Landmarks for El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya

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> The moment it is recognized that a statute provides only for what it provides, and that what is not so provided simply remains unprovided, there can be no further excuse for using a hairsplitting machine, -or as it were, for squeezing decisions out of a statute with a hydraulic press…it is the business of legal science to teach the law as it actually works. Whoever knows but the 'intent of the legislator' is still far from knowing the law that is really in effect.[1]

1. INTRODUCTION

Constitutional litigation and discourse in Kenya have invariably been inspired by deep-seated, persistent and apparently insoluble controversies. Once upon a time, nay, not very long time ago, Kenyan courts could not enforce the Bill of Rights[2]. The rights embodied in the Bill were "as dead as a dodo"[3] because the Chief Justice had not made procedural rules for their enforcement.[4] A provision in the former section 2A of the Constitution of Kenya that Kenya shall be a single-party state did not infringe upon the freedom of association and assembly.[5] Further, courts could not grant an injunction against the Government to vindicate fundamental rights and freedoms. The Government Proceedings Act, an ordinary statute, barred the giving of such remedy against organs and officers Government.[6]

The Kenyan President's Constitutional powers to establish and abolish offices in the Public Service[7] were equivalent to the English Monarch's royal prerogative powers.[8] Consequently, public servants in Kenya held their offices *during the pleasure of the President*.[9] Further, presidential candidates in a General Election had no sufficient interest in the conduct

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and supervision of elections (*sic*). Accordingly, they could not challenge the eligibility of members of the Electoral Commission. The appointment of such members was the prerogative (*sic*) of the President.[10] A citizen could not challenge the confiscation of his passport, whether or not the impounding infringed his freedom of movement, the passport was the property of the Government.[11] A citizen could also be validly detained without disclosing the grounds for the detention.[12]

2. THE CONSTITUTIONAL REVIEW CASES;[13] REVISITING THE QUESTION OF THE PROPER APPROACH TO CONSTITUTIONAL INTERPRETATION

The issue of the proper approach to constitutional interpretation has haunted Kenyan courts for as long as we have been independent. Prior to the Constitutional Review Cases, and save for a few isolated judgments like the celebrated Ruling in *Githunguri* v. *Republic*,[14] the courts adopted an unprincipled, eclectic, vague, pedantic, inconsistent[15] and conservative approach to constitutional interpretation. The Constitutional Review Cases rekindled, in an unprecedented way, the thorny issue raised by El Mann, i.e. the proper approach to constitutional interpretation.[16] In the Constitutional Review Cases, and more particularly in *Njoya*, the disputants made lengthy, articulate and passionate submissions on the proper approach to this knotty task.[17] They urged the Court to adopt a broad, liberal and purposive construction. The Constitution, being the supreme law of the land, embodies certain values and principles.[18] It was the duty of the court, argued the Applicants, to interpret it in such a manner as would give effect to those values and principles. The Constitution, the Applicants submitted, is not an Act of Parliament. Accordingly, it would have been erroneous to interpret the Constitution in the same manner as an Act of Parliament.

The Referendum Court, on the other hand, did not hear much on the proper approach to constitutional interpretation. The Applicants nonetheless urged the Court to follow the majority holding in *Njoya*. The Referendum Court was exhorted to *"rise to the challenge of constitutional interpretation of constitution making and give a way, a lead, in making a people-friendly constitution and deliver the people from the current minefield of constitution making."* Doing otherwise, submitted the Applicants, would cause *"our young, emerging democracy to stagnate too early in its growth as ours was an evolutionary system."* The constitution is like a living tree; it must be watered with a pragmatic, practical, and realistic interpretation.[19]

The Njoya Applicants invoked several judicial, legal and scholarly authorities in aid of their plea for a broad, liberal and purposive interpretation. The most illustrative was Samatta C.J.'s judgment in the Tanzanian case of *Ndyanabo* v *Attorney General*[20] the material parts of which read:

> "... the constitution ... is a living instrument, having a soul and a consciousness of its own ... Courts must... endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it... fundamental rights have to be interpreted in a broad and liberal manner... ensuring that our people enjoy their rights, our young democracy not only functions but grows, and the will and dominant aspirations of the people prevail."[21]

The most important argument in aid of calls for a liberal and purposive interpretation was probably the contention that the Constitution of Kenya, being the supreme law of the land, occupied the highest pedestal among the norms of the Kenyan legal system:

> "... The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme... constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way... Constitutional provisions must be read to give (effect to) values and aspirations of the people... the Constitution, of necessity, has principles and values embodied in it...when one interprets an Act of Parliament in the backdrop of the Constitution, the duty of the court is to see whether that Act meets the values embodied in the Constitution."[22]

In both Constitutional Review Cases, the Respondents pushed for a textualistic and legalistic approach to constitutional interpretation. It was a cardinal rule of interpretation of any statutory document including a constitution, submitted the Respondents, that the words used therein must be given their natural and ordinary meaning in order to determine the intention of the legislature.[23] The Respondents asserted that where the words of the Constitution were clear and unambiguous, there was no room for inferences and implications.[24]

The Njoya Court settled for a broad, liberal and purposive approach to constitutional interpretation. On the other hand, though the Referendum Court had framed the proper approach to constitutional interpretation as one of the issues for determination,[25] it never made any definite findings on it. Instead, it decided most of the issues on the basis of the American Political Question Doctrine.[26] Although the Referendum Court did not fault

the Njoya Ruling on a liberal and purposive approach to constitutional interpretation, its restrictive approach to the issues, particularly on the political question doctrine impels a conclusion that it was inclined to the strict or *El Mann* doctrine of constitutional interpretation.

3. REPUBLIC V. *THE JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 2 OTHERS EX PARTE GEORGE SAITOTI*;[27] ANOTHER LOOK AT THE PROBLEM OF CONSTITUTIONAL INTERPRETATION?

The Saitoti Case Revolved around corruption, another knotty and apparently insoluble problem bedeviling the Kenyan society.[28] It touched on the recommendations of a Judicial Commission of Inquiry (the Goldenberg Commission) appointed by the Kenyan President to investigate the activities of Goldenberg International, a private limited liability company which had swindled the Kenyan Government of billions of shillings in Kenya's biggest corruption scandal of all times. The Goldenberg Commission had recommended the prosecution of 14 personalities, among them Hon. (Professor) George Saitoti, who was one of the Ministers of Finance during the times the looting took place. The Goldenberg Commission was established almost sixteen years after the activities of Goldenberg International. Previous attempts to identify and punish the perpetrators of the Goldenberg fraud had come to naught, mainly due to lack of political commitment on the part of the Government.[29]

(a) Legal Challenge to the Recommendations of the Goldenberg Commission

Professor Saitoti, being of the opinion that the Goldenberg Commission made factual and legal errors in making adverse recommendations against him, obtained leave to bring judicial review proceedings against the Commission.[30] He sought an order of certiorari to remove into the High Court the Report of the Goldenberg Commission and to quash the findings, remarks and decisions therein relating to him. He also sought an order of prohibition directed to the Attorney General and/or any other person prohibiting the filing and prosecution of criminal charges against him.

Though styled as judicial review proceedings, the Saitoti Case largely hinged on constitutional questions raised by the Applicant.[31] Professor Saitoti argued that the intended prosecution would deny him, among others, the following constitutional guarantees:

- The right to a fair trial (by an independent and impartial court of

law) within a reasonable period of time as provided for in section 77 of the Constitution of Kenya;[32]

- ❖ Pretrial rights, including the right to be presumed innocent; and
- ❖ The benefit of the principle of proportionality.[33]

The court upheld the Applicant's contentions with regard to the foregoing rights.

Though largely decided on constitutional considerations, the Saitoti Ruling does not address the question of the proper approach to constitutional interpretation. It is nonetheless relevant to this discourse to the extent that it approved the ruling in *Githunguri* v. *Republic,*[34] a milestone in human rights litigation in Kenya. Githunguri was arguably the first and boldest attempt by Kenyan courts towards a liberal and purposive interpretation of the constitution as regards fundamental rights and freedoms.

4. IDENTIFYING UNDERLYING PHILOSOPHIES IN CONSTITUTIONAL INTERPRETATION IN KENYA

How much value do practising lawyers attach to Jurisprudence, Social Foundations of Law, Legal Theory or kindred courses? It has been suggested that the legal practitioner does not bother much about these (academic) courses.[35] Commercialization of legal practice impels most (if not all) contemporary law schools to lay more emphasis on "*bread and butter courses.*"[36] This attitude is not uniquely Kenyan. Dicey, easily the one of the greatest constitutional scholars of all times, eloquently depicts the typical lawyer's cynicism about deep legal theory:

> "Jurisprudence is a word which stinks in the nostrils of a practising barrister. A jurist is, they constantly find, a professor whose claim to dogmatize on law in general lies in the fact that he has made himself master of no one legal system in particular, whilst his boasted science consists in the enunciation of platitudes which, if they ought, as he insists, to be law everywhere, cannot in fact be shown to be law anywhere[37]

The decisions of judges, however, as well as the arguments of lawyers who appear before them, are invariably informed by various theories in jurisprudence. The positions they take or urge invariably reflect their inclination to one or more of the major theories of law. Kenya lacks a consistent philosophy of constitutional interpretation because her judges and lawyers are dissimilarly persuaded by various theories of law. They see the role of the law in the social system through different prisms. As Professor Githu Muigai observes, constitutions (with their infinite variability

in text, values, doctrine and institutional practice) may be interpreted differently by different yet equally well-meaning people.[38] A close analysis of the opinions of Kenyan judges and the advocates in the cases cited in this discourse reveals varying levels of adherence to the positivist, naturalist and other theories of law.

(a) Positivist Persuasions[39]

Positivism conceives law as rules that flow from human rather than divine or other sources.[40] Under the positivist scheme, law consists of the aggregate of rules established by political superiors for the guidance of human conduct.[41]

> "A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power of him."[42]

Jare Oladosu observes that the positivist theory of law has metamorphosed through different phases of changes, refinements and creative modifications over the last two centuries.[43] The development of the positivist theory of law over the years has led to the emergence of three main versions of the theory. These are imperative/classical positivism, legal realism and normative legal positivism. The thread that runs through all of them is commonly referred to as the *separability thesis*, the contention that law and morality are conceptually distinct and separable.[44]

(i) Imperative/Classical Positivism and Constitutional Interpretation

Imperative or classical positivism is the oldest version of the positivist theory of law. It pervades the works of Jeremy Bentham and John Austin. This strand of positivism venerates the letter of the law as enacted by the person (or persons) in whom the sovereign powers repose.[45] Under this brand of positivism, it is irrelevant whether the letter of the law is inimical to the people's perceptions of morality, justice or other value judgments. In the unforgettable words of John Austin:

> "The existence of a law is one thing, its (moral) merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed (moral) standard, is another enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text by which we regulate

our approbation and disapprobation."[46]

Under this strand of positivism, otherwise objectionable practices like racism, apartheid and Nazism, for instance, would be unchallengeable if predicated on some law. Our ignoble torture chambers too.[47] As the cases cited in the introduction to this discourse indicate, imperative positivism has been more dominant than any other theory of law among Kenyan judges and lawyers. Innumerable instances may be cited on the influences of this brand of jurisprudence in the Constitutional Review Cases, particularly in *Njoya*. According to Mr. Ababu Namwamba, counsel for the first and second interested parties in *Njoya*, the court had to approach the issues relating to (the) referendum and the constituent power of the people under the guidance of one premise, *the law as it is*.[48] According to counsel, though exercise of the sovereign power of constitution making through Parliament was not the best way to exercise the power, it was nonetheless the law. Accordingly, the court was bound to uphold it.

> "The legal framework Kenya has may not be perfect but it is the law and it should prevail."[49]

To Mr. Namwamba, the Court was obliged to uphold the letter of the law (the Constitution) however monstrous the effect. This unswerving adherence to the imperativist positive creed is not peculiar to advocates. It influences judges as well:

> "The words themselves alone do in such a case best declare the intention of the lawgiver. Where the language of an Act is clear and explicit, we must give effect to it, *whatever may be the consequences*, for in that case the words of the statue speak the intention of the legislature."[50]

Some judges and lawyers would uphold a position as expressed in the text or letter of the law (the Constitution in this case) even if this would lead to absurdity or other undesirable consequences. The matter starts and ends in *the law as it is*:

> "I find this (Constituent Assembly) to be one of the alternative modes of exercising (the) constituent power. It is not provided for in our constitution or in ordinary law. In the context of our constitution making, if Kenyans desire to have it as their mode of constitution making, I am of the considered view that it has to be expressly provided for... If Kenyans want [a] referendum as a mandatory right, it has, in my respectful view, to be provided for expressly. The court is ill equipped to determine if this is the wish of Kenyans."[51]

It is debatable whether one can denounce the existence of a primary right merely because it was not "expressly" provided for in the Constitution. Such an approach to interpretation may, if consistently followed, undermine the adjudicatory function of the court. Several points may be raised against adopting such a strict approach. First, the law is not an end in itself. The law exists to serve the people, not the other way round. Accordingly, the court should not be obsessed with the letter of the law (the Constitution in this case) or the literal meaning of words if to do so would either lead to an absurdity or other undesirable consequences. Examples of absurdities and undesirable consequences that might result from obsession with the text of the law include creating an omnipotent legislature, executive or other arm of the government.[52] Secondly, the proposition that the people should be restricted to what they have "expressly" and literally provided for ignores the fact that it is not within human powers to foresee, when drafting a constitution or other legal instrument, the manifold sets of facts which may arise. Even if it were, it is not possible to provide for them in terms free from all ambiguity. As Lord Denning inimitably explains, *"...the English language (read "language") is not an instrument of mathematical precision."*[53]

The contention that Parliament's powers under section 47 of the Constitution of Kenya were unlimited[54] might have been inspired by the classical positivism concept of an illimitable sovereign. This conception posits that in all independent societies there exists a sovereign, a determinate person (or group of persons) with the ultimate power to make binding laws. In the *Njoya Case*, the Respondents thought Parliament to be this sovereign. They asserted that Parliament's power to alter the Constitution under section 47 was unlimited. The perfect depiction of the conceptual legislative omnipotence of the classical positivist sovereign is probably this holding in *Njoya*:

> "In view of sections 47(6)(b) and 123(9)(b) of the Constitution of Kenya, it is my respectful view that it is legitimate to interpret Parliament's alteration power under section 47 to mean that if Parliament can alter one provision, it can alter more; and if it can alter more, it can alter all (*sic*). And this conclusion flows from the Constitution itself (*sic*)."[55]

(ii) Realist Positivism and Constitutional Interpretation

Scandinavian and American jurists are the most notable proponents of this version of legal positivism. Legal realists advise that we should understand

the law from the actual practices of the courts and law enforcement agencies, rather than as rules and doctrines set forth in statutes or scholarly treatises. According to Justice Oliver Wendell Holmes Jr., the main proponent of American legal realism, law consists in the predictions of the decisions and sundry pronouncements of the courts in cases brought before them:

> "The prophesies of what the courts will do indeed, and nothing more pretentious, are what I mean by the law."[56]

Unnoticed to date, legal realism stealthily found its way into Kenyan jurisprudence through the Constitutional Review Cases, particularly the Njoya Case. How are the Constitutional Review Cases influenced by this concept? One of the arguments by the Respondents in Njoya was that the Kenyan Parliament had over the years changed the Constitution so much as to lose its original character. This had been effected, according to the Respondents, in a manner warranting a proposition that the powers of alteration under section 47 were unlimited. This had been done, so went the argument, without challenge in the courts. The law must therefore have sanctioned it. If the law had not sanctioned it, the multiple amendments which had changed the basic structure of the Constitution, were themselves invalid. Yet no one could say, the Respondents submitted, that those amendments were not part of the law of Kenya. Justice Ringera's rejoinder clearly demonstrates his inclination to the idea of the primacy of the courts in determining what counts as law:

> "As regards alterations to the ba*sic* structure of the constitution, that had manifestly been effected. *All I can say in that respect is that fortunately or unfortunately, the changes were not challenged in the courts and so they are now part of our law."*[57]

Justice Ringera leaves questions swirling in a keen reader's mind. The foregoing statement has a weighty proposition implicit in it; that had the changes been challenged in the courts, they might have been nullified. If one were to take him seriously on the notion of the Constituent Power of the people,[58] these changes must have been *ultra vires* Parliament. If this be correct, how did an illegality of such monumental magnitude become part of the law of Kenya? Might the learned Judge have been implying that these amendments became part of the law of Kenya by acquiesce? By custom? Convention? Estoppel? How?

There is no notable influence of this school of thought in the Referendum Case. The closest the Referendum Court came to asserting its competence to determine what counts as law is in relation to its findings on jurisdiction. Though the Referendum Court finds that its jurisdiction could be limited by

the Constitution or any other written law (*sic*),[59] it nonetheless states that only the Court has the power to delineate the outer limits of its jurisdiction.[60] One possible meaning of this is that the High Court has the power to extend (and probably narrow) the outer limits of the jurisdiction conferred on it by the Constitution or other laws.[61] Such a proposition necessarily means granting more remedies or exercising more powers than those provided by law.

(iii) Normative Positivism and Constitutional Interpretation

Normative jurisprudence overlaps with moral and political philosophy. It includes, among other things, questions of whether we should obey the law, the punishment of lawbreakers (or redress of wrongs) and the proper uses and limits of regulation. Debate on the proper approach to constitutional interpretation, from *El Mann* to date has oscillated between classical positivism and normative positivism. Normative positivism is best exposed in the works of H.L.A. Hart and Hans Kelsen. The idea of the supremacy of the Constitution and the contention that all other laws must be conformable to it for their validity accords with Kelsen's concept of a *grundnorm*. According to Kelsen, legal norms are created by acts of will, but any one of such acts can only create law if it is in accord with another "higher" legal norm that authorizes its creation in that way[62]. The "higher" legal norm, in turn, is valid only if it has been created in accordance with yet another, even "higher" legal norm that authorizes its enactment. Ultimately, Kelsen argued, one must reach a point where the authorizing norm is no longer the product of an act of will traceable from this chain of validity. At this point, one would have reached the basic norm, the grund norm whose validity must necessarily be presupposed.[63] The grund norm is thus a hypothetical (primary) norm upon which all subsequent levels of a legal system are based.

The Referendum Court held that neither the existing Constitution nor Parliament, the Executive, or the Judiciary, had the power to stop the exercise of the constituent power of the people to enact a new constitution by way of a constituent assembly or referendum.[64] In the hierarchy of power, stated the Referendum Court, as well as Justice Ringera in the Njoya Case, the people come first. It is the people, so went the reasoning, who give rise to constitutions. Accordingly, the constituent power of the people to make a new constitution was primary and could not be derived from the existing constitution or other rules of the existing legal order:

> "...the touchstone of validity in respect of the amending power is the existing constitution. On the other hand, the touchstone of validity

> in respect of the constituent power is the people. Put differently, there is no touchstone of validity in respect of constituent power because it is primary and assumed or presumed to exist and always vested in the people. Hans Kelsen ...and Wade & Philips express the same view in their own words and we have touched on this in this judgment.[65]

From the foregoing, the supremacy of the Constitution of Kenya is explicable beyond the chain of validity of "higher" and "even higher" norms that leads to Kelsen's grund norm. According to Justice Ringera, the supremacy of the Kenyan Constitution lay in the fact that it originated from a higher power, a power higher than the Constitution itself or any of its creatures. This "higher" power was explained to be those in whom the sovereign power reposes, the people themselves.[66] However, as professor Yash Ghai[67] correctly observes, it is a matter of historical fact that the people of Kenya never participated in the making of the Constitution in any of the ways propounded by Justice Ringera (i.e. referendum or constituent assembly). Accordingly, Justice Ringera's explication cannot entirely be correct with respect to the Kenyan Constitution. It can only be correct with respect to a general constitution, a constitution of the kind referred to in Professor Nwabueze's book.[68]

Though Justice Ringera's reasoning and that of the Referendum Court agree on the predominance of the people in giving legal validity to constitutions, it is conceptually problematic. Their analysis does not explain the validity of a constitution which is not the expression of the will of the people, e.g. one imposed by a military dictator.[69] In this regard, it is submitted that Kelsen went further in analyzing the problem. According to Kelsen, the validity of such constitutions lay in their efficacious application by the person imposing them, and their ultimate acceptance by the people.[70]

Normative positivism seeks to construct a legal theory that is positivist in conception but which nonetheless is sufficiently flexible conceptually to account for the normativity of the law.[71] As Justice Ringera states:

> "The court must seek to find whether those (statutory) provisions meet the values and principles embodied in the Constitution. To affirm that is not to deny that words even in a constitutional text have certain ordinary meanings in the English or other language employed in the Constitution and that it is the duty of the Court to give effect to such meaning(s). It is to hold that *the Court should not be obsessed with the ordinary and natural meaning of words if to do so would lead to an absurdity or plainly dilute, transgress*

or vitiate constitutional values and principles."[72]

(b) Naturalist Persuasions and Constitutional Interpretation in Kenya[73]

The natural theory of law holds that there are immutable and immanent laws of nature that govern humanity, to which human conduct, laws and institutions ought to conform. The basic tenet of the natural theory of law is that there is an intricate link between law and morality. The natural law theory assumes the existence of an objective moral order applicable to all legal systems.[74] The realm of natural law extends to eternal/God-given laws, laws of nature, morality, and justice. All these are discoverable through humanity's exercise of its rational faculties, by the exercise of reason. The natural theory of law is an antithesis of the separability thesis found in the works of positivist theorists. The natural theory of law has a good share of exposition in the works of Thomas Hobbes[75], Sir William Blackstone[76] and St. Thomas Aquinas, among others. Blackstone taught that man is created by God and granted fundamental rights by God. Accordingly, asserted Blackstone, the laws of God are superior in obligation to all other laws.[77] No human/positive laws should contradict them:

> "This law of nature, being so co-eval with mankind and dictated by God himself, is of superior obligation to any other. It is binding all over the globe, in all countries and at all times: no human (or positive) laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their validity, mediately or immediately, from this original."[78]

Constitutional litigation and adjudication in Kenya have rarely been inspired by naturalist theories. In Njoya, the Respondents vehemently denounced the Blackstonian views expressed in the foregoing paragraph. Justice Ringera states that all the Respondents took the view that since the Constitution did not provide for the constituent power of the people, the notion was

> *"...an extra-constitutional one in the same plane as the law of God; a very good notion, something to be aspired for but lacking in constitutional validity....the Applicants were in effect inviting the court to a space outside and above the Constitution and asking it to judge the constitutionality of the impugned provisions of the (Review) Act in the light of that space."*[79]

Though these contentions related to the notion of the constituent power of the people, they contain a tacit contention, that the law of God is of no Constitutional (read "juridical") status. In the understanding of the

Respondents' advocates, the Kenyan legal system does not accord the law of God (or natural law) the predominance that Blackstone and Aquinas gave it.

Naturalist influences may nonetheless be cited in the Constitutional Review Cases. In *Njoya*, it was contended on behalf of the Applicants that the Constitution of necessity has certain values and principles embodied in it,[80] that the Constitution is a living instrument which should be construed in tune with the values and aspirations of the people. What are the principles embodied in the Constitution of Kenya? Do they include moral principles? Divine edicts? The enumeration given by Justice Ringera[81] is not worded in exhaustive terms. The finding by both the Njoya and Referendum Courts that the notion of the Constituent power of the people is primary[82] and needs no formal textualization in our laws for its enjoyment accords with the naturalist proposition that some rights are inherent in human beings:

> "... (The constituent power) is inherent in the people... constituent power ... is primary and assumed or presumed to exist and always vested in the people...the orders and declarations sought must fail. They are based on the mistaken view that the constituent power (of the people) must be textualized...We find and hold that the exercise of the constituent power is a primary right of the people and no group, Parliament, the Executive or the Judiciary has the right to take the peoples right away...[83]

(c) Political Jurisprudence and Constitutional Interpretation

Political jurisprudence is a recent theory of law. It posits that some decisions are more influenced by politics than unbiased or analytical judgment. The proponents of political jurisprudence posit that court judgments are not always focused on a judge's critical analysis-that it is the judges instead who become the focus for determining how the decision is reached. Political jurisprudence advocates that judges are not machines but are influenced and swayed by the political system and by their own personal beliefs of how the law should be decided. [84]

The holding in *Njoya* that constitution making could only be made through a constituent assembly and a compulsory referendum (*sic*) invited suggestions that the decision was politically inspired since it was inconsistent with experiences all over the world.[85] The invocation of logic did not clear the doubts, because many people felt that the learned judge knew better. [86] Questions have repeatedly been raised as to whether the decisions in the introductory part of this discourse were the result of political jurisprudence.[87]

The absurdity of some of the decisions, as well as the fact that they were all made at the heyday of the oppressive Single-Party State rule, impel a conclusion that they may have been inspired by political considerations.[88]

This discourse would be incomplete without some insights on judicial activism. Judicial activism is a philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that the adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.[89] It is the tendency by (some) judges to take a flexible view of their powers of adjudication. It occurs when such judges import subjective reasoning that displaces objective evaluation of applicable law.[90] Some authors see judicial activism as the judicial practice of protecting or expanding individual rights through decisions that depart from established precedent, or are independent of or in opposition to supposed constitutional or legislative intent.[91] The term "judicial activism" is commonly used (pejoratively) to describe judicial decisions that are perceived to endorse a particular (invariably political) agenda.

The methods by which judges engage in judicial activism include (a) quashing legislation using an interpretation of the constitution which critics believe is not clearly mandated or implied by the constitutional text; (b) ruling against the text or intent of a statute; and (c) selectively using obscure case law or foreign law in preference to an apparently more pertinent case law or statutory law. It is said that activist judges (rhetorically) hide behind such excuses and devices[92] as (a) spirit of the law;[93] (b) public policy;[94] (c) equity; (d) broad/liberal/purposive construction;[95] and (e) living constitution approach of interpretation. Though the correctness of the decisions in the constitutional review cases and the Saitoti Ruling is incontestable, critics have expressed the view that the decisions were products of judicial activism.[96]

There is need for caution before accepting the criticism of a judicial decision as activist. The criticism may be superficial and lacking in merit. It may mean no more than that the judge has made an important decision which the critic disagrees with. Of course it may be correct in one or more such instances that the judge has transgressed the proper bounds of the judiciary.

5. CONCLUSION

Kenya has had landmark cases in constitutional litigation and adjudication. A close study of court decisions from El Mann to the Saitoti Ruling reveals a glaring lack of consistency in the philosophy that informs constitutional interpretation. The regrettable decisions were possibly a case of imperative/ classical positivism taken too far. The inadequacies in Kenya's Constitution would not justify some outrageous decisions that came from our courts.[97] We also have had a good share of laudable decisions, notably *Githunguri* v. *Republic*, *Crispus Karanja Njogu v. Attorney General* and the Constitutional Review Cases, among others. The Constitutional Review Cases, particularly *Njoya*, embody a laudable approach to constitutional interpretation.

As we chase for a universally acceptable philosophy of constitutional interpretation, we must always bear in mind that a constitution, and indeed any other legal document, is not an end in itself. Accordingly, (at the risk of promoting judicial activism) the Constitution and other laws must be construed in tune with the enduring values and aspirations of the people. As to what these values and aspirations are, our judges should be guided by Professor Nwabueze:

> "The judge is not of course like an oracle bellowing out divined prescriptions from its deep recesses. He is simply a product of his society and its culture, an agent whose training and work have endowed him with wisdom and learning in the traditions, philosophy and ethics of his people...*the judge should continually try to deepen his insight by immersing himself in the history and the changing conditions of his community and in the thought and the vision of the philosophers and the poets.*"[98]

This draft
This contentious instrument
Was given many names
Named Zero Draft
This Zero Draft
Zeroed on Zero issues
Zeroed on eaters
Two eaters
Of the national cake[99]

Endnotes

1 Eugen Ehrnlich, *Judicial Freedom of decisions; its Principles and Objects*, in Philip Schuman, Cohen and Cohen's Readings in Jurisprudence and Legal Philosophy, Little Brown and Company, at p. 139.

2 Sections 70-83 (inclusive) of the Constitution of Kenya.

3 Per Dugdale J., in *Joseph Maina Mbacha &Three Others* v. *The Attorney General* (High Court Misc. Application No. 356 of 1989).

4 *Gibson Kamau Kuria* v. *The Attorney General*, High Court Misc. Application No. 279 of 1985. At the time of the matter, the Chief Justice had not made rules with respect to the practice and procedure of the High Court in relation to the exercise of its jurisdiction to enforce fundamental rights and freedoms. The Chief Justice's power to make rules is provided under section 84(6) of the Constitution of Kenya. Surprisingly, no such rules were made even after this decision, until 2001. The 2001 Rules, popularly known as "the Chunga Rules," provided for automatic stay of proceedings in subordinate courts pending the determination of a constitutional reference to the High Court. This led to abuses of court process as accused persons, especially those charged with corruption and related offences, took advantage of automatic stay to indefinitely delay the proceedings. This lacuna has since been cured by Rule 29 of the Constitution of Kenya (Supervisory Jurisdiction And Protection of Fundamental Rights And Freedoms of the Individual) High Court Practice And Procedure Rules, 2006, popularly known as "the Gicheru Rules."

5 *Gitobu Imanyara* v. *The Attorney General*, High Court Misc. Application No. 7 of 1991. The freedom of association and assembly is protected under sections 70(b) and 80 of the Constitution of Kenya.

6 *Per Dugdale J., in Fotoform & Three Others* v. *The Attorney General & Another,* High Court Misc. Application No. 418 of 1993. Issues revolved around the wide powers given to the High Court in enforcing fundamental rights and freedoms under section 84 (2) of the Constitution, the supremacy of the Constitution under section 3 and the provisions of section 16 of the Government Proceedings Act (Chapter 40 of the Laws of Kenya) to the effect that the order of injunction, or other order of like effect, could not issue against the Government or its servants. On whether an injunction can issue against the Government in Children matters, see *Samuel Pipo Limet* v. *Attorney General*, High Court (Nairobi) Miscellaneous Civil Application No. 1609 of 2003 (Unreported). Section 3 of the Constitution of Kenya provides, *"this Constitution is the Constitution of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void*." It is submitted that section 16 of the Government Proceedings Act cannot be invoked in proceedings touching on section 84 of the Constitution

of Kenya since, under section 84, the High Court may *"make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive)."* Supremacy of the Constitution means, among other things, that where the Constitution grants unlimited powers in respect of remedies that may issue from the courts, an ordinary Act of Parliament cannot purport to limit the remedies that may issue from the court.

7 Section 24 of the Constitution of Kenya. The power extends to "making appointments to any such office and terminating any such appointment..."

8 Writing on the nature of the English Monarch's prerogative powers, sir William Blackstone states, "By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology, (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others... Yet, in every branch of this large and extensive dominion, our free constitution has interposed such reasonable checks and restrictions, as may curb it from trampling on those liberties, which it was meant to secure and establish. The enormous weight of the prerogative (if left to itself, as in arbitrary government it is) spreads havoc and destruction among all the inferior movements: but, when balanced and bridled (as with us) by its proper counterpoise, timely and judiciously applied, its operations are then equable and regular, it invigorates the whole machine, and enables every part to answer to the end of its construction." See Blackstone, William *Commentaries on the Laws of England,* Vol. 1 at p. 252 *et seq*.

9 Per Hancox J. in *Mwangi Stephen Murithi* v. *The Attorney General,* High Court Misc. Case No. 1170 of 1981. Emphasis added. On whether the Kenyan President possesses the English Monarch's prerogative powers, see Kathurima M'Inoti, *The Impact of English Principles on Constitutional Litigation in Kenya,* The University of Nairobi Law Journal, 2003 vol. 1 p.195.

10 *Jaramogi Oginga Odinga & Three Others* v. *Zachariah Richard Chesoni & Another,* High Court Miscellaneous Application No. 602 of 1992.

11 *John Harun Mwau* v *Attorney General,* reported in the *Nairobi Law Monthly*, Dec. 1988, p.6.

12 *Raila Odinga* v. *Attorney General*, discussed in Priscilla Kanyua, Philip Kichana and Dr Bernard Sihanya (Eds.) *Constitutional Law Digest; Fundamental Rights and Freedoms,* 2004. The ruling in this case is inconsistent with section 72(2) of the Constitution of Kenya, which states, "a person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention."

13 See *Njoya & 6 Others* v. *Attorney General & 3 Others* [2004] 1 KLR

261 (the *Njoya* Case) and *Patrick Onyango Ouma & 12 Others v. Attorney General & 2 Others* [2005] eKLR (the Referendum Case). For a detailed analysis of these cases, see Muthomi Thiankolu, *The Constitutional Review Cases; Emerging Issues in Kenyan Jurisprudence*, 2005 East African Law Journal, Vol 2, also available at http://www.kenyalaw.org.

14 [1986] KLR 1.

15 Muigai, Githu *Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation,* 2004 (1) *East* African Law Journal, p. 1.

16 See *El Mann* v. *Republic* [1969] EA 357. This case was decided on the reasoning that the Constitution should be construed like an Act of Parliament; put another way, like ordinary legislation. Though this reasoning and part of the *ratio decindedi* in *El Mann* have continually been put into question, the ruling continues to inspire a significant number of Kenyan judges and lawyers.

17 The twin tasks of constitutional interpretation and construction pose one of the judiciary's most intractable challenges. According to Prof. Githu Muigai, the difficulties attending constitutional interpretation and construction arise due to the constitution's dual identity- first, as a political charter and, secondly, as a legal instrument. See Muigai, Githu *Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation,* 2004 (1) *East African Law Journal*, p. 1.

18 For an analysis of the values and principles embodied in the Kenyan Constitution, see Muthomi Thiankolu, *The Constitutional Review Cases; Emerging Issues in Kenyan Jurisprudence*, 2005 *East African Law Journal*, Vol. 2, also available at http://www.kenyalaw.org.

19 See the *Referendum Case,* pp. 18-19.

20 [2001] EA 485.

21 [2001] EA 485 at p. 493.

22 *Crispus Karanja Njogu v. Attorney General*, Criminal application no. 39 of 2000 (unreported).

23 The *Njoya* Case, at p. 331.

24 The *Njoya* Case at p. 333, per the holding in *Republic* v. *El Mann* [1969] EA 357, at 360. It is submitted that the words of the constitution and indeed other legal instruments are seldom (perfectly) clear and unambiguous. If they were, disputants would rarely go to the courts for determination of their meanings.

25 The Referendum Case, p. 22.

26 On the applicability of the American Political Question Doctrine in Kenya, see Thiankolu, Muthomi *The Constitutional Review Cases, Emerging Issues in Kenyan Jurisprudence*, 2005 *East African Law Journal*, vol. 2, also available at http://www.kenyalaw.org

27 [2006] eKLR, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 102 of 2006 (hereinafter cited as "the Saitoti Case").

28 On the sufficiency of the Kenyan legal regime to combat and prevent

corruption, see Muthomi Thiankolu, *The Anti-Corruption And Economic Crimes Act; Has Kenya Discharged Her Obligations to Her Peoples And the World?* 2006, available at http://www.kenyalaw.org.

[29] The Government's commitment to fighting corruption has always been an issue in Kenya, with the political opposition criticizing the Government's apparent condonation of grand corruption. In 2002, a new Government was elected mainly (or so it is widely believed) on the platform of zero tolerance to corruption. As at the time of typing this work, there had been no notable achievement in addressing the Goldenberg and other monumental frauds involving the looting of public funds/property.

[30] On the legal regime for instituting and prosecuting judicial review proceedings in Kenya, see *inter alia* sections 8-10 of the Law Reform Act (Chapter 26 of the Laws of Kenya) and Order LIII of the Civil Procedure Rules (Chapter 21 of the laws of Kenya, Subsidiary Legislation).

[31] The court treated the application as a hybrid one, mainly on the ground that orders had been sought against the Attorney General by virtue of his constitutional powers. See p. 49 of the Ruling. Though the reasoning and ultimate findings of the court in the Saitoti Ruling are incontestable, the ruling has been the subject of considerable controversy and criticism –arising mainly because few people appreciated that the application had been treated as hybrid-partly constitutional and partly judicial review. The author has been constrained in locating from the law books the procedure for filing and prosecuting such "hybrid" applications -whether in the Law Reform Act, the Civil Procedure Act or the Constitution of Kenya (Supervisory Jurisdiction And Protection of Fundamental Rights And Freedoms of the Individual) High Court Practice And Procedure Rules, 2006. It would have been easier for the court to grant the orders sought (by invoking sections 3, 3A and 84 of the Judicature Act, the Civil Procedure Act and the Constitution of Kenya respectively) without introducing the novelty of "hybrid" applications, which is unknown to Kenyan law.

[32] Due to the great lapse of time, the making of the impugned errors by a senior judge and senior lawyers. The most notable Kenyan judgment on the right to a fair trial within a reasonable period of time prior to Saitoti is *Githunguri versus Republic* [1986] KLR 1.

[33] The principle of proportionality requires the maintenance of an appropriate balance between the adverse effects which an administrative authority decision may have on the liberty and interests of the person concerned and the purpose which the authority is seeking to pursue. The Applicant in the Saitoti case argued that the Goldenberg Commission violated the principle by being obsessed with 225 million Kenya shillings paid to Goldenberg International during his tenure as Minister for Finance, since the main mission of the Commission was to unravel the looting of billions paid long after the Applicant had left

office. The court ultimately agreed with the Applicant, holding that the principle of proportionality is entrenched in the limitations to the fundamental rights in Chapter 5 of the Constitution of Kenya. See the Saitoti Ruling, at p. 45.

[34] [1986] KLR 1.

[35] Replying to the author's application to join them pending admission to the Roll of Advocates, a leading Kenyan law Firm wrote, "... [We] were impressed by your C.V., which shows considerable promise in the academic field. Our Firm's current requirements are for a candidate with practical experience in the day-to-day running of a legal practice, with particular emphasis on conveyancing and drafting of commercial documents. Accordingly, we have reluctantly decided to decline your application."

[36] Per Jare Oladosu; courses such as Commercial Law, Land Law, Tort, Criminal Law, Law of Evidence etc. These are intended, or so it is widely thought, to give the law graduate ready employment either by the government or the private sector-thus furnishing them with a secure source of livelihood. See Oladosu, Jare (2001). Choosing A Legal Theory On Cultural Grounds: An African Case For Legal Positivism. W*est Africa Review*: 2, 2, available at http://www.icaap.org/iuicode?101.2.2.2 (last accessed on 8th December 2006).

[37] See Oladosu, Jare *Op. Cit*.

[38] Muigai, Githu Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation, 2004 (1) *East African Law Journal*, p. 1.

[39] A detailed exposition of the tenets of the Positivist Theory of Law, and the works of the proponents of the different versions of the theory, are beyond the scope of this discourse. Consequently, only passing references will be made to the works of the various jurists, and only so far as is necessary to demonstrate the influence of these works on the minds of Kenyan lawyers and judges.

[40] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, Sweet & Maxwell, 7th edition, at p. 245.

[41] *Ibid*, at p. 242.

[42] Austin, John *The Province of Jurisprudence Determined*, in M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, Sweet & Maxwell, 7th edition, at p. 242.

[43] Oladosu, Jare Choosing A Legal Theory On Cultural Grounds: An African Case For Legal Positivism, *West Africa Review*: 2, 2, available at http://www.icaap.org/iuicode?101.2.2.2 (last accessed on 8th December 2006).

[44] Although the predominant positivist view is that there is no necessary connection between law and morality, influential contemporary positivists have rejected this view and introduced the concept of inclusive legal positivism. Inclusive legal positivism holds that moral considerations may determine the legal validity of a norm, but it is not necessary that this is the case. Joseph Raz, for instance, argues that

it is a necessary truth that there are vices which a legal system cannot possibly have; it cannot, for instance, endorse murder or rape.

45 Austin's Sovereign was a unitary rather than a collegial entity. Under the scheme, the sovereign was an illimitable and indivisible entity. As such, Austin's conception of the sovereign envisioned a determinate person rather than a body or group of persons. Bentham's sovereign, on the other hand, was neither indivisible nor illimitable. Bentham accepted the possibilities of divided and partial sovereignty. For further insights into this, see M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, Sweet & Maxwell, 7th edition, at p. 203 *et seq*.

46 Austin, John *The Province of Jurisprudence Determined*, edited with an introduction by H.L.A. Hart, Weidenfield and Nocolson, London, 3rd impression, 1968, at p. 184.

47 Underground cells at Nyayo House in central Nairobi. During the Single-Party State days, they were used as covert dens in which political dissidents were tortured and murdered.

48 The *Njoya* Case, p. 334, per Kubo J. (Emphasis added).

49 The *Njoya* Case, at p. 338.

50 *Ibid*, at p. 332. The learned judge was borrowing from an English authority on interpretation of statutes, i.e. *Barnes* v. *Jarvis* [1953] 1 WLR. Of interest, is whether the Kenyan Constitution is an Act of the Legislature. The High Court had in the *Crispus Karanja Njogu* case found that it is not. Can the Kenyan Parliament (validly) intend a manifest illegality, absurdity or other repugnant thing? If so, should the High Court, properly addressing itself to the role of the law in society, uphold such intention? The author shares the view espoused in Njoya, that the Constitution of Kenya is not an Act of Parliament.

51 The *Njoya* Case, pp. 30-31.

52 The *Njoya Case*, at p. 277, Per Ringera J.

53 *Seaford Court Estates* v. *Asher* [1949] 2 KB 481. See Lord Denning, *The Discipline of Law,* 1979 London Butterworths. Emphasis added.

54 This issue was passionately contested in the Constitutional Review Cases. Prior to the Referendum Case, the *Njoya Court* had held that the powers of the Kenyan Parliament were limited to making minor alterations to the Constitution without abrogating its main character. This was explicated, *inter alia*, on the notion of the constituent power of the people. The Referendum Case arose mainly because of this holding. In the Referendum Case, it was contended that Parliament had, by altering the Bomas Draft, acted *ultra vires*. For insights on this, see Muthomi Thiankolu, The Constitutional Review Cases; Emerging Issue in Kenyan Jurisprudence, 2005 *East African Law Journal*, vol. 2, also available at http://www.kenyalaw.org

55 The *Njoya Case,* at p. 357.

56 Holmes O.W. (Jnr.), The path of the law, *Harvard Law Review*, Vol. 10 (1897), pp. 457-478.

57 The *Njoya* Case, p. 299. Emphasis added.

58 On the meaning, scope and juridical status of the notion of

the constituent power of the people, see Thiankolu, Muthomi The Constitutional Review Cases; Emerging Issues in Kenyan Jurisprudence, 2005 *East African Law Journal*, vol. 2, also available at http://www.kenyalaw.org

[59] The original jurisdiction of the High Court of Kenya cannot be limited by an ordinary Act of Parliament, as this would offend the provisions of section 60 (1) of the Constitution of Kenya which provides, *inter alia*, that the High Court shall be a superior court of record with unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law.

[60] The Referendum Case, p. 110.

[61] A contradiction of the Njoya and Referendum Courts' other finding, in that the High Court's powers would be unlimited contrary to the doctrine of supremacy of the Constitution.

[62] Norms were described in Kelsen's conception, as "ought" statements prescribing certain modes of conduct. See htp//plato.Stanford.edu/entries/lawphil-theory/ (Last accessed on 8th December 2006).

[63] It is conceptually problematic to explain the legal validity of the entire legal system on a norm which is extra-legal.

[64] The Referendum Case, at p. 52.

[65] *Ibid*, at pp. 46-47.

[66] The *Njoya* Case, at p. 383.

[67] Ghai, Y.P., *An Analysis of The Decision In Re: Constitution of Kenya, Njoya* v. *AG*," April 2004. Article obtained from the University of Nairobi's School of Law, at Dr Ben Sihanya's library at the University of Nairobi's School of Law.

[68] Nwabueze, B.O. *Presidentialism in Commonwealth Africa*, L. Hurst & Co. 1974 at p. 392.

[69] Rejecting the existence of a link between military dictatorships in Africa and the positivist theory of law, Jare Oladosu states, "It is as if legal positivism were a variety of plant, to draw an analogy with botanical processes, nurtured in the democratically fertile climates of Western Europe, and North America, [where] this plant is thoroughly domesticated; it bears succulent fruits. Transplanted onto the harsh and rocky terrain of political dictatorship and tyranny in Africa, it becomes a man-eating weed. Now, what are we to make of this argument?" See Oladosu, Jare Choosing A Legal Theory On Cultural Grounds: An African Case For Legal Positivism. West *Africa Review*: 2, 2, available at http://www.icaap.org/iuicode?101.2.2.2 (last accessed on 8th December 2006).

[70] This has been interpreted by some to mean that Kelsen sanctioned absolutism.

[71] Oladosu, Jare, "Choosing a legal theory on Cultural Grounds: An African Case for Legal Positivism," *West Africa Re view* (2001) ISSN: 1525-4488 at p.7. Article available at http//www.westafricareview.com/war/ vol2.2/olaosu.html (last accessed on 8th December 2006).

72 The *Njoya* Case, at p. 277. Emphasis added.

73 A detailed exposition of the tenets of the Natural Theory of Law, and the works of its exponents, is beyond the scope of this discourse. Consequently, only passing references shall be made of the theory and its contents, and only so far as is necessary to demonstrate the attitudes, inclinations and persuasions of Kenyan judges and lawyers by the theory.

74 A rather problematic assumption. During the author's undergraduate studies at the University of Nairobi, a question arose as to the true meaning of section 3(2) of the Judicature Act (Chapter 8 Laws of Kenya). This section provides that Kenyan courts may apply African Customary Law in civil cases in which one or more of the parties is subject to or affected by it as far as the said customary law *"...is not repugnant to justice and morality..."* Addressing the section in view of the heterogeneity of Kenyan society and the great diversity in her peoples' cultures and values, the Equity teacher (Mrs. Joy Asiema) asked, "whose morality?" On the applicability of African customary law in personal law matters, and the question as to whether that law is repugnant to morality and justice, see among others *Virginia Edith Wambui Otieno* v. *Joash Ochieng Ougo* [1982-88] KAR 1048, popularly known as "the SM Otieno Case." Also, see [1987] KLR 371 *et seq*.

75 Hobbes, Thomas *Leviathan*. Hobbes held the view that natural law was a precept, a general rule found by reason-by which man was forbidden from destroying his life or taking away the means of preserving the same, or omitting that by which human life is best preserved. Hobbes, a social contractarian, believed that the legitimacy and validity of law lay in the people's tacit consent. Civilized society, taught Hobbes, was formed from a state of nature to protect man from the state of war between humankind that would otherwise exist. In the state of nature, according to Hobbes, life was "solitary, poore, nasty, brutish and short."

76 Blackstone, William *Commentaries on the Laws of England,* Vol. 1 especially pp 39-41.

77 The notion divine law is probably incompatible with the notion of a secular State provided for in many contemporary constitutions. The First Amendment to the American Constitution, for instance, proscribes, *inter alia*, the enactment of a law establishing religion. The Proposed New Constitution of Kenya (Kenya Gazette Supplement No. 63 of 22nd August 2005, hereinafter **"the Wako Draft"**), though providing for freedom of religion and worship (Article 48) nonetheless provides for religious courts (Article 195). It is yet to be seen whether Article 195 of the Wako Draft conflicts with Article 10 which provides (1) state and religion shall be separate; (2) there shall be no state religion; and (3) the State shall treat all religions equally. Further, the notion of divine laws ignores the reality of the existence of a sizeable number of atheists around the world. If the law of God be supreme, is it binding on the atheist?

[78] Blackstone, William *Commentaries on the Laws of England,* Vol. 1 p. 41. My interpolation.

[79] The *Njoya* Case, at p.280.

[80] *Ibid*, pp. 275, 309 and 339. This argument was also advanced in the Referendum Case.

[81] The *Njoya* Case, at 277.

[82] There were contradictions in the judgment of Justice Ringera on whether the constituent power was constitutional or primordial. On this, the Referendum Court states, *"...we must with respect state that we do not share the apparent contradiction in the Njoya judgment of Ringera J wherein he says in one place that the constituent power is constitutional and in another potion [that] it is inherent and yet in another [that] it is primordial. In our view, the constituent power need not be expressed as a constitutional right in order to be exercised...we do however share the view in Justice Ringera's great judgment that constituent power is inherent or primordial."* See the Referendum Case, at p. 45.

[83] The Referendum Case, pp. 36, 43, 46-47, 53, 75 and 101. The most memorable expression of the notion of inherent or God-given rights is probably the American Declaration of Independence (1776) that people are *"endowed by their Creator"* with natural rights to *"life, liberty, and the pursuit of happiness."* On this view, God is the supreme lawmaker and enacted some basic human rights. Though the notion of the constituent power of the people was not explained as divine in origin, the fact that it was expressed as primary, primordial/inherent and not needing enactment ousts it from the province of positive law and propels it towards the realm of natural law.

[84] It appears there is no room for political jurisprudence under the Kenyan legal system. In criminal matters, the accused is entitled to a fair trial by an independent and impartial court of law. See section 77(1) of the Constitution of Kenya. A Kenyan civil court must also be impartial and independent, section 77(9).

[85] See *inter alia* Ghai, Y.P. *An Analysis of The Decision In Re: Constitution of Kenya, Njoya* v. *AG*," April 2004. Article obtained from Dr Ben Sihanya's library at the University of Nairobi's School of Law.

[86] "Logic" is defined in *Black's Law Dictionary* (Sixth Edition) as "*the science of reasoning, or of the operations of the understanding which are subservient to the estimation of evidence. The term includes both the process itself of proceeding from known truths to unknown, and all other intellectual operations, in so far as auxiliary to this.*" There is no basis, logically, for Justice Ringera's contention that constitution making can only be performed by representation. Even assuming that representation is a logical prerequisite in the constitution making process, it is not necessarily logical that such representation must be through a constituent assembly. Further, it is not necessarily logical, and indeed it is not, that the constitutional proposals having been made must be ratified through a referendum. Further, as the definition in

Black's Law Dictionary indicates, logic is *subservient to the estimation of evidence*. Though he had emphasized the subservience of logic to evidence during his teaching career at the University of Nairobi (per Dr Ben Sihanya), Justice Ringera disregarded historical evidence of innumerable constitutions in the world, including Kenya's, which were not the products of the process he was propounding.

87 For a superb discourse on whether these decisions were inspired by political jurisprudence, see Muigai, Githu *Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation,* 2004 (1) East African Law Journal, p. 1.

88 Paul Mwangi observes that most of the cases cited in the introductory part of this discourse were referred to a particular judge. He narrates an instance where police officers were spotted harassing court clerks with a view to establishing how a certain matter (i.e. *Marete* v. *Attorney General* [1987] KLR 690) ended before a liberal judge. See Mwangi, Paul *The Black Bar*.

89 *Black's Law Dictionary*, eighth edition.

90 A view taken by professor Yash Ghai in respect of Justice Ringera's judgment in the Njoya Case. See Ghai, Y.P. *An Analysis of The Decision In Re: Constitution of Kenya, Njoya v. AG*," April 2004. Article obtained from the University of Nairobi's School of Law, at Dr Ben Sihanya's library.

91 See Ghai, Y.P., *op. cit*. Also, see http://www.en.wikipedia.org/wiki/Judicial_activism#column-one (last accessed on 3rd Janurary 2007).

92 For an analysis of the devices and excuses given by activist judges, see Stephen Markman, *Clarifying Extremism;* available at http://nationalreview.com/comment/markman200509190840.asp (last accessed on 5th January 2007).

93 This argument holds that where the language of a law conflicts with the policy preferences of a judge, it is common to claim that the "spirit of the law" compels the preferred outcome. It is noteworthy that the majority decision in *Njoya* hinged so much on assumed constitutional values and principles.

94 Where judges resort to "public policy" as a way to bypass the words of the law.

95 See the judgments of Ringera and Kassango JJ in the *Njoya* Case.

96 Though he did not expressly state it, a reader is impelled to conclude that this is the view Professor Yash Ghai held on the majority ruling in *Njoya*, particularly the judgment of Justice Aaron Ringera. See Ghai, Y.P. *An Analysis of The Decision In Re: Constitution of Kenya, Njoya v. AG*," April 2004. Article obtained from the University of Nairobi's School of Law, at Dr Ben Sihanya's library. Also, see Muthomi Thiankolu, *The Constitutional Review Cases; Emerging Issues in Kenyan Jurisprudence*, 2005 East African Law Journal, Vol 2, also available at www.kenyalaw.org.

97 For an analysis of the deficiencies in Kenya's Constitution, see Muthomi Thiankolu, *The Njoya Case; Emerging Issues in Kenyan*

Jurisprudence, 2005 University of Nairobi LL.B. Dissertation (unpublished).

[98] Nwabueze, B.O. *Judicialism in Commonwealth Africa*: *The Role of the Courts in Government*, St. Martin's Press, New York 1977 at p. 139. Emphasis added.

[99] Adopted from *The Draft* in Muthomi Thiankolu, *Poems From The Slopes*, 2006 (unpublished).