THE RETROSPECTIVE REACH OF TRANSITIONAL CONSTITUTIONALISM IN KENYA

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Abstract

Constitutionalism in periods of political change stands in constructivist relation to the prevailing political order, but is also constitutive of the perception of political change. Transitional constitution-making responds to past repressive rule, through principles delimiting and redefining the prevailing political system. Such constitutions are simultaneously backward- and forward-looking, yet informed by a conception of constitutional justice that is distinctively transitional. The Constitution of Kenya, 2010 was drafted in a period of profound political contestation and change thus unlike in established democracies where the rule of law is forward-looking in its directionality, the Kenyan Constitution is backward looking and forward looking, retrospective and prospective, continuous and discontinuous. In other words it contains provisions which seek to respond and possibly provide redress, for the injustices of the past. This is apart from the fact that it lays the basis for the kind of future society that it envisages. In this respect, the Constitution reflects the fundamental normative commitments of the new society being constructed. This critique will focus on the Supreme Court of Kenya’s decisions in Macharia and Rai cases with the aim of demonstrating that the court failed to grasp the restitutionary nature of transitional constitutionalism.

1 Introduction

Transitional justice has been defined as the conception of justice associated with periods of political change characterised by legal responses to confront the wrongdoings of repressive
There is a complicated relationship between transitional justice and the past. In transitional justice discourse, revisiting the past is understood as the way to move forward. There is an implied notion of progressive history. The paradoxical goal in transition is to undo history. The aim is to re-conceive the social meaning of past conflicts, particularly defeats, in an attempt to reconstruct their present and future effects.

Therefore interest in the pursuit of justice does not wane with the passage of time. This may be because transitional justice relates to exceptional political conditions, where the state itself is implicated in wrongdoing and the pursuit of justice necessarily awaits a change in regime. Transitional justice implies a non-linear approach to time. This phenomenon is reflected in legal responses taken, often in the form of delayed litigation.

Transitions present a threshold choice. The question is posed anew after the passage of time, which underscores the threshold challenge of remaining in history as well as the limits of transformation. The question as to what extent is there continuity, and to what extent discontinuity, both descriptively and normatively imply that transitions should be conceptualised as exceptional in political life. Justice seeking in periods of transitions is differentiated by the rule of law associated with ordinary periods. The central dilemma of transitional justice relates to the recurring issues that, even if not sui generis, are largely associated with the legal and political factors common to unstable periods of liberalizing political transformation. Therefore, while in the abstract it might be desirable to insist that justice-seeking projects in transitional times to emulate those in established liberal democracy contexts, this exhortation will ultimately be of

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1 Guillermo O'Donnell and Philippe C Schmitter Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies (1998) 6 defining transition as the interval between one political regime and another.
4 Jeremy Waldron ‘Superseding Historical Injuries’ (1992)4 Ethics 103 arguing for ‘succession’ of claims; and see also Ruti G Teitel, Transitional Justice (Oxford University Press 2000 138-39 discussing the paradox of the passage of time as concerns transitional justice.
6 In the international sphere, this dilemma was resolved by the adoption of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity G.A. res. 2391, U.N. GAOR, 23rd Sess. No. 18, at 40, U.N. Doc. A/7 218 (1968).
7 Teitel Supra note 4 11-18, 33-36.
limited normative guidance. The rule of law capacity of transitional societies cannot be expected to function at the same level as in context with consolidated liberal juridical apparatus.

The central question of transitional justice arises within a distinctive context, a shift in political orders:

Understanding the particular problem occasioned by the search for justice in the transition context requires entering a distinctive discourse, organised by dilemmas inherent to these extraordinary periods. The threshold dilemma lies in the context of political transformation: Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective. Transitions imply paradigm shifts in the conception of justice; thus, law’s function is inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order, even as it enables transformation. Ordinary predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate *sui generis* paradigm of transformative law.\(^8\)

The conception of justice in periods of political change is extraordinary and constructivist: It is alternately constituted by, and constitutive of, the transition. The conception of justice that emerges is contextual: What is deemed just is contingent and informed by prior injustice. Responses to repressive rule inform the meaning of adherence to the rule of law. As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative.

During ordinary times, adherence to the rule of law implies the operation of principles that constrain the purposes and application of the law. In periods of substantial political change, by contrast, the transitional dilemma means that the law is unsettled, and the rule of law is not

well explained as a source of ideal norms in the abstract. From the perspective of transitional jurisprudence, the rule of law can be better understood as a normative value scheme elaborated in response to past repression supported by the prior legal system. Thus transitional law is settled and unsettled. It is both backward- and forward-looking, as it disclaims past illiberal, and reclaims future liberal, norms.9

Traditional constitutionalism views a constitution as the guardian of fundamental rights through constraining government powers, including limited government, separation of powers, checks and balances and judicial review.10 The fundamental theory behind this classical reading of constitutionalism is a clear distinction between law and society, and a conviction that it is not the vocation of law or constitution to stabilize a social order and to form political consensus. But constitutional experiences of transitional democracies demonstrate a trend against this basic assumption. During democratic transitions, when social consensus disintegrated, transitional societies drifted away from existing legal and social norms. Faced with the crisis of breakdown, transitional societies must substitute new agendas for old legalities that were deeply questioned. Thus within the agenda of constitutional reforms, transitional constitutionalism takes up a steering role and serves as a strong mechanism for forming political consensus and transforming social values.11 Constitutions during democratic transition are expected to serve functions that depart from traditional understandings which are primarily on limiting government powers and protecting fundamental rights. Instead, transitional constitutionalism intervenes in transitional process by facilitating social integration.12

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9 Teitel Supra note 8 2015.
11 Ulrich Preuss ‘The Politics of Constitution Making: Transforming Politics into Constitutions’ (1991) 13 Law and Policy 113, 119; Daniel Franklin and Michael Baun (eds) Political Culture and Constitutionalism: A Comparative Approach (1994) 5. ‘Some of the features or functions that we identify in transitional constitutionalism exhibited primarily in the democratizing states since the 1980s and 90s may be shown in some earlier forms or types of traditional constitutionalism. They, however, were rather scattered and not as systematic as in recent transitional constitutionalism.’
The Constitution of Kenya, 2010 (the Constitution) has been described as a radical charter\(^ {13}\) with a transformative leitmotif.\(^ {14}\) Operating this way, the constitution’s functions has moved from the liberal conception of constitution of constraining government powers to steering reform agendas or even reconstructing social structures. It draws a line demarcating the normative shift from illegitimate to legitimate rule. It is recognition that in a time of profound transition, a society has to cope with the past, deal with the current, and look forward to the future. As a result, transitional constitutionalism presents itself in many significant ways as defiant to traditional functions of constitutions.

In a transitional context, measures are taken directed at tackling particular transitional issues aimed to offer redress transitional justice.\(^ {15}\) Vetting of judges and magistrates is one of the ways through which the Constitution responds to legacies of injustice. Vetting plays a foundational role in the transformation to a more liberal political order. The Constitution envisaged a vetting mechanism under Section 23 of the Sixth Schedule on Transitional Provisions.\(^ {16}\) This was to engineer a re-birth of the judiciary which suffered an image crisis due

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13 Patricia Kameri-Mbote ‘Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses’ Inaugural Lecture (University of Nairobi 2013) 29.


15 Czech Republic for instance altered statutes of limitation so as to begin prosecutions of criminal acts committed by former officials. This was the so-called lustration acts, which triggered constitutional review by Polish Constitutional Tribunal. For the excerpt of the court decision and their relevant discussion, See Vicki C Jackson and Mark Tushnet *Comparative Constitutional Law* (1999) 347-56; In unified Germany, prosecutions of criminal acts committed by former officials were allowed, and the constitutionality of which was affirmed by the German Constitutional Court. For brief discussions of the case, See Teitel, *Supra note 8* 2030-31; In Taiwan, individual claims for compensation for past rights infringements or property takings were allowed by special laws. For the discussion of transitional justice in Taiwan, See Naiteh Wu, ‘Transitional without Justice, or Justice without History: Transitional Justice in Taiwan’ (2005)1 *Taiwan Journal of Democracy* 77-102.

16 Section 23 of the Sixth Schedule of the Constitution, reads as follows:

(1) Within one year after the effective date. Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a time-frame to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.

2) A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.
to perception that it was beholden to the powers that be, corrupt practices and pandered to formalistic reasoning.

Parliament enacted the Supreme Court Act to operationalise the Supreme Court and by dint of Section 14 of the Act, conferred on the Supreme Court ‘special jurisdiction’ that envisaged that where a judgment or decision of a judge is the basis for removal, resignation or retirement of a Judge consequent to complaint of misconduct or misbehaviour, then the Supreme Court would have jurisdiction to review the judgment if it formed the basis for removal of such a judge. The constitutionality of this provision was the subject of judicial consideration to the extent that the provision was retrospective in its operation. The Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (Macharia Case)* ruled that Section 14 of the Supreme Court Act was unconstitutional. The main thrust of decision was

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17 For completeness the provision stipulates thus:

‘14 (1) To ensure that the ends of justice are met, the Supreme Court shall, within twelve months of the commencement of this Act, either on its own motion or on the application of any person, review the judgments and decisions of any judge—

(a) removed from office on account of a recommendation by a tribunal appointed by the President, whether before or after the commencement of this act; or

(b) removed from office pursuant to the Vetting of Judges and Magistrates Act, 2011; or

(c) who resigns or opts to retire, whether before or after the commencement of this Act, in consequence of a complaint of misconduct or misbehavior.

(2) To qualify for review under subsection (1), the judgment or decision shall have been the basis of the removal, resignation or retirement of, or complaint against, the judge.

(3) The Court shall, in exercise of its powers under this section—

a. conduct a preliminary enquiry to determine the admissibility of the matter; and

b. have all the necessary powers to determine the review under this section, including calling for evidence.

(4) An application for review in respect of a judgment or decision made before the commencement of this Act shall not be entertained two years after the commencement of this Act.

(5) Nothing in this section shall be construed as limiting or otherwise affecting the inherent power of the Court, either on its own motion or the application of a party, to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the due process of the Court.’

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that Article 163 (4) (b) of the Constitution which confers appellate jurisdiction upon the Supreme Court did not envisage a retrospective appellate jurisdiction for the Supreme Court. In reaching this conclusion, the court unanimously grounded its decision on three bases. First, a literal reading that ‘in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution.’ Secondly, the court reasoned that ‘such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.’ Thirdly, ‘the parties to the appeal derived rights, and incurred obligations from the judgments of that Court. If this Court were to allow appeals from cases that had been finalized by the Court of Appeal before the Commencement of the Constitution of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens.’

This finding of unconstitutionality of Section 14 of the Supreme Court Act in the Macharia case was subject of review in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others (Rai case). The petitioners applied for a review of the decision in the Macharia case as made per incuriam. The majority analysis in the Rai case concentrates on the principles applicable to enable the court to depart from its prior decisions and does not substantively engage the court’s prior finding in Macharia. However, the Separate Concurring Opinion of Chief Justice Mutunga engages substantively with the issue of retrospective application of the Constitution and endorses the Macharia case on what to quote him ‘in addition to the reasons already articulated by this Court, I am convinced that Section 14 of the Supreme

19 Para 62 of Macharia Case.
20 Para. 62 of Macharia Case.
21 Para. 62 of Macharia Case.
22 Para. 63 of Macharia Case.
Court Act is unconstitutional on two additional grounds: one, it is discriminatory, contrary to Articles 10(1)(b), 10(2)(b), and 27 of the Constitution; and two, it violates private property rights contrary to Article 40 of the Constitution.24 The Separate Concurring Opinion of the Deputy Chief Justice Rawal endorses Macharia case but identifies one of the problems with the decision as its formalistic reasoning and points out that the court should have substantively engaged with the question. She opines thus:

In my opinion, the conclusion arrived at in the Macharia Case is correct, in that Section 14 of the Supreme Court Act is unconstitutional, insofar as it purported to give the Supreme Court a ‘special jurisdiction’. Still, I am convinced that this Court, as an iconic court in the land, should have approached the issue of the constitutionality, or lack thereof, of Section 14 of the Supreme Court Act, in the Macharia Case, in a more comprehensive manner, and strived to explain its background and context extensively, or even painstakingly, so that the people of Kenya, and the litigants (present or prospective), could fully grasp the reasons behind its refusal to exercise jurisdiction as purportedly provided under Section 14 of the Supreme Court Act. The promise of justice embedded in Section 14, was undoubtedly an issue close to the hearts of the Kenyan people; and this, thus, provided an opportunity for the Supreme Court to seek the parties’ participation by way of detailed submissions, as a basis for full justice on the issue. This would especially have been advisable, in view of the well established presumption, of the constitutionality of a statute, and of its provisions.25

The Dissenting Opinion of Justice Mohamed disagrees with the finding in Macharia and calls for its review. Justice Mohamed’s major quarrel with the decision is its formalistic reasoning. He points out that substantive justification would help reduce the counter-majoritarian difficulty

24 Para. 82 of Rai Case.
25 Para 128 of Rai Case.
faced in judicial review as the court would then declare legislation unconstitutional on firmer premise.\textsuperscript{26}

This critique is focused on the decision of Supreme Court in the \textit{Macharia} and \textit{Rai cases} and aim to show that the court failed to grasp the restitutionary nature of the constitution in a context of transition. Part 1 of this article has sought to lay a basis for the subsequent critique by introducing the nature of transitional constitutionalism and its difference with the traditional idea of constitutionalism. It has also introduced the findings of the Supreme Court in the \textit{Macharia} and \textit{Rai cases} which will be the subject of interrogation. Part 2 of the article will tease out the restitutionary nature of the vetting mechanism as envisaged in the Constitution and the inevitable retrospective reach of the Constitution in order to meet the end of transitional constitutional justice. Part 3 of the article entails a robust engagement with the rule of law dilemmas that informed the court’s rejection of retrospective reach of the Constitution to provide justice to past victims of judicial impunity. The rule of law dilemma questions that informed the court’s twin decisions being: vesture of rights (beneficiaries of judgments having acquired property interest in the judgments subject of review), and discriminatory implication of review of only a select category of judgments delineated as those which informed a finding of misconduct on the part of a judge. Also to be engaged is the formalistic reasoning in \textit{Macharia} case that alludes to textual backing as the basis for the rejection of retrospective application. In part 4 the article offers an outlook that affirms that indeed the Constitution of Kenya, 2010 envisages retrospective application in other provisions including the Bill of Rights.

2. \textbf{The vetting mechanism as a restitutionary feature of the constitution}

Teitel notes, that in periods of fundamental political change, law appears to represent ‘a pragmatic balancing of ideal justice with political realism that instantiates a symbolic rule of law capable of constructing liberalizing change’.\textsuperscript{27} John Elster defines processes of transitional justice

\textsuperscript{26} Paras. 146-160 of \textit{Rai Case}.
\textsuperscript{27}Teitel \textit{Supra note} 4 213.
as ‘the legal treatment of former wrongdoers and victims after political transitions.’ As during transitional periods, determinations of what is fair and just are products of what is perceived as previously endured injustices: transitional justice can be described through restorative and transformative features. Wojciech Sadurski underscores the nature of transitional justice as ‘fundamentally different’ from the normal liberal and democratic commitments, given sui generis problems that the system of constitutional justice has to grapple with while dealing with the legacies of the past.

Various mechanisms have been employed in institutional transformation in societies in transition. Vetting, lustration and purges have been used by different countries in transition. The main focus of these processes is to deal with institutions from past regimes which are perceived to have been undemocratic, authoritarian or to have abrogated people’s rights. In the Kenyan context, vetting of judges and magistrates was inspired by the need to ensure that the judiciary is effective and that it enjoys the confidence of the public, as the ultimate beacon of justice. The impact that judges and magistrates have on the life, limb and property of the public explains the need to ensure that the institution enjoys public confidence. The entrenchment of the vetting process in the Constitution arose from historical complaints that the judiciary had caused intolerable injustice to the populace. It is critical to note that, while the vetting process was ultimately adopted in the Constitution, there was a proposal made to the Committee of Experts on Constitutional Review to have a purge of all judges and magistrates. It was proposed that all judges and magistrates be deemed to have lost their jobs upon the promulgation of the Constitution.

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29 Teitel supra note 4 224.


31 Reben Zamora, ‘The Struggle for A lasting Reform: Vetting Process in El Salvador’, in Alexander Mayer-Rieckh and Pablo De Greiff (eds), Justice as Prevention Vetting Public Employees in Transitional Societies (Social Science Research Council: USA, 2007) 80 to 120. For example, lustration laws were applied in Czechoslovakia, Hungary, Albania, Lithuania, Latvia and Estonia. Vetting legislation was used in Poland and Afghanistan.


constitution. They would have been at liberty to apply for re-appointment. The Committee of Experts opted for a more ‘gentle’ approach. Judicial officers would remain in office but they would be required to take a new oath and to undergo a ‘vetting’ process. Vetting has been defined in The Vetting of Judges and Magistrates Act, 2011 to mean the ‘process by which the suitability of a serving judge or magistrate to continue to serve is determined.’

Justice and accountability bears heavily on the legitimation of the emerging order. In particular, vetting makes it possible to isolate and delegitimate an individual past and wrongdoing. When a society moves away from illiberal rule, the defining normative shift is in the status and treatment of the individual; through the individuation of responsibility, vetting offers a mechanism for recalling and disowning past wrongdoing, while confirming societal legal processes and institutions. Using vetting to construct transition implies a profound dilemma created by the tension of mediating discontinuity and continuity in the law. Vetting is expected to lay the foundation of the transition by expressing disavowal of predecessor norms, yet for such mechanisms to realise their normative potential, they must be carried out in keeping with the full procedural legality associated with working democracies in ordinary times. Otherwise, paradoxically, such mechanisms become vulnerable to challenge.

3. Rule of law dilemmas and transitional constitutional justice

Constitutionalism in periods of political transformation raises a basic tension between radical political change and the constraints on such change that would appear to be the predicate of constitutional order. The tension is reconciled by the understanding that constitutionalism functions as the very basis of the new democratic order. The constitutional ideal is forward-looking; the purpose is to put the past behind and to move to a brighter future. Constitution making is conceived as the foundation of the new democratic order.

34 Ibid.
35 Ibid.
36 Section 2 of the Vetting of Judges and Magistrates Act, 2011.
37 Teitel Supra note 8 2057.
In the development of constitutionalism, rule of law is a core concept standing against potential power abuses by power wielders. Rule of law entails the principles of legal certainty and legal clarity among others. These fundamental principles are undermined to some extent during transitional moments. In transitional contexts, one of the most contested issues is how to deal with the legacies of the past order. Some countries decide to respect legal certainty, thus leaving past wrongdoings to go unpunished and unjust laws to remain the same. Other countries, decide to deal with the past upfront, thus revoking unjust laws and beginning punishing wrongdoings that were legal in the old order. This undertaking undoubtedly generates a grave concern for legal certainty and thus courts are called upon to decide this highly contested dilemma.

Adherence to the rule of law during periods of political upheaval creates a tension between rule of law as backward-looking and forward-looking, as settled versus dynamic. In this dilemma, the rule of law is ultimately contingent; rather than grounding legal order, it serves to mediate the normative shift in justice that characterises these extraordinary periods. In democracies in ordinary times, the rule of law means adherence to known rules, as opposed to arbitrary government action. Yet revolution implies disorder and legal instability. Periods of radical change are often times of massive paradigm shifts in understandings of justice. It is a societal struggle to transform its political, legal and economic systems.

Writing on the agitated years of Central and East European transition to democracy, Preuss notes that ‘the principle of the rule of law was invoked time and time again during the revolutions of 1989, and in some cases was even declared the principal guide of all the political actions of the revolutionaries.’ In this specific context, Preuss wonders what the true meaning of the notion ‘rule of law’ could be: the protection of legal rights, regardless of their moral,

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39 Teitel *Supra* note 8 2049-51.
political, or economic justification? Prohibition of any kind of legal retroactivity, immunizing rights acquired in the past from takings? Or does it simply require that any kind of change should be carried out legally?\textsuperscript{42}

Teitel answers this by arguing that in periods of transition, the rule of law serves to mediate the normative shift in justice.\textsuperscript{43} The predecessor regime’s immorality determines the necessity for a ‘fresh start’ for the rule of law to be grounded on something else than adherence to the pre-existing law.\textsuperscript{44} Accordingly, if law should be able to guide human conduct, prior arbitrariness that often resulted in unequal lawmaking and unjust outcomes must be overturned: rule of law regimes cannot be founded on immoral grounds. There was thus a perceived injustice characterising society, an injustice reflected in many aspects of life: an injustice that had to be undone.\textsuperscript{45}

Restitutionary justice has also been thought of in terms of ‘national rebirth’ and ‘moral purification’,\textsuperscript{46} efficiency and historical justice,\textsuperscript{47} or legitimation of the emerging order.\textsuperscript{48} As Teitel puts it, ‘transitional reparatory justice…reconcile[s] the apparent dilemma in the extraordinary context of balancing corrective aims with the forward-looking goals of the transformation.’\textsuperscript{49} Restitution aims to correct past injustices and to consolidate the moral foundations of the system. The vetting mechanism sought to respond to the legacy of judicial impunity in Kenya. The vetting mechanism derives its strength and legitimacy from the dignity of this response. The new Kenya is thus being built upon historical sands of injustices of the past. Failure to provide redress to the victims of judicial impunity endorses a vision of the Constitution as having legalised suffering and protected perpetrators. The experience to victims

\textsuperscript{42}Ibid.
\textsuperscript{43}Teitel Supra note 4 11–27.
\textsuperscript{44}Ibid.
\textsuperscript{45}‘What is deemed just is contingent and informed by prior injustice,’ notes Teitel Supra note 4 6.
\textsuperscript{48}Verdery Katherine, The Vanishing Hectare: Property and Value in Postsocialist Transylvania (Cornell University Press 2003)
\textsuperscript{49}Teitel Supra note 4 11–27.
of judicial impunity is that even a good constitution could not provide the protection it was
designed to ensure. Vetting was envisaged to offer a transitional mechanism for normative
transformation to express public condemnation of aspects of the past, as well as public
legitimation of the new rule of law.

The Supreme Court in *Macharia* and *Rai Cases* was grappling with the extraordinary
circumstances that abound in transitions and whether it should endorse an approach that
transitions should respect liberal norms. The two contending broad arguments before the
Supreme Court were demands for justice with demands for legality. This critique demonstrates
that the Supreme Court failed to assert itself as the motor of transformation as the mission that
the Constitution had envisaged for the institution. Interestingly, the court and probably the
advocates appearing before the court did not consider the adjudication as a response to transition,
but approached the issue as a contest in ‘normal times’. It was therefore an endorsement of the
imperative need for adherence to the rule of law which lead the court to the conclusion that legal
certainty is more important than substantive justice to victims of past incidences of judicial
impunity.

The tension described between the demand for justice and the necessity to comply with
requirements of formal legality is represented by the question of retroactive justice.\(^{50}\) Teitel gives
convincing answer to this dilemma, arguing that the law’s role is exactly to bridge conventional
legality and radical reform. Even if certain measures ‘threaten the conventional rule of law, what
supports their use….is that they are justified….by the future aim of constructing a more liberal
state.’\(^{51}\) As Teitel describes it, ‘in its ordinary social function, law provides order and stability,
but in extraordinary periods of political upheaval, law maintains order even as it enables
transformation. Accordingly, in transition, the ordinary intuitions and predicates about law

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\(^{50}\) Jiří Přibaň *Dissidents of Law* (Ashgate 2002) 88–120.

\(^{51}\) Teitel *Supra* note 4 11–27;187–8.
simply do not apply. In dynamic periods of political flux, legal responses generate a *sui generis* paradigm of transformative law.\(^{52}\)

A proper vision of transitional justice would appreciate that the notion of a state ruled by law warrants retroactive justice.\(^{53}\) If the role of a Constitution is limited to procedural guarantees, then all kinds of political content can be poured in. The court could have refused to legitimise the past acts judicial impunity by recognising that preventing retroactive justice means to prefer the legal certainty of beneficiaries of injustice to the legal certainty of victims. The court therefore adopted a value neutral reading of the Constitution. Moreover, it should be noted that by these twin decisions, the court has failed to produce fundamental change not only in Kenya’s constitutional system, but also in the culture of legalism and judicial interpretation and application of the law. The court failed to endorse the principle of justice as fairness, by failing to accord the principle of fairness precedence over formal law. Legalization of a historical injustice cannot be accepted in the name of legal stability. This profound rule of law dilemmas is what the Supreme Court grappled with and the article will proceed to interrogate the Supreme Court’s approach and proffer alternative reading of the Constitution to that adopted by the Supreme Court.

### 3.1 Vesture of rights (property rights acquired pursuant to unjust judgments)

The dominant vision of the rule of law for the Supreme Court was certainty of the law based on formal and objective principles. Thus certainty of the law demanded the protection of rights previously conferred. The legislation thus threatened individual rights to repose. In its discussion, the Court in *Macharia case* analogised the vesture of rights at issue to personal property rights.\(^{54}\) This was endorsed and elaborated by Chief Justice Mutunga in the *Rai case*.\(^{55}\)

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52 Ibid 6.
53 It is worth comparing this view with the one worded by Sampford, who, taking a somewhat different line, considers that ‘[t]here may be reasons to allow an individual departure from the Rule of Law ideal within a system which displays a substantial degree of conformity to it; or it may be that other valuable goals override the normative force of the Rule of Law in particular cases’. See Charles Sampford *Retrospectivity and the Rule of Law* (Oxford University Press 2006) 63–4.
54 Para. 62 of the *Macharia Case*. 
The conception of the rule of law by the Supreme Court endorses the rule of law value as ordinarily understood and fails to grasp the transformative understanding. The court fails to appreciate the historical and legal legacies where the judiciary was deemed to have operated out of the bounds of legality.

Where injustice was systematically perpetrated under legal imprimatur, the transitional legal response is an attempt to undo these abuses under the law.\(^\text{56}\) The scope of the constitutional protection to property must be considered within a framework that takes into account the subject, object and function of competing private and public claims. Although the constitution attempts to minimize uncertainty about property rights,\(^\text{57}\) Engerer observes that transformation (transition) is not a process following given rules, but rather a process producing them. Therefore, neoclassical, contractarian, and monetary theories may not thoroughly explain property rights in transition.\(^\text{58}\)

In the seminal work, *Anarchy, State and Utopia*, Nozick develops his central thesis relating to property, according to which any attempt to artificially alter the existing *status quo* of justly acquired property rights (i.e., redistribution) upon egalitarian considerations will result in unacceptable restrictions on individual freedom.\(^\text{59}\) According to Nozick, ‘entitlement theory of justice…... is historical; whether…(a restitutionary scheme)\(^\text{60}\) is just depends upon how it came about.’\(^\text{61}\) This view fits perfectly in the constitutional scheme for redressing past judicial injustice. If such a scheme were to be politically motivated, aimed at the eradication of private property, discriminatory without justificatory basis, or stigmatization of certain groups; or simply illegal (without any legal basis)— then the scheme could hardly be perceived as just. Arguably, following this line of thought, reviewing court decisions that are the basis of a finding of judicial misconduct appears as the objective necessity of undoing past injustice.

\(^{55}\) Para. 82 of the *Rai Case*.


\(^{57}\) Article 40 of the Constitution.


\(^{60}\) Words in bracket are the authors own.

\(^{61}\) Nozick *supra* note 59 153.
The concern of altering a status quo grounded on a—at least sometimes—legitimate appropriation was massively present in post-communist restitution contexts, with a focus on the need for justice. Romanian Constitutional Court upheld this solution, arguing that the enforcement of rights obtained through ill will or by the abusive actions of the organs of public administration is not compatible with the constitutional guarantee of rights and liberties.\textsuperscript{62} Even the European Court of Human Rights demonstrated sensitivity towards this problem. It upheld restitution of property that was appropriated after confiscation in ways incompatible with the rules of the time, and it also upheld expropriation when property was appropriated illegally under the previous regime, even if afterwards the title was lawfully registered.\textsuperscript{63}

The Supreme Court’s protection of purported vested property rights is premised upon a foundation that does not give weight to the constitution’s recognition of the need to redress past judicial impunity through the entrenchment of a vetting mechanism. The Constitution cannot lightly be imputed with the intention to authorise courts to protect such a legacy. The fact that the Constitution is silent means that parliament was not foreclosed from elaborating and providing for redress. In former Czechoslovakia, the Constitutional Court adopted the astonishing ‘lawlessness of communism’ decision, by which it announced that the communist regime cannot be regarded as a Rechtsstaat, and that the legal certainty of perpetrators may not be preferred to those of the victims.\textsuperscript{64} It is therefore evident that by choosing legal certainty for the beneficiaries of judicial impunity and denying redress to the victims, the Supreme Court failed to appreciate restorative justice as a vision of the Constitution.

The transformative role of law in shift to a post liberal regime is that prior judgment under the old dispensation lacked morality and hence did not constitute valid judgments. In so far as rights accrued under that environment, the rights too are immoral as consequences of illiberal


decisions. The role of law in transition is to respond to evil perpetrated under the previous judicial dispensation. The principle of prospective application is therefore only violated in a formal sense, not in the far more important, material sense. The Supreme Court does not address this issue substantially; the demand for justice cannot be ignored out of deference to considerations of retroactivity.

The question of fear turmoil in private relations and potential avalanche of suits alluded to by the Supreme Court must be balanced having regard to the degree of cases involved, the capacity and the skill of the courts to fairly and sensibly manage its effects and the grave consequences of an alternative approach denying justice to a section of the populace. Thus it is not convincing that the avalanche of suits argument is sufficiently compelling to favour the legalistic approach adopted by the court. The danger of avalanche of suits could be managed by the Supreme Court given that earlier on the case load of the court is in fact light. The danger is therefore evidently limited and containable. It is not of a magnitude sufficient to justify the plainly untenable denial of victims of injustice a remedy that is not explicitly foreclosed by the Constitution.

3.2 Discriminatory consequences of justice to victims of judicial impunity

The Chief Justice in his Separate Concurring Opinion in the Rai Case found that Section 14 of the Supreme Court Act was unconstitutional on the further ground that it was discriminatory. The Chief Justice states thus:

Article 10 of the Constitution requires Parliament to be non-discriminatory when it enacts laws. Parliament violated Article 10 when it enacted Section 14 of the Supreme Court Act because it limited the remedy of a new trial only to those who could prove that the judge in their case had been removed, retired or resigned on the basis of their

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65 Lon Fuller *The Morality of Law* (Yale University Press 1969) 245.
67 Para. 63 of the Macharia case: ‘it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens.’
complaints. The right to a fair trial, however, applies to everyone, not just those who were denied the right because of the misconduct of judges who then voluntarily or involuntarily left the bench. It also applies to those litigants whose rights were violated even though their respective judges had been found suitable by the Judges and Magistrates Vetting Board, or who did not have to be vetted under the Act. If the right to a fair trial belongs to everyone, the remedy must also belong to everyone. Therefore, based on the provisions of Article 10 that promote and protect the principle of non-discrimination and the equal protection afforded by Article 27, I find no basis for this discrimination and I would have declared Section 14 unconstitutional.  

The prohibition against discrimination allows for unequal treatment, if sufficient reasons for discrimination exist. In fact, unequal treatment is compatible with reigning international agreements, to the extent that it is based on reasonable and objective criteria. Thus the aim of restitutionary justice fulfills these criteria. The Chief Justice’s argument as to exclusion harkens to a formal conception of equality before the law. It falls short of the thick conception of the rule of law to which substantive justice and equality is a core feature.

According to Rawls’s difference principle, inequality is permissible as long as it maximally benefits the least well off. Teitel maintains that in transitions, law’s role itself is transitional and not foundational. Transitional jurisprudence’s task is to bridge conventional legality and radical transformation. Historical legacies determine the values that prevail. The propriety of the choice of values is functional in the effectiveness of the chosen value in fulfilling the envisaged objectives. If the outcome of the process is demonstrably just then it cannot be argued that such a choice is arbitrary. It is difficult to appreciate the Chief Justice’s opinion that he finds ‘no basis’ for differential treatment. The need to address the legacy of judicial impunity was a deliberate choice by the Kenyan people and in fact was one of the core concerns that

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68 Para 83 of Rai Case.
71 Teitel Supra note 4 215.
informed the agitation for a new constitutional dispensation thus redress cannot be said to be arbitrary.

The extent and conditions for redress are usually the exclusive domain of the law maker and so long as the decision is rational it is not the province of the court to question the merits of the decision. Thus, the Lithuanian Constitutional Court faced with a similar argument insisted that the Supreme Council had the ‘unquestionable’ right to choose a variant of the solution, and that the choice ‘was [...] predetermined by hard political and social conditions of that period’; therefore, it constitutes a ‘compromise solution.’\textsuperscript{72} In Hungary, the Constitutional Court did not find any obligation of the state to compensate former owners, victims of the unconstitutional takings. On the contrary, it emphasized that the partial compensation scheme put forward by the government was an exclusive function of the state’s sovereign will, based solely on its gratitude.\textsuperscript{73}

3.3 Literal reading as a basis for finding of unconstitutionality

Transitional constitutionalism has implications for constitutional interpretation. It calls for a purposive appreciation of the intent of the relevant constitutional provision under consideration. It appreciates the understanding that constitutional provisions are best examined in light of historical and political contexts. The relevant interpretive inquiry might be to what extent the relevant constitutional provision is considered transitional and whether the provision is transformative in purpose. The Supreme Court’s theorizing does not fully account for the substantial political change envisaged in the constitution. The Constitution is both normative and transformative in its response to pre-existing political order.

The deliberations over justice in transition are best understood when situated in the actual political realities and in the transitional political context, which include the features of the


\textsuperscript{73} H CC, AB 21/1990, 1057/G/1990.
predecessor regime as well as political, juridical and social contingencies. The Supreme Court fails to undertake a contextual analysis in the Macharia case and instead makes a blanket finding that Article 163 (4)(b) of the Constitution does not contain ‘a whiff of retrospectivity’. The literal interpretation leads to very unjust, perhaps even absurd, consequences. The denial of persons of a remedy leads to substantial injustice based purely on arbitrary circumstances, totally unjustified by any objective considerations. That the Constitution recognised the injustices of the past judicial decisions and yet leaves a substantial group of people without a remedy seems to negate the very spirit and tenor of the Constitution and its widely celebrated objectives. Fundamental to the spirit and tenor of the vetting mechanism was the promise to redress past judicial injustice. The literal interpretation invades this objective in its arbitrary recognition of injustice and yet denying a remedy. The Courts must strive to avoid such a result if the language and context of the relevant provision, interpreted with regard to the objectives of the Constitution, permits such a course. The course adopted by the Supreme Court allows a disgraced and unacceptable legacy of historical injustices to continue into the future, and ironically protected by the Constitution. The Supreme Court ought to have favoured the most beneficial construction given that the context of the provision did not foreclose such a course.

The presumption against retrospectivity is not inflexible. It operates only if there is no contrary intention. In a very important sense a document as fundamental as a Constitution can itself be the basis for the inference of such a contrary intention. The presumption is not intended to exclude the benefit of rights sanctioned by new legislation. The presumption that the Supreme Court reiterates must be interrogated not only on the literal meaning but in their proper context. The relevant context would be vetting mechanism as envisaged in Section 23 of the Sixth Schedule of the Constitution and the larger context of the Constitution regarded as a holistic and integrated document with critical and important objectives. Unlike the literal approach, the purposive approach gives force and effect to the fundamental objectives and

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75 It is noteworthy that the Deputy Chief Justice criticises this approach of the Macharia case in the Rai case.
76 Mohamed J in State v Mhlungu, 1995 (3) SA 867 (CC) para. 36.
aspirations of the Constitution, is less arbitrary in its consequences and is more in natural harmony with the context of vetting mechanism itself and the Constitution as a whole. It is clear from the objectives of the Constitution that the vetting mechanism seeks to provide justice to victims of the past judicial impunity; the literal approach fails to appreciate this objective.

Moreover, the interpretive presumptions regarding retrospectivity in the case of statutory amendments do not apply with respect to a Constitution which operates as a supreme law does not fall to be interpreted along such lines. It is not a case of one statute repealing, amending or replacing one or more others. What is happening is a supreme law being superimposed on the whole of the existing legal landscape, bathing the whole of it in its beneficent light. In the true sense of the words, it is not retroactive or retrospective. As Wilson J pointed out in a notable dissent:

Such presumptions can be inconsistent with the purposive approach to Charter interpretation which focuses on the broad purposes for which the rights were designed and not on mechanical rules which have traditionally been employed in interpreting detailed provisions of ordinary statutes in order to discern legislative intent.

Moreover the Supreme Court’s approach to jurisdiction is that the legislation envisaged in Article 163(9) of the Constitution can only be operational and not substantive in nature to confer appellate jurisdiction to the court. The question that arises is whether it can conclusively be said that Article 163(9) of the Constitution is procedural and not substantive. Furthermore, this distinction assumes that a provision is either procedural or substantive. It could be a hybrid provision involving both. It is in fact unacceptable that by fiat of labelling the court thwarts the intention of the law-maker without a cogent justificatory basis.

77 Kriegler J in Mhlungu Ibid para. 99.
78 Thomson Newspapers v Canada 67 DLR (4th) 161 at p192.
79 Paras 69-71 of the Macharia Case.
There are indeed many provisions in the Constitution where it is clear that, for reasons of inclusivity, compromise and smooth transition, special arrangements were made and particular textures were introduced, not all of them obviously consistent with the broad general principles of the constitution. This would include the transitional provisions of which the vetting promise is a prominent part.\textsuperscript{80} The provisions were inserted to deal with special cases and special situations, and to go back on them would be to undermine finely honed provisions of exceptional import to particular sections of the community. The Constitution is intensely value-laden; it acknowledges a past of intense suffering and injustice and promises a future of reconstruction. To treat it with dispassionate attention one might give to a tax law violates its spirit. It would be as repugnant to the spirit, design and purpose of the constitution as a purely technical, positivist and value-free approach to the post-Nazi Constitution in Germany would have been.

4 Instead of a conclusion: A brief outlook

Revolutionary periods and their aftermath are times of political flux, and, as such, present tensions with constitutionalism, which is ordinarily considered to bind the political order. In periods of political change, the role of law defies the guiding principles governing ordinary periods. In ordinary times, law is largely continuous and prospective. In transitional times, by contrast, law’s directionality is ambivalent; it is simultaneously continuous and discontinuous, retrospective and prospective.\textsuperscript{81} Constitutionalism in transitional times is particularly retrospective in nature, justificatory and constructive of the political transformation. Transformation occurs through the use of law to clarify and sanction past wrongs. Through investigatory and condemnatory processes, the law exposes and delegitimizes the value system associated with past rule, clearing the way for transformative norm change.

Transitional constitution-making responds to past repressive rule, through principles delimiting and redefining the prevailing political system. They, in turn, effect further political

\textsuperscript{80} Dennis Mogambi Magare \textit{Supra}. note 32.
\textsuperscript{81} Teitel \textit{Supra} note 4 2077.
change in the system. Such constitutions are simultaneously backward- and forward-looking, yet informed by a conception of constitutional justice that is distinctly transitional. The Supreme Court’s decisions in *Macharia* and *Rai cases* fail to recognise the significance of the nature and role of constitutionalism in periods of political change. In fact the Supreme Court does not seem to grasp the distinction between the making of a constitution from other lawmaking.

Constitutionalism in periods of radical political change reflects transitionality in its processes and normative commitments. Transitionality has normative implications. The idea of a polis at constitutional point zero that views constitutionalism as unidirectional, forward-looking, and fully prospective does not take into account political change that seeks to deal with past injustice. From a transitional perspective, what is considered constitutionally just is contextual and contingent, relating to the attempt to transform legacies of past injustice. Successor constitutions reconstruct the political order associated with injustice. Thus transitional constitutionalism operates differently from our prevailing intuitions about the role of constitutionalism. It is boldly reconstructive of past constitutional tendencies identified with illiberal politics. Modern constitutions are generally conceived and designed as structures to constrain state power, but transitional post-authoritarian constitutions counter illiberal tendencies more broadly.

In its backward looking aspect, the Constitution aims to facilitate the transformation of society by setting right the wrongs of the past. In the Kenyan context, the wrongs of the past arise from the legacy of colonialism, authoritarian rule, patriarchal culture, and judicial impunity. There are many provisions of the Constitution that seek to redress these past injustices. Thus the equality clause in the Constitution contains an express provision relating to ‘restitutionary equality’, permitting legislative and other measures designed to protect or advance persons, or

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82 *Ibid* 2057.
83 *Ibid* 2058.
84 *Ibid* 2067.
categories of persons, disadvantaged by unfair discrimination in order to promote substantive equality.\textsuperscript{86} Affirmative action measures are envisaged to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under privilege. The restitutionary dimension is also incorporated in the property clause which incorporates both a protective and reform dimension. The protective purpose seeks to protect existing property rights against unconstitutional state interference in the form of either arbitrary deprivation of property or expropriation which does not comply with the purpose and compensation requirements envisaged in article 40 of the Constitution. But even in this protective dimension the restitutionary elements are evident. Thus property acquired pursuant to unlawful means is not accorded constitutional protection.\textsuperscript{87} These represent two important examples in the Constitution of measures aimed specifically to redress the injustices of the past. It is therefore incumbent upon courts to appreciate the transitional feature of the Constitution whenever questions of retrospective application of the Constitution arise before them.

\textsuperscript{86} Article 27 of the Constitution.
\textsuperscript{87} Article 40(6) of the Constitution.