

JUDICIAL APPROACHES TO CONSTITUTIONAL INTERPRETATION IN KENYA

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ABSTRACT

Constitutional interpretation entails the assigning of meanings to words contained within the constitution with the intention of facilitating legal decisions that are justified by it. There are various mechanisms that courts utilize in interpreting a legal text. Examples of the mechanisms include doctrinal, functional, historical, prudential, textual, equitable and natural. The doctrinal method is founded on the existing practices or the opinions of legal professionals which are mainly executive, legislative, and judicial precedents that are based on the doctrine of *stare decisis*. The functional method analyses the structures of the constitution of law and their intended functioning as a coherent, harmonious system. The historical method relies on an exploratory analysis of the drafting and promulgation of the law. The prudential method considers factors such as efficiency of the governmental operations, the convenience of the overburdened officials, response to political pressure, and the avoidance of the stimulation of more cases. The textual method works on the premise that since law is a command, it ought to mean what it meant to the lawgiver, and if the meaning of the words used in it have been altered, then textual examination and analysis ought to be in accordance with the lawgiver's intentions. The equitable or ethical method relies on the innate sense of justice, what is regarded as right or wrong, and balancing the interests of the parties, regardless what the written law may provide. The natural method is founded on the laws of nature's requisition or advise, human nature, possibilities within the physical and economic realms, or on what is likely to occur.

Key Words: *constitutional, interpretation, approach, supremacy, jurisdiction, jurisprudence*

APPLICATION OF CONSTITUTIONAL INTERPRETATIVE DOCTRINES

The legitimacy of Constitution democracy is founded on the inherent capacity of the courts to uphold a principled and coherent approach in interpreting a country's constitution. Constitutional adjudication prioritizes the application of "neutral principles".ⁱ Even though courts rely on reasoning when deliberating on matters at hand, it ought to be noted that the legislators are not bound by such reasoning. Essentially, composing the constitutional question needs to follow constitutional principles that go beyond the case at hand. Fundamentally, the decisions ought not be made only as and when needed. However, they ought to be considered and justified as legitimate on more general grounds as deliberated in previous case law, statutes, and other authorities that apply to the situation at hand.ⁱⁱ

Professor Githu Muigai highlights the challenges encountered in Constitutional interpretation. First, he initially acknowledges that the Constitution is both a legal document and a political charter. In this regard, there is the likelihood of Constitutional interpretation resulting in controversy.ⁱⁱⁱ Secondly, he states that controversy emanates from the court's interpretation of the constitution. The reason for controversy in this context is how the court applies judicial review resulting in counter-majoritarianism. In essence, the judiciary being a non-elected body exercises its mandate to review and possibly overrule the express actions and enactments of elected representatives of the public is likely to result in controversy revolving around legitimacy.^{iv} Thirdly, he opines that despite there being a conventional definition of the Constitution in place, it is imperative to note that the Constitution is a complex web of doctrine, text, values, and institutional practice. Particularly, the Constitution is open to different interpretations by different yet equally well-meaning individuals.^v Fourthly, he outlines that there are conflicting and inconsistent provisions within the Constitution that call upon the courts to partake in reconciliation and in other scenarios, the Constitution implicitly ranks institutions or values and the courts are subjected to a situation where they need to establish the order of importance.^{vi} Fifthly, at particular cases, the Constitution is imprecise or vague or it has obvious gaps and the courts are required to provide counsel on the unwritten sections.^{vii}

Various jurisdictions founded on common law outlined how constitutional text ought to be interpreted. For instance, the Privy Council in the case involving the *Minister of Home Affairs and Another versus Fischer*^{viii} in interpreting the Constitution of Bermuda highlighted the fact that the constitution is prima facie a special document that needs to be deliberated on based on characteristic principles and not necessarily on the temerity and ordinary regulations for statutory interpretation. Hence, an abstract statement focused on the commencement of Constitutional interpretation is necessary to ensure full recognition of the basic rights and freedoms are in place to guarantee their exclusive effect.

Lord Wilberforce, when delivering a considered Court opinion, outlined the nature of the Constitution as being a legal instrument containing various concepts such as the rights of individuals capable of being enforced in a court of law. Fundamentally, there is a need for respect for the language used within the document as well as to the customs and usages which have given a meaning to the language. In essence, there is consistency in according respect to the language and the recognition that rules of interpretation may apply to take as a point of exit for the interpretation process and a recognition of the character and origin of the instrument. Nevertheless, the observation of the guiding principles when giving full recognition of the effect to the fundamental rights and freedoms with an abstract statement for the commencement of Constitutional interpretation is implicit.

Kenya's grasp of the ideal principles of Constitutional interpretation is unique. For a moment, courts have been insistent on interpreting the Constitution just like any other statutory text. In *R Vs. Elman* case involving a charge made under the Exchange Control Act, the late Chief Justice Kitili Mwendwa expressed the need for fundamental conservative creed in adjudication and interpretations involving the constitution by stating that from a cardinal perspective, the Constitution is to be deliberated in the same manner as any other legislative enactment. In the case, the applicant was obligated to issue information in an official form which tended to incriminate him and he sought to activate the provisions of Section 77(7) of the Constitution as a mechanism for protection. However, the court upheld that the consideration for protection of the applicant was only applicable when they were undergoing trial and not during trial as intended and thus the appeal was rejected.

The decision of the High Court of Kenya in the case involving *Anthony Ritho Mwangi and Another Vs The Attorney General Nairobi High Court* recognized the Constitution's sanctity

and its special character in according specific rules for interpretation whereby it stated that Kenya's Constitution is a citadel that secures the rule of law as practiced by the three arms of government for the sake of good governance. The existence of a system of checks and balances through the doctrine of Separation of Powers and independence of the three arms of government requires that a judicial review is instituted by supervising and checking the powers, functions, and obligations of the executive and legislature. The perception that the judiciary is omnipotent ought not to be held as so because it is obligated to observe and uphold the rule of law and the Constitution's majesty.

In Kenya, there has been a withstanding argument regarding how the constitution ought to be interpreted. On the one hand, there is the school of thought that it ought to be seen as a living document. On the other hand, there are those who perceive that it ought to be interpreted as an Act of Parliament. According to Justice Ringera, based on a citation from *Njoya and Others v. Attorney General and Others*^{ix}, the Constitution is the supreme law of the land and it ought to be regarded as a living instrument with a consciousness and a soul that contains particular basic principles and values that ought to be construed purposely, broadly, liberally, or teleologically with the aim of according effect to those principles and values.

While supporting this position, Justice Kasango cited section 3 of the former Constitution stating that Kenya's constitution outlined its supremacy by providing for its interpretation as being unique such that it differs from other statutes subordinate to it. Kasango's sentiments were emphasized in the *Njogu v Attorney-General*^x whereby it was upheld that the Constitution ought not to be interpreted in the same manner as an Act of Parliament because it is not an Act of Parliament. Based on the country's statutes, the Constitution of Kenya exists on its own accord. In essence, the Constitution is supreme and as such it ought to be interpreted liberally or broadly and not in a restrictive manner. Nevertheless, the values and aspirations of the people ought to be enshrined within its provisions and the court needs to acknowledge it as containing the principles and values that make it be regarded as a living piece of legislation.

In *Ndyanabo v. Attorney-General*,^{xi} the Chief Justice of the Tanzanian Court of Appeal upheld that first, the Tanzanian Constitution ought to be regarded as a living creation by virtue of it having its own consciousness and soul as highlighted in the document's preamble. Thus, the courts must avoid mutilating and crippling the Constitution through inappropriate technical interpretation. Hence, the Tanzanian Constitution needs to be interpreted according to the

majestic purposes it was intended to achieve. Constitutional interpretation acts as a blueprint for the rule of law and democracy. Owing to the sentiments of the former Chief Justice of the Gambia, Justice E.O. Ayoola, the constitution becomes stale and sterile when judiciary's power to undertake constitutional interpretation becomes unimaginative and timorous. The second resolve by Tanzania's Chief Justice was that a broad and liberal approach to interpretation ought to be adopted in deliberating on matters regarding fundamental rights. In this regard, the people's rights would be assured, the nation's young democracy would not only function but also grow in the right direction characterized by the prevailing of the dominant aspirations and the will of the nation's citizens. Introspectively, any restrictions touching on the basic rights ought to be strictly construed.

Further lack of doctrinal clarity on constitutional interpretation is seen in the case of ***R.M. (Suing Thro' Next Friend) J.K. Cradle (The Children Fund) Millie and G.A.O. VS the Attorney General RM (a minor) & 3 others v Attorney General***^{xii} whereby the reasoning that was applied in the case of *REPUBLIC v EL MANN 1969 EA 357* was applied revealed that one vital principle was still upheld that the Constitution's or statute's word ought to be accorded their natural and ordinary sense. Even though El Mann principles have been buffeted by powerful forces when interpreting the Constitution, it is only the two fundamental principles that still reign supreme. In essence, the context where a living spirit ought to be injected to the Constitution's provisions include where a language used has the tendency to lead to unjust situations. The living tree principle of construction reminds us that the nourishment derived by the whole plant originates from the roots, the trunk, and the natural branches. As a matter of interpretation, the court would not disregard these parts when giving flesh to the constitution or to graft in its own artificial branches. In essence, the living tree is sustained by the component parts – the roots, the trunk, and the natural branches and any attempt at grafting is likely to be rejected. Every effort ought to be dedicated towards the courts being innovative in considering the modern context of any generation but let these innovations be founded on the roots. In this regard, what was fully endorsed was the presumption of Constitutionality as powerfully expressed by the Supreme Court of India in the case of ***Hamdard Dawakhana v ersus Union of India Air***^{xiii} in which the Court upheld that when examining Constitutionality of a statute, there ought to be a presumption that the legislature comprehends and appreciates the need of the people and the law it institutes are linked to the problems which arise out of experiences and the elected representatives gathered in the legislature enacts the laws that they regard as

reasonable and as being appropriate for the purpose they are enacted. Thus, presumption favours an enactment's Constitutionality.

The implication of the court's resolution was that the Elmann doctrine was neutral regarding its applicability to Kenya's Constitutional interpretation. However, the reliance of the courts on Hamdard Dawakhana's case that was outright concerned with legislative enactments interpretation rather than the Constitution leads to the bemoaning of the lack of doctrinal clarity.

From the foregoing, one perceives the *jurisprudence* that Constitutional interpretation subjects courts to accord a particular interpretation and meaning to Constitutionalism, enjoyment of rights and freedoms, non-discrimination, and the system of checks and balances among the three arms of government.

The dictum that utilization of the dry bones approach in interpreting the constitution ought to be tolerated only where the evidence suggests that the framers of the law intended to retain the frames only has been backed by the High Court's mechanisms. Otherwise, it ought to be the task of the court to grant life to the bones through giving flesh and spirit to it.^{xiv}

A directive listing of the decisions from the courts whose role is to interpret the Constitution that reveals on rare occasions if at all, do the courts implement these principles to guide them in determining cases before them?

CONCLUSION

Introspectively, the above decisions highlight the fundamental doctrinal weaknesses within Kenya's judiciary. A further examination of more cases in Kenya's judiciary reveals that there is a need for improvement of mechanisms practiced in interpreting various laws when passing judgment. The pertinent "neutral principles" that are presumed to be a guide to Constitutional principles continue to be conspicuously ignored in the efforts implemented to ensure there is proper Constitutional interpretation in Kenya. However, the golden law, in this context is that the courts have consciously attempted to rely on liberal interpretation of the Constitution which is in harmony with the present trends in other progressive nations.

ENDNOTES

ⁱ Richards, DAJ., 1977. Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication Georgia Law Review Vol 11 p 1069.)

ⁱⁱWechsler., 1959. Towards Neutral Principles of Constitutional Law, Vol 73 Harvard Law Review p 1

ⁱⁱⁱ Muigai, G., 2004. Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation, East African Law Journal, Vol 1 p 1

^{iv} Ibid

^v Ibid

^{vi} Ibid

^{vii} Ibid

^{viii} Minister of Home Affairs and Another v Fisher and Another (Privy Council, 14 May 1979)

^{ix} Civil Appeal 112 of 2015 - Kenya Law. (2015). <http://kenyalaw.org/caselaw/cases/view/141660>.

^x Civil suit 574 of 2002 - Kenya Law. (2002). <http://kenyalaw.org/caselaw/cases/view/14302>.

^{xi} *Julius Ishengoma Ndyanabo versus The A.G. E.* <https://elaw.locusattorneys.co.tz/content/julius-ishengoma-ndyanabo-versus-ag>.

^{xii} *RM and Cradle v. Attorney General.* CRIN. <https://archive.crin.org/en/library/legal-database/rm-and-cradle-v-attorney-general.html>.

^{xiii} *The Hamdard Dawakhanna and Anr Vs. Union of India (UOI) and Ors on 13 January, 1964 - Legitquest.* <https://www.legitquest.com>. <https://www.legitquest.com/case/the-hamdard-dawakhanna-and-anr-v-union-of-india-uo-i-and-ors/14E9AC>.

^{xiv} *Lemeiguran & 3 others v Attorney-General & 2 others* (2008) 3 KLR (EP) 325