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SUPREME COURT OF KENYA ADVISORY OPINION ON THE TWO THIRDS GENDER PRINCIPLE: A CRITIQUE THROUGH DWORKIN'S CONSTRUCTIVE INTERPRETATION

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ABSTRACT

Since independence, women in Kenya have been underrepresented in elective politics, recording insignificant numbers in the legislature. The constitution of Kenya 2010 entrenches articles 81which guarantees not more than two thirds representation of either gender, aimed at increasing women's representation in Parliament. The constitution also requires the state to put in place legislative measures to ensure equality in politics. to ensure that at least a third of the female gender gets to parliament. However, achievement of the one third women representation in the National Parliament has remained elusive and to date there is no legal framework for it. The Attorney General of the Republic of Kenya sought an advisory Opinion of the Supreme Court on how to achieve the principle. The majority decision, adopted a conservative and ruled that realisation of the principle would be progressive, thus thwarting women's hopes to achieve equitable parliamentary representation. This Article gives a critique of the Supreme Court's Advisory Opinion. Adopting Ronald Dworkin's theory of constructive interpretation, this article argues that the Supreme Court not only failed the women of Kenya but also failed to set the state for transformative judicialism.

KEY WORDS*: interpretation, constructive, textual, principle, policy, conservative, Dworkin.*

ACCRONYMS

AG	Attorney General
AU	African Union
BDPA	Beijing Declaration and Platform of Action
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
FIDA	Federation of Women in Kenya
ICCPR	International Convention on civil and political Rights
ICESR	International Convention on Economic social and cultural Rights
JSC	Judicial Service Commission
MP	Member of Parliament
MDGs	United Nations Millennium Development Goals
NGEC	National Commission on Gender and Equality Commission
NDI	National Democratic Institute
PWDs	Persons living with disabilities
UNDHR	United Nations Declaration on Human Rights
UNECA	United Nations Economic Commission for Africa
UNGA	United Nations General Assembly

Cited Cases

Gibson Kamau Kuria v. The Attorney General, HC Misc. Case No. 550 of 1988
Joseph Maina Mbacha & Three Others v. The Attorney General, (High Court Misc. Application No. 279 of 1985
Communications Commission of Kenya v Royal Media Services, Petition No. 14 of 2014 [2013] eKLR
National Assembly and the Senate (2012) eKLR (Advisory Opinion No, 2 0f 2010)

INTRODUCTION

Approximately half of the world's population is women yet their participation in representative politics has remained lower than men. In Kenya, the situation has remained unfavourable for women even when there has been improvement in other countries in the region.[1] A recent survey on women's representation in parliament since independence showed that out of three hindered and forty nine members of parliament, only sixty three women were elected, while no women were elected to the gubernatorial positions or senators in the elections held in 2013.[2] The same study showed that out of one thousand four hundred and fifty seats in the country government were held by women, a clear demonstration of women's low numbers in elective politics.

The unhappy situation has, since independence, seen women struggle to participate effectively alongside their male counterparts in decision making and governance and in all other aspects of public life. However, progress in that regard has been slow, due to combination structural impediments which include deeply entrenched patriarchal socio-cultural values, undemocratic institutions, and policy frameworks, poverty and low levels of civic awareness among women.[3] For instance, in the 2002 general elections many women aspirants were locked out at the nomination stage. In their public and private lives, women have to struggle to articulate their desires and to find their own voices. For a long time, women have been seen as extensions of men: as people who cannot politically stand on their own, but have to be propped by men.[4]As a result, women have remained relegated to the peripheries of political leadership.

[1] Rwanda leads in women's representation at 56%, while Uganda and Tanzania have over 30%, meeting the United Nations recommended critical mass.
[2] Nzomo M., WOMEN IN POLITICAL LEADERSHIP IN KENYA: ACCESS, AGENDA SETTING & ACCOUNTABILITY. https://ke.boell.org/sites/default/files/uploads/2014/01/women_in_political_leadership_in_kenya-_access_influence-.pdf p 1
[3] *Ibid*
[4] *Ibid* p 749

Women's underrepresentation in the political sphere has drawn the attention of many scholars. For instance, The then Chief Justice of the Republic of Kenya Willy Mutunga, in his minority opinion is the Supreme Court of Kenya Advisory Opinion Number 2 of 2011 noted that the disenfranchisement of Kenyan women in the political arena is a form of discrimination that *"ashamedly started with the birth of Kenya as a Nation State".*[5] He noted that in the first legislature in 1963, there was no woman, while the percentage of women representation in Parliament over the subsequent years has remained negligible.[6]

The underrepresentation of women has persisted, even as Kenya is signatory to most international and regional human rights instruments which require the state of Kenya to ensure equal participation of men and women in politics and in the public arena. These instruments include the Convention on Civil and Political Rights, [7] the Convention on the Elimination of all forms of discrimination against women (CEDAW),[8] the convention of Economic Social and Cultural Rights (ICESR).[9] They all draw their aspirations from the Universal Declaration of Human Rights (UDHR). The UDHR at article 21 recognises the right of every person to take part in the government of his or her country directly or through freely elected representatives. Article 25 of The ICCPR recognises the right to participate in public affairs, to vote, and to have access to public service:

> *"Every citizen shall have the right and the opportunity . . . without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country."*[10]

Article 3 of the ICESCR requires state parties to ensure the equal rights of women and men to the enjoyment of all . . . rights recognised under the convention. CEDAW makes specific provisions as basis for the realisation of equality of men and women. It calls for women's equal access to, equal opportunities in, political and public life, including the right to vote and to stand for elections.[11] This convention also requires State parties to take all appropriate measure to eliminate the historical discrimination against women and all obstacles to women's participation in decision-making processes including legislation and affirmative action measures.[12]

The Beijing Declaration and Platform for Action (BDPA) of 1995 recognises the unequal share of women in power and decision-making. The Platform for Action outlines concrete actions to ensure women's equal access to, and full participation in, power structures[13] and to increase women's capacity to participate in decision-making and leadership.[14] Regionally, the African Union Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) and the Solemn Declaration on Gender Equality in Africa, require Kenya to promote the principles of equality and non discrimination and also to ensure the achievement or Parliamentary representation in an equitable manner.[15]

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[5] *In the Matter of the Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate and in the Matter of the Attorney General (on behalf of the Government) as the Applicant*
[6] Ibid
[7] Kenya ratified *ICCPR* on 1st May, 1972.
[8] Kenya ratified *CEDAW* on 9th March, 1984.
[9] Kenya ratified ICESR on 1st May, 1972
[10] Vivien Hart, Democratic Constitution Making. United States Institute of Peace Special Peport. Available at https://peacemaker.un.org/sites/peacemaker.un.org/files/DemocraticConstitutionMaking_USIP2003.pdf p 5
[11] Article 7 of *CEDAW.*
[12] See Articles Articles 4 and 8..
[13] Strategic Objective G.1.
[14] Strategic Objective G.2.
[15] Ibid

The country has also recognised the essence of these international human rights instruments ad has duly recognised the in the Constitution. The Constitution incorporates all treaties that it had ratified prior to 2010, thus domesticating all the said instruments and making them part of its domestic law.[16] To safeguard human rights and fundamental freedoms, the Constitution has entrenched the concept of affirmative action in article 81 (b) which requires that no gender shall occupy more than two thirds of all elective and appointive positions. This is one of the most profound provisions for empowerment of women and boosting their numbers in public positions. Its aim was to eliminate the discrimination that women have faced over the years and also meet the necessary critical mass in the public positions for women to make any meaningful contribution in governance**.**[17] At article 27, the constitution entrenches the principles of equality and non-discrimination, which taken together with article 81(b), has the potential to transform women's participation I the public sphere. Furthermore, in article 27(8), the constitution obligates the state to take legislative and other measures to ensure implementation of the two thirds gender principle.[18]

Apart from its normative contents, the Constitution spells out how the judiciary is to interpret its robust Bill of Rights and all other rights in the constitution.[19] The Supreme law at Article 259, states that the constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms; permits development of the law and contributes to good governance. Article 299(3) requires all provisions of the constitution to be construed according to the doctrine of interpretation that the law is always speaking.[20] The constitution is therefore a living document. This provision requires the judiciary under the to move away from the conservative ad rationalist modes of judicial interpretation and adopt a more robust and purposive approach in order to breathe life into the constitution. This would ensure a movement away from the imperative mode of interpretation that characterised judicial decisions of yesteryears that failed to uphold and promote the human rights and fundamental freedoms of the citizens in favour of the undemocratic governments.

A number of scholars have stated that under the new Constitution, the courts are required to *"liberate themselves from previously self-imposed restraints that undermined their position in the equilibrium of governmental power".*[21] Some of these restraints included a legal culture in which judges and lawyers failed to connect their actions and thoughts with the purposes of a Constitution.[22] Judges under the new constitution ought to commit themselves to doing more with the law and be aware of the prominence that they enjoy and the society's expectations of the courts.[23]

Supreme Court Act[24] also stresses the important position that the Supreme Court occupies and gives insights into how it should carry out its judicial decision making. It sees the apex Court as a court of final authority to develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth. Additionally, the court should enable important constitutional and legal matters, including

[16] Under Article 2(5) of the Constitution, any statute ratified by Kenya, forms part of the laws of Kenya. Kenya has adopted the Universal Declaration of Human Rights (UDHR) which guarantees the full range of rights – civil, political, economic, social and cultural.
[17] As per the Fifth Schedule of the Constitution of Kenya.
[18] The Society for Open Development, note 13 above p 3.
[19] *Professor Yash Ghai in an unpublished article has stated that "Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenya Constitution sets, through the judiciary, its barricades against the destruction of its values and the weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary."In Mutunga, W--- "The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme court's decisions" (Vol 1) [2015]*
[20] Mutunga, W, "The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions" (Vol 1) [2015] p 5.
[21] Ibid
[22] Ojwang, B., Ascendant judiciary in East Africa: Reconfiguring the balance of power in a democratising constitutional order(2013).
[23] Ibid
[24] See Section 3 of the Supreme Court Act,

matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya.[25]

Further, the Supreme Court of Kenya, in one of its earliest Advisory Opinions, pronounced itself on what type of interpretive judicial approach when interpreting the constitution. One such case is the matter of the *Interim Independent Election Commission*[26] *in which* the court noted that the rules of constitutional interpretation do not favour '*formalistic or positivist'* modes of interpretation[27] but rather that the Supreme law calls for transformative and purposive approach in their judicial decision making. The decision also notes that the Constitution has a most modern Bill of Rights that envisions human rights based, and social-justice oriented State and society which must guide its decisions. It must also be guided by the rich array of values and principles well articulated in the constitution[28] which reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya.[29]

The call for purposive approach to constitutional interpretation was put to test in Advisory Opinion number 2 of 2012, in which the Attorney General (AG) on behalf of the Government of Kenya, sought the Supreme Court's opinion on whether the enforcement of the two thirds gender principle was realisable immediately or progressively based on articles 27 and 81(b) of the Constitution.[30] In spite of the two provisions having been deliberately incorporated to ensure that women's representation in Parliament was increased, the AG, rightly feared that there was a danger that the Parliament that would result from the 2013 General elections would be unconstitutional since there was no legislative framework to govern the implementation of the two Articles and hence the two thirds gender principle would not be met.

By majority of the judges, the Court ruled that issued its Advisory Opinion that the achievement of the two-thirds gender Principe would be progressive and dependent on the State's further action.[31] The Supreme Court also stated that the rights under article 27 (6) and (8) could only be fully realised using legislative as well as other measures and over a spaced period of time by means of policy and other measures, thus declaring that the realisation of the two thirds gender principle was progressive. The Court further advised that a framework giving effect to the two-thirds gender principle should be in place by 27th August 2015. To date, that has not been achieved, rendering the Advisory Opinion of the apex court vain.

This Supreme Court's majority opinion is the basis of this article's present critique. Adopting Ronald Dworkin's constructive interpretation, this article argues that the Supreme Court's majority opinion failed the test of transformative *judicialism* as required of it by the Constitution at article 259(1). Dworkin's constructive has been adopted as the best mode of interpretation for transformative constitutionalism. It is preferred due to its perspicuity in grasping real problems and in providing a theoretical account of actual tendencies in the exercise of adjudication in transformative constitutions.[32] As theoretical framework, Dworkin's theory offers objective criteria that should guide genuine adjudicative practice among judges.[33]

Thus, Kenya's 2010 Constitution calls for transformative judicialism and diminishes the difficulty that courts have previously faced by setting parameters for a transformative interpretation. This approach requires of judges as the guardians of the socio-political transformation project of the country. It is underpinned in the constitution was meant to deal with the past controversies that dogged Kenya's judicial history of

[25] Ibid
[26] *Re Interim Independent Election Commission [2011]eKLR, para [86].*Ibid
[27] See Articles 20(4) and 259(1).
[28] See the Preamble, in Article 10, in Chapter 6 of the Constitution.
[29] *Mutunga, W*, "note 17 above, p 5.
[30] Ibid
[31] *The Supreme Court issued its Advisory Opinion No. 2 of 2012[5]*
[32] Gustavo Zaglebelsky, Ronald Dworkin's Principle based constitutionalism. (Oxford University Press, (2003) Vol. 1 No. 4 p 622
[33] *Ibid*

interpretation of human rights. There are hardly and inspiring decisions that promoted the human rights of women and judicial adjudication on issues of women's rights is novel in Kenya's judicial history and this requires innovative and transformative judicial decision making if the judiciary is to uphold and promote their rights. Indeed as noted by Williams, the standard account of "good" interpretive theory in constitutional law is in tension with much feminist scholarship on method and epistemology, which the drafters of Kenya's constitution seem to have been aware of.[34] It was never going to be easy for women to realise their constitutional rights if courts, and specifically the Supreme Court, continued with the conservative approaches to judicial interpretation of yesteryears.

The article is divided into four parts. Part one is the theoretical underpinnings to interpretation, citing the positivist mode of interpretation espoused by Professor H.L.A Hart and Professor Hans Kelsen and the constructive interpretivism of anti positivist Ronald Dworkin. Part two discusses Kenya's judicial interpretive history, faulting the pre 2010 judicial decisions which were conservative and failed to uphold the human rights of the citizens but preferred to confirm and sustain the coercive and most times brutal powers of the state. Part three gives an analysis of the Supreme Court of Kenya Advisory Opinion no 2 of 2011, noting its shortcomings through Dworkin's theory of constructive interpretivism. Part four is the conclusion to the Article.

Theoretical underpinnings to constitutional interpretation

Kelso in his work titled *"Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History "*notes that judges faced with the task of interpreting the Constitution must decide what role various sources of meaning will play in the act of constitutional interpretation.[35] In his view, there are four main sources of meaning: contemporaneous sources of meaning, subsequent events, non-interpretive considerations, and individual bias.[36] However, relevant to this article is mechanistic jurisprudence which the positivists adopt and the purposive approaches favoured by anti formalists. Zaglebelsky posits that today, mechanistic jurisprudence stand firmly in place in common law jurisdictions as a product of need for certainty.[37] Uncoupling the law from the personalised will of the legislator not only confirms the centrality of this fundamental positivist postulate but also casts it an even bolder relief: "*that the law looms as an artifact, is objective in its existence, and before which a judge must be pure simple mirror that reflects its reality in order to give a clear, faithful image*".[38] This reflects the core argument about legal interpretation in positivist theory, which is that the role of judges is merely to interpret the written law and remain faithful to its image.

Some of the best known proponents of this positivist approach are Professor HLA Hart, against whose philosophy of legal interpretation is contested by Professor Ronal Dworkin, an anti formalist. According to Hart, when carrying out the duty of interpretation, courts should adopt an approach that best promotes the purpose of the statute and the legal system as a whole, so long as the text would "bear" that reading.[39] The purpose the court should impute to the legislature is not an actual, historical intent or purpose, but should flow from the assumption that legislation is an act of "reasonable persons pursuing reasonable purposes reasonably."[40] This clearly is what the majority judges strive to do. This logical scheme of the normative

[34] See generally Susan H. Williams (ed), Constituting Equality gender equality and comparative constitutional law. *Cambridge University Press, 2009).*
[35] Kelso R.R, Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History. *Valparaiso University Law Review, Volume 29 Number 1 pp.121-*233
[36] *Ibid*
[37] *Ibid P 622*
[38] *Ibid*
[39] Pojanowski, J.A., Reading Statutes in the Common Law Tradition*. Virginia Law Review [Vol. 101:1357 p 1370*
[40] *Ibid*

syllogism is by no means abandoned, but for a long time now, the ideas that the major premise (the norm to be applied) should almost never be completely determined by law have firmly taken over".[41]

Notwithstanding the endurance of this postulate, theoretical jurisprudence has rejected, indeed ridiculed the idea of judging as the exclusive application of though law by means of "deductions" relating to facts "subsumed" in a normative description. Dworkin, in his theory of constructive interpretation, (which is used interchangeably with progressive judicialism in this article) offers an account of how courts (and judges) not only decide hard cases, but how they ought to decide penumbral or hard cases.[42] Dworkin rejects the positivist idea that the process of adjudication is a mechanical process of applying the law to a set of facts: it is an interpretive process. It is about the nature of law is the view that 'legal rights and duties are determined by the scheme of principle that provides the best justification of certain political practices of a community: a scheme identifiable through an interpretation of the practices that is sensitive both to the facts of the practices and to the values or principles that the practices serve'. [43] Dworkin urges that Judges should decide hard cases by interpreting the political structure of their community by trying to find the best justification they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract.[44]

Central to the theory of constructive interpretation is Dworkin's broader theory of interpretation, in which he defines interpretation as a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[45] It involves interpreting something, whether it be a law or a piece of art, in such a way so as to present the object in its best light.[46] There are three main insights about the nature of interpretation which are present in Dworkin's theory. First, that interpretation strives to present its object in its best possible light. Second, that interpretation is essentially genre-dependent. Dworkin's approach to interpretation of the constitution is best captured in the famous Canadian case of R. vs. Big M Drug Mart Ltd which the court stated that:

> *"The proper application to the definition of rights and freedoms guaranteed in the charter was a purposive one. The meaning of a right and freedom guaranteed by the charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood in other words in the light of the interest it was meant to protect… The court's view, the court's analysis is to be undertake, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the charter itself, to the language chosen to articulated the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the specific rights and freedoms with which it is associated with in that text of the charter.[47] The interpretation should be …a generous rather than legalistic one aimed at fulfilling the purpose of the guarantee ad securing for the individuals the full benefit of the charter's protection. At the same time, it is important not to overshoot the actual purpose of the rights or freedom in question but to recall that the charter was not enacted in a vacuum, and must therefore… b placed in its proper linguistic, philosophic and historical context.[48]*

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[41] *Ibid*
[42] *Ibid*
[43] Hunter, T., Interpretive Theories: Dworkin, Sunstein, and Ely. *Bond Law Review Volume 17 | Issue 2 Article 5,* 2005, p 78.
[44] *Ibid*
[45] *Ibid*
[46] Dworkin, R., *Law's Empire, Cambridge, MA: Harvard University Press, 1986)* p 52. In Vincent William Wisniewski Jr, An Application and Defense of Ronald Dworkin' s Theory of Adjudication. Thesis presented in partial fulfillment of the requirements for the degree of Master of Arts in Philosophy The University of Montana Missoula, MT Fall 2007 . Available at https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1136&context=etd p 15
[47] *Ibid*
[48] R. *vs. Big M Drug Mart Ltd [1985] 1 SRC 295*. In Eric Kibet, Transformative constitutionalism and the adjudication of constitutional rights in Africa, Afr. hum. rights law j. vol.17 n.2 Pretoria 2017. P 341

In justice for hedgehogs, in hard cases, Dworkin offered a view of interpretation that distinguishes between easy cases, where the legal sources did the work, and hard cases, in which judges were required to move beyond the rules that were explicit in legal texts and resort to principles.[49] According to Dworkin's, the ideal judge, Hercules, must decide on the basis of the moral theory that best justifies the law as a whole.[50] Dworkin maintains that interpretation is concerned with intentions or purposes, and he takes the construction of such purposes as essential to what interpretation is all about.'[51]

A pivotal aspect of Dworkin's theory of constructive interpretation is his notion of 'law as integrity'.[52] The conception of law as integrity is an intrinsic political value that requires judges 'to treat our present system of public standards as expressing and respecting a coherent set of principles'. Law as integrity requires the interpreter to choose interpretation that is most justified, assuming that the law is structured by a coherent set of principles about fairness, justice, procedural due process and integrity.[53] Central to interpretation is the principle that all people should be treated with equal concern and respect, and according to Scholten, every constructive interpretation has to comply with the ideal of justice that expects us to treat equals equally and unequals unequally.

Kenya's judicial interpretive history

One of the most effective bases for promotion of progressive judicialism has been provided for by the Constitution of Kenya which has transformative constitutionalism at its core. The constitution not only makes a profound attempt at laying the foundation a new society that will reverse the injustices of the past, but is heavily laden with values principles and mechanisms designed to create a jut, equal and fair society which a judge cannot ignore when interpreting the constitution. Progressive judicialism also means that judges should go beyond their traditional role of interpreters of the constitution and should strive to do justice by giving effect to contemporary social conditions and values.[54]

The constitution is aware of Kenya's judiciary, which has not had an enviable record on constitutional interpretation, resulting in many cases of upholding violations of citizen's human rights. Lack of philosophical direction on how the constitution should be interpreted, the majority of judges adopted positivistic approach and were in many cases influenced by personal inclinations. The result was disastrous. Constitutional law scholar, Professor Githu Muigai in his seminal work titled *'Political Jurisprudence or Neutral Principles'* notes that the Kenyan courts were previously adopted positivist mode of constitutional interpretation which is underpinned by the '*myth of judicial neutrality and objectivity'* and which perpetuates the belief that it is possible to expunge values from the process of judicial adjudication without ever acknowledging their existence.[55]

He further notes that in this approach, the judiciary perceived its role as the maintenance of the status quo, which is postulated as 'providing political stability and continuity, without which the Republic would be plunged into chaos and anarchy'.[56] The judicial process was

> *presented as value neutral, and capable of delivering blind justice using an idealised and mythical decision-making model which the law on a particular issue is pre-existing, clear, predictable and*

[49] Dworkin, R., Hard Cases, 88 Harv. L Rev. 1057 (1975). In Lawrence B. Solum, The Unity of Interpretation. *Boston University Law Review [Vol. 90:551*
[50] Ibid
[51] See generally Andrei Marmor, Interpretation and Legal Theory. *Hart Publishing* 2005.
[52] Ibid
[53] Ibid
[54]. Fomband, C.H., Constitutional Adjudication in Africa. *Oxford University Press, p 358*
[55] *Muigai, G., Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation*. *The East African Law Journal* p 15.
[56] *Ibid*

> *available to anyone with reasonable legal skills.*[57] *The facts relevant to the disposition of a case are ascertained by objective hearing and evidentiary rules that reasonably ensure that the truth emerges. The result in a particular case is determined by a rather routine application of the law to the facts, and except for the occasional bad judge, any reasonably competent judge will reach the correct decision.*[58]

The learned Professor of law also notes that the jurisprudence of constitutional interpretation in Kenya [under the old constitution] was in dire need of rejuvenation and that there was need for the courts to move beyond making perfunctory comments as to the general goals for which the Constitution exists to the formulation of ambiguous standards for application in similar disputes.[59] During this period, the dominant trend in the interpretation of the constitution was the conservative approach. In this approach, the judiciary perceived its role as the maintenance of the status quo, which is postulated as providing political stability and continuity, without which the Republic would be plunged into chaos and anarchy.[60]

Other scholars have supported this view and stated that the new Constitution completely removes the last shreds of the hitherto conservative approach to constitutional interpretation, especially in the context of human rights, when it requires courts to develop the law to the extent that is gives effect to the right or fundamental freedom in its interpretation.[61] It is further argued that what this means is that where rules of common law do not adequately comply with the objects of the Bill of Rights, the courts shall have the duty to develop such rule so that it complies.[62] This requirement is also matched by an obligation to chose the interpretation that most favours the enforcement of a right or fundamental freedom.[63] This is an obligation, requires courts to read the statute in a manner that the Bill of Rights is as compliant as possible.[64]

This approach is a clear departure from the conservative approach that courts applied in interpretation of individual rights and fundamental freedoms over the years. It has also been rightly noted that in the past, Kenyan courts have been bedevilled by lack of a proper approach to constitutional interpretation since the time of independence and that the judiciary had exacerbated [Kenya's political and social] problems through an "*unprincipled, eclectic, vague, pedantic, inconsistent…"* and conservative approach to constitutional interpretation.[65] The consequence was that the courts failed to uphold the individual rights and fundamental freedoms of citizens in efforts to please the executive.

Several cases attest to this sad interpretive history of the Kenyan courts. In the case of *Gibson Kamau Kuria v. The Attorney General*, the High Court declined to uphold the applicant's contention that the impounding of his passport infringed his constitutional right to travel to and from Kenya.[66] In the Court's reasoning, the entire Bill of Rights as contained in the then Chapter 5 of the then Constitution was unenforceable because the Chief Justice had not, as at the time of the application, made the procedural rules provided for in section 84(6) of the (old) constitution.[67] The court chose to ignore the substance of the rights and fundamental freedoms of the applicant, preferring procedures instead.

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[57] *Ibid*
[58] *Ibid p 8.*
[59] *Ibid p 15.*
[60] *Ibid*
[61] In terms of Article 20(3) (a). In Mutunga, W, note 17above, p 5.
[62]
[63] In Article 20(3)(b).
[64] *Ibid*
[65] *Muthomi Thiankolu*, The Constitutional Review Cases: Emerging Issues In Kenyan Jurisprudence. http://kenyalaw.org/Downloads_Other/Constitutional_Review_Cases.pdf p 5
[66] *Gibson Kamau Kuria v. The Attorney General, HC Misc. Case No. 550 of 1988*. In *Muthomi Thiankolu*, Ibid p 15.
[67] *Ibid*

Another example is the case of *Joseph Maina Mbacha and Three Others v. The Attorney General*,[68] in which the applicants applied inter alia, for a declaration that their prosecution for asserting that an election had been rigged violated their freedom of expression as guaranteed under section 79 of the Constitution. It was stated that the right of access under section was "as dead as a dodo" and could only be revived by the grace of the late chief justice.[69]

After this dark past of conservative constitutional interpretation, the promulgation of the 2010 constitution should have marked a crucial step in women's struggle for a new constitutional dispensation that would ensure equitable participation in parliamentary politics. One important purpose of the provisions on the not more than two thirds gender principle was to attain gender equality in representation as a right which could be achieved without delay. The majority decision effectively means that women who decide to vie for county representation are assured of gender equity while those who, aspire for national parliament are not.[70]

The Supreme Court Advisory Opinion: A critique

In its majority opinion, The Supreme Court held that the provisions of Article 81(b) as read with Articles 27(4), (6), and (8) could only be realised progressively as the government could not redress gender inequality through a single act. However, it noted that the Fifth Schedule of the Constitution required parliament to pass the necessary legislation to realise sufficient representation of marginalised groups within five years of the Constitution's promulgation.37 Thus, parliament was given until August 27, 2015 to enact necessary legislation to promote representation of women, youth, Persons living with disabilities (PWDs), ethnic and other minorities and marginalised communities.[71]

The court developed the principle in Article 81(b) into an enforceable right, setting it on a path to maturation through progressive, phased-out realisation. Guided by the terms of Article 100 on promotion of representation of marginalised groups, and by the Fifth Schedule, which prescribes the timelines for the enactment of required legislation to effect the full implementation of the constitution, the Supreme Court held that legislative measures for giving effect to the two-thirds gender principle under Article 81(b) should be taken by August 27, 2015.[72] This is the date by which the current debate on the nature of and mechanism for implementation of the two-thirds gender requirement must be settled.[73] The court thus directed that any legislation and legislative measures to give full effect to the 2/3 principle under Article 81 (b) of the constitution and in relation to the National Assembly and the Senate should be attained by the 27th August 2015 according to the terms of Article 100 on the promotion of representation of the marginalised group.[74]

Several scholars too, have expressed the view that the majority approach was positivistic. In her seminal treatise titled '*women's Representation in Elective and Appointive Offices in Kenya: Towards Realisation of the two-thirds gender principle*", Professor Winifred Kamau argues that the majority Supreme Court adopted a conservative 'half-way house' approach, which avoided the possibility of Parliament being declared unconstitutional for not being properly composed while still giving credence to the two-thirds gender principle.[75] Kamau further argues that the upshot of the Supreme Court's decision is that differential treatment to members of the National Assembly and Senate on the one hand, and to members of county assemblies on

[68] *Joseph Maina Mbacha & Three Others v. The Attorney General, (High Court Misc. Application No. 279 of 1985*.). In Muthomi Thiankolu, Ibid p 15.
[69] *Ibid*
[70] *Ibid*
[71] A Gender Analysis of the 2017 Kenya General Elections, 2018, A Report prepared by NDI in conjunction with FIDA Kenya, p15
[72] Ochiel J. D. J., *Gender Rights and Wrongs: Critique of the Supreme Court Decision on the One Third Gender Principle.* Available at http://kenyalaw.org/kenyalawblog/gender-rights-and-wrongs-critique-of-the-supreme-court-decision/
[73] *Ibid*
[74] *Ibid*
[75] Kamau, W., Women's *Representation in elective and Appointive Offices in Kenya: Towards Realisation of The Two-Thirds Gender Principle. In Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal. Pretoria University Law Press (*PULP) 2015, p 200.

the other hand, is permissible. Kamau rightly notes that this creates incongruence in the sense that that women who vie for representation in county assemblies are assured of gender equity while those who contest for National Assembly seats are not. Thus the former enjoy full protection of constitutional guarantees while the latter do not.[76]

According to Ochiel, whose opinion this article shares, the core of the majority opinion was not informed by Article 20(3) of the Constitution, which provides that in applying a provision of the Bill of Rights, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom. It failed to take into account the values and principles that ought to have guided its decision-making and instead indulged in analytical positivism.[77] It decided to adopt the conservative, mechanical and legalistic approach that the constitution discourages them from when interpreting the rights of citizens.

Further, it failed to consider the history and philosophical underpinnings of affirmative action captured in *Article 81(b), to wit*, for women to make any meaningful contribution in any Parliament, there has to be at least thirty per cent representation to meet the critical mass for decision making threshold. Indeed gender and politics scholars and activists suggest that women are not likely to have a major impact on legislative outcomes until they grow from a few token individuals into a considerable minority of all legislators: only as their numbers increase will women be able to work more effectively together to promote women-friendly policy change and to influence their male colleagues to accept and approve legislation promoting women's concerns.[78] This has to be immediate, not long-term. As argued by Childs and Krook, 'critical mass' has gained wide currency among politicians, the media and international organisations as a justification for measures to bring more women into political office.[79]

Postponing realisation of the thirty per cent critical mass achievement renders the whole quest for equal participation in parliament meaningless. Transformative and purposive decision making demanded of the majority judges to look at the very purpose for which there should be equal or equitable representation is defeated.

Second, other than applying as approach that would bring the right to affirmative action in the best light possible, the majority judges seem to have been more concerned with the programmatic difficulties that would befall the executive in the implementation of the one third gender Principe and the life of the then existing parliament. The majority Opinion seems to have been motivated more by the desire to preserve the life of Parliament, than to enforce the one third gender principle. He rightly argues that the majority failed to consider that "…there is nothing like supremacy of Parliament outside the Constitution. There is only supremacy of the Constitution.[80] They too, seemed to have apprehended the political question of the effect of declaring parliament unconstitutional."[81] This takes the court back to the old desire to the judges in the precious dispensation to preserve the status quo and 'save the country from anarchy and other problems.

Third, the majority judges seem to have placed all possibilities for realisation of the right under article 27 and article 81(b) within a legislative and policy framework, thus echoing the imperative approach to adjudication. The court was of the view that "the realisation of the rights under Article 27 (6) and (8) could only be fully realised using legislative as well as other measures but over a spaced period of time and by means of positive and good-faith exercise of governance discretion". The court also noted that the realisation of these rights cannot merely be attained by legislation but by policy and other measures. This is a clear reflection of

[76] *Ibid* p 201.
[77] *Ibid*
[78] Sarah Childs Mona Lena Krook, Critical Mass Theory and Women's Political Representation. *POLITICAL STUDIES: 2008 VOL 56, 725–736*
[79] *Ibid*
[80] Ochiel J. D. J., note 72 above p 4.
[81] *Ibid*

imperative thought. They made no use of the rich values and principles that characterise the Constitution. Other than attempting to differentiate between a norm and a principle, the majority judges made no mention of or no use of the plethora of values and principles that underpin the constitution.[82] The Court made a distinction between a specific, accrued right on the one hand, and a broad, protective principle on the other hand.[83] It construed article 81 to be a statement of general principles which is not confined to the National Assembly, the Senate, or County Assemblies but contemplates all public bodies which hold elections for their membership. Article 81(b) was a statement of aspiration, namely that wherever and whenever elections are held, the Kenyan people expect to see mixed gender.[84]

Fourth, the majority judges focused more on the text and words at the expense of giving meaning to the rich array of principles of equality, non discrimination and affirmative action.[85] The learned judges seemingly focused on the text of the constitution and failed to take into account the plethora of principles that underpin the Constitution. For instance, in grappling with the textual meaning of the Constitution, the judges stated that

> *"after considerable reflection upon this point, they have come to the conclusion that the expression 'progressive realisation', as apprehended in the context of the human rights jurisprudence, would signify that there is no mandatory obligation resting upon the State to take particular measures at a particular time, for the realisation of the gender-equity principle, save where a time-frame is prescribed. And any obligation assigned in mandatory terms, but involving* protracted measures*, legislative actions,* policy-making *or the* conception of plans *for the attainment of a particular goal, is not necessarily inconsistent with the* progressive realisation *of a goal".*[86]

Fifth, in its decision, the majority opinion judges arrived at what they themselves described as the "ultimate question".[45] That is "whether the relevant organs would in their membership be held to offend the Constitution, if the general elections of March 2013 did not yield the stated gender proportions".[46] The answer to that question should be a simple "yes" if Article 2 of the Constitution is to have any meaning.[47]However, instead of finding that an inequitable parliament would be unconstitutional; the majority introduced a strange element into the equation; the need to ensure that "…other organs bearing the primary responsibility for effecting operations that crystallise enforceable rights are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution".[48]

Sixth, the majority judges went against the Supreme Court's own pronouncement on how to interpret the constitution. Apart from the Supreme Court having pronounced itself on the issue of how it should interpret the constitution, lower courts have since taken cue from it. For instance, the Court of Appeal of Kenya has captured the principles of interpretation embodied in Articles 10 and 259. This has been adopted by several lower courts, who have given the constitution vibrant interpretation. For instance, Githinji JA, in the case of *Centre for Human Rights and Awareness v. John Harun Mwau and 6 others*[87] stated that the Constitution should be interpreted in a manner that promotes its purposes, values, and principles, advances the rule of law, human rights and fundamental principles and permits the development of the law and contributes to good governance. The Judge also noted that that the spirit and tenor of the Constitution must provide and permeate the process of judicial interpretation and judicial discretion"[88] The late Justice Onguto in the High Court case of *Marilyn Muthoni Kamuru vs. Attorney General & Another,* noted that "It is the duty of this court…to give effect to the constitution that given… the gender rule must be read together in a manner that gives full effect

[82] *Ibid*
[83] *Ibid*
[84] *Ibid*
[85] *Ibid*
[86] *Ibid*
[87] See the case of *Centre for Human Rights and Awareness v. John Harun Mwau and 6 others, [2012] eKLR*
[88] Ibid At paragraph 21.

to the purpose of the constitution must be read together with each sustaining the other and each not destroying the other".[89]

The Spirit of Dworkin in Willy Mutunga's Dissenting Opinion

Whereas the majority judges obviously adopted a rationalistic imperative approach to their opinion, the dissenting minority opinion better captured the transformative spirit of the Constitution. *Chief Justice Mutunga* noted that Constitution was wholesome in its provisions and no prescriptions other than those provided in the Constitution were necessary.[90] He was aware that no constitution is perfect and that it could have *"inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon, all hallmarks of a negotiated document that took decades to complete*".[91] He, however stated that the Constitution has sufficient mechanisms for the unravelling any legal contradictions and conundrum.[92] He noted that for the majority judges to argue that the two thirds principle is progressive severely disregards the reasons that Kenyans voted for the Constitution and for a cause that the women in Kenya have continuously and consistently struggled for.

While acknowledging the variety of approaches to constitutional interpretation, he pointed out that the Kenyan Constitution had its own prescriptions for its interpretation to be found in various articles of the Constitution[93] from which the Supreme Court, as the exemplary guardian of the Constitution, finds its approach to interpretation of the Constitution. 'The approach is to be purposive, promoting the dreams and aspirations of the Kenya, yet not in such a manner as to stray from the letter of the Constitution.'[94] Thus in interpreting the Constitution and developing jurisprudence, the Judge explicitly espoused a purposive interpretation of the Constitution as guided by the Constitution itself, so as to breathe life into all its provisions.

Mutunga further noted that the Constitution's view to equality, as one of the values provided under the constitution, in this case is not the traditional view of providing equality before the law.[95] Equality, in his view, is substantive and involves undertaking certain measures, including affirmative action, to reverse negative positions that have been taken by society.[96] Where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive. For example, when after struggles for universal suffrage Kenyans succeeded in getting that right enshrined in the Bill of Rights of the 1963 constitution, nobody could be heard to argue that we revert back to the colonial pragmatic progressive realisation of the right to vote.[97]

The Chief Justice asserted that the Supreme Court must remain the exemplary custodian of the Constitution bearing the embodiment of the aspirations of the Kenyan people. He noted that the operation of the Supreme Court was to cultivate indigenous jurisprudence in progressing the rights of the Kenyan people. The Chief Justice was of the opinion that:

> *The Supreme Court has the mandate to develop the Constitution and the law to suit the needs of the Kenyan People. He added that in interpreting the Constitution, the Court needed to take a purposive approach without merely relying on the jurisprudence developed by other jurisdictions. Noting however to learn from the experiences in other jurisdictions such as Canada and South Africa. This is what is meant by indigenous jurisprudence.*[98]

[89] *Marilyn Muthoni Kamuru vs. Attorney General & Another (2016(eKLR*).
[90] *Ibid*
[91] *Ibid*
[92]
[93] *Notably Articles 10, 259 and 20 of the Constitution*.
[94] *Ibid*
[95] *Winifred Kamau,* note 72 above, p 200.
[96] *Ibid*
[97] *Ibid*
[98] *Ibid*

CONCLUSION

From the above analysis, the Supreme Court not only ignored the mode of interpretation entrenched in the constitution of Kenya but went against its own set standards of constitutional interpretation. It also clearly seems to lag behind lower courts which, through their robust transformative interpretation of the law and the constitution, have breathed life into the constitution. The Supreme Court lost an opportunity to solidify its place as the promoters of transformative constitutionalism under the constitution. It resorted to legalism and ignored the spirit and philosophy of the constitution which calls upon them to be purposive in interpretive approach. It choose to ignore the rich plethora of values, principles entrenched in the constitution and instead be guided by meanings of words and phrases, while failing to give effect to the rich array of values and principles entrenched in the constitution. It failed to address the historical context of the two third gender principle and the philosophy that underpins affirmative action. The majority decision confirms some of the fears expressed by several scholars regarding judicial attitudes in transitional circumstances that 'inbred formalism within a legal culture is bound to arise within the common law, working in tandem with the absence of a critical jurisprudential tradition' with the consequence of muffling the Constitution's transformational goal. Had he been alive today, Dworkin would have opined them as much.

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