

**Legal certainty and the pursuit of justice: A legal discussion**

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**Declaration**

I, AAZFAR REYAZ SHARIFF, do hereby declare that this research is my original work and that, to the best of my knowledge and belief, 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 University Supervisor.

Signed:.....

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## **Contents**

Declaration	2
Abstract	5
Chapter One	6
Background	6
Statement of the Problem	6
Justification of the study	7
Statement of objectives	7
Scope and limitations of the study	7
Breakdown of the Paper	7
Chapter Two: Theoretical framework	8
Legal certainty	8
Scholarly writings on theoretical issues facing legal certainty	8
Implications of the theoretical issues	9
Practical issues with legal certainty	10
Implications of these practical issues	11
Review of proposed methods to check judicial power	13
Originalism as a mechanism of controlling judicial power	13
Originalism's failures	14
Populism as a means of constraining judicial discretion	16
Flaws inherent in populism	16
Spirit of the law as a means of preventing judicial overstep	16
Failures of the spirit of the law approach	17
Dworkin's Moral Readings of the Constitution approach as a method of minimising judicial discretion	18
Trouble with Dworkin's approach	18
The Grand Style	18
Proposed method of judicial constraint	19
Justice	20
The outcome	22
Chapter Summary	24

Chapter Three: Statutory Certainty and justice-oriented decision-making in Modern Jurisprudence- Selected Cases	26
Justice-oriented decision-making	26
<i>L.N.W v Attorney General &amp; 3 others</i>	26
<i>Samuel G Momanyi v The Hon Attorney General &amp; Another</i>	27
<i>Beatrice Wanjiku &amp; another v Attorney General &amp; 3 others</i>	28
<i>P.A.O &amp; 2 others v Attorney General</i>	29
Attempts at promoting legal certainty in decision-making	30
<i>Geoffrey Andare v The Hon. Attorney General, Director of Public Prosecutions and Article 19- East Africa</i>	30
<i>AIDS Law Project v Attorney General et al</i>	31
Chapter Four: Lessons taken away from the Kenyan jurisprudence	33
Chapter Five- Final thoughts	35
Bibliography	36
Books	36
Journals	36
Cases	37
Written law	38
Websites	38

## **Abstract**

This paper shall contrast two methods of judging, the first method being one that emphasises justice as the primary reason for the judge deciding in the manner that he/she did- justice-oriented judging- and the second being one that emphasises the promotion of certainty in the law- a legal certainty-oriented approach to judging. Additionally this paper shall tackle the implications of the prioritisation of justice-oriented judging on the legislature and the judiciary on the legal system.

# Chapter One

## Background

According to Lord Bingham, one of the principles of the rule of law is that “The law must be accessible and so far as possible intelligible, clear and predictable”.<sup>1</sup> This principle captures the constitutional law principle of legal certainty.

Legal certainty’s importance cannot be understated. A government cannot hold its citizens to account for conduct that is not explicitly forbidden. However achieving absolute certainty is impossible and, perhaps, undesirable, as the legislative arm of government cannot enact laws to cater for every possible scenario. Additionally, if a legal system is to be turned into a completely determinate jurisdiction with no role for judicial interpretation then the outcome would be that justice would not be served as the legislature cannot capture everything in its codified laws, and in those areas where the law would be lacking injustice would manifest itself. It is therefore necessary to strike a balance between determinism and a degree of ambiguity. The law should be certain enough to allow citizens to understand their position within the legal system while flexible enough to allow courts and tribunals to mete out justice *ad hoc* in disputes that are brought before them, having recourse to justice ensures that the systematic operation of law does not result in injustices.

This paper shall attempt to justify the reasons why justice ought to be the focal point of the law, over legal certainty, and why the outcome, an empowered and stronger judiciary with authority to have the final word on the state of the law, is tolerable, and potentially, beneficial.

## Statement of the Problem

The interplay between justice and legal certainty determines the nature of the legal system; if priority be given to justice then the outcome would be the strengthening of the court systems while if priority be given to legal certainty then the scene is set for a situation where injustice becomes tolerable and parliament becomes the final voice in the legal system.

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<sup>1</sup> Bingham T, *The Rule of Law*, Penguin Books Ltd, London, 2011, 37.

### **Justification of the study**

The field of study of this paper is one in which there has been very little publication. Legal certainty is crucial because understanding the concept may help clarify the appropriate role of courts and parliament regarding who has, or ought to have, the final say in the content of the law. Much is said about the overstep of courts, this paper will also seek to clarify whether courts, in reaching beyond their traditional limits, as captured in rules governing judicial review, are justified in their decisions.

### **Statement of objectives**

This research aims to reach a conclusion on the state of legal certainty in Kenya; the Constitution shall be analysed to determine the position of legal certainty and equity within the text and to assess the potential problems arising with the current position.

### **Scope and limitations of the study**

This paper has not directly tackled the issue of judicial review in analysing the justification for opening up of judicial limits on decision-making. Additionally, as the constitution is only five years old, much is still to be seen as to the approach courts take in the future though inferences can be made based on present literature on the field and current decisions by courts.

### **Breakdown of the Paper**

Chapter two shall assess the numerous theoretical underpinnings of the concepts of legal certainty and justice and the implications of the prioritisation of justice over certainty in a legal system. Chapter three shall take the reader through Kenyan case law to illustrate the differences between the approaches two approaches to judging- a justice-oriented approach and an approach emphasising legal certainty. Chapter four shall take the reader through the practical considerations noted in Chapter three and Chapter two and attempt to cement the idea that legal certainty ought not be a prime consideration when judges arrive at their decisions. Chapter five shall present the final thoughts of the author on justice-oriented judging.

## **Chapter Two: Theoretical framework**

### **Legal certainty**

### **Scholarly writings on theoretical issues facing legal certainty**

John Hasnas wrote that law is not, nor should it be, deterministic.<sup>2</sup> He asserted that to make the law into a “body of definite, consistent rules that produce determinate results”<sup>3</sup> would take away from the flexibility of the law, an important trait in a time when postmodernism and globalization have increased the diversity of persons within countries.<sup>4</sup> Timothy Endicott agreed with this notion, noting that were the law to be determinate it would end up being rigid, impairing it as a tool for ordering public life.<sup>5</sup>

Hasnas further noted that any conclusion is explainable from the language of the law; it is possible to argue nearly any claim using the language of the law.<sup>6</sup>

Oliver Wendell Holmes wrote:

*Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form... We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.*<sup>7</sup>

Muthomi Thiankolu contextualises this problem to Kenya by noting that the Constitution has vacuities and asserting that numerous interpretations can be reached, using the same text, by different people.<sup>8</sup>

### **Implications of the theoretical issues**

The sentiments expressed by Hasnas and Endicott hint at the possibility that the law, when reduced to a determinate state, would become rigid. This is an area where the conflict between

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<sup>2</sup> Hasnas J, 'The Myth of the Rule of Law', *Wisconsin Law Review*, 1995, 22-23, <http://faculty.msb.edu/hasnasj/GTWebSite/MythFinalDraft.pdf> on 21st February 2017.

<sup>3</sup> Hasnas J, 'The Myth of the Rule of Law', 19.

<sup>4</sup> Hasnas J, 'The Myth of the Rule of Law', 19.

<sup>5</sup> Endicott T, 'The Impossibility of the Rule of Law', 19(1) *Oxford Journal of Legal Studies*, 1, 1999, 6.

<sup>6</sup> Hasnas J, 'The Myth of the Rule of Law', 11.

<sup>7</sup> Holmes OW, 'The Path of the Law' 110(5) *Harvard Law Review*, 1997, 998.

<sup>8</sup> Thiankolu M, 'The Constitutional Review Cases: Emerging Issues In Kenyan Jurisprudence', *Kenya Law*, 2006, 3, [http://kenyalaw.org/Downloads/Other/Constitutional\\_Review\\_Cases.pdf](http://kenyalaw.org/Downloads/Other/Constitutional_Review_Cases.pdf) on 20th February 2017.



legal certainty and justice would arise as a rigid set of laws may not be able to do justice; application of determinate laws may lead to injustices.<sup>9</sup> Additionally, determinate laws may be inadequate as methods of public organisation, as noted by Endicott.<sup>10</sup>

The points made by Holmes, Hasnas and Thiankolu, regarding the language of the law, is an important point in favour of installing replacing vague laws with determinate laws. Their arguments are that nearly any outcome can be argued from the language of the law. Holmes takes it a step further and writes that any conclusion can be given a logical form, meaning that judges could hide behind the veil of the law to input their own values into the law, through judicial interpretation of vague law. To solve this, a method of constricting judges would have to be devised, one that would take into account the flaws raised.

The ideal of legal certainty is very alluring from a theoretical standpoint. The idea, that we could have laws that would cover all situations and would reflect the just outcome in all cases, is fantastic. Indeed it could be argued that all criticisms of the ideal wither away under closer scrutiny. Hasnas and Endicott's critiques that the law would lack flexibility, and be inadequate as a tool for public ordering, are not problematic as the law would be drafted to capture all the scenarios that laws need to capture as flexibility would no longer be needed. Additionally, judges would only need to apply the law thus no room for judicial activism or creativity, a particularly prominent fear nowadays. This would mean that the possibility of judges importing their own values through the language of the law would be a non-issue. The one theoretical issue that could arise would be that, as Hasnas stated it, were the law fully determinate, it would not be able to consider the equities of each individual case.<sup>11</sup> He further posits that the purpose of the law is to create a legal environment that is both orderly and just; two purposes that are always in conflict.<sup>12</sup> This could be resolved by the drafters ensuring that they draft laws that cater for

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<sup>9</sup> To visualise this, the example of laws relating to Jews during the Nazi regime could be used.

<sup>10</sup> An example of this can be seen in the area of tax, more specifically the rationale behind the existence of general anti-avoidance regulations. These regulations exist so as to efficiently order the tax regimes without worrying about use of technicalities to avoid tax liabilities.

<sup>11</sup> Hasnas J, 'The Myth Of The Rule Of Law', 19.

<sup>12</sup> Hasnas J, 'The Myth Of The Rule Of Law', 19.

individual scenarios and factor in the true meaning of justice, a task that would be truly Herculean.

The more prominent issues, as has been alluded, arise from the application of the concept of legal certainty.

### **Practical issues with legal certainty**

HWR Wade summed up the crisis in the USA regarding legal certainty, as the lack of hope for the concept of *stare decisis* due to the sheer number of authorities in the field.<sup>13</sup> Gilmore added that the existence of conflicting precedents serves to undermine faith in *stare decisis*.<sup>14</sup>

Thiankolu argues that it is impossible for laws to adequately cater for every possible scenario that can arise, unless the said laws were drafted with divine prescience.<sup>15</sup> This justifies the intervention of courts to fill lacunas within the law and bring in certainty.<sup>16</sup> Endicott noted that certainty in the law is lacking owing to legislative necessity; the law has to be made vague by drafters.<sup>17</sup>

Anthony D'Amato claims as evidence, of legal uncertainty, the increasing number of statutes and the increasing number of judicial decisions, all of which represent attempts at ensuring certainty within uncertain legal systems. He argues that these only add to the dilemma since the addition of more laws confuses the issue rather than clarifying it.<sup>18</sup> Wade agreed with this train of thought, noting that marching towards legal certainty becomes more difficult as more laws are enacted and as laws become complicated.<sup>19</sup>

Vague laws, noted Endicott, leads to a situation where the wills of judges are unopposed, a rule of judges.<sup>20</sup> In the same breath, Endicott wrote that drafting precise laws would, paradoxically, increase the arbitrariness within the legal system.<sup>21</sup> To demonstrate this, Endicott used a

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<sup>13</sup> Wade HWR, 'The Concept of Legal Certainty: A Preliminary Skirmish' 4(3) *The Modern Law Review*, 1941, 183.

<sup>14</sup> Gilmore G, 'Legal Realism: Its Cause and Cure' 70(7) *The Yale Law Journal*, 1961, 1041.

<sup>15</sup> Thiankolu M, 'The Constitutional Review Cases', 2.

<sup>16</sup> Thiankolu M, 'The Constitutional Review Cases', 2.

<sup>17</sup> Endicott T, 'The Impossibility of the Rule of Law', 4.

<sup>18</sup> D'Amato A, 'Legal Uncertainty' 71(1) *California Law Review*, 1983, 4-5.

<sup>19</sup> Wade HWR, 'The Concept of Legal Certainty', 197.

<sup>20</sup> Endicott T, 'The Impossibility of the Rule of Law', 4-5.

hypothetical scenario, a modification of which is as follows.<sup>22</sup> Assuming a court is faced with four defendants all charged with murder and the law states that the defendant must be produced in court within 24 hours of being arrested and by misfortune one of them is produced after the time limit. The court would have to either contradict the law or disallow the prosecution and cut him loose. Endicott argued that such a situation is symptomatic of arbitrariness since the court would have to treat the defendant differently from the other defendants, an arbitrary decision to let him go and prosecute the others.

### **Implications of these practical issues**

As was noted by Wade and Gilmore, the number of authorities in the field proposing numerous, often conflicting, paths to follow in the law's development means that the idea of legal certainty faces bleak times. The outcome of this is that judges can direct the law into any path they choose, as often times they will have the legal precedent to back them up.

Additionally, as was noted by Thiankolu, the impossibility of drafting laws that would cater to every single scenario imaginable, lest the law be accepted as allowing for lacunae, means that vague laws are inevitable meaning that the judicial mandate of interpretation is a necessity.

Endicott wrote that increases in certainty may actually result in increased arbitrariness, highlighting a crucial flaw in trying to bring about a determinate legal system.

The attempts at plugging the holes existent in the laws only leads to a new type of uncertainty- a situation where fewer people could know the law relating to a matter due to the increased complexity and volume of it.

On the flip side, as was noted by Endicott, vague laws would lead to the risk of judges imposing their will on cases, an idea that shall be discussed in further detail later on with a view to constraining their interpretive powers. In addition to this, the status of judges within the legal system would be elevated to the apex. The idea that there could be some compromise between

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<sup>21</sup> Endicott T, 'The Impossibility of the Rule of Law', 8. Endicott raised a myriad of arguments to justify this position. Among them he noted that one of the ways in which arbitrariness is increased is when the requirements of the law no longer reflect the reasons for the law's passage. The other ways are: the Government is arbitrary if it does not constrain the will of the rulers; government is arbitrary if like cases are not treated equally- lack of consistency; and government is arbitrary if it is not predictable. See Endicott T, 'The Impossibility of the Rule of Law'.

<sup>22</sup> Endicott T, 'The Impossibility of the Rule of Law', 4-5.

judicial and legislative supremacy is a fallacy, as per Learned Hand and Ronald Dworkin.<sup>23</sup> The reasoning of the proponents aside, it is easy to see why they asserted this notion since, at the end of the day, the primary purpose behind the legislature is the passage of policy, or law, and the capacity of the courts to challenge such law, or simply have to abide by such law, determines whether the courts are at the apex or whether parliament is at the apex.

Legal certainty may thus not be possible, from a practical perspective, owing to the impossibility of drafting laws capturing justice to the minutest details. This is for two reasons; first it would be nearly impossible to agree on a definition of justice and what it means in practice, and secondly, it would be impossible to capture, in writing, all the situations law needs to cover. Even if the laws could be drafted, the volume and complexity of such laws could mean that no one would know or understand them. Were attempts to be made at reaching a point of legal certainty then the issues that would arise are numerous; solving the problems raised by *stare decisis*, tackling the arbitrariness conundrum, and the issue of increased complexity and volume of law rendering it unintelligible and unknowable. All these are the trade-offs for a judiciary that does not sit at the apex of the legal system.

The previous point cannot be seen in isolation from the debate concerning majoritarian and counter-majoritarian politics initiated by Bickel.<sup>24</sup> Bickel noted that the structure of democracy leads to situations where majorities decide policy. The difficulty envisioned would be the balance between majority and minority groups. Thus there would need to be a framework to protect minority groups against the dictates of the majority in situations where their rights could be infringed. The means by which the balance is struck in modern societies, between the two interest groups, is by use of the courts. The judiciary is the custodian and protector of minority rights, but this role does not come at the expense of majority interests. The courts, in fulfilling this role, should only decide in a manner that advances the interests of justice.

According to Dworkin “(t)he Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might

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<sup>23</sup> Dworkin R, *Freedom's Law: The Moral Reading of the American Constitution*, Oxford University Press, Oxford, 1996, 342; Farber D and Sherry S, *Desperately Seeking Certainty: The Misguided Quest For Constitutional Foundations*, The University Of Chicago Press, Chicago, 2002, 124.

<sup>24</sup> Bickel A, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, New York, 1986.

want to make, even when that majority acts in what it takes to be the general or common interest”.<sup>25</sup> This directs us to the reality that the ideals of the majority cannot always be imposed on the other groups in a society. Good governance cannot, and should not, be envisioned as the rule of the majority but it must equate to a system of government facilitating all persons in their quests for the best life.

The only way forward, it would seem, would be for law to be vague. There would, however, need to be mechanisms in place to manage the power given to the judiciary, primarily its power of interpretation.

## **Review of proposed methods to check judicial power**

### **Originalism as a mechanism of controlling judicial power**

Originalism is an approach to constitutional interpretation, made prominent by the endorsement of the late Supreme Court<sup>26</sup> Judge Antonin Scalia.

Originalism is a method of constitutional interpretation where the constitution is looked at from the perspective of what the founders intended.<sup>27</sup> The underlying principle behind this approach is that the public meaning understood at the time of the law’s passing ought to be the interpretation preferred in constitutional interpretation.<sup>28</sup> Other writers have amended this to state that the meaning that should be imputed to the text should be derived from the ratifiers and other sophisticated political actors of the time.<sup>29</sup> Originalists see this as the only legitimate basis for the judiciary to thrust aside legislation made by the legislature, a representative of the people.<sup>30</sup>

The *raison d’etre* of this approach is the constraint of judges.<sup>31</sup> Bork wrote that if judges were freed from the restraints of history, they would have absolute discretion in deciding cases.<sup>32</sup> Karl Llewellyn supported this agenda, opining that the core of a legal system is the idea of constraint on judges, not allowing them to be free to decide cases in a manner of their choosing.<sup>33</sup>

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<sup>25</sup> Dworkin R, *Taking Rights Seriously*, Bloomsbury Academic, London, 2013. 132-33.

<sup>26</sup> Supreme Court of the United States of America.

<sup>27</sup> Whittington K, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, University Press of Kansas, Lawrence, 1999, 35.

<sup>28</sup> Bork R, *The Tempting of America: The Political Seduction of the Law*, Free Press, New York, 1997, 144; Whittington, ‘Constitutional Interpretation’, 35.

<sup>29</sup> Easterbrook F, ‘Abstraction and Authority 59(349) *University of Chicago Law Review*, 1992, 359.

<sup>30</sup> Easterbrook F, ‘Alternatives to Originalism?’ 19(479) *Harvard Law Review*, 1996, 485.

<sup>31</sup> Farber and Sherry, *Desperately Seeking Certainty*, 10.

<sup>32</sup> Bork, *The Tempting of America*, 288.

Therefore judges must be guided by something other than individual preferences or vague notions.<sup>34</sup>

Scalia differed with the doctrine in three ways. Firstly, he acknowledged that the original meaning is not always knowable and applied correctly by judges and does not insist on the dogmatic pursuit of the original intention.<sup>35</sup> Secondly, he proposed that the doctrine of *stare decisis* plays an important role in adulterating the doctrine of originalism; some words lack an original meaning and have evolutionary traits which can only be uncovered by looking at the progress made in previous decisions.<sup>36</sup> Third, Scalia views the majoritarian acceptance of moral subjects to be crucial in making them authoritative.<sup>37</sup>

### **Originalism's failures**

The very changes Scalia proposed to his own version of originalism highlight problems existing within the approach. Firstly, the original meaning cannot always be known; the writings of the ratifiers and sophisticated political actors could be used as guides, in theory, but this ignores the process by which constitutions are made. They are always compromises and the thoughts and beliefs of the ratifiers, or political actors, are not always reflected in the final document. All this serves to do is to bind the people of the present to the beliefs and understandings of the people of the past; a very dangerous prospect when one considers that many of the drafters lived during a time when slavery was the norm, relying on their moral and philosophical beliefs may not be a good idea.

As was noted by Wade and Gilmore, the number of authorities existing in the field renders the idea of evolutionary growth of the law redundant; judicial discretion can still be exercised.

Thirdly, and finally, majoritarian acceptance can, on occasions, be at the expense of the interests, and perhaps the safety, of minority groups. This is a point that scarcely needs to be belaboured but, as an example, the situation in America today, where Donald Trump won the election on the back of a campaign that alienated Muslims<sup>38</sup> and Latinos<sup>39</sup>, could explain the point.

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<sup>33</sup> Llewellyn K, 'On Reading and Using the Newer Jurisprudence', 40(4) *Columbia Law Review*, 1940, 581.

<sup>34</sup> Llewellyn K, 'On Reading and Using the Newer Jurisprudence', 581.

<sup>35</sup> Brisbin R, 'Justice Antonin Scalia, Constitutional Discourse, and the Legalistic State', 44(4) *The Western Political Quarterly*, 1991, 1007-8.

<sup>36</sup> Brisbin R, *Justice Antonin Scalia*, 1007-8.

<sup>37</sup> Brisbin R, *Justice Antonin Scalia*, 1007-8.

Originalism is problematic because of flaws in this approach to interpretation and construction of the law. “As a formalist, Scalia is preoccupied with minimising judicial discretion and making the enterprise of judging as value neutral as possible”<sup>40</sup>. This is a good aspect to the work of Scalia and would be admirable were it not for the fact that it is known, by Scalia as well, that the originalist approach is not capable of being applied in its entirety - “Justice Scalia’s thought is not, however, merely a reincarnation of nineteenth-century formalism. Unlike the earlier formalists, he is seemingly aware that formalism can never be fully realized. Indeed, there is some evidence that he views it instead as a sort of noble myth to which judges ought to give their allegiance even if it not wholly true”.<sup>41</sup>

Originalism’s approach, analysing the text alone, solves none of the problems of judicial discretion since original intent cannot always be easily understood or deciphered and often times will necessitate the judge putting himself/herself into the shoes of the founders- an experience which is necessarily subjective. This was conceived by Whittington who proposed that this problem can be worked around using what he dubbed the ‘best-fit’ approach whereby judges could simply develop the “logical implications of the settled law”.<sup>42</sup> Additionally it has the flaw of being unable to account for changes within the law since the social context at the time of the founding of the Constitution will change necessitating the law to adapt to stay relevant, and to be useful in the process of social ordering. The problems a society encounters as it progresses are usually different from those faced by the founders thus the people of the present have to make new value choices reflective of their times.<sup>43</sup>

The flaws in the approach suggest that it is not an appropriate method to use in managing the power of the judiciary.

### **Populism as a means of constraining judicial discretion**

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<sup>38</sup> <https://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/muslim-in-trumps-america> on 18th February 2017; <http://edition.cnn.com/2015/11/27/politics/donald-trump-insults-groups-list/> on 18<sup>th</sup> February 2017.

<sup>39</sup> [https://www.nytimes.com/2016/07/20/opinion/campaign-stops/the-trump-affront-to-latinos.html?\\_r=0](https://www.nytimes.com/2016/07/20/opinion/campaign-stops/the-trump-affront-to-latinos.html?_r=0) on 18<sup>th</sup> February 2017.

<sup>40</sup> Farber and Sherry, *Desperately Seeking Certainty*, 29.

<sup>41</sup> Farber and Sherry, *Desperately Seeking Certainty*, 37-38.

<sup>42</sup> Whittington, *Constitutional Interpretation*, 42.

<sup>43</sup> Bickel, *The Least Dangerous Branch*, 68.

This approach is another method of interpretation seeking to tackle the counter-majoritarian problem. Learned Hand was an advocate of this approach, advocating for the scrapping of judicial review in favour of pure majority rule.<sup>44</sup> Other writers on the approach have put forward similar arguments, Amar argues that judicial review be treated as a provisional step that would be the law until the masses can express their own ideas.<sup>45</sup>

The justification behind this approach can be found in the ideas of Ackerman who argued that the validity of constitutional rulings ought to rest on the acceptance of the people.<sup>46</sup>

### **Flaws inherent in populism**

The problem with this approach is that it fails to solve, or even tackle, the counter-majoritarian dilemma. If the popular opinion is the only factor to be taken into account then opinions of minorities, whose arguments and justifications may carry some weight, would be neglected.<sup>47</sup>

This approach pushes truth to a secondary role, behind public opinion. The problematic nature of this can be best seen by visualising the situation in post-independence America where slavery was an acceptable phenomenon.

From a logistical perspective, adding up the voices of all the people could be difficult though the growth of communication technology may soon mean that public participation in all policies may be effected by a simple press of a button.

### **Spirit of the law as a means of preventing judicial overstep**

Justice Cardozo's writings on the topic of legal certainty are especially relevant as he highlights a potential solution to this conundrum;

*"The law is not an exact science... Exactness may be impossible, but this is not enough to cause the mind to acquiesce in a predestined incoherence."<sup>48</sup>*

Cardozo agrees with the notion that legal determinism is impossible but notes that this cannot justify inaction. He notes that it is not enough for the legislature to lay down its tools, citing

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<sup>44</sup> Farber and Sherry, *Desperately Seeking Certainty*, 126.

<sup>45</sup> Farber and Sherry, *Desperately Seeking Certainty*, 126.

<sup>46</sup> Farber and Sherry, *Desperately Seeking Certainty*, 127.

<sup>47</sup> Farber and Sherry, *Desperately Seeking Certainty*, 128.

<sup>48</sup> Cardozo B, *The Paradoxes of Legal Science*, The Lawbook Exchange Ltd, New York, 2000, 2-3.



judicial interpretation as the solution to the ambiguities in law. The legislature needs to provide the spirit of the law, the guiding hand that leads courts to 'correct' results.

Paul Neuhaus supports this position and argues that judges must be able to answer, to questions that are not directly posed to them, using the spirit of the law.<sup>49</sup> Neuhaus seems to be suggesting that judges must identify neutral principles to be used as answers for lacunas within the law and is proposing the spirit of the law as being the light the judge uses to identify the appropriate neutral principles.

### **Failures of the spirit of the law approach**

The problems with this approach are that this places the legislature at the apex of the legal system, the final determinant of the content of the law. Such a structure cannot work in the absence of a determinate legal system.

The legislature could pass laws that are bad, in either the moral sense or the implicative sense. While it is true that courts could just as easily be guilty of the same, the rites of passage that a judge goes through prior to his/her becoming a judge are such that the chances of such a risk occurring are lessened. Additionally, the democratic structure of legislatures means that they often will not pursue measures that are contrary to the prevailing societal norms, regardless of the morality of the matter.

The spirit of the law could easily be twisted by courts to mean a whole host of different things that the legislature did not anticipate thus this method may not actually constrain the courts.

### **Dworkin's Moral Readings of the Constitution approach as a method of minimising judicial discretion**

Ronald Dworkin wrote that legal systems are comprised of principles and rules.<sup>50</sup> He argues that principles can be used to fill in the space left where law is silent.<sup>51</sup> The principles Dworkin argued in favour for were to be found in the constitutional text itself.<sup>52</sup> Thus judges are to locate the principles that shall be used to fill the lacunae, existent in law, from the Constitution itself.

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<sup>49</sup> Neuhaus P, 'Legal Certainty versus Equity in the Conflict of Laws', 28(4) *Law and Contemporary Problems*, 1963, 803.

<sup>50</sup> Dworkin R, *Taking Rights Seriously*.

<sup>51</sup> Dworkin, *Taking Rights Seriously*, 48-56.

<sup>52</sup> Farber and Sherry, *Desperately Seeking Certainty*, 129.

### **Trouble with Dworkin's approach**

The primary, and perhaps unavoidable, flaw in this method is that the moral principles, or constitutional principles, that can be located in a constitution are numerous and some of them are conflicting. Dworkin did not identify a mechanism to be used in situations where the judge is faced with two conflicting principles in one case, which principle is he/she to apply. Judges would still be making a decision on their own whim.

### **The Grand Style**

The Grand Style is seen by Llewellyn as the surest device to check judicial creation and preserve the duty to justice.<sup>53</sup> He proposed three elements to assess judicial precedent to determine the weight to be given to each precedent; “reputation of opinion-writing judge”, “principle- a generalization yielding sense and order”, and “policy or consequences of the rule”.<sup>54</sup>

This approach seems directed towards the usage of precedent and in that sense serves as a useful method for solving the issues raised by Wade and Gilmore.

The issues with this approach are plentiful. Reputation is a concept that is entirely subjective and hard to ascertain. Even if it were possible to ascertain the reputation of the judge, it risks reducing the process to a popularity contest since only the most popular judges' writings would come to the fore. The consideration regarding the policy or consequences of the rule may lead to a situation where judges have to overtly consider the political implications of the judgements they render rather than simply follow the path justice has laid out. Judges should not be involved in the messy political arena.

### **Proposed method of judicial constraint**

As was observed in the preceding pages, there are problems with all the major approaches to constitutional interpretation. Therefore, what would be an appropriate mechanism to tackle the issue of potential judicial oversteps while simultaneously protecting justice, as an idea, which would also entail the solution of the counter-majoritarian dilemma.

As has been observed thus far, attempts at controlling the exercise of judicial interpretation are fatally flawed. Clark & Trubek pointed out that it is difficult to create principles to guide judicial

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<sup>53</sup> Clark C and Trubek D, 'The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition', 71(2) *Yale Law Journal*, 1961, 259-60.

<sup>54</sup> Clark C, Trubek D, 'The Creative Role of the Judge', 259-60.

freedom through the labyrinth of value-choices presented by each case of significance.<sup>55</sup> Consideration may thus need to be given to an idea, though controversial, espoused by Clark. He proposed that the whole idea of judicial constrictions is flawed and that some of the best decisions in American jurisprudence occurred when the judiciary shook off the shackles and explored the best solutions without limitations.<sup>56</sup> Clark pushes for the unprincipled decision-novel and unprecedented.<sup>57</sup> Cardozo noted that the nature of the judicial process is creation, rather than discovery, of law, and the birth and death of principles is simply a part of the process.<sup>58</sup>

Cardozo wrote about judges, “(t)his judge, even when he is free, is not wholly free...He is to draw his inspiration from consecrated principles.”<sup>59</sup> Building on this idea, and taking Clark’s proposal into account, the proposed method of judicial constraint is the liberation of the judiciary. Rather than trying to create an elaborate method to check and counter judicial reasoning, why not simply allow the judiciary the room to innovate, with the sole requirement that their judgements be grounded in the Constitution and the language of justice. This would ensure, at the bare minimum, that the inevitability of judicial creation is not conducted in an unprincipled manner.<sup>60</sup>

Furthermore, historical inquiry, into the purpose and intent behind drafters, as prescribed by the pragmatists, should not simply be abandoned but the binding aspect to it, as was proposed by the originalists, should be done away with. The approach that the pragmatists took to the study of history should be adopted.<sup>61</sup>

Providing a definition of justice would, then, be necessary to guide the judiciary in its pursuit of a justice-oriented approach to judging.

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<sup>55</sup> Clark C, Trubek D, 'The Creative Role of the Judge', 275.

<sup>56</sup> Clark C, 'A Plea for the Unprincipled Decision', 49(4) *Virginia Law Review*, 1963, 664-5.

<sup>57</sup> Clark C, 'A Plea for the Unprincipled Decision', 665.

<sup>58</sup> Cardozo B, *The Nature of the Judicial Process*, Yale University Press, New Haven, 1921, 166-167.

<sup>59</sup> Cardozo, *The Nature of the Judicial Process*, 141.

<sup>60</sup> Llewellyn K, *The Common Law Tradition: Deciding Appeals*, WS Hein, Buffalo, 1996; Clark and Trubek, 'The Creative Role of the Judge', 275.

<sup>61</sup> Pragmatists regard the study of history as not serving the purpose of informing judgements but simply to identify the existence of rules so that they can be re-evaluated and appraised. This process serves the purpose of identifying rules that need revision, outright rejection or acceptance- Posner R, 'Legal Pragmatism', 35(1-2) *Metaphilosophy*, 2004, 151-2.

## Justice

Justice, for the purposes of this paper, is defined to mean, as expressed by the classical scholars, ‘to each his own’.<sup>62</sup> Justice can be seen as involving two factors; “things, and the persons to whom things are assigned”.<sup>63</sup> Justice discriminates according to merit, according to the relevant excellence.<sup>64</sup> The idea underlying this idea of justice is that justice should be dispensed to the most deserving persons. Justice cannot, and should not, be dispensed on any other basis simply because any other form of distribution of justice would be seen as discriminatory- if justice were to be dispensed on the basis of appearance or wealth it would be unfair.<sup>65</sup>

Unfortunately, giving persons their dues cannot always be easily quantified as deciphering what a person is due is not a straightforward matter. This is where the natural law theory can be linked to another school of thought, the social contract theory, as advanced by Rawls, to determine what persons are due.

The social contract theory provided the framework within which John Rawls explored the idea of justice as fairness. Rawls argued that the proper way to approach the question of defining justice would be to consider the principles the people would agree to in an initial position of equality. Rawls’ approach starts by asking, if the people gathered to draft a social contract, what principles would the people choose? Rawls tackles the problem of unequal bargaining positions and inherent biases by putting in place the thought experiment, the veil of uncertainty, whereby people would be unable to know their predispositions- age, race, class, religion etc. This would lead the people to choose from an initial position of equality and would lead to people choosing principles that would be just. Rawls stated that the principles that would emerge from the selection process would be; firstly, we would agree to provide equal basic liberties for all citizens and secondly we would agree on social and economic equality, which should not be mistaken for equal distribution of resources but simply that the level of inequality permissible would be the level that is permissible to society.<sup>66</sup>

Applying Rawls’ idea means that justice is the outcome that is fairest in that, when we take away all the predispositions of thought from individual persons, the agreed principles would be the

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<sup>62</sup> Sandel M, *Justice: What's the Right Thing to Do?*, Penguin, London, 2009, 185.

<sup>63</sup> Aristotle, *The Politics* in Baker E (ed), Oxford University Press, New York, 1946, sec 1282b.

<sup>64</sup> Sandel, *Justice*, 185.

<sup>65</sup> Sandel, *Justice*, 185-6.

<sup>66</sup> Rawls J, *A Theory of Justice*, The Belknap Press of Harvard University, Cambridge, 1971; Sandel, ‘Justice’, 140.

basis for a just society. Rawls' conception of justice can complement the classical definition of justice in that the maxim that best sums up the classical definition, 'to give to each their own', can be linked to the original set of values that would be agreed upon.

These two conceptions are often proposed as alternatives to each other but it is possible to see the two theories as leading to similar outcomes.

Rawls' conception of justice aligns with the natural law school of thought in that the conception of the veil of uncertainty could be perceived to be a mechanism for deciding what the dues of each person is- he arrives at the conclusion that "All social values- liberty and opportunity, income and wealth, and the social bases of self-respect- are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's benefit".<sup>67</sup> What this would lead to in practice would be a system where each person is entitled to, at the bare minimum, the essentials without which life would be nearly impossible to live, or not worth living at all. Rawls captures what each person is due in this regards, and justice, within his conception, would constitute the provision of these basic minimums without which the life of the person would be hollow. Rawls further states that within the initial position equal basic liberties compatible with a similar scheme of liberties for others would be agreed on.<sup>68</sup> Within the frameworks of natural law and Rawlsian philosophy, the idea of giving persons their dues would be captured since the Rawlsian School argues for basic liberties to be provided which would lead to persons being given their dues; essentially an exposition of the natural law school of thought.

The question as to what one is owed could be deciphered with help from Rawls. He conceived of justice as containing two principles that the majority of people can agree to- basic liberties and socio-economic equality.<sup>69</sup> This fits in comfortably within the natural law theory since these two principles could cover the entire breadth of what people are actually due. Rawls elaborates and expounds on the idea that justice means giving people what they are due and highlights, through the use of a thought experiment, what he conceives as being due to people.

### **The outcome**

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<sup>67</sup> Rawls, *A Theory of Justice*, 54.

<sup>68</sup> Rawls, *A Theory of Justice*, 52-53.

<sup>69</sup> Rawls, *A Theory of Justice*, 302.

The end result of the recalibration of the method of judging to focus justice as the core of the court's interpretive function would be that courts would have to frame and structure their arguments and decisions in line with the ideal of justice. The proposed approach to justice would seemingly allow for a wider scope of decisions, thus empowering judges to decide matters with more flexibility. Despite the fears articulated by many scholars, it is argued that this would be an acceptable outcome. The reason behind this is that, as was noted earlier, there can only be one body, either the legislature or the judiciary, at the pinnacle of the judicial system. The argument as to why the judiciary, and by extension judges, are the more suitable body to be at the pinnacle shall be explored below.

Firstly, judges are not democratically elected and their life tenures free them from the pursuit of votes and favourable public opinion. This means that courts are free to pursue the correct outcome regardless of the popular outcome. This is the primary reason that is advanced for why courts are usually the forums where historic injustices end up being addressed.<sup>70</sup>

Secondly, the decision in *Johnson Muthama v Minister for Justice and Constitutional Affairs & Another*<sup>71</sup> has had a profound impact on the meritocratic nature of the legislative branch. The court pronounced that requirements for post-secondary qualifications are discriminatory on the basis of status and social origin.<sup>72</sup> This means that the legislative organ, as an almost purely populist body, is not as well equipped as courts to decide matters relating to the content of the law. This is a point that can be further explained by looking at the journey judges pass through on their path to becoming judges. The passage through law school, the bar association and the years of experience they shall have to rack up prior to their appointments means that they would be well versed in the functioning of the law and would also develop an appreciation for the intricacies of the law. This would also be an appropriate mechanism for addressing the fears of judicial activism since the exposure to *stare decisis* would sensitise judges to the importance of slow and measured steps forward rather than radical leaps. The pragmatic nature of the judiciary is explainable by the characteristics of the legal profession and not a product of the content of laws.<sup>73</sup>

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<sup>70</sup> As an example, think of the civil rights movement in America and the fact that many of the landmark moments were court victories.

<sup>71</sup> *Johnson Muthama v Minister for Justice and Constitutional Affairs & Another* (2011) eKLR.

<sup>72</sup> *Johnson Muthama v Minister for Justice and Constitutional Affairs & Another* (2011) eKLR.

Fears relating to the importation of personal value, of the judge, into judicial opinions may be exaggerated. The requirement that judges explain the reasoning behind their decisions, a requirement that is not imposed on legislatures when they pass law, means that any personal opinions would have to be structured in a way to meet the expectations of the demands of legal language. Holmes and Hasnas's writings should be in the back of the reader's mind but at the same time consideration should be given to the reality that value judgements are still expected to be framed within the structure of the language of the Constitution and the ideal of justice. It is no easy task to structure a value judgement in such a way, and if the judge does manage to do so it would be because the value judgement may not be a necessarily bad one. In any case, if the value judgement is negative then subsequent courts hearing similar matters would still have the option of departing from such a judgement using better arguments on justice and the text of the Constitution.

Questions may arise as to the scope for the functioning of the legislature. The legislature would still have a role- the passage of laws- but the ultimate authority on the validity of those laws would be the courts.

Fourthly, Boukema puts forward the perspective that "Judicial innovation is sometimes called for in order to do justice".<sup>74</sup> From this perspective, judicial innovation is called upon to ensure justice prevails, possibly at the expense of the predictability of the law as the judge may have to depart from a strict reading of the text, or from precedent, or may have to engage in legal construction<sup>75</sup> so that justice can be done. He goes on to state that the law needs to change with the economic, social and political circumstances and, occasionally, the legislative arm fails in its duty to enact this change leaving the judiciary with the challenge of meting out justice through archaic laws.<sup>76</sup> It usually does so- i.e. adapt the legal rules to the prevailing circumstances- when a case concerning the same is brought to the court.<sup>77</sup> One of the functions of the court is as a

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<sup>73</sup> Hasnas J, 'The Myth of the Rule of Law', 22-23.

<sup>74</sup> Boukema HJM, 'Legal Realism and Legal Certainty', 66(4) *Archives for Philosophy of Law and Social Philosophy*, 1980, 473.

<sup>75</sup> The judge may have to build upon the existing law and create law to address a situation where the law is unclear or no conclusion can be drawn from a reading of the law

<sup>76</sup> Boukema HJM, 'Legal Realism and Legal Certainty', 473.

dispute settlement mechanism. This means that they have to produce resolutions to all the matters brought before them. This mandate makes them the best platform to observe deficiencies in the law and to require that legislatures rectify them prior to the courts being able to reach an acceptable answer to the matter in question would require that legislatures make amendments in a manner resembling the 'just in time' concept in business<sup>78</sup> and would also entail a violation of the concept of legality.

If the argument that courts are the best body to be at the helm of the law is accepted, the next consideration would have to be how the courts would actually function within the conceptualisation of justice proposed. If one were to consider issues such as cases relating to business incorporation it is difficult to see how courts would consider the dues owed to the parties to the dispute, especially since such matters often hinge on technicalities. What solution would courts have to offer then? If one were to ascribe to the notion that all cases involve issues relating to justice then the court would simply have to identify the method by which the dispute would be resolved in a manner consistent with the ideal of justice, that the parties in the case be given their dues.<sup>79</sup>

## **Chapter Summary**

It is important to note that the conflict between certainty and justice would not exist in a land ruled by Plato's philosopher kings since they would capture all justice perfectly within their laws. The conflict arises in practice, however, because perfection cannot exist as part of the human condition thus our laws when reduced to determinacy, and the role of courts reduced to mere application, would lose the very flexibility that justice draws its life from.

The chapter has reached numerous conclusions that it is useful to summarise here as the next chapters hinge on these conclusions. Firstly, legal certainty cannot be the emphasis of a judicial system, from a practical perspective, regardless of its appeal from a theoretical standpoint. Secondly, the methods that scholars have proposed to check judicial power are inadequate. Thirdly, in the absence of any effective method of judicial control, which preserves the function

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<sup>77</sup> Boukema HJM, 'Legal Realism and Legal Certainty', 473.

<sup>78</sup> This concept entails that suppliers deliver their materials on demand to manufacturers when required by the manufacturers.

<sup>79</sup> Whether their dues be, for example, that the matter be decided in their favour and their prayers be granted or their dues be the imposition of a fine.



of justice, it may be justifiable to allow courts to decide matters based on justice and the Constitution. Fourth, in the battle between judiciary and legislature, it is imperative that courts be preferred, indeed this is the workable model.

## **Chapter Three: Statutory Certainty and justice-oriented decision-making in Modern Jurisprudence- Selected Cases**

This chapter shall seek to use case law in Kenya to highlight the decisions that are reached by courts utilising a justice-oriented approach and contrast these decisions to decisions made by courts where emphasis was laid on legal certainty, the judge followed the letter of the law.<sup>80</sup>

A useful point to note would be that judges, when deciding matters based on justice, often times ground their decisions in constitutional discourse. This is a useful mechanism to allow judges to assess matters based on justice and constitutional concepts rather than simply applying statutes regardless of the outcomes.

### **Justice-oriented decision-making**

#### ***L.N.W v Attorney General & 3 others***

In the case of *L.N.W v Attorney General & 3 others*, the Court considered the status of section 12 of the Births and Deaths Registration Act.<sup>81</sup> In declaring that section 12 is inconsistent with the Constitution, the Court had to balance two competing interests very intricately- that of justice and legal certainty.

The Court cited article 27 that provides that there should be no discrimination against people on account of their birth and read this article alongside article 53 and concluded that the rights in article 53 should not be denied from them regardless of whether they were born within a marriage or not.<sup>82</sup> Specifically, article 53(1) (e) provides that a child has the right to parental care and protection, involving both parents equally, regardless if they are married to each other or not.<sup>83</sup> Implicit in this right is the requirement that the child must know their parent therefore in the child's documentation the identity of the father should be included, completely contrary to the provision in section 12, and such inclusion should not be dependent on the will of the father. Article 53 (2) also provides that in all matters touching on the child, the best interests of the child should be of paramount importance.<sup>84</sup>

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<sup>80</sup> The cases used are not intended to be illustrative of any trends and are only used as examples.

<sup>81</sup> *L.N.W v Attorney General & 3 others* (2016) eKLR.

<sup>82</sup> *L.N.W v Attorney General & 3 others* (2016) eKLR.

<sup>83</sup> *L.N.W v Attorney General & 3 others* (2016) eKLR.

<sup>84</sup> *L.N.W v Attorney General & 3 others* (2016) eKLR.

The Court thus ruled that section 12 is unconstitutional and in violation of articles 27, 28 and 53 of the Constitution. None of the articles in the Constitution directly address the issue of whether the father's name should be included in register of births however the Court interpreted the Constitution to extend to this issue. In this case justice, the inclusion of the father's name in the register, triumphed over legal certainty, section 12.

This case serves as an example of justice-oriented judging in that, though the court utilised the Constitution to arrive at its decision, justice was a central theme in the decision. The court, in deciding as it did, ruled against discrimination, the inclusion of only mothers in the birth certificate. The decision could be seen as giving the mother her due, equal treatment regardless of her gender, and the child is also given his/her due, equal treatment regardless of the marital status of his/her parents being interpreted as meaning the child ought to be entitled to know who his/her father is regardless of the fact that the parents are not married thus the father is not in his/her life.

***Samuel G Momanyi v The Hon Attorney General & Another***

This matter involved a challenge on the constitutionality of section 45(3) of the Employment Act. Section 45(3) provides that:

*An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*<sup>85</sup>

The plaintiff in this matter had filed a case before the Industrial Court relating to unfair termination but the matter was struck off under section 45(3) since he had only worked for 11 months and 27 days rather than the full 13 months required under section 45(3). He then appealed to the High Court for a declaration that section 45(3) was inconsistent with articles 28, 41(1), 47, 48 and 50(1).<sup>86</sup>

The Court noted that the provision was not in line with the principles enshrined in the Constitution: equality and freedom from discrimination (article 27) and the right to access justice

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<sup>85</sup> *Samuel G. Momanyi v Attorney General & another* (2012) eKLR.

<sup>86</sup> *Samuel G. Momanyi v Attorney General & another* (2012) eKLR.

(article 48). Therefore the provision was declared unconstitutional to the extent of the inconsistency with the Constitution.<sup>87</sup>

This case involved justice-oriented judging in that the judge opted to give the employee his due by entitling him to sue for unfair termination regardless of the fact that the time period stipulated in the law had not yet been met.

***Beatrice Wanjiku & another v Attorney General & 3 others***

The Court in this matter considered the constitutionality of Order 22 rule 7(1) of the Civil Procedure Act that provides:

*Where a decree is for the payment of money the court may on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the court.*<sup>88</sup>

The Court considered the section of the Act to be an unnecessary infringement on the rights of the judgement-debtor thus unconstitutional. The provision, the Court noted, did not entitle the judgement-debtor to sufficient notice or the opportunity to pay the debt regardless of the fact that the judgement-debtor has the means to do so. The Court in giving, its ruling, cited provisions of the repealed Constitution, specifically that the provision would infringe the right to due process, and provisions of the 2010 Constitution, on right to a fair trial, to support the finding it made. The Constitutional provisions and the ideal of justice, persons being given their dues, were in line therefore the Court was guided by justice and ignored the demands of legal certainty.<sup>89</sup>

This case highlights justice-oriented judging since the court emphasised the dues of persons, due process, and provided that laws infringing such would be impermissible.

***P.A.O & 2 others v Attorney General***

The Court was faced with an application regarding the wording of the Anti-counterfeit Act, specifically section 2 (d) of the Act which defines counterfeiting as:

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<sup>87</sup> *Samuel G. Momanyi v Attorney General & another* (2012) eKLR.

<sup>88</sup> *Beatrice Wanjiku & another v Attorney General & another* (2012) eKLR.

<sup>89</sup> *Beatrice Wanjiku & another v Attorney General & another* (2012) eKLR.

*“in relation to medicine, the deliberate and fraudulent mislabeling of medicine with respect to identity or source, whether or not such products have correct ingredients, wrong ingredients, have sufficient active ingredients or have fake packaging”*.<sup>90</sup>

The petitioners, using articles 26(1), 28 and 43(1) as the basis of their application, emphasised that their rights to life, human dignity and health would be infringed upon. The petitioners further emphasised that the Act did not specifically exempt generic drugs and medications from the definition of counterfeit products. The petitioners stated their concerns that, by failing to exclude generic drugs from the definition, the definition provided would prohibit the importation and production of generic drugs within Kenya.<sup>91</sup>

The Court, in arriving at its decision, agreed with the petitioners that the Act did indeed threaten to violate their rights under the Constitution of Kenya, namely articles 26(1), 28 and 43(1), and therefore ruled in favour of the petitioners.<sup>92</sup>

This case raises a key issue. The Court, in arriving at its decision, rightly acknowledged that there was a risk of the terms generic and counterfeit being used interchangeably to deny persons access to affordable medication and opted to remedy the problem by deciding that the provisions of the Act, in so far as they would threaten or limit *“access to affordable and essential drugs and medicines including generic medicines for HIV and AIDS, it infringes on the petitioners’ right to life, human dignity and health”* as guaranteed under the Constitution.<sup>93</sup> Additionally the Court declared that enforcement of the Act *“in so far as it affects access to affordable and essential drugs and medication particularly generic drugs is a breach of the petitioners’ right to life, human dignity and health guaranteed under the Constitution”*.<sup>94</sup>

In this case the judge did side with justice and, crucially, opted to ‘rectify’ the legislation passed by parliament in that it ‘amended’ the Act to protect the rights of persons to affordable healthcare.

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<sup>90</sup> *P.A.O. & 2 others v Attorney General* (2012) eKLR.

<sup>91</sup> *P.A.O. & 2 others v Attorney General* (2012) eKLR.

<sup>92</sup> *P.A.O. & 2 others v Attorney General* (2012) eKLR.

<sup>93</sup> *P.A.O. & 2 others v Attorney General* (2012) eKLR.

<sup>94</sup> *P.A.O. & 2 others v Attorney General* (2012) eKLR.

This case serves to illustrate another scenario where persons' dues were emphasised- right to life, human dignity and health.

## **Attempts at promoting legal certainty in decision-making**

### ***Geoffrey Andare v The Hon. Attorney General, Director of Public Prosecutions and Article 19- East Africa***

The case of *Geoffrey Andare v The Hon. Attorney General, Director of Public Prosecutions and Article 19- East Africa*<sup>95</sup> shall be the first case analysed to illustrate the outcome when courts opt to advance the cause of legal determinism, resulting in what could be deemed an unjust outcome.

The Court in this matter declared section 29 of the Kenya Information and Communications Act unconstitutional for, among other reasons, being in violation of article 33 of the Constitution- the provision, in the Court's opinion, "*imposes a limitation on the freedom of expression in vague, imprecise and undefined terms that go outside the scope of the limitations allowed under Article 33 (2) of the Constitution*"<sup>96</sup>- and the failure on the part of the respondents to demonstrate that such limitations are justifiable under article 24.<sup>97</sup> The Court further determined that the provisions in section 29 were so wide that they were left to be interpreted by judicial officers.<sup>98</sup>

The scope provided in Article 33(2) is not a conclusive list and to interpret it in a manner that deems it conclusive would be to interpret the Constitution in a literal manner. If we are to view constitutions as 'alive' then to interpret the Constitution in such a manner to deny the possibility of organic growth would be counter-intuitive. The unfortunate reality is that for justice to be guaranteed in the Constitution there is a need for it to be interpreted in a manner that leads it to be expanded upon in the future, in line with justice. As has been noted, the language of the law can justify any outcome thus there is a need to use it to advance the cause of justice. However, for stability to prevail in the law the Constitution must be a dead document. The Court in this

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<sup>95</sup> *Geoffrey Andare v The Hon. Attorney General, Director of Public Prosecutions and Article 19- East Africa* (2016) eKLR.

<sup>96</sup> *Geoffrey Andare v The Hon. Attorney General, Director of Public Prosecutions and Article 19- East Africa* (2016) eKLR.

<sup>97</sup> *Geoffrey Andare v The Hon. Attorney General, Director of Public Prosecutions and Article 19- East Africa* (2016) eKLR.

<sup>98</sup> *Geoffrey Andare v The Hon. Attorney General, Director of Public Prosecutions and Article 19- East Africa* (2016) eKLR.

case, by utilising article 33 as a strict barometer for freedom of speech, opted to side with an argument that implicitly prioritises legal certainty and predictability over justice.

Though this case may at first sight be deemed to be an instance of justice-oriented judging, it is, on closer inspection, a clear example of a case where the judge opted to side with legal certainty. Though the court did opt to throw out a statutory provision that was, in fairness, on the grounds that article 33(2) was a definite list of situations when freedom of expression can be limited, this position actually advances the cause of legal determinism. To follow the logic of this decision would lead to the Constitution being rendered, at some point in the future, due to the reading of it as dead document, irrelevant. The promotion of justice-oriented judging would have required the court to assess the statutory provision and assess whether the limitations espoused by statute are justifiable from the perspective of the dues of the persons. In doing so the court would have had to weigh freedom of expression against the right to privacy. Additionally, the dues of each person would have been considered, the justice-oriented approach would probably have asserted that the individual is due his right to express himself and only if he violates the right of the other can any action be taken against him.

### ***AIDS Law Project v Attorney General et al***

The case revolved around the constitutionality of section 24 of the HIV and AIDS Prevention and Control Act. The Court additionally ruled that section 24 was too broad and would violate individuals' rights to privacy secured under article 31.<sup>99</sup>

The Court noted that legislation should not be so ambiguous such that judicial interpretation would be needed for individuals to know what is prohibited. The Court went on to state that criminal sanctions required clarity and certainty. The Court determined that since the term 'sexual contact' lacked a definition under section 24, the term was vague and section 24 was too broad.<sup>100</sup> The AG proposed that the term be interpreted using the normal meaning of the term but his recommendation was not accepted.<sup>101</sup>

The Court in this case fell heavily on the side of legal certainty. The Attorney General, during the proceedings, noted that the Constitution guaranteed the right to access information held by

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<sup>99</sup> *AIDS Law Project v Attorney General et al* (2015) eKLR.

<sup>100</sup> *AIDS Law Project v Attorney General et al* (2015) eKLR.

<sup>101</sup> *AIDS Law Project v Attorney General et al* (2015) eKLR.

another for the exercise or protection of a fundamental right or freedom (the right to life and highest attainable standard of living<sup>102</sup>) and, therefore, this necessarily involved access to information regarding the HIV status of their partners.<sup>103</sup>

The Court however declared section 24 to be unconstitutional due to it being vague and the likelihood that the provision would infringe upon individuals' rights to privacy, as guaranteed under article 31 of the Constitution.<sup>104</sup>

The court in this matter opted to utilise the reasoning that because of the vague drafting of the law and because of the right to privacy, persons with HIV would not have to disclose their status to persons potentially at risk of being infected by sexual contact between them. The fixation of the court on privacy rights, and the failure of the court to consider the rights of persons potentially at risk of contracting an incurable, fatal disease, can be illustrative of the type of decision typical of a court focusing on legal certainty. The court opted to utilise constitutional provisions and read them as is, without assessing the dues of persons at risk of contracting the disease.

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<sup>102</sup> *AIDS Law Project v Attorney General et al* (2015) eKLR.

<sup>103</sup> *AIDS Law Project v Attorney General et al* (2015) eKLR.

<sup>104</sup> *AIDS Law Project v Attorney General et al* (2015) eKLR.



## Chapter Four: Lessons taken away from the Kenyan jurisprudence

The last chapter focused on the case law reflecting the two approaches central to this paper, the first being a justice-oriented approach to judging and the second being a legal certainty-centred approach to judging.

The trends that emerge from the justice-oriented approach are particularly illuminating. The judges seemed to be faced with laws that were poorly drafted, supporting the case made for the court being at the apex of the legal regime.

All the cases on justice-oriented judging were matters where judges considered the dues of persons and arrived at solutions that could objectively be described as in line with the conceptualisation of justice offered in this paper. The dues of persons, their rights in these cases, were considered and the decisions were in line with their rights.

Additionally, as was noted in the case of *Samuel G Momanyi v The Hon Attorney General & Another*, the increase in arbitrariness of the law, as noted by Endicott, when certainty is emphasised is an issue that Kenyan courts have indirectly faced. The 13 month stipulation is a provision that would lead to arbitrary outcomes, like-cases would not be treated the same owing to a time stipulation that is very difficult to understand.

The case of *P.A.O & others v Attorney General* is an especially interesting case as the Court raised a question as to the intention of the drafters of the Act in question and attempted to decipher their intent by deducing what the spirit of the law was.<sup>105</sup> The difficulty anyone would have in stating that the Court did actually capture the intent of the founders captures a profound reality, the inappropriateness of originalism, particularly in the Kenyan context.

In the cases where legal certainty was prioritised, the courts often employed in their reasoning language suggestive of a lack of any evaluation as to what is right but simply assessed the matter based on the existing law. How the court, in the case of *AIDS Law Project v Attorney General et al*, arrived at the conclusion it did, that the rights of privacy are to be prioritised over the other

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<sup>105</sup> The court deduced that it was not standards and quality since the Act did not place much emphasis on it.

rights in question, is a difficult question to answer. Additionally, the case of *Geoffrey Andare v The Hon. Attorney General, Director of Public Prosecutions and Article 19- East Africa*, raised numerous issues with the conceptualisation preferred by this approach. The Constitution is intended to be a document that adapts with the times. Thus an evolutionary reading ought to be given to it. The court, in opting to read the Constitution strictly, opted to treat it as a dead document. The danger with this is that it could lead to the stunting of society's development, if the maxim that law influences society is to be believed, or it would lead to the law being irrelevant as societal norms forge ahead of its contents.

The cases on legal certainty do raise an interesting point, a potential flaw in justice-oriented judging- how are judges to decide cases where both sides have valid claims?

In answering this question, the obvious answer would be that judges would have to assess the dues of both parties and then assess whether the case of one party is weightier than the other. This can be illustrated by the *AIDS Law Project* case where the court ought to have prioritised the right to life, and the right to information, over and above the right to privacy. However, there are cases where the claims from both sides would be more balanced, as in the case of *Geoffrey Andare v The Hon. Attorney General, Director of Public Prosecutions and Article 19- East Africa*. The balance to be struck between the right to privacy, on the one hand, and freedom of expression, on the other, is a question that is difficult to address. Individual cases would have to be looked into, in such cases, and decisions would have to be tailor-made for each case; perhaps considerations, such as the impact on each party of the actions of the other, could be factored into the court's decision.

The final point to be noted is that the attempts by courts, to maintain legal certainty, as the focal point of the legal system, are flawed. A better focal point, it is argued, would be justice-oriented reasoning as it ensures that the parties are the central focus of the system rather than the laws. If the law is not serving the people then it is not sufficient.<sup>106</sup>

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<sup>106</sup> This should not be viewed as a call to populism but as a call to an objective standard that does not benefit one party to the detriment of the others.

## **Chapter Five- Final thoughts**

This paper has defined justice from both the Rawlsian and the natural law perspective. Either school could suffice to provide a workable and good definition of justice, it is the author's opinion that there are very few other schools of thought that could provide as complete, acceptable and coherent a definition of justice as these two schools.

Additionally, the paper has focused on the assumption that no effective mechanism exists to check judicial discretion while not paralysing the court in its mandate to mete out justice. This position could be incorrect but the author did not come across any adequate methods for balancing the two interests.

Finally, the paper has also proceeded on the assumption that the system of checks and balances, which so many countries proudly call out as the backbone of their democracy, is flawed. The primary reason for this is that government needs finality in decisions thus one body must be superior in government, from a policy perspective. This could be a flawed perspective, i.e. the idea of a functioning system of checks and balances could indeed be possible.

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