and regional self-reliance. Instead of being mired in seeking solutions within the confines of the current neoliberal system, African youth must have bold dreams and think in terms of fundamental transformation. That was the vision of the radicals of the earlier era, and it is a vision that the youth of today must adopt…The technological capacity to resolve all the critical problems facing humanity have been present at least for half century. But it is the strangle-hold of the rich and the powerful classes and nations over the state, politics, media, thought process that have prevented that capacity from being utilized.' Note 98 at page, 241. Yash Tandon emphasises the role a 'vanguard party that can mobilize the people to bury their internal (religious, regional, sectarian) differences to fight the Euro-American Empire and its local agents.' in 'The common people of Sudan at a strategic crossroad,' *Pambazuka News*, 24 April, 2019. One needs to add within that Empire Japan. And not forget China as an emerging Empire.

their revolutionary political leadership in the South and North.[125] Amin has given us a pathway to this global socialist commonwealth.[126]

VIII: Postscript: Kabarak and its role in the search and defence of radical legal education

Professor Hirji,[127] the Tanzanian revolutionary intellectual urges us to see radical legal education as part, of our struggle to counter under-education within the struggles to counter under-development. These are the struggles to build a society that is free, just, peaceful, gender just, non-sexist, non-ethnic, non-racist, non-militarist, ecologically safe, equitable and prosperous socialist society.

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[125] Paul Robeson, '…the time seems long past when people can afford to think exclusively in terms of national units…' quoted in Gerald Horne, *Paul Robeson: The artist as revolutionary*, (London: Pluto Press, 2016), 52.

[126] See Sorace, Franceschini & Loubere (eds), *Afterlives of Chinese Communism*. This book has a rich discussion on the legacy, and lessons of the Chinese socialism and communism. Discussions on socialist law, permanent revolution, world revolution, political leadership, where political power resides, and who are the people in whose name revolution is waged are illuminating. See also the last written words of Amin in Samir Amin & Firoze Manji in 'Toward the formation of a transnational alliance of working and oppressed peoples' *Monthly Review* Vol. 71, No 3, July-August, 2019, 120-126. These 6 pages discuss contemporary imperialism and its current state. The Transnational Alliance of Working and Oppressed Peoples of the World evolves as planetary political organization that must struggle against contemporary imperialism. This alliance must consolidate the gains of the World Social Forum, rescue its weaknesses. Within this global solidarity national and regional chapters of the Alliance will clarify their intellectual, ideological, and political roles as required by the Alliance. See also Hirji, *Under-education in Africa*.

[127] Hirji, *Under-education in Africa*, 266.

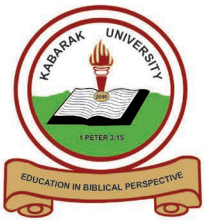
Radical legal education is anchored upon unfettered academic freedom. Both the state and the university leadership must uphold, protect, and defend academic freedom in teaching, research, and writing. Academic freedom is also about resisting any attempts to subvert the academy by any interests – internal and external. Academic freedom births the battle of ideas in the academy, a fundamental reason why universities exist.

I have heard it said in jest that the crisis of our political leadership has its origin in some of our colonial and postcolonial schools, particularly Alliance High School, Alliance Girls High School, Mangu High School, Kianda School, Strathmore School, Starehe Boys' Centre, and St Mary's School. The desegregated white and brown schools played their role, too. Whatever the merits and demerits of this debate, one issue is clear: Education is the mother of all rights. Educational institutions are nurseries for the status quo as they are for the resistance of the status quo. I believe every law school in this country has to take a position on the issue of radical legal education. The position will be identified in the various approaches I have reflected upon in this Inaugural Lecture. Let us now turn to Kabarak.

Will Kabarak be a beacon of this search and defence of radical legal education? Will it carve out its own niche as such a beacon? Will Kabarak be 'the Dar' of 1970s in its innovative, democratic, and creative methods? Will it be Nairobi before the reversal? Will it continue the vision that Makerere supports? Will it follow Makerere by establishing another gender institute on the African continent and also a centre for human rights and social justice that are both committed

to radical legal education? Will it value interdisciplinary and multi-disciplinary approaches in legal education? Will law students at Kabarak be exposed in their studies to national and global struggles to create a better planet? Will their academic and political freedoms be upheld, respected, and protected while at Kabarak? How will the contestation of ideas happen? Will Kabarak reflect intellectual leadership or intellectual hegemony? Will the law students and staff value collective intellect? Will the respect for academic freedom reign? How will Kabarak ensure that these changes take root and prosper and there are no reversals? In a nutshell there are struggles going forward that need answers.

I doubt if these questions and inquiries are new at Kabarak. Let the debates continue. Let the battle of ideas continue. Let the search and defence of radical education in Kenya and the world, and, indeed, at Kabarak continue.



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ISSN 2790-3842
eISSN 2790-3850