THE 2010 CONSTITUTION AS BOTH A MONUMENT AND A MEMORIAL; THE ROLE OF THE MEDIA AS A PUBLIC WATCHDOG

By Joshua Malidzo Nyawa

Introduction

In the bible[1] , we are told of the story of Noah and the ark, the rainbow is described as a token which comes from the Hebrew word 'oath' which means a signal or a monument, whenever the believers see the rainbow, it is to remind them of the covenant, that never again will there be flood to destroy all life on earth. The rainbow is thus a monument, Monuments contribute to fix in space dominant "discourses on the past".[2] In Snyman's own words,[3]

> [Monuments] are signs that remind one to remember, namely that which one can take pride in remembering, and which demarcate a decisive moment as a (new) beginning — a triumph or a victory. The remembrance of such a decisive moment from the past is rendered in the present by heroic figures, and these heroes embody the historical self-perception of the founders of the monument. The subject of the monument in this sense is a collective 'we', symbolizing an uninterrupted continuity between the represented heroes, the founders, and a possible public who ought to identify with what is represented, thereby binding themselves to the tacit oath of allegiance to the collectivity the monument celebrates. On the other hand, there are memorials. They are erected as an antidote against forgetting. Memorials ritualize remembrance and demarcate a decisive moment as an ending. It reminds one that what is remembered through this sign may never happen again. Memorials are about victims.

There is a small difference between what a monument is and what a memorial[4] is, A monument "celebrates while a memorial commemorates...[5] Alois Riegl has explained that commemoration has been the traditional function of monuments since their origins: A monument in its oldest and

[11] Genesis 9;12

[2] Violi, Patrizia 2014. *Paesaggi Della Memoria. IL trauma, lo spazio, la storia*. Milano: Bompiani.

[3] J Snyman 'Suffering and the politics of memory' in CW du Toit *New modes of thinking* (1996) 103; and J Snyman 'Interpretation and the politics of memory' (1997) *Acta Juridica 317-318.*

[4] . Monuments and memorials have memory in common, but in distinct ways: a monument celebrates; a memorial commemorates.

[5] *Lourens du Plessis, AZAPO: Monument, memorial ... or mistake?*

Electronic copy available at: https://ssrn.com/abstract=3081455

most original sense is a human creation, erected for the specific purpose of keeping single human deeds or events [...] alive in the mind of future generations.[6] While Hay et al is of the view that

Memorials and monuments are political constructions, recalling and representing histories selectively, drawing popular attention to specific events and people and obliterating or obscuring others...[7]

THE 2010 CONSTITUTION AS BOTH A MONUMENT AND A MEMORIAL

The former (the constitution as monument) is an approach that celebrates the constitution and its achievements in an optimistic fashion. The latter (the constitution as memorial) remembers the atrocities of the past and is aware of the limits of constitutionalism[8].

A constitution both *narrates* and *authors* a nation's history[9]. It tells us of our history, Pierre de Vos has made this point very clearly:

Put bluntly, according to this approach one can get to grips with the meaning of the constitutional text if one refers to the specific apartheid past to identify all the wicked attitudes and practices that existed before commencement of the interim Constitution. It is thus only with reference to this shameful history that we can really understand what the text of the Constitution is trying to achieve[10]

A constitution memorializes the past, but is also a monument triumphantly shedding the shackles of what went before, and setting a nation free to take thought (and responsibility) for its future[11]. This view is propounded by Johan Snyman in the paper '*Suffering and the politics of memory'*. He states that after a society has gone through some form of trauma, it always finds ways to heal

[6] Riegl, Alois 1903. *Der modern Denkmalkultus, seine Wesen und seine Entstehung*. Wien & Leipzig: W. Braumüller.at 117

[7] Hay, Iain, Andrew Hughes and Tutton, Mark 2004. Monuments, Memory and Marginalisation in Adelaide's Prince Henry Gardens. *Geografiska Annaler* 86 (B/3): 201-216.

[8] Karin van Marle (2007) The Spectacle of Post-Apartheid Constitutionalism, Griffith Law Review, 16:2, 411-429, DOI: 10.1080/10383441.2007.10854597

[9] Ibid pg 12

[10] See P de Vos 'A bridge too far? History as context in the interpretation of the South African Constitution' (2000) 17 South African Journal on Human Rights 111.

[11] L Du Plessis, Theoretical (Dis-) Position And Strategic Leitmotivs In Constitutional Interpretation In South Africa, Eissn 1727-3781

Electronic copy available at: https://ssrn.com/abstract=3081455

itself from the effects of the trauma. It does this for instance by building war memorials where the war etc. can be remembered. Some societies deal with the trauma by coming up with constitutions as a way of reminding them of the trauma which they went through. Snyman states that while constitutions can be both monuments and memorials at the same time, they differ in the sense that a memorial commemorates whereas a monument celebrates. Constitutions as memorials celebrate the dead and have the future in mind whereas the constitution as a monument provides a reorientation to the past[12]

Stofleth describes memories to be the materials that we use to construct our lives, and out of the bunch of the materials, we only pick what are necessary, and it is from these memories that we pick what are necessary and make our constitutions represent them, he states that;

> Memories are the materials we use to construct our lives. They are not unlike the Planks of Wood we use to build our homes. From all the Trees in a forest, one selects the strongest and healthiest to cut down, avoiding those which have rotted or are of a weak temper, which Might compromise the stability of one's dwelling. We are given a forest full of memories, but select only a few by which to define ourselves. In This way, we construct our essence and actively choose how to perceive our past, how to live our present, and what we expect of our future.[13]

From its preamble, our constitution represents the break from the past, it states in parts;

> RECOGNIZING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law[14]

The preamble is comparable to that of South Africa which reads;

> "We, the people of South Africa, Recognize the injustices of our past; Honours those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every

[12] Van Beek UJ Democracy Under Scrutiny: Elites, Citizens, Cultures (2010) 99.
[13] Daniel E. Stofleth *Memory Politics in Spain: The Law of Historical Memory And the Politics of the dead*
[14] The Kenyan 2010 constitution

citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people…?"[15]

And the reconciliation and national unity reads to the effect that;

... Provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.[16]

The South African constitution has thus been termed to be "a transitional constitution but one which itself establishes a new order in South Africa; an order in which human rights and democracy are entrenched and in which the Constitution'[17] Du Plessis has termed it to be memorial constitutionalism, and he describes it to be;

Memorial constitutionalism is a constitutionalism of memory in a South Africa (still) coming to terms with its notorious past, but eventually also a constitutionalism of promise along the way of (still) getting to grips with the future.[18]

It is also to be noted that the memorial Constitution coexists with the monumental Constitution,[19] Lourens du Plessis argues that the South African constitution is a monument in the sense that it provides a monumental achievement after centuries of racial oppression in South Africa. It is a memorial in the sense that it reminds the nation that they have an obligation to ensure that social justice is engendered. He states that it is an attempt at preventing 'otherisation' by embracing humanity of other people through principles such as *Ubuntu.*

[15] M & G MEDIA LIMITED, NICHOLAS ADRIAN MICHAEL DAWES v 2010 FIFA WORLD CUP ORGANISING COMMITTEE SOUTH AFRICA LIMITED (ASSOCIATION INCORPORATED UNDER SECTION 21) CASE NO: 09/51422 PH 342

[16] These words are taken from the first paragraph of the provision on National Unity and Reconciliation with which the Constitution concludes

[17] **CHASKALSON P,** THE STATE **versus** T MAKWANYANE AND M MCHUNU Case No. CCT/3/94, para 8

[18] ibid

[19] The image of the Constitution as monument and memorial emerged from legal scholars' engagement with the work of the South African philosopher, Johan Snyman, on the politics of memory. See Snyman 1998 *Acta Juridica* 317-321.

The monument commemorates the past and reminds the people of its heroes and the sacrifices that they made and calls for offers of sacrifice when called upon to do so. On the other hand, the memorial asks the viewer will be the one who will fight to ensure that such 'sacrifice' needs not to happen again and disrupts the logic of sacrifice and identify with the victims.[20] Du Plessis also refers to the entrenchment of the values of democracy, human dignity, equality and freedom as 'monumental flair'.[21] Our Kenyan constitution is monumental because it has entrenched values and principles as evident in its preamble and art 10.

Our Kenyan constitution is a monument in the sense that it was monumental achievement after decades of bad governance in Kenya[22]. As mutunga explains that;

> The making of the Kenyan 2010 Constitution is a story of ordinary citizens striving *and succeeding* to overthrow the existing social order and to define a new social, economic, cultural, and political order for themselves. Some have spoken of the new Constitution as representing a second independence. There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 50 years of independence. [23]

Our constitution is used to commemorate the past and the fact that Kenya underwent a traumatic past but came up with a document that now guides it.[24] A past where the media was curtailed, a

---

[20] Joshua Kembero Ogega, The Constitution as both a monument and a memorial: A psychoanalytical perspective of the International Criminal Court and Rule of Law Debates in Kenya

[21] Ibid pg 64

[22] . In *Joseph Kimani Gathungu v Attorney General & 5 others* [2010] eKLR, Constitution Reference 12 of 2010, Ojwang J. (as he then was) remarked thus regarding these amendments:
'Prior to the ***27th August, 2010*** Kenya's governance was based on the Constitution of **1969**, which incorporated sweeping amendments effected over a five-year period, to the original **Independence Constitution** of **1963**. I take judicial notice that, whereas the **1963** Constitution was an elaborate document marked by delicate checks-and-balances to public power, the **1969** Constitution had trimmed off most of these checks-and-balances, culminating in a highly centralized structure in which most powers radiated from the Presidency, stifling other centres of power, and weakening their organizational and resource-base, in a manner that deprived the electorate of orderly and equitable procedures of access to civil goods. Judicial notice is taken too of the fact that the Constitution of **2010** derived its character, by a complex and protracted law-making process, from the history of popular grievance associated with the limitations of the earlier Constitution.'

[23] Willy Mutunga ,**The 2010 Constitution of Kenya and its Interpretation: *Reflections from the Supreme Court Decisions***

[24] ibid

past where the freedom of the media was a vocabulary, a past where the mighty did not want to be held to account.

Deputy President Mohamed. *In Shabalala & Others v Attorney-General of the Transvaal & Another*, underscores the traumatic past that South Africans went through and how their constitution serves as a memorial, he avers that;

What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. **It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'**. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.[25](Emphasis mine)

Our Kenyan constitution is memorial and monumental in the sense that it reminds us of our past and tells us not to go back to it, our courts have grasped this idea. The Supreme Court held in The Supreme Court in *Samuel Kamau Macharia*[26] that 'A Constitution looks forward and backward, vertically and horizontally, as it seeks to **re-engineer the social order,** in quest of its legitimate object of rendering political goods'. This is to mean that as it looks backwards, it is

[25] Shabalala & Others v Attorney-General of the Transvaal & Another 1996 1 SA 725 (CC); 1995 12 BCLR 1593 (CC) para 26 (emphasis added).
[26] *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eklr No. 2 of 2011 at para 62

memorial, it seeks to remind us of our past, as it looks to the future, our constitution is monumental as it seeks to tell us on what we should do or how we should break from the past.

Mutunga[27] while explaining the import of our new constitution, he equally provides the memories and monuments and he shows on how our constitution is monumental and memorial. He asserts thus;

In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through: reconstitution or reconfiguration of a Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the vision of the Constitution; a vision of nationhood premised on national unity and political integration, while respecting diversity; provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state and society in Kenya; mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development; among others reflect the will and deep commitment of Kenyans for fundamental and radical changes through the implementation of the Constitution. The Kenyan people chose the route of transformation and not the one of revolution. If revolution is envisaged then it will be organized around the implementation of the Constitution. [28]

The Supreme Court has also added its voice in the Speaker *of the Senate*, the Court observed that

„ [u]nlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today‟s Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.‟"[29]

[27] Mutunga supra

[28] Emphasis added

[29] Speaker Of The Senate & Another V Hon. Attorney-General & Another & 3 Others [2013] eKLR, Advisory Opinion Reference 2 of 2013 Para 51

The Supreme Court went on to hold that:

'Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy.* This is clear right from the preambular clause which premises the new Constitution on –*"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."*And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government.'[30]

In *Jasbir Singh Rai,* Mutunga CJ while appreciating the role of history in constitutional

interpretation, He also showed how the constitution is memorial and monumental in the

following terms:

There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a status quo that was unacceptable, through: provisions on the democratization and decentralization of the executive; devolution; the strengthening of institutions; the creation of institutions that provide checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya which they delegate to institutions that must serve them, and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human-rights State in Kenya; mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development. These instances, among others, reflect the will and deep commitment of Kenyans, reflected in fundamental and radical changes, through the implementation of the Constitution[31]

The high court has also used historical interpretation and held as follows;

When the Constitution was adopted, the framers knew, and clearly had in mind, the different status of persons in the society and the need to protect the weak from being overrun by those with ability. They had in mind the history of this country, both the differences in endowment either by dint of the region where one came from or as a function of other factors, which might necessitate special protection[32].

[30] ibid

[31] Jasbir Singh Rai para 89.

[32] John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others [2011] eKLR.

THE MEMORIAL AND MONUMENTAL NATURE OF THE 2010 CONSTITUTION VS THE ROLE OF THE MEDIA AS A PUBLIC WATCHDOG

Bishop argues that, **A** single memory of the horrors of the past exists in order to constantly remind and convince us that we must do everything in our power to avoid a return to those horrors[33]The traditional account of memory in AZAPO argues that the memory of the evils of the past compels us to seek out a better future[34].A bad memory can serve as a memorial to remind us that we will 'never again' return to that past. In that way it acts as a solvent for transformation because it inspires us to rectify our past to alter our future[35]. The bad memory today, is what was encountered in the pre-2010 In Kenya, where the media was curtailed by the mighty, where journalists were arrested and draconian laws were passed. Oriare and Mshindi adjudge[36] that the plethora of laws affecting the Kenyan media to be "controversial… retrogressive, punitive and repressive..."[37] A detailed account is given below.

During the colonial era, the laws of sedition were employed to stifle Africans' agitation for their rights and freedom. The authoritarian colonial government's dominant perception of the Press

[33] Michael Bishop, Transforming memory transforming in Law, memory and the legacy of apartheid: Ten years after AZAPO v President of South Africa

[34] ibid

[35] ibid

[36] Oriare, P. M. and T. Mshindi (2008), Kenya Media Sector Analysis Report. Prepared for the Canadian International Development Agency, Nairobi.

[37] *The list includes: Defamation Act, Cap 36; The Penal Code, Cap 63; Copyright Act, Cap 130; Preservation of Public Security Act, Cap 57; Public Order Act, Cap 56; Film and Stage Plays Act, Cap 222 (1962); Chief's Authority Act, Cap 128; Official Secrets Act, Cap 187; Police Act, Cap 84; Armed Forces Act, Cap 199; Kenya Broadcasting Act, Cap 221; and ICT Act.*

was always that of an unnecessary evil that deserved close supervision and control[38] The origins of the modern media in Kenya was extensively racialised with missionaries evangelising 'natives', Europeans championing their settler and investor interests, and Asians and Africans championing justice for themselves[39] The breakout of the Mau war and the Declaration of Emergency in 1952 gave the colonial government the excuse to ban all indigenous publications and to intensify propaganda against the nationalist movement[40]

After independence the same laws were applied to protect African leaders from their political rivals[41] Indeed some excesses of the independence government in the suppression of the press were clearly beyond the call of state security and public order[42] on 30th April 1993, the raid by Kenya police on Fotoform press .The taveta chronicle suffered continuous police raids of its offices and a succession of sedition prosecutions of its editors and publishers[43]

With political detention without trial in the statutes alongside the Official Secrets Act, it became very easy for the increasingly repressive Kenyatta government to contain dissent that would have come through the media.[44] The list of the victims during 1994-95 included Alex Chege, Julius Mokaya, Mutegi Njau, Joseph Ngugi and David Makali [45] After the 1982 coup attempt, the then

[38] Makali supra
[39]Ngugi, (2012), From Fetters to Freedom: media regulation in Kenya. In Media Council of Kenya (2012). Also see Nyamora, Pius M. (2007), the role of alternative press in mobilization for political change in Kenya 1982-1992: Society magazine as a case study. Graduate School Theses and Dissertations. Paper 2305. Available at http://scholarcommons.usf.edu/etd/2305 (Accessed 28/09/2017).
[40] Makali supra
[41] David Makali (ed), Media Law and Practice: The Kenyan Jurisprudence(Phoenix Publishers Ltd Nairobi 2003) 30 at pg 59
[42] ibid
[43] According to Odinga Oginga in *NOT YET UHURU* ,(Heinemann Educational books Ltd , London, Ibadan,Nairobi, 1967, at pg 110)
[44] Nyamora supra ft 36 at : 62- 7
[45] Article XIX, 1995.

President Moi's government had become additionally repressive, transforming Kenya into a constitutional single-party state.

With the mainstream press largely intimidated into towing the government line, the gap in critical journalism was gradually taken up by various publications of varied levels of seriousness that have generally been dubbed the 'alternative media'[46] The government restricted and limited political freedoms making Kenya a de Jure political state. Dissent was criminalized and open clampdown on critical press enhanced. The government harassed the media through sedition trials of the underground press and later banned independent and critical publications such as *beyond* magazine in 1988; the *Financial Review* in 1989; *Financial Review* in 1989; *Development Agenda* and *Nairobi Law Monthly* in August 1989 September 1990 respectively. Between 1988 and 1990 about 20 publications were banned in Kenya[47] in 1998 ,The media, civil society and opposition parties rejected the bills because they were considered to be in bad taste, draconian, failed to protect the right to information, failed to protect journalists, publishers and broadcasters and gave government unfair representation in proposed regulatory body[48]

The Constitution of Kenya(before 2010) was the supreme law of Kenya and guaranteed the right to freedom of expression: However, it did not mention freedom of press and other media specifically; provided limitations of the fundamental rights and freedoms under vague circumstances thus allowing for violations of same rights[49]

A CHANGE

[46] Nyamora, supra ft 36
[47] See Kenya Human Rights Commission reports, 1997.
[48] See Kenya Union of Journalists' Media Bill 1998: Framework for Free and Independent Press (1998)
[49] See David Makali's *Media Law and Practice: The Kenyan Jurisprudence*, 2004

The Constitution of Kenya, 2010 (the Constitution) is different – it is a transformative constitution.[50] It is memorial and monumental, it carries with it the ills suffered prior to 2010, the Constitution contemplates the oppressive enjoyment of rights and freedoms and provides that these can be limited by law "to the extent… reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors…" M. Kiwinda Mbondenyi and J. Osogo Ambani rightly observe thus;

> So crucial are Human Rights that in Kenya's context the problems of the Bill of rights in the repealed constitution were a prominent reason why the people opted for constitution review in the first place; there are several accounts why the preceding Bill of rights was invariably considered retrogressive and obsolete due to the chapter on the Bill of rights being replete with limitations, whose enormity had rendered the enjoyment of the Bill of rights peripheral[51]

Fundamentally, then, the document is not a carte blanche for anarchy: instead, it is a framework for enhancing psychological and material human welfare, which is consistent with enhancing democracy[52]. The Constitution is a document committed to social transformation.[53] It has the aspiration and intention to realize in Kenya a democratic, egalitarian society committed to social justice and self-realization opportunities for all.[54] In support of a post-liberal reading, one would highlight that the Kenyan Constitution, in sharp contrast to classical liberal documents is social,

---

[50] See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146, 150:

> 'By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere'.'

[51] M Kiwinda Mbondenyi and J Osogo Ambani, *the New Constitutional Law of Kenya, Principles, Government & Human Rights* (2012) p. 155.

[52] Othieno Nyanjom, Factually true, legally untrue Political Media Ownership in Kenya

[53] *Speaker Of The Senate & Another versus Hon. Attorney-General & Another & 3 Others,* Advisory Opinion Reference No. 2 of 2013, [2013] eKLR paras 51-53.

[54] *Ibid* para 51.

redistributive, caring, positive, horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.[55] Here, armed with the new Constitution, the media is able to question and give information on government appointments. People are made aware of the impeding appointments or appointments made by the government and it is not surprising we have numerous public litigation cases on appointments which are made in violation or likely to violate the Constitution. Courts also reap; occasion to pronounce themselves on such important constitutional issues on exercise of public power. And in doing so, Courts have insisted on justification of exercise of public power based on the pillars erected in the Constitution, especially Article 10 of the Constitution on National Values and Principles of Governance. Couple this with Chapter Six of the Constitution. These are opportunities created by the media when it disseminates correct information[56].

THE ROLE OF THE MEDIA AS A WATCH DOG

"Were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate to prefer the latter."[57]

In *Scott*, Lord Shaw of Dunfermline famously warned 'in the darkness of secrecy, sinister interest and evil in every shape have full swing against the dangers of justice behind closed doors'.The media a watchdog[58] , it incites the general public to wake up and demand that which is rightfully theirs[59], as a watchdog it answers the famous question, '*Sed quis custodiet ipsos*

[55] *Ibid* para 51, the Preamble and Articles 10 and 19 of the Constitution support this reading.
[56] ibid
[57] the famous Jeffersonian declaration
[58] . As Joffe J said in government of the Republic of South Africa v Sunday Times Newspapers and Another 1995 (2) SA 221 (T) at 227I to 228A:
"It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must advance communication between the governed and those who govern."
[59] As Imanyara (1992) has noted,
"Generally, the role of the press in democratization has been that of an independent forum and mouthpiece of crusaders of change. The openness of the alternative press to the public and its bold approach to sensitive and

custodes?'[60] In posing that question, the Roman Poet Juvenal [61]was suggesting that wives could not be trusted and that keeping them under guard was no solution because guards could not themselves be trusted. Leonid Hurwicz, in accepting the Nobel Prize in Economic Sciences, stated: 'Yes, it would be absurd that a guardian should need a guard.'[62] But however it is well clear that the guardian today needs a guard, the government that was elected to serve and protect the institutions that were created by the people, are hell bent in ensuring that the institutions do not work. The guardians today are the ones propagating police brutality. They are the ones who are responsible for the maladministration. Cornell supports this view when she avers that;

The watchdog press is guardian of the public interest, warning citizens against those who are doing them harm. A fearless and effective watchdog is critical in fledgling democracies where institutions are weak and pummeled by political pressure[63].

And she to note that;

When legislatures, judiciaries and other oversight bodies are powerless against the mighty or are themselves corruptible, the media are often left as the only check against the abuse of power. This requires that they play a heroic role, exposing the excesses of presidents, prime ministers, legislators and magistrates despite the risks[64].

The courts have also expressed this view, the have appreciated that the media acts as a public watchdog to watch over the watches, to watch over the guardians[65]. The European Court of

---

critical political issues has had the cumulative effect of inciting the general public to wake up to their democratic rights and demand change"

[60] But who will guard the guards themselves?'

[61] *Satura VI* lines 347-8

[62] Leonid Hurwicz 'But who will guard the guardians?' Nobel Prize Lecture delivered on 8 December 2007, available at *http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2007/hurwicz_lecture.pdf* accessed on 1 October 2017.

[63] SHEILA S. CORONEL, **THE ROLE OF THE MEDIA IN DEEPENING DEMOCRACY**

[64] SHEILA S. CORONEL, supra. Emphasis mine

[65] Sen sees the media as a watchdog not just against corruption but also against disaster. "There has never been a famine in a functioning multiparty democracy," he said.

Human Rights (ECtHR) has established a body of principles and rules granting the press as the "purveyor of information and public watchdog"[66] In *Du Plessis*[67] ,the Constitutional Court of South Africa, urged that;

"A free press and the practice of democracy contribute greatly to bringing out information that can have an enormous impact on policies for famine prevention… a free press and an active political opposition constitute the best early-warning system a country threatened by famine could have."

While in *Brummer*, the constitutional court had to say;

The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public[68]

The mass media are often seen as fulfilling the vitally important role of *fourth estate, the guardians of democracy and defenders of the public interest*. A view that is supported by the South African's constitutional court when it held that

Furthermore, the media are important agents in ensuring that government is open is open, responsive and accountable to the people as the founding values of our Constitution requires. In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.'[69]

---

[66] *Barthold v Germany* [1985] 7 E.H.R.R. 383, para 58

[67] Du Plessis & Others v. De Klerk & Another [1996] ZACC 10

[68] *Brummer v Minister of Social Development and Others (South African History Archives Trust and South African Human Rights Commission as Amici Curiae)*, 2009 (6) SA 323 (CC) para 63

[69] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) paras 22 to 24. Also see *SABC v NDPP* 2007 (1) SA 523 (CC) paras 24, 28 and 122

The House of Lords took its time to show the importance of a media in a democracy, the court In

R v Secretary of State for the Home Department Ex Parte Simms, Lord Steyn:[70]

'Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognized that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfillment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market": *Abrams v United States* (1919) 250 US 616 at 630 per Holmes J (dissent). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.

While in *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd,*[71] the House of Lords

held that:

'In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society … The majority cannot participate in the public life of their society … if they are not alerted to and informed about matters which call or may call for consideration in action. It is very largely through the media … that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring.'

The Supreme Court of Appeal in South Africa remarked as follows in *City of Cape Town*[72]

"Secrecy is the very antithesis of accountability. It prevents the public from knowing what decision was made, why it was made, and whether it was justifiable."

Similarly in SABC Ltd[73] the Constitutional Court expressed itself as follows on this aspect:

"The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy. This was also recognized by the House of Lords in McCartan Turkington Breen (A Firm) v Times Newspapers Ltd that '(t) he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring'. A vibrant and independent media encourages citizens to be actively

[70] *R v Secretary of State for the Home Department Ex Parte Simms* [1999] 3 All ER 400 at 408.
[71] [2000] 2 All ER 913 (HL) at 992.
[72] City of Cape Town v South African National Roads Authority Limited and Others [2015] ZASCA 58 at para 45
[73] SABC Ltd v NDPP 2007 (1) SA 523 (CC) at para 28

involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness."

The Canadian Supreme Court, McLachlan CJ has held that, investigative journalism has filled

what he terms as 'Democracy deficit', he holds that;

'The role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions. The need to shine the light of public scrutiny on the dark corners of some private institutions as well is illustrated by [the list of corporate delinquencies which 'secret sources' have exposed].[74]

The European Court of Human Rights has also recognized that obstacles created to hinder access

to information of public interest might discourage the media and other public interest

organizations from pursuing their vital role as public watchdogs:[75]

'The Court considers that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs" and their ability to provide accurate and reliable information may be adversely affected (see, mutatis mutandis, Goodwin v. the United Kingdom, judgment of 27 March 1996, Reports 1996-II, p. 500, § 39). The foregoing considerations lead the Court to conclude that the interference with the applicant's freedom of expression in the present case cannot be regarded as having been necessary in a democratic society. It follows that there has been a violation of Article 10 of the Convention

The constitutional court in *Tshabalala-Msimang & another v Makhanya & others* pointed out[76]:

'[i]n her capacity as a Minister [of Health] the first applicant cannot detract from the fact that she is a public figure. In such a case her life and affairs have become public knowledge and the press in its turn may inform the public of them'.

It further said:

[74] *R. v. National Post* 2010 SCC 16 para 55

[75] *Társaság a Szabadságjogokért v. Hungary* (Application no. 37374/05), 14 April 2009, para 38-39

[76] *Tshabalala-Msimang & another v Makhanya & others* 2008 (6) SA 102 (W) para 45.

'The public has the right to be informed of current news and events concerning the lives of public persons such as politicians and public officials. This right has been given express recognition in s 16(1) (*a*) and (2) of the Constitution which protects the freedom of the press and other media and the freedom to receive and impart information and ideas. The public has the right to be informed not only on matters which have a direct effect on life, such as legislative enactments, and financial policy. This right may in appropriate circumstances extend to information about public figures.'[77]

CONCLUSION

Janabari: Serge, I have been trying to tell you that our wars were not merely to replace a white face with a black one, but to change a system which exploits us, to replace it with one which will give us a share in the wealth of this country. What we need is another war of freedom, Serge[78].

The Kenyan Constitution of 2010 was meant to address and redress a legacy of a multiplicity of governance problems revolving around centralised power, which had been abused and used to marginalise the majority of the people, as individuals, communities and regions. This legacy goes back to the colonial days and devolution should be understood as having been intended as a remedy to this marginalisation[79].According to the High Court in *Dennis Mogambi Monga're*,

„ [w]hen the people of Kenya voted in favour of the Constitution, they made a decision to make a break with the past and bring in a new constitutional dispensation on the basis of the values and principles set out in the Constitution".[80]

After a long period of struggle that was marred by unprecedented civil strife and outright violations of basic Human Rights, Kenya finally adopted a new constitution in the year 2010. This position is consistent with the view of Mohamed J in the South African case of *S v Mhlungu*, that the main desire of the South African people in adopting the new Constitution was

[77] Ibid para 38

[78] Z Mda We shall Sing for the Fatherland (1993) 22.

[79] **JOHN KANGU MUTAKHA, AN INTERPRETATION OF THE CONSTITUTIONAL FRAMEWORK FOR DEVOLUTION IN KENYA: A COMPARATIVE APPROACH**

[80] *Dennis Mogambi Monga're* para 53. See also *Community Advocacy* para 73.

that there was going to be „a ringing and decisive break with the past".[81] The South African Constitutional Court similarly declared that

„The Constitution is not simply some codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable."[82]

The Supreme Court in Kenya has asserted that the Supreme Court Act grants it „a near-limitless, and substantially elastic interpretative power"

[That] „Allows the court to explore interpretative space in the country's history and memory that … goes beyond the minds of the framers whose product, and appreciation of the history and circumstances of the people of Kenya, may have been constrained by the politics of the moment".[83]

. Our constitution is memorial and monument, it is a mirror representing the national soul[84], it seeks to remind us of where we come from and it gives us a decisive break from the past that haunts the Kenyan population[85]to heal the wounds that the population suffered in the past[86]. This

[81] S v Mhlungu 1995 (3) SA 3991 (CC) para 8.
[82] Shabalala v Attorney General of the Transvaal 1996 (1) SA 725 (CC) para 26. See also Brink v Kitshoff N 1996 (4) SA 197 (CC) para 40.
[83] Speaker of the Senate paras 157.
[84] MahomedAJ explained constitutional supremacy as follows in the Namibian case of *S v Acheson* 1991 2 SA 805 (Nm) 813A-C:
'(T) He Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a **"mirror reflecting the national soul"**, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.'
[85] Reflecting on the essential character of the new Constitution [in ***Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another, Mombasa*** HCCC No. 190 of 2010], Ojwang J has remarked that:
'I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary.'
[86] *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at para 100 (Budlender AJ) ('ours is a transformative constitution. Justice Scalia of the US Supreme Court has said that "the whole purpose of a constitution, old or new . . . is to impede change or pejoratively put "to obstruct modernity" ... Whatever the position may be in the USA or other countries, that is not the purpose of our Constitution. Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity.' (References omitted)); *City of Johannesburg v*

is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future[87]. Prof. Yash Paul Ghai in '*Chimera of constitutionalism: State, economy and society in Africa'* in explaining the contemporary surge in constitution making and the difficulties in implementing constitutions in many African countries observes that:

'The primary reason for adopting new constitutions is the failure of governments to fulfil the promise of independence, or internal conflicts or serious economic crises that have beset these countries. These new constitutions therefore seek to solve several problems, of both state and society. In particular they aim to promote values and framework of 'nation building' as well as to restructure the state. The perception has gained ground that without constitutionalism, these countries face massive problems of unity, solidarity, fair and effective administration, the protection of rights, and social and economic development. The constitution is then regarded as the basis of both state and society. The simultaneous pursuit of these objectives accounts for the ambitiousness of these constitutions, reflected in the scope and multiplicity of their purposes and the range and complexity of institutions.'

In *Communications Commission of Kenya*, the Supreme Court regarded the Kenyan Constitution as one of the „ [t]ransformative constitutions [which] are new social contracts that are committed to fundamental transformations in societies".[88] It was Etienne Mureinik who pointed out that the true shift from apartheid to post-apartheid South Africa is a move from 'a culture of authority' to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion[89]. Our constitution equally accepts the shift.

Rand Properties (Pty) Ltd and Others 2006 (6) BCLR 728 (W) at paras 51-52 (Jajbhay J) ('Our Constitution encompasses a transformative provision. As such, the State cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights.... [T]he full transformative power of the rights in the Bill of Rights will only be realized when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole, and the social and economic context within which the applicant now finds itself in particular.')

[87] Justice Pius Langa Transformative Constitutionalism, Prestige Lecture delivered at Stellenbosch University on 9 October 2006.

[88] Para 377

[89] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31 at 32.

We must pick our way among the remains, wrestle with and conjure the ghosts of the past, ply them with patient importunity in order to construct the best story we can[90], our constitution equally heeds to this dream. A monument is accordingly typically designed to leave visitors with a feeling of grateful indebtedness towards the heroes of the past. A memorial, on the other hand, is typically designed to leave visitors with a sense of obligation to prevent the repetition of injustice in the future[91]. Memorial constitutionalism is one of the leitmotivs of the 2010 constitution. Memorial constitutionalism understands the Kenyan constitution as both a memory coming to terms with a notorious past, and promise, along the way towards a transformed future. Our constitution warns us not to go back to the past where media was curtailed, this is because as Du Plessis notes that,

> Although no one should be cynical about the 'monumental achievements' of the South African constitution, one should also embrace the 'restrained constitution'. The restrained constitution is the constitution as memorial — that is, a written constitutional text cannot alone provide justice, but rather reminds us to strive for justice.[92]

We are not going back!

I look at the rainbow and remember of my past!

[90]JD Caputo *the prayers and tears of Jacques Derrida* (1997) 247.
[91] Wessel le Roux, War memorials, the architecture of the Constitutional Court building and counter monumental constitutionalism
[92] Ibid pg 65