

**THE EVALUATION OF THE EXECUTIVE IN LIGHT OF THE
ACHIEVEMENT OF TRANSFORMATIVE CONSTITUTIONALISM IN
KENYA.**

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By

TAZITA EMILY WANI

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Prepared under the supervision of

ABUNGU CECIL YONGO

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DEDICATION

This one is for me.

DECLARATION

I, **TAZITA EMILY WANI**, do hereby declare that this research paper is my original work and that to the best of my knowledge and behalf, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed.....

Date.....

This dissertation has been submitted for examination with my approval as the University Supervisor.

Signed.....

Abungu Cecil Yongo

ABSTRACT

This paper is a study of the concept of transformative constitutionalism; an idea developed by the American scholar Karl Klare with the basis of his study in South Africa. This study will engage with various scholars on their views of transformative constitutionalism established in Karl Klare's paper 'Legal Culture and Transformative Constitutionalism'. The paper seeks to explore whether the executive can achieve transformative constitutionalism in Kenya with reference to the executive abuse of power in Kenya. Previously, the executive had been given enormous power which was mismanaged leading to various human rights abuses. This paper will expound on the overfocus of the judiciary as an agent of transformative constitutionalism and continue to discuss the possibilities ignored by this overfocus.

LIST OF ABBREVIATIONS

1. KANU - Kenya African National Union
2. ICESCR - International Covenant on Economic, Social and Cultural Rights
3. ANC - African National Congress
4. PAC - Pan Africanist Congress

LIST OF CASES

1. Communications Commission of Kenya v Royal Media Services Limited & 5 others (2014) eKLR.
2. Mwai Kibaki v Daniel Toroitich Arap Moi (1999) eKLR.
3. Speaker of the Senate & another v Attorney General & another & 3 others (2013) eKLR.
4. State v Makwanyane (1995), Constitutional Court of South Africa.
5. Trusted Society of Human Rights Alliance v Attorney General (2012) eKLR.

LIST OF LEGAL INSTRUMENTS

1. Constitution of Kenya, 2010.
2. Repealed Constitution of Kenya, 1969.
3. International Covenant on Economic, Social and Cultural Rights.

CHAPTER ONE: RESEARCH PROPOSAL

1.1 Background of the study

Transformative constitutionalism was raised after the fall of the apartheid government in South Africa and since then, many scholars have tried to give definition to this term.¹ The Black's dictionary defines transformation as a process of organisation and radical changes,² while the free online dictionary defines transformation as a marked change in appearance or character which is usually for the better.³ Transformative constitutionalism is a concept first elucidated by the American scholar Karl Klare in his famous article, '*Legal Culture and Transformative Constitutionalism*' in a study of South Africa where he addressed the relationship between constitutional content and legal methodology.⁴ Karl Klare defines transformative constitutionalism as⁵:

'...A long-term project of constitutional enactment, interpretation and enforcement committed...to transforming county'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 non-violent political processes grounded in law...'

Klare contends that transformative constitutionalism seeks to build a country based on social justice and substantive equality in the social, economic, and political sectors.⁶ Transformative constitutionalism generally derives its authority from the constitution of any given country and seeks to build a democratic nation encompassing the rule of law, substantive equality and the protection of fundamental human rights and freedoms.⁷ As per Klare's conclusion, large scale social transformation can be achieved when the judiciary actively participates in transformative adjudication. He states that a distinct method of interpretation should be adopted by the South

¹ Teshome M, 'Transformative Constitutionalism in South Africa', Research Gate, 2011, 1.

² Black's Law Dictionary, 7th ed.

³ Free online Dictionary, 7th ed.

⁴ Hailbronner M, 'Transformative Constitutionalism: Not Only in the Global South', 65 (3) *The American Journal of Comparative Law*, 2017, 532.

⁵ 'Legal Culture and Transformative Constitutionalism', *South African Journal on Human Rights*, 1998, 150.

⁶ Rapatsa M, 'Transformative Constitutionalism in South Africa; 20 years of democracy', *Mediterranean Journal of Social Sciences*, 2014, 1 <<http://www.mcser.org/journal/index.php/mjss/article/viewFile/5158/4975>> on December 2014.

⁷ Rapatsa M, 'Transformative Constitutionalism in South Africa', 1.

African judges and lawyers to fully effect a transformative constitution, a postliberal reading and interpretation of the Constitution.⁸

One may summarise a constitution as that which seeks to achieve social justice like better living conditions for its citizens. The Constitution of South Africa, together with that of Kenya, has been deemed as a transformative document. The former Chief Justice Willy Mutunga reaffirmed the transformative nature of the Kenyan Constitution declaring the document as one that looks to a future very different from the past.⁹ In *Communications Commission of Kenya v Royal Media Services Limited*, the Supreme Court established that the judiciary has a role in attaining transformative constitutionalism.¹⁰ The Supreme Court of Kenya held the same position in *Speaker of the Senate v Attorney General* stating that the constitution of Kenya 2010 is of a transformative character seeking to institute social change and reform through values such as social justice, equality, freedom and democracy.¹¹ **To ensure this social transformation, the courts are empowered to adjudicate upon breach of rights.** Adjudication, however, is the work of the legislature and according to the French jurist Montesquieu, adjudication by judges would be interference with their work.¹²

Most scholars including **Karl Klare focus on the judiciary as the main enterprise to achieve transformative constitutionalism because of the history of executive abuse of power that violated people's rights.**¹³ The judiciary has been termed as the best organ to examine preparatory documents through the courts because it will lead to a better reasoned decision of a transformative constitution that focuses on people's rights.¹⁴ This is mainly because of the previous human rights abuses by the executive.¹⁵ During Moi's presidency for instance, various amendments were made to the Constitution establishing an authoritarian system in which the President became personally involved in everything concerning the country while delegating

⁸ Karl E K, 'Legal Culture and Transformative Constitutionalism', 152.

⁹ Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions', 29 (1), *Speculum Juris*, 2015, 1.

¹⁰ *Communications Commission of Kenya v Royal Media Services Limited & 5 others* (2014) eKLR.

¹¹ *Speaker of the Senate & another v Attorney General & another & 3 others* (2013) eKLR.

¹² AW Bradley & K Ewing, *Constitutional and Administrative Law*, 14th ed, Pearson Education, London, 2007, 81.

¹³ Chege Kibathi & Company Advocates LLP, 'Separation of powers and Independence of the Judiciary in the Kenyan Context', ZED Africa, 2014, 3.

¹⁴ Abungu C, 'Revisiting the place of Preparatory Documents in the Interpretation of Transformative Constitutions', 13(1), *ICL Journal*, 2019, 80.

¹⁵ Abungu C, 'Revisiting the place of Preparatory Documents in the Interpretation of Transformative Constitutions', 80.

no responsibilities to other organs for example; the president had the right to suspend individual rights among other things.¹⁶ However, what are the costs of placing an excess focus on the judiciary as an enterprise to achieve transformative constitutionalism?

Transformation cannot be borne by the court alone, but it is a task for all the arms of government; the executive, the legislature, and the judiciary.¹⁷ Wide scale social transformation is beyond the powers of the courts alone therefore the power given to the judiciary to achieve transformative constitutionalism should be limited.¹⁸ Roux contends that the project of transformative constitutionalism needs all the help it can get and making the abandonment of liberal legalists is therefore unnecessary.¹⁹ What if, in fact, transformative constitutionalism is compatible with Montesquieu's concept of Separation of powers allowing for the other arms of government in specific the executive to realise social and economic justice in the society as it did back in the 1930s and 1940s under President Franklin D Roosevelt?

1.2 Problem Statement

Transformative constitutionalism is a concept intended to have a positive impact on the society through focusing on the essential features of transformative constitutionalism; substantive equality, socio-economic transformation, participatory governance, horizontal and vertical application, and the diversification of culture.

Klare is of the view that transformative constitutionalism can only be achieved through transformative adjudication that allows the judiciary to actively participate in reshaping of laws to bring forth a social impact. Klare stresses that social transformation can only be achieved by a strong judiciary, however, this study aims at illustrating the possibility of the executive realising social transformation.

Social transformation can be achieved not only by the judiciary but also through the executive taking an active role in policy development and having a social transformation agenda. President Franklin Roosevelt managed to realise large scale social transformation and economic justice which, in my opinion, can be termed as transformative constitutionalism. This

¹⁶ Adar K.G and Munyae I.M, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001', *African Studies Quarterly*, 2001, 4.

¹⁷ Langa P, 'Transformative constitutionalism', 17 *Stellenbosch Law Review* 351, 2006, 358.

¹⁸ Langa P, 'Transformative constitutionalism', 359.

¹⁹ Theunis R, 'Transformative Constitutionalism and the Best Interpretation Of the South African Constitution', 267.

study therefore seeks to illustrate how the executive can contribute to the project of transformative constitutionalism.

1.3 Justification of the study

This study is of academic relevance as it aims at portraying the importance of a strong executive arm of government that can lead to the realisation of large-scale social transformation and economic justice.

1.4 Significance of the study

This research study seeks to benefit both the judiciary and the executive by helping them realise that the project of transformative constitutionalism can be achieved if they work hand in hand rather than as separate institutions.

1.5 Aims and Objectives

1.5.1 Research Aim; To evaluate the means and policies that the executive can adopt to achieve social transformation and economic justice for the people of Kenya in the light of realisation transformative constitutionalism.

1.5.2 Research Objectives include;

- I. Defining and identifying the aim of transformative constitutionalism.
- II. Illustrating how and why most scholars of transformative constitutionalism focus on the judiciary as the only enterprise for achieving transformative constitutionalism.
- III. Discussing the history of the executive abuse of power in Kenya and South Africa.
- IV. Discussing the cost and consequences of the overfocus on the judiciary as the only enterprise responsible for achieving transformative constitutionalism.
- V. Analysing how the executive can achieve social transformation by focusing on case studies.

1.6 Research Questions

- I. What is transformative constitutionalism?
- II. Why do most scholars focus on the judiciary as the means to realising transformative constitutionalism?
- III. What are the costs of overly focusing on the judiciary as the driving force to achieving transformative constitutionalism?

- IV. What are the possibilities being ignored by placing heavy focus on the judiciary?
- V. Can the executive positively contribute to the realisation of transformative constitutionalism?

1.7 Hypothesis

The existence of a strong executive arm of government to a large extent can contribute to the recognition of social transformation and economic justice in the Kenyan society.

1.8 Theoretical Framework

Critical Legal Studies (CLS) was influenced by other schools like the Third World Approaches to International Law, Critical Race Theory and Critical Feminist Legal Thought, among others. CLS introduced a new scholarship initially focused on class and labour race and slavery, sex and gender, legal history, and a wide range of other legal subjects.²⁰ Critical Legal Studies participated in various forms of legal and political activism and they launched numerous initiatives in a bid to transform legal education.²¹ Critical Legal Realism (CLR) originally pursued two theories; the first theory intended to promote the reception into US legal thought of modernist and postmodernist social and cultural theory and the second theory was to recover and extend techniques of legal criticism developed by the Legal Realists. However, Legal Realism faded after World War 2.²²

Critical Legal Realism then resurrected in the 1970s seeking to apply their critical approaches both in doctrinal argument and policy as well as in private and public law as seen in the works of Kennedy and Klare.²³ CLR showed that lawyers and legal scholars have an important role to play in constructing and legitimating unjust social arrangements. Klare's paper in 1998 revealed the emancipatory possibilities in lawyer's work. According to Critical Legal Realism therefore, lawyers and judges, to some extent, construct the law to which they are bound and owe fidelity to it. They shape legal materials through the choices made at bend points in individual cases and in choices made about the allocation of their interpretive energies.²⁴

²⁰ Davis M.D & Karl K, 'Critical legal realism in a nutshell', in Christodoulides E, Dukes R and Goldoni M (eds), *Research Handbook on Critical Legal Theory*, 1st ed, Edward Elgar Publishing, United Kingdom, 2019, 28.

²¹ Davis M.D & Karl K, 'Critical legal realism in a nutshell', 28.

²² Davis M.D & Karl K, 'Critical legal realism in a nutshell', 28.

²³ Davis M.D & Karl K, 'Critical legal realism in a nutshell', 29.

²⁴ Davis M.D & Karl K, 'Critical legal realism in a nutshell', 29.

Realists are of the view that the relationships and identities that fill the daily life are always already legal constituted for instance; family, employment, gender, and sexual relationships, among others. They argue that adjudicators have some responsibility for the social impact of their decisions whether they are aware that their choices influence the texture of social life and the distribution of power and wellbeing.²⁵ Realists continue to state that the social power of law is present when legal rules establish an entitlement as well as when the law refrains from doing so or is simply silent. This allows legal subjects to act in certain ways that affect the lives of others in the society.²⁶

Transformative constitutionalism is a theory aimed at reconfiguring the governance structures, democratisation of governance, attitudes and practices that surround politics as well as the robust protection of civil and political rights, socio-economic rights, and gender equality rights.²⁷ Transformative constitutionalism according to Klare is founded on the theories put across by Critical Legal Realism as has been explained above.

1.9 Research Methodology

This research study will use secondary research including both primary but mostly secondary sources. These will include; statutes of Kenya and South Africa, case law, newspaper and self-published articles, books and chapters in books, journals, dissertations, and other online internet sources.

1.10 Literature Review

According to Karl Klare, transformative constitutionalism demands that the legal profession changes the way it thinks about legal problems, the role of law in society. With Klare's transformative constitutionalism comes in handy the idea of transformative adjudication that requires judges to attempt in the work of legislators in a bid to accomplish political projects.²⁸ This is in turn is known to be judicial activism. For the successful recognition of transformative constitutionalism, the judiciary must assume a more assertive position than in ordinary traditional contexts.²⁹ Karl Klare thus contends that the postliberal reading is preferable to the

²⁵ Davis M.D & Karl K, 'Critical legal realism in a nutshell', 44.

²⁶ Davis M.D & Karl K, 'Critical legal realism in a nutshell', 45.

²⁷ Kibet E & Fombad C, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa', 17 *African Human Rights Law Journal*, 366, 2017, 356.

²⁸ Langa P, 'Transformative Constitutionalism', 2.

²⁹ Kibet E & Fombad C, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa', 356.

neoliberal, conservative, or the social democratic way of reading the Constitution. Klare is of the view that a traditional liberal view has a presumption of being a legal interpretation while a postliberal view has the presumption of being a political interpretation. However, traditional interpretations are every bit as political as post liberal interpretation and inversely.³⁰

Willy Mutunga affirms that progressive forces of the judiciary can utilise the law and constitutional provisions in moving towards a transformative society. He confirms that the provisions of the 2010 Constitution of Kenya is centralised on the people and their rights.³¹ The Preamble provides that the people of Kenya adopt and enact this constitution to be used by present and future generations.³² Article 1, among other significant articles, provides that all sovereign power belongs to the people of Kenya and shall be exercised in accordance with the Constitution.³³ The underlying questions would therefore be; would an overfocus on the judiciary negatively affect people's participation in democracy in a bid to achieve transformative constitutionalism? What are the costs of limiting the executive? What possibilities are being ignored?

Some scholars argue that a transformative constitution must have justifiable socio-economic rights for instance fairness in the workplace,³⁴ while other scholars emphasize that constitutional rights must affect relationships between private parties, considering a transformative constitution cannot accept that private life takes place in a realm of its own where the old hierarchies and inequalities in this sector persist.³⁵ Pieterse argues that constitutional transformation includes the eradication of social structures. He notes that much of the inequality exists in private relationships, for example in racism by employers or sexual violence against women. He also maintains that leaving such private relationships unchallenged would undermine the quest to create a substantively equal society.³⁶

Theunis Roux on the other hand criticises Klare for assuming that transformative adjudication seems out of place within liberal legalism as it is a politically engaged and politically

³⁰ Karl E K, 'Legal Culture and Transformative Constitutionalism', 152.

³¹ Willy Mutunga, 'People Power in the 2010 Constitution: A Reality or an Illusion', The Elephant, 2020, 3.

³² Preamble, *Constitution of Kenya* (2010).

³³ Article 1, *Constitution of Kenya* (2010).

³⁴ Fowkes J, '*Building the constitution: the practice of constitutional interpretation in post-apartheid South Africa*', 1st ed, Cambridge University Press, United Kingdom, 2016, 350.

³⁵ AJ Van D W, 'Transformative constitutionalism and the development of South African property law (part 2)', *Journal of South African Law* 1, 2006, 30.

³⁶ Pieterse M, 'What do we mean when we talk about transformative constitutionalism', 20 *South African Pretorian Law*, 2005, 159.

transparent method of constitutional interpretation that is necessary under Klare's post liberal reading.³⁷ Roux shows the difference between Kennedy's theory and strategy that Klare bases his paper on and Dworkin's theory.³⁸ He states that Dworkin's theory maintains the open textured nature of a constitution allowing for objective grounds on which the liberal reading can be asserted as the best interpretation of that document while Kennedy's theory denies that either a liberal or conservative reading of the open-textured United States Constitution can be termed as the "best" interpretation.³⁹ Roux proposes that it is possible to engage in the project of transformative constitutionalism through Ronald Dworkin's constructive interpretation method.⁴⁰ He agrees with Klare on the postliberal reading of the Constitution but explains that the postliberal reading can be presented as the best interpretation of the Constitution in the Dworkinian sense which is about defending one's interpretation of the Constitution on the basis of "political theory that justifies the Constitution as a whole".⁴¹

Michela Hailbronner in her paper, '*Transformative Constitutionalism: Not Only in the Global South*' states that transformative constitutionalism is not a project only steered at combating poverty as Southern jurisdictions have portrayed it to be. Rather, it is a legal concept part of a broader global trend towards more expansive constitutions that encompass positive and socioeconomic rights.⁴² Michaela explains that transformative constitutionalism is only possible in societies that demand an active role for the state as a catalyst of fundamental social change using their constitutions as a tool to enforce the idea of statehood.⁴³ In her paper, she illustrates German transformative constitution portraying how the German Court views the state as a provider of the conditions necessary for individuals to enjoy their constitutional rights.⁴⁴ She criticises Klare's judicial adjudication stating that entrusting courts with the task

³⁷ Theunis R, 'Transformative Constitutionalism and the Best Interpretation Of the South African Constitution: Distinction Without A Difference', 20 *Stellenbosch Law Review*, 2009, 266.

³⁸ Theunis R, 'Transformative Constitutionalism and the Best Interpretation Of the South African Constitution', 267.

³⁹ Theunis R, 'Transformative Constitutionalism and the Best Interpretation Of the South African Constitution', 280.

⁴⁰ Theunis R, 'Transformative Constitutionalism and the Best Interpretation Of the South African Constitution', 268.

⁴¹ Theunis R, 'Transformative Constitutionalism and the Best Interpretation Of the South African Constitution', 268.

⁴² Hailbronner M, 'Transformative Constitutionalism', 528.

⁴³ Hailbronner M, 'Transformative Constitutionalism', 540.

⁴⁴ Hailbronner M, 'Transformative Constitutionalism', 544.

of realising a transformative constitution amplifies the realm of what was previously thought to be legal questions.⁴⁵

Karin Van Marle regards transformative constitutionalism as a critical project. She suggests a possible criticism against the transformative constitutional project namely, that it lies outside the limits of the law, because legal rules function as “exclusionary reasons” and political considerations fall outside the limits of the law. However, this is precisely why the post liberal interpretation of the constitution would include political insights which is by no means an impossible task.⁴⁶

It is evident that many scholars agree with Klare’s assertion that transformative constitutionalism envisions change from a divided, unequal, and discriminatory society to a more equal society. Most scholars are also in agreement that this transformation applies to both the private and public sphere. **The aim of transformative constitutionalism is the need to create change and create a new society based on substantive equality.**⁴⁷ For the realisation of social transformation and economic justice therefore, some things need to be changed for instance; the dismantling of the established systematic domination and inequalities steered by discriminative provision of opportunities to some people.⁴⁸ In my opinion, transformative constitutionalism entails a positive shift in the society with a commitment to the improvement of socioeconomic conditions and the recognition of substantive equality.

In conclusion, **this research therefore tries to establish the compatibility between transformative constitutionalism and Montesquieu’s concept of separation of powers illustrating that transformative constitutionalism can indeed be achieved by any other arm of government.** This study concentrates on the executive arm of government drawing examples from Roosevelt’s New Deal.

1.11 Chapter Breakdown

Chapter 1: Introduction and background.

Chapter 2: Transformative constitutionalism as elucidated by Karl Klare in ‘*Legal Culture and transformative constitutionalism*’. This chapter strives to explain transformative

⁴⁵ Hailbronner M, ‘Transformative Constitutionalism’, 548.

⁴⁶ Van Marle K, ‘Transformative constitutionalism as/and critique’, *Stellenbosch University Law Review* 3, 2006, 300.

⁴⁷ Mwenda M, ‘The Context of Transformative Constitutionalism in Kenya’, 2015, 2.

⁴⁸ Mwenda M, ‘The Context of Transformative Constitutionalism in Kenya’, 2.

constitutionalism and why many scholars that have written on transformative constitutionalism focus on the judiciary as the main arm that can achieve this project.

Chapter 3: This chapter discusses the history of executive abuse of power in Kenya and South Africa and aims at portraying the cost of overly focusing on the judiciary while limiting the executive in a bid to achieve transformative constitutionalism. This chapter also examines the consequences of the excess use of judicial power and its effects on people's participation in democracy.

Chapter 4: This chapter aims to portray how the executive arm can achieve transformative constitutionalism based on the New Deal under President's Franklin Roosevelt's regime. This chapter continues to critique Klare's overfocus on the judiciary as the only means to achieve transformative constitutionalism.

Chapter 5: Findings, Conclusions and Recommendations

CHAPTER TWO: TRANSFORMATIVE CONSTITUTIONALISM

2.1. CONSTITUTIONALISM

A few years ago, it was unnecessary to look beyond constitutions. Constitutions used to represent the highest expression of the individual will of a political community, sovereign to the extent it could defend that sovereignty among the community of nations.⁴⁹ It was the memorialization and institutionalization of political power that marked constitutions.⁵⁰ However after the second world war, values became an important thing in constitutions which led to the development of constitutionalism.⁵¹

Constitutionalism is the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution.⁵²

Constitutionalism recognizes the necessity of government but insists upon a limitation being placed upon the powers. It connotes therefore a 'limitation on government; it is the antithesis of arbitrary rule...'⁵³ Constitutionalism can also be understood as the systematic thinking of constitutions grounded in development since the mid-20th century whereby constitutions are legitimated. Constitutionalism serves as a means of evaluating the form, substance, and legitimacy of the constitutions.⁵⁴

2.2 TRANSFORMATIVE CONSTITUTIONALISM

South Africa attained her independence from the British on 31st May 1910 but Freedom Day; 31st May 1994, is considered as their Independence Day.⁵⁵ Apartheid rule brought about world criticism of South Africa's racially discriminatory policies and police violence.⁵⁶ During the 1960's, racial discrimination was the order of the day. Black homelands were the land set aside for racial groups who were mainly the Africans, Asians and the coloured.⁵⁷ The African National Congress (ANC) and Pan Africanist Congress (PAC), were political groups that were

⁴⁹ Backer L, 'From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems', 113 *Penn State Law Review* 3, 2009, 673.

⁵⁰ Backer L, 'From Constitution to Constitutionalism', 674.

⁵¹ Backer L, 'From Constitution to Constitutionalism', 675.

⁵² J Curie & J De Waal, *The bill of rights handbook*, 5th ed, Juta & Company, 2005,8.

⁵³ Ambani J & Kiwinda M, *The New Constitutional Law of Kenya*, 8.

⁵⁴ Backer L, 'From Constitution to Constitutionalism', 676.

⁵⁵ Worger H & Byrnes R, 'History of South Africa (Part 2: The Republic of South Africa: 1961 present)', Library of Congress, 1.

⁵⁶ Worger H & Byrnes R, 'History of South Africa', 1.

⁵⁷ Worger H & Byrnes R, 'History of South Africa', 1.

banned from operating in South Africa, turned to violence in their struggle to attain independence as well as fight against Apartheid.⁵⁸ ANC adopted cruel methods of bombing police stations, power plants to cut the constant supply of resources for the whites. While ANC was doing this, PAC engaged in terrorizing African chiefs who were in collaboration with the apartheid government.⁵⁹

ANC and PAC leaders were tracked and hunted down, arrested, and charged with treason among all other criminal offences.⁶⁰ Nelson Mandela was sentenced in 1962 to 27 years in prison while Oliver Tambo fled the country and led ANC into exile. In the 1990's, apartheid started to slowly disappear from the face of South Africa.⁶¹ Liberation movements and revolutionary movements were established that ran campaigns to overthrow the Portuguese government and finally attain their own independence. Steve Biko is one of the many anti-apartheid activists that founded the Black consciousness movement which was famous for the quote 'black is beautiful'.⁶²

South Africa finally became a republic in May 1994 when the first democratic elections were held. This was two years after Nelson Mandela was released from prison. ANC won with the highest votes but did not get the two thirds majority needed to change the constitution.⁶³ Nelson Mandela became president of the republic of South Africa and stayed in power until 1999. South Africa finally gained a constitution in 1996.⁶⁴ It was signed by President Nelson Mandela on 10th December 1996 and it became effective in February 1997.⁶⁵

Transformative constitutionalism originated after the apartheid regime in South Africa and it aimed at achieving equality, social justice, protection of fundamental rights and freedoms and large-scale social transformation in a society.⁶⁶ It was mainly established to eradicate the past discrimination, inequality, imbalances, and marginalization of disadvantaged groups. The Black's law dictionary defines transformation as a process of organization and radical changes,⁶⁷ while the free online dictionary defines transformation as a marked change in

⁵⁸ Worger H & Byrnes R, 'History of South Africa', 1.

⁵⁹ Worger H & Byrnes R, 'History of South Africa', 1.

⁶⁰ Worger H & Byrnes R, 'History of South Africa', 2.

⁶¹ Worger H & Byrnes R, 'History of South Africa', 2.

⁶² Worger H & Byrnes R, 'History of South Africa', 2.

⁶³ Worger H & Byrnes R, 'History of South Africa', 3.

⁶⁴ Worger H & Byrnes R, 'History of South Africa', 5.

⁶⁵ Worger H & Byrnes R, 'History of South Africa', 5.

⁶⁶ Karl E K, 'Legal Culture and Transformative Constitutionalism', 150.

⁶⁷ Black's Law Dictionary, 7th ed.

appearance or character, which is usually for the better.⁶⁸ Transformative constitutionalism is a concept that has been discussed widely in South Africa's constitutional discourse.⁶⁹ Constitutional scholars have attempted to define transformative constitutionalism but Karl Klare's definition is the most used and referred to definition today.⁷⁰ Langa CJ conceives that there is no single definition for transformative constitutionalism because transformation as a word has changeable features.⁷¹ Transformative constitutionalism has been defined as a constitutional law which has a purpose of overcoming past discrimination suffered by people based on sex, race, colour and provide equal rights and protection of all South Africans.⁷² Siri Gloppen defines social transformation "as the altering of structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or social orientation."⁷³

Karl Klare's defines transformative constitutionalism as;⁷⁴

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 country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.

According to Klare, transformative constitutionalism suggests an enterprise of inducing large scale social change through nonviolent political processes. It is a concept intended to carry a positive impact and create a social good in the society.⁷⁵ The aim of transformative constitutionalism in South Africa is the need to create change and create a new society based on substantive equality as well as radical change for the state and the society at large.⁷⁶ For transformative constitutionalism to successfully have a social impact on the society, some things need to be changed for instance; the reallocation of power and resources to all people;

⁶⁸ Free online Dictionary, 7th ed.

⁶⁹ Mugambi F, 'Transformative Constitutionalism, Legal Culture and the Judiciary under the 2010 Constitution of Kenya', 1st ed, Pretoria, 2015, 88.

⁷⁰ Mwenda M, 'The Context of Transformative Constitutionalism in Kenya', 1.

⁷¹ Mwenda M, 'The Context of Transformative Constitutionalism in Kenya', 2.

⁷² Pieterse M, 'What do we mean when we talk about transformative constitutionalism?', 20 *South African Pretorian Law*, 2005, 158.

⁷³ S Gloppen 'Courts and Social Transformation in New Democratic: An Institutional Voice for the Poor', Ash gate publishing, USA, 2006, 37.

⁷⁴ Karl E K, 'Legal Culture and Transformative Constitutionalism', 150.

⁷⁵ Mwenda M, 'The Context of Transformative Constitutionalism in Kenya', 2.

⁷⁶ Mwenda M, 'The Context of Transformative Constitutionalism in Kenya', 2.

dismantling of the established systematic domination and inequalities that are steered by discriminative provision of opportunities to some people.⁷⁷

In Karl Klare's paper, he establishes that South Africa, after independence, adopted a postliberal constitution, one that is committed to large-scale, egalitarian social transformation. He goes on to point that the South African Constitution should be read and interpreted using a post liberal reading.⁷⁸ Karl Klare argues that the post liberal reading is preferable than the neoliberal, conservative, or the social democratic way of reading the Constitution. He uses an example of the social democratic reading and he points out that it does not capture essential features of the South African experiment: multiculturalism, close attention to gender and sexual identity, emphasis on participation and governmental transparency.⁷⁹ Klare argues that a traditional liberal view has a presumption of being a legal interpretation while a postliberal view has the presumption of being a political interpretation. However, traditional interpretations are every bit as political as post liberal interpretation and inversely.⁸⁰ The South African Constitution has greatly evolved and developed from liberalism towards democracy and empowerment. Judge Mahomed wrote in the case of *State v Makwanyane*,⁸¹

'...the South African Constitution is different: it...represents a decisive break from...that part of the past which was disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring, and aspirational egalitarian ethos, expressly constituted in the Constitution.'

Karl Klare in his paper '*legal culture and transformative constitutionalism*' establishes five essential features of transformative constitutionalism which include;

I. Substantive equality and social rights

Since transformative constitutionalism is aimed at creating a social impact and change in society, the concept of substantive equality and social rights is the first approach that Karl Klare points out. Substantive equality is said to be the main and primary objective of transformative constitutionalism.⁸² Transformative constitutionalism intends to proclaim democratic political rights and to commit the South African people to achieve a new kind of society in which people

⁷⁷ Mwenda M, 'The Context of Transformative Constitutionalism in Kenya', 2.

⁷⁸ Karl E K, 'Legal Culture and Transformative Constitutionalism', 152.

⁷⁹ Karl E K, 'Legal Culture and Transformative Constitutionalism', 152.

⁸⁰ Karl E K, 'Legal Culture and Transformative Constitutionalism', 152.

⁸¹ *State v Makwanyane* (1995), Constitutional Court of South Africa.

⁸² Mwenda M, 'The Context of Transformative Constitutionalism', 1.

have the social resources they need to exercise their rights.⁸³ According to Justice Langa, the goal of social transformation is to reach a level of equality where everyone can live a life of constant and consistent human dignity and respect.⁸⁴ Karl therefore argues that if substantive equality can be attained in South Africa, there will be a drastic change in society.

II. Socio-economic transformation

For transformative constitutionalism to be attained, people must be provided with equal access to socio-economic rights for the improvement of living standards.⁸⁵ The Constitution is expected to impose positive duties on the state to eradicate poverty and promote social welfare of the people in the community to enable them to enjoy their constitutional rights.⁸⁶ For the realization of transformative constitutionalism, the Constitution according to Karl Klare is expected to provide for social-economic rights as well as political rights for all people of South Africa.⁸⁷

III. Horizontal and Vertical Application

This is concerned with the relationship of private persons and the state. Discrimination and inequalities emanated from private relations like workers-employer relations, family relations, workplace, and the market.⁸⁸ The state had to reign into the private sphere because of these tendencies of discrimination and inequality.⁸⁹ The relationship between private persons and the state was originally not governed by laws and therefore, for transformative constitutionalism to be achieved, new laws had to be placed into the Constitution of South Africa.⁹⁰

IV. Participatory governance

By participatory governance, Karl Klare meant that for there to be a social change and impact on people, the government is expected to be completely transparent with the people.⁹¹ The Constitution is expected to have transparent institutions of government, accountable,

⁸³ Karl E K, 'Legal Culture and Transformative Constitutionalism', 153.

⁸⁴ Mwenda M, 'The Context of Transformative Constitutionalism in Kenya', 3.

⁸⁵ Mwenda M, 'The Context of Transformative Constitutionalism in Kenya', 4.

⁸⁶ Karl E K, 'Legal Culture and Transformative Constitutionalism', 154.

⁸⁷ Karl E K, 'Legal Culture and Transformative Constitutionalism', 154.

⁸⁸ Mwenda M, 'The Context of Transformative Constitutionalism', 7.

⁸⁹ Mwenda M, 'The Context of Transformative Constitutionalism', 7.

⁹⁰ Karl E K, 'Legal Culture and Transformative Constitutionalism', 155.

⁹¹ Karl E K, 'Legal Culture and Transformative Constitutionalism', 155.

participatory, and decentralized institutions that deepen a culture of democracy among its people.⁹² This will lead to large scale transformative constitutionalism.

V. Diversification of culture

This is another essential feature of transformative constitutionalism. Karl Klare states that a constitution is expected to have an advanced cultural of politics.⁹³ By an advanced cultural of politics, Klare meant that it should be able to have a diversity of cultures within one framework. The Constitution is also expected to promote gender justice and rights for the vulnerable and victimized groups.⁹⁴ In general, the Constitution is expected to protect language diversity and respect cultural tradition. Transformative Constitutionalism is easily attained with the presence of cultural diversity in a society.

2.3 CONCLUSION

In conclusion, Karl Klare points out five essential features that any constitution requires to establish social transformation. Klare refers to the 1996 Constitution of South Africa because its constitution was created basing on past discrimination and inequality and was therefore aimed at creating a new society that protected fundamental human rights, promoted equality and social justice.

⁹² Karl E K, 'Legal Culture and Transformative Constitutionalism', 155.

⁹³ Karl E K, 'Legal Culture and Transformative Constitutionalism', 155.

⁹⁴ Karl E K, 'Legal Culture and Transformative Constitutionalism', 155.

CHAPTER THREE: ASSESSMENT OF THE OVERFOCUS ON THE JUDICIARY

3.1 INTRODUCTION

This chapter aims to discuss how Karl Klare together with other scholars focus mainly on the judiciary as the best agent in the realisation of transformative constitutionalism. It continues to portray the reasons for the overfocus on the judiciary and the consequences of focusing mainly on the judiciary to attain transformative constitutionalism.

3.2 THE OVERFOCUS ON THE JUDICIARY

3.2.1 PROOF

Transformative constitutionalism brings about the idea of transformative adjudication where judges attempt in the work of the legislators to accomplish political projects. A concept that Karl Klare discusses in his paper, *Legal Culture and Transformative Constitutionalism*. He states that transformative constitutionalism demands that the legal profession must change the way it thinks about legal problems, the role of judges and the law in society. Since the 1950's, judicial power has risen to a point where the courts usually get involved in matters of the legislature such as nullifying legislation. For the successful attainment of transformative constitutionalism, the judiciary, according to Karl Klare, must assume a more assertive position than in ordinary traditional contexts.⁹⁵

In the case of *Trusted Society of Human Rights Alliance v Attorney General*, the High Court of Kenya described itself as a 'co-ordinate' and 'co-equal' organ of government with the mandate to interfere with the decisions of the political arms which exceed the limits of the law, the Constitution, and their power in general.⁹⁶ This therefore requires judges and lawyers to liberate themselves from judicial restraints such as legal culture. Karl Klare states the fact that legal culture greatly affects lawyers and judges as it affects how they see and relate to the law and politics.⁹⁷ If a judge fails to appreciate the breadth of their role and that of the law, social transformation could be undermined. In the Kenyan case of *Communications Commission of*

⁹⁵ Kibet E & Fombad C, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa', 17 *African Human Rights Law Journal*, 366, 2017, 356.

⁹⁶ *Trusted Society of Human Rights Alliance v Attorney General* (2012) eKLR.

⁹⁷ Klare K, 'Legal Culture and Transformative Constitutionalism', 166.

Kenya & 5 others v Royal Media Services Limited & 5 others, the Supreme Court established the fact that the judiciary has a role in attaining transformative constitutionalism.⁹⁸ The text of the Constitution is the vehicle for social transformation and therefore the courts must live up to the task of adjudication to bring about change.⁹⁹

Justice Pius Langa in his paper *Transformative Constitutionalism* is also of the view that to have a transformative society, the judges must bear the responsibility to justify their decisions not only by reference to authority but also by reference to ideas and values.¹⁰⁰ He points that transformative adjudication requires an acceptance of the politics of law as it requires judges to acknowledge the effect of “personal, intellectual, moral or intellectual preconceptions” on their decision making.¹⁰¹ He states that judges would be required to change the law to bring it in line with the rights and values for which the Constitution stands in order to uphold transformative constitutionalism.¹⁰²

The South African High Court’s Justice SM Mbenenge in an address noted that the definition of transformative constitutionalism established by Karl Klare empowers judges, institutions and other functionary role players in transformative constitutionalism.¹⁰³ He pointed out that judges are custodians of constitutional values such as human dignity, equality and freedom and they bear the obligation to ensure that constitutional provisions are implemented in ways that improve the quality of life of each citizen.¹⁰⁴ In India, so much power and authority has been given to the courts in enable them achieve transformative constitutionalism.

3.2.2 POSSIBLE REASONS

The succession of Daniel Arap Moi as President in October 1978 indicated the dawn of a new era for the people of Kenya.¹⁰⁵ Immediately after taking over the Presidency from Jomo Kenyatta, President Moi released twenty-six political detainees who had been in jail for several years. He assured the Kenyan people that his administration would not tolerate corruption,

⁹⁸ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR.

⁹⁹ Kibet E & Fombad C, ‘Transformative constitutionalism and the adjudication of constitutional rights in Africa’, 358.

¹⁰⁰ Langa P, ‘Transformative Constitutionalism’, 17(3) *Stellenbosch Law Review*, 2006, 353.

¹⁰¹ Langa P, ‘Transformative Constitutionalism’, 353.

¹⁰² Langa P, ‘Transformative Constitutionalism’, 353.

¹⁰³ Meera E, ‘Constitution Day 2019: Transformative Constitutionalism and the Indian Supreme Court’, Bar and Bench, 2019, 3.

¹⁰⁴ Meera E, ‘Constitution Day 2019: Transformative Constitutionalism and the Indian Supreme Court’, 3.

¹⁰⁵ Adar K.G and Munyae I.M, ‘Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001’, 5(1) *African Studies Quarterly*, 2001, 1.

smuggling and ‘tribalism’ among the many other problems deeply rooted in the country.¹⁰⁶ The Moi administration went further to act against the main civil servants accused of corruption like the Police Commissioner, Bernard Hinga.¹⁰⁷

With time, Moi began to personalise power and centralise that power in a bid to achieve state control, legitimisation of his leadership, popular support from the Kenyan people and consolidation of power.¹⁰⁸ Moi, unlike Kenyatta, centralised and personalised so much power which eventually laid ground for a dictatorship and the violation of people’s human rights by the Moi regime. From the 1980’s, change and dictatorship began when Moi declared the country a one party state under Section 2(A) of the Constitution of Kenya following the attempt to register a socialist opposition party under George Anyona and Jaramogi Odinga.¹⁰⁹ He also used the police to suppress any criticisms and criminalised competitive politics.¹¹⁰

The concept of separation of powers was inexistence during the Moi regime. After being sworn in as President, he introduced a bill that granted the President emergency powers for the very first time in post-independent Kenya. This enabled him to centralise and personalise his rule.¹¹¹

The existence of colonial laws like the Preservation of Public Security Act, the Public Order Act and the Chief’s Authority Act vested in the president the power to suspend individual human rights as guaranteed by the Constitution of Kenya.¹¹² President Moi’s dictatorship and authoritarian rule began with various presidential directives and constitutional amendments like the directive by the President for provincial administrators who were civil servants to get involved in the internal affairs of the Kenya African National Union (KANU), the ban on all ethnic focussed welfare associations like the Meru Association, the Luo Union and the Abaluhya Union among others and Act No. 14 that limited the independence of the judiciary.¹¹³

In 1986 and 1988, the Parliament, which was under the control of the executive, passed constitutional amendments that removed the judges of the High Court and the Court of Appeal, removed the tenure and security of the Attorney General, and continued to remove the Controller and the Auditor General’s office.¹¹⁴ This was because of the then Attorney General,

¹⁰⁶ Adar K.G and Munyae I.M, ‘Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001’, 1.

¹⁰⁷ Adar K.G and Munyae I.M, ‘Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001’, 1.

¹⁰⁸ Adar K.G and Munyae I.M, ‘Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001’, 2.

¹⁰⁹ Section 2(A), *Constitution of Kenya, repealed* (1969).

¹¹⁰ Adar K.G and Munyae I.M, ‘Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001’, 2.

¹¹¹ Adar K.G and Munyae I.M, ‘Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001’, 2.

¹¹² Adar K.G, and Munyae I.M, ‘Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001’, 3.

¹¹³ Adar K.G, and Munyae I.M, ‘Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001’, 4.

¹¹⁴ Adar K.G, and Munyae I.M, ‘Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001’, 4.

James Karugu criticising the decision of the judge in a particular case. In this case, the judge found the accused, an American marine, guilty of murdering a Kenyan woman in Mombasa. The judge only gave him a fine of Kshs.500 and bonded him for a one-year probation. President Moi regarded this as a direct threat to his office and leadership thus the Act of 1986 that vested more power in the President over all the other arms of government.¹¹⁵

As per the judiciary, **President Moi still exerted his power and control over their decisions mostly in the cases where he had a solid interest.**¹¹⁶ Former British judge in Kenya, Eugene Cotran, openly stated that in cases where the president had a direct interest, the executive applied pressure on the judges to rule in favour of the state. This influence and power of the executive over the judiciary caused two expatriate judges, Justice Derek Schofield, and Patrick O'Conner to resign. **The executive controlled both the parliament and the judiciary and thus having the executive power to manipulate the decisions and functions of these arms of government. Under the Moi regime, there were simply no checks and balances resulting from the loss by the legislature and judiciary of the constitutional right to check the power of the executive.**¹¹⁷

Similarly, there were various human rights during the Arap Moi administration. **The KANU government instigated ethnic violence in the early 1990s in a bid to eliminate opposition in the KANU-only zones. More violence broke brought in the Rift Valley Province between 1992 and 1998 which was mainly comprised of various human rights violations by the state.**¹¹⁸ The church, with the rise of human rights violations and ethnic cleansing, issued statements criticising the government's inaction to protect people's human rights and their inaction to promote order in the country. **Kenya during this period was characterised by the detention of people, arbitrary arrests and torture of human rights advocates as well as pro-democracy advocates.**¹¹⁹

In 1993, the Committee on Economic Social and Cultural Rights (CESCR) submitted a report to the United Nations stipulating that there were no institutional mechanisms responsible for the enforcement of human rights.¹²⁰ Article 16 of the International Covenant on Economic,

¹¹⁵ Adar K.G and Munyae I.M, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001', 5.

¹¹⁶ Adar K.G, and Munyae I.M, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001', 5.

¹¹⁷ Adar K.G, and Munyae I.M, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001', 4.

¹¹⁸ Adar K.G and Munyae I.M, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001', 8.

¹¹⁹ Adar K.G and Munyae I.M, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001', 8.

¹²⁰ United Nations, Committee on Economic, Social and Cultural Rights, Concluding Observations on Kenya, UN Doc. E/C. 12/1993/6, 1993.

Social and Cultural Rights (ICESCR) provides that state parties to the Covenant must submit reports on the measures that they have adopted, and the progress made in achieving the rights under the Covenant.¹²¹ Article 17 further stipulates that state parties shall present their reports in stages within one year of the entry of force of the Covenant after consultation with the state parties and the concerned specialised agencies.¹²² Kenya, a state party to the ICESCR, had not submitted a single report as required under these provisions of the ICESCR by January 1976 despite the various human rights violations happening in the country.¹²³

The 1992 and 1997 elections were characterised by the suppression of voter's rights by the KANU. Voter registration was rigged into excluding the opposition voters, there was intimidation of journalists, the KANU government placed a ban of print media that was critical to the regime. The Electoral Commission of Kenya was also biased in that the commissioners, who were selectively appointed by the President, ignored the protests of the Kenyan voters while working in favour of the Moi administration.¹²⁴

Since the judiciary was under the control of the executive, citizens with claims of human rights violations were left without any judicial protection or judicial recourse. The High Court stipulated that it had no jurisdiction to promote, enforce and protect human rights provisions as provided for under Chapter V of the Constitution.¹²⁵ This is a contradiction of Section 84 of the Constitution of Kenya that provides for redress for human rights violations before the High Court.¹²⁶ High Court judges that ruled in favour of human rights victims exposed themselves to punitive transfer to other provinces in the country. The independence of the judiciary was further reduced when President Moi appointed Bernard Chunga, the chief prosecutor at the time, as the Chief Justice in September 1999.¹²⁷

The High Court in 1999 dismissed the petition case filed by Mwai Kibaki against President Moi claiming that the President had rigged the 1997 presidential elections through the help of the Electoral Commission.¹²⁸ Mwai Kibaki was at the time the opposition leader of the

¹²¹ Article 16 (1), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, SD1002 UNTS 993.

¹²² Article 17 (1), *International Covenant on Economic, Social and Cultural Rights*.

¹²³ United Nations, Committee on Economic, Social and Cultural Rights, Concluding Observations on Kenya, UN Doc. E/C. 12/1993/6, 1993.

¹²⁴ Adar K.G and Munyae I.M, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001', 10.

¹²⁵ Chapter V, *Constitution of Kenya repealed* (1969).

¹²⁶ Section 84, *Constitution of Kenya repealed* (1969).

¹²⁷ Adar K.G and Munyae I.M, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001', 10.

¹²⁸ *Mwai Kibaki v Daniel Toroitich Arap Moi* (1999) eKLR.

Democratic Party. The petition was dismissed on the grounds of procedural technicalities stating that Mwai failed to submit a copy of the petition to President Moi. Further in 1999, President Moi commanded courts to avoid interference in the affairs of public universities, in land matters or in any issues relating to political parties.¹²⁹ The Chairman of the Kenya Judges and Magistrates Association stated that: “these pronouncements clearly threaten the rule of law, the independence of the judiciary and the constitutional doctrine of separation of powers.”¹³⁰ Therefore, the overfocus on the judiciary as a means to attain transformative constitutionalism is because of the previous abuse of power by the executive arm of government that led to various human rights abuses.

3.2.3 CONSEQUENCES

The Kenyan Constitution embraces notions of participatory democracy, openness, and transparency in various provisions. Article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya.¹³¹ The Bill of Rights provides for a variety of rights that the Kenyan people are entitled to for instance economic and social rights¹³², fair hearing¹³³ and access to justice¹³⁴ among others. The constitution requires that public participation should be undertaken and respected at every level of government before government officials make decisions that affect the people of Kenya.¹³⁵ Public participation is part of the democratic process because it entails having an open and accountable process where citizens of any given country interact and influence decision making.¹³⁶

Rawls in his *Theory of Justice* asserts that “the definitive idea for deliberative democracy is the idea of deliberation itself. When citizens deliberate, they exchange views and debate their supporting reasons concerning public political questions.”¹³⁷ Historically, democracy was expressed and seen in terms of ballots and elections.¹³⁸ Sen is of the view that although ballots play a very important role, even for the expression of public reasoning, they are not the only

¹²⁹ *Mwai Kibaki v Daniel Toroitich Arap Moi* (1999) eKLR.

¹³⁰ Amnesty International, Kenya, Political Violence Spirals, 10 June 1998 <<https://www.amnesty.org/download/Documents/148000/afr320191998en.pdf>> on 6 October 2020.

¹³¹ Article 1(1), *Constitution of Kenya* (2010).

¹³² Article 43, *Constitution of Kenya* (2010).

¹³³ Article 50, *Constitution of Kenya* (2010).

¹³⁴ Article 48, *Constitution of Kenya* (2010).

¹³⁵ Mariru P, ‘What About Public Participation? Where Are We?’, International Institute for Legislative Affairs, 2015, 1.

¹³⁶ Mariru P, ‘What About Public Participation? Where Are We?’, 2.

¹³⁷ Rawls J, *Collected Papers*, 1st ed, Harvard University Press, Massachusetts, 1999, 579.

¹³⁸ Amartya S, *The Idea of Justice*, 1st ed, Harvard University Press, Massachusetts, 2009, 326.

thing that matters in a democratic society.¹³⁹ Sen claims that the attainment of social justice without any public reasoning-based on participatory and democratic models, is not possible. He points that democracy should not only been seen in terms of public balloting but in the exercise of public reason.¹⁴⁰

Sen claims that democracy and the notions of justice are closely related in that the demands of justice must be assessed with the help of public reasoning. This broadens democracy as it allows people to take an interest and participate through public discussion while helping each other out and attaining a better understanding of each other's lives.¹⁴¹ Participatory democracy is generally about citizens' right to participate in the decisions that affect them while respecting the political organisations in the state.¹⁴² It is therefore imperative for the public to have conversation and take part in decisions that will affect their wellbeing in each society and country.

This notion of participatory democracy is important in the attainment of transformative constitutionalism and in the achievement of a just society. The constitution of Kenya expressly provides for public access and participation in the electoral process as well as in the structure of governance.¹⁴³ Article 118 of the constitution clearly provides for public access and participation.¹⁴⁴ The Parliament and county assemblies are expected to open their proceedings to the public, both public and state agencies are required to involve the public in decision making together with financial management. Under the policy making process, public participation is represented through the election and appointment of officials.¹⁴⁵ An overfocus on the judiciary jeopardises participatory democracy where the judiciary is solely in charge of realising transformative constitutionalism as put across by Karl Klare and other scholars.

Karl suggests that judges and courts should take a strong approach in the realisation of transformative constitutionalism. However, if there is an overfocus on the judiciary, participatory democracy goes down the drain. This is because when the judiciary becomes the sole agent for transformative constitutionalism, they deliberately kill participatory democracy

¹³⁹ Amartya S, *The Idea of Justice*, 327.

¹⁴⁰ Amartya S, *The Idea of Justice*, 324.

¹⁴¹ Solange R, 'Transformative Constitutionalism in a Democratic Developmental State', 3(1) *Stellenbosch Law Review*, 2011, 543.

¹⁴² Solange R, 'Transformative Constitutionalism in a Democratic Developmental State', 550.

¹⁴³ Kanyinga K, *Kenya Democracy and Political Participation*, 1st ed, Open Society Initiative for Eastern Africa, Nairobi, 2014, 35.

¹⁴⁴ Article 118, *Constitution of Kenya* (2010).

¹⁴⁵ Kanyinga K, *Kenya Democracy and Political Participation*, 35.

as people no longer take part in the decisions that they affect them. Although the judiciary can achieve transformative constitutionalism, focusing solely on the judiciary blocks participatory democracy.

3.3 CONCLUSION

In conclusion, excessive power has been vested in the judiciary because constitutional history saw a need for a strong rampart against majority tyranny. There is also evidence that it is safer to have an overly aggressive judiciary than an overly restrained one as it is the duty of judges to be the perfect middle ground.¹⁴⁶ However, what possibilities are being ignored by the overfocus on the judiciary as the 'best' enterprise to achieving transformative constitutionalism?

¹⁴⁶ Sherry S, 'A Summary of Why We Need More Judicial Activism', *Vanderbilt Law School*, 2014, 3.

CHAPTER FOUR: EXECUTIVE'S ROLE IN TRANSFORMATIVE CONSTITUTIONALISM

4.1 INTRODUCTION

This chapter aims to portray the role of the executive arm of government in realising social transformation in each county. The chapter elaborately explains the impact of the New Deal under President Franklin Roosevelt's regime and continues to reimagine the role of executive in achieving transformative constitutionalism without exceeding the power given to them to achieve this transformation by using two questions.

4.2 THE NEW DEAL

The new deal was a policy introduced, adopted, and implemented by President Franklin Roosevelt in a bid to respond to the Great Depression that started in 1929. The Great Depression started with the stock market crash of October 1929 usually referred to as 'Black Thursday'.¹⁴⁷ On this day, millions of Americans bought shares of stock at falling prices because the value of the US stock market had doubled in a frenzy of speculative buying. Except the stock market crash, other factors contributed to the Great Depression which include the weak banking system, industrial overproduction, and the collapse in farm prices.¹⁴⁸ The Great Depression caused millions of people to lose their jobs. By 1933, the unemployment rate was as high as 25% with those who managed to retain their jobs often took pay cuts of almost a third.¹⁴⁹

President Franklin Roosevelt took office in 1933 and introduced the new deal which was aimed at responding to the effects of the Great Depression. The new deal was among the various programs that President Franklin's government initiated to give Americans hope in a time of despair.¹⁵⁰ The New Deal introduced the Federal Emergency Relief Act (FERA), the National Industry Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA). FERA was established to support states, NIRA established to stabilise prices and the AAA to help farmers and revive farm prices.¹⁵¹ Some of the other programs under the new deal include the creation

¹⁴⁷ Recchiuti L.J, 'The Great Depression', Khan Academy, 2016, 2.

¹⁴⁸ Recchiuti L.J, 'The Great Depression', 3.

¹⁴⁹ Recchiuti L.J, 'The Great Depression', 5.

¹⁵⁰ 'The Living New Deal', < <https://livingnewdeal.org/what-was-the-new-deal/>> on 1 November 2020.

¹⁵¹ Kennedy M.D, 'What the New Deal Did', 124(2) *Political Science Quarterly*, 2009, 254.

of jobs and raising of wages, investing in public works, modernizing regions greatly affected by the depression and stabilizing banks to stimulate the economy.

Unemployment. By 1933, the unemployment rates in America were as high as twenty five percent with one in four Americans out of work. **The New Deal established agencies that provided employment for the unemployed.**¹⁵² These agencies include the Civilian Conservation Corps (CCC), FERA and the Public Works Administration (PWA). **The CCC was intended to employ young men without the required skills or means to work on conservation projects. The CCC provided employment at a minimum wage allowing the young men to work on soil conservation, park improvements and reforestation among other things.**¹⁵³ **The minimum wage recognised workers' rights leading to a raise in wages and a surge in union membership. The CCC employed almost three million people in nine years while the Works Progress Administration (WPA) employed over two million between 1936 and 1941 thus reducing the unemployment rate.**

FERA on the other hand invested in states by furnishing grants to the governments that had been overwhelmed by failing tax revenues, business failures and mass poverty. **Over ten million jobs were provided which saved millions of American families from destitution.** The Social Security System supported pensions for seniors as well as provided support for mothers with children. As early as 1933, there was rapid national employment with the rate of unemployment falling from twenty five percent in 1933 to ten percent in 1937.¹⁵⁴

Modernisation of states. The government of President Franklin that introduced the New Deal believed that they were serving both families and communities.¹⁵⁵ **The New Deal inspired a new civic, cultural, and economic renaissance by investing in states, cities and towns which lead to the improvement of the lives of people and reshaped the public sphere through a wide range of programs like the Civil Works Administration (CWA), the PWA, the CCC and the WPA.** The PWA funded almost 35000 projects that improved the public sphere through the construction of new roads, bridges, libraries, city halls, hospitals, schools, parks, airports, sewage systems and military bases among other things.¹⁵⁶ Through the help of various federal

¹⁵² 'The Living New Deal', <<https://livingnewdeal.org/what-was-the-new-deal/>> on 1 November 2020.

¹⁵³ Walker R, 'The New Deal in Brief', <<https://livingnewdeal.org/wp-content/uploads/2012/01/New-Deal-in-Brief.pdf>> on 5 November 2020.

¹⁵⁴ Khan Academy, 'The New Deal', <<https://www.khanacademy.org/humanities/us-history/rise-to-world-power/great-depression/a/the-new-deal>> on 26 December 2020.

¹⁵⁵ 'The Living New Deal', <<https://livingnewdeal.org/what-was-the-new-deal/>> on 1 November 2020.

¹⁵⁶ Amadeo K, 'New Deal Summary, Programs, Policies and Its Success', The Balance, 2020, 4.

agencies, private contractors and local governments, improvements were witnessed throughout the country.

Recovery of the economy. Because of the Great Depression, the American economy collapsed because of the falling prices in agriculture, industrial overproduction together with the Great Crash of October 1929. Industrial production fell by twenty five percent in 1930 followed by the collapse of the banking system between 1931 to 1933 that Americans to lose their savings and the close of thousands of banks. **The New Deal dealt with the financial crisis by passing the Federal Emergency Banking Act and the Glass-Steagall Act which provided bank oversight thus stabilizing banks and allowing credit to flow again.**¹⁵⁷ **The New Deal invested in state and local governments, stabilised farm prices and invested money into the economy that increased household incomes and business revenues.** By 1939, the national income had returned to the level it was at before the Great Depression in 1929.¹⁵⁸

Culture and Education. **The New Deal repaired more than four thousand educational buildings and employed up to fifty thousand schoolteachers. Over 5,900 new schools were constructed, 30,000 and more were renovated and additions to the schools like libraries, auditoriums, cafeterias, and laboratories were also constructed thus improving the lives of millions.**¹⁵⁹ More than 5000 primary schools and secondary schools were built together with over 500 university buildings and colleges. In addition to schools, the PWA constructed public libraries that aided and provided employment to thousands of Americans. **With regards to culture, the Federal Writers', Arts, Theatre and Music Projects employed thousands of artists providing them with an avenue to express their creativity for public benefit.**¹⁶⁰

Some of the other legislation that the New Deal passed in a bid to revive the American economy and transform the society include; the Social Security Act that required employers and employees to contribute to the social security trust fund that makes monthly payments to retirees over the age of 65, the Fair Labour Standards Act which introduced a 40-hour work

¹⁵⁷ Walker R, 'The New Deal in Brief', <<https://livingnewdeal.org/wp-content/uploads/2012/01/New-Deal-in-Brief.pdf>> on 5 November 2020.

¹⁵⁸ The Living New Deal', < <https://livingnewdeal.org/what-was-the-new-deal/>> on 1 November 2020.

¹⁵⁹ Library of Congress, 'U.S History Primary Source Timeline', <<https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/>> on 26 December 2020.

¹⁶⁰ Walker R, 'The New Deal in Brief', <<https://livingnewdeal.org/wp-content/uploads/2012/01/New-Deal-in-Brief.pdf>> on 5 November 2020.

week, restricted child labour and set an hourly minimum wage and the Wagner Labour Relations Act that guaranteed workers the right to bargain collectively and form unions.¹⁶¹

Transformative constitutionalism suggests an enterprise of inducing large scale social change through nonviolent political processes. It is a concept intended to carry a positive impact and create a social good in the society.¹⁶² President Franklin's government through the implementation of the New Deal and the programs under the New Deal, in my opinion, realised transformative constitutionalism in the American society. The New Deal realised some essential elements of transformative constitutionalism according to Karl Klare which include; socio-economic transformation, diversification of culture and substantive equality and social rights. The New Deal achieved socio-economic transformation in the American society by providing employment opportunities to thousands of Americans thus allowing them to improve their living conditions.

4.3 EXECUTIVE'S ROLE IN TRANSFORMATIVE CONSTITUTIONALISM

Karl Klare in his paper contends that for the successful achievement of transformative constitutionalism, judges must change the way they think about legal problems, the role of judges and the law in society.¹⁶³ Because courts are the guardians of the Constitution, they have a prominent role of ensuring the realization of transformative aspirations.¹⁶⁴ Transformative constitutionalism, the attainment of social change and transformation can only be achieved if transformative adjudication by the courts and judges is attained. This concept of transformative constitutionalism brings about the re-ordering of social, political, economic spheres of life thus demands and shapes a new role of judges.¹⁶⁵ This means that the government must intervene in society to advance social justice, equity, human dignity, and the rights of marginalised groups.¹⁶⁶

Karl Klare states that legal culture greatly affects lawyers and judges as it affects how they see and relate to the law and politics.¹⁶⁷ If a judge fails to appreciate the breadth of their role and

¹⁶¹ Kennedy M.D, 'What the New Deal Did', 253.

¹⁶² Mwenda M, 'The Context of Transformative Constitutionalism in Kenya', 2.

¹⁶³ Klare K, 'Legal Culture and Transformative Constitutionalism', 156.

¹⁶⁴ Mwenda M, 'The Context of Transformative Constitutionalism', 13.

¹⁶⁵ Musila G, 'Judicial Activism during Transformative Constitutionalism', Standard Digital, 2012, 2.

¹⁶⁶ Musila G, 'Judicial Activism during Transformative Constitutionalism', 2.

¹⁶⁷ Klare K, 'Legal Culture and Transformative Constitutionalism', 166.

that of the law, social transformation could be undermined. In the Kenyan case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, the Supreme Court established the fact that the judiciary has a role in attaining transformative constitutionalism.¹⁶⁸ The text of the Constitution is the vehicle for social transformation and therefore the courts must live up to the task of adjudication to bring about change.¹⁶⁹ The adjudication system is thus required to shift from the culture of authority to the culture of justification.¹⁷⁰ This means that the exercise of power should be justified based on democracy and reasonability. Transformative adjudication therefore demands that the judges and courts rule cases based on honesty and reasonability.¹⁷¹

A) How can we reimagine the role of the executive in achieving transformative constitutionalism?

Drawing from President Moi's regime, too much power given to one arm of government, specifically the executive leads to tyranny. However, the New Deal under President Franklin Roosevelt as seen in this chapter led to the realisation of economic and social change. President Franklin's New Deal transformed the presidency under the executive from an office that was out of touch with the needs of Americans into an office strongly entrenched and involved in the everyday lives of the American people.¹⁷² As President, Franklin Roosevelt derived his power from the Constitution of America and from being the commander in chief. He was also favoured by most of Congress which allowed him to call special sessions in a bid to implement his policies during his first hundred days under the New Deal.¹⁷³ This Presidential power enabled President Franklin through his various policies to restore employment to the American people and resolve the agricultural and banking crisis at the time leading to the realisation of significant social transformation which can be viewed as part of transformative constitutionalism.

Chapter 9 of the Constitution of Kenya provides for the National Executive.¹⁷⁴ Article 131 provides for the authority of the President¹⁷⁵ while Article 132 provides for the functions of the

¹⁶⁸ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR.

¹⁶⁹ Kibet E & Fombad C, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa', 358.

¹⁷⁰ Teshome M, 'Transformative Constitutionalism in South Africa', 4.

¹⁷¹ Teshome M, 'Transformative Constitutionalism in South Africa', 4.

¹⁷² Kirkland L.S, 'FDR and the New Deal: Expanding Presidential Power', 1

¹⁷³ Kirkland L.S, 'FDR and the New Deal: Expanding Presidential Power', 5.

¹⁷⁴ Chapter 9, *Constitution of Kenya* (2010).

¹⁷⁵ Article 131, *Constitution of Kenya* (2010).

President.¹⁷⁶ Article 131(1) states that the President shall exercise the executive authority of the Republic¹⁷⁷ and this authority shall be exercised in a manner compatible with the principle of service to the people of Kenya for their wellbeing and benefit.¹⁷⁸ This provision in the Constitution gives power to the President and commands the President to exercise this power in a manner beneficial to the people of Kenya. As with President Roosevelt, the Kenyan President holds enough power that can be used positively to impact social transformation in the Kenyan society.

Article 132(1) provides that the President shall address the nation on the measures taken to realise the national values referred to in Article 10 and publish in the Gazette the details of the measures and progress as per subsection (i).¹⁷⁹ This provision commands that the President accounts for the measures taken by the government in realising the national values of patriotism, national unity, human dignity, equity, social justice, equality, human rights, and non-discrimination, among others. Some of these national values under Article 10 of the Constitution are closely tied to the five principles put across by Karl Klare under transformative constitutionalism.¹⁸⁰

The constitution of Kenya empowers the President under the executive arm of government. This power, if put to good use, can lead to the realisation of transformative constitutionalism and social transformation as seen with President Roosevelt who used his power to pull the United States out of the Great Depression. The executive can therefore be regarded as an agent of transformative constitutionalism where the executive uses its power to bring about social and economic change in any society. If the executive can use the power given to them by the Constitution properly for instance, use the power to work in hand with the legislature in establishing and implementing policies that seek to cause social change and adopting policies that bring about social transformation. The role of the executive can therefore be re-imagined by allowing the executive to use their constitutional power to achieve transformative constitutionalism.

- B) After reimagining the executive's role in transformative constitutionalism, how then can we prevent the executive from using this power to create a despotic government?

¹⁷⁶ Article 132, *Constitution of Kenya* (2010).

¹⁷⁷ Article 131(1), *Constitution of Kenya* (2010).

¹⁷⁸ Article 129(2), *Constitution of Kenya* (2010).

¹⁷⁹ Article 132(1), *Constitution of Kenya* (2010).

¹⁸⁰ Article 10, *Constitution of Kenya* (2010).

Excess power to the executive can however be a danger to the country and the citizens of the country. The rule of law is a principle that requires people in positions of authority to exercise their powers within a framework that respects public norms rather than their own preferences. Manipulating the constitution for one's personal gain is an example of the abuse of the rule of law.¹⁸¹ The rule of law is associated with the ideals of independence of the judiciary as well as separation of powers allowing for the institutions to embody procedural safeguards like checks and balances.¹⁸²

Executive power can be kept in check through the process of judicial review that allows the courts to review the exercise of the executive authority. An independent judiciary is required for this to happen.¹⁸³ Article 160 of the Constitution of Kenya provides for the independence of the judiciary stating that the judiciary shall not be subject to the control or direction of any person or authority.¹⁸⁴ The judiciary is expected to be an independent organ of government for it to keep the other branches of government from exceeding their power. The courts, through judicial review, can invalidate orders from the government if the government has gone beyond its executive power.¹⁸⁵

4.4 CONCLUSION

In conclusion, an independent judiciary is very important in any given country for the realising of transformative constitutionalism. Once power is granted to the executive, the judiciary has the power to keep the executive in check to prevent them from exceeding their power. The executive, as witnessed by the New Deal, realised social transformation engineered and spear headed by the executive. This proves that transformative constitutionalism can indeed be achieved by the executive, however, the judiciary should be used as tool prevent the excess use of executive power.

¹⁸¹ Roschman C, Wendoh P and Ogolla S, 'Human Rights, Separation of Powers and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States', October 2012, 13.

¹⁸² Roschman C, Wendoh P and Ogolla S, 'Human Rights, Separation of Powers and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States', 13.

¹⁸³ Roschman C, Wendoh P and Ogolla S, 'Human Rights, Separation of Powers and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States', 13.

¹⁸⁴ Article 160, Constitution of Kenya (2010).

¹⁸⁵ Roschman C, Wendoh P and Ogolla S, 'Human Rights, Separation of Powers and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States', 14.

CHAPTER FIVE: FINDINGS AND CONCLUSION

5.1 FINDINGS

Transformative constitutionalism seeks to build a country based on social justice and substantive equality in the social, economic, and political sectors. It is an enterprise aimed at inducing large scale social change in any given society. Klare concludes by arguing that large scale social transformation can be achieved when the judiciary actively participates in transformative adjudication. He states that a distinct method of interpretation should be adopted by the South African judges and lawyers to fully effect a transformative constitution, a postliberal reading and interpretation of the Constitution. From this study, however, we have come to a different conclusion.

Drawing from the New Deal under President Franklin Roosevelt, the New Deal can be termed as social transformation brought about by the executive arm of government whilst working together with the other arms of government. The New Deal restored the American economy after the Great Depression that caused unemployment and loss of people's incomes. The American executive took on the New Deal and spearheaded the projects leading to the realization of social, economic, and political change in the country. The unemployment rate drastically reduced, there were more schools and a steady recovery of the economy.

Transformative constitutionalism can be achieved by the executive as portrayed by the New Deal. This study finds that the power to realize social and economic transformation, that transformative constitutionalism advocates for, should be shared among the three arms of government, the executive, the legislature, and the judiciary bearing in mind; separation of powers and checks and balances. Checks and balances would ensure that that the arms do not use excessive power in a bid to realize their various projects while separation of powers, to an extent, allows for the arms not to interfere with the work of the other.

5.2 CONCLUSION

Focusing on the judiciary solely to realize transformative constitutionalism ignores the possibilities of any other arm, especially the executive branch, from achieving the same goal. The executive should be allowed to spearhead projects that might lead to the realization of transformative constitutionalism. This study however finds that power and authority can indeed be given to the executive to spearhead projects aimed at realizing social transformation.

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