‘Constitutions without constitutionalism’ and judicial leadership in Kenya

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Abstract

Judicial leadership and ‘constitutions without constitutionalism’ are two opposing but useful concepts to demonstrate the oppositional stance taken by a minority of judges in safeguarding the rule of law in Kenya. Okoth-Ogendo accused African states of adopting constitutions not for the sake of rule of law, but to consolidate their hegemonic power through law – what Issa Shivji referred to as ‘rule by law’. I conducted an empirical study on the role of courts in constitution-making in 2018. At the time, the conversations were focused on persistent constitutional problems that garnered immense public-interest litigation: the two-thirds gender principle, and the right to housing. After the empirical study, I followed the trajectory of these judges, some of whom were involved in the subsequent *Building Bridges Initiative Case* on constitutional amendments by popular initiative. For this reason, I focus on adjudicatory leadership, not only in the two themes of the two-thirds gender principle, and the right to housing, raised in the 2018 study, but also on the BBI cases in constitutional amendments. A central theme is the retaliatory backlash against these few oppositional judges involving huge personal and professional sacrifices.

Keywords: Kenya, constitutions without constitutionalism, judicial leadership, politicisation of the judiciary

My aim with this paper is to show the importance of critical and oppositional judicial leadership in safeguarding the rule of law. A minority of judges in Kenya are carrying out the work of guarding the rule of law. These judges have provided the necessary judicial leadership, by taking a critical and oppositional stance to politicians’ antics to water down the Constitution and trump the rule of law. They have exercised judicial leadership amidst retaliatory repercussions, involving huge personal and professional sacrifices, as well as institutional

backlash from the other two arms of government (legislative and executive) aimed at intimidating individual judges, and undermining the credibility of the institution, from budgetary cuts, verbal insults through the press, and open defiance of court orders.

The paper is based on both a longitudinal study on judges in Kenya, and a constructivist grounded theory[1] empirical study that I conducted between October and December 2018 in Kenya on the role of the judiciary in constitution-making. In the 2018 empirical study, I interviewed constitution review experts (CREs): members of the Committee of Experts on Constitution Review (CoE), Constitution of Kenya Review Commission (CKRC) and Commission for the Implementation of the Constitution (CIC); public-interest lawyers (PILs); civil society rights activists (CSRAs); and ten judges – three judges of the Supreme Court (SCJs), four Court of Appeal judges (CAJs), and three High Court judges (HCJs). I carried out two focus-group discussions at the British Institute of Eastern Africa, comprising human rights lawyers involved in public-interest litigation in the three senior courts since 2010. Using a list of broadly open-ended and semi-structured questions shared in advance, I allowed free-flowing conversation between the study participants. The conversation was mostly led by the participants with few interjections from me. I observed with an open mind, and we covered interesting and unanticipated topics. Participants discussed two pressing constitutional problems of the time: the *implementation of the two-thirds gender principle*, and the *right to housing for dwellers of informal settlements on public land*. I have dubbed these issues "the battle for constitutional rights".

I used an inductive thematic analysis model[2] to (re)group the study data in constantly recurring themes. It was very important to let the data speak for itself, allowing themes to emerge organically instead of superimposing them onto the data. A recurring theme was judicial oversight of the other two arms of government. I argue that judicial (adjudicatory) leadership is

an apt analytical framework to ground the study findings, and therefore devote two substantive sections of the paper to discussing judicial leadership in the battle for constitutional rights. Having followed the trajectory of the judges from the 2018 study, some of these were subsequently involved in the case on constitutional amendments in 2020, *BBI* [Building Bridges Initiative*]*.[3] I therefore devote a section of the paper to judicial leadership on unconstitutional constitutional amendments and the *BBI*.

Judicial leadership has traditionally been defined in three dimensions: administrative leadership (judicial governance), community leadership (concerned mainly with the extra-judicial functions of the courts) and jurisprudential leadership. In developing democratic contexts, Upendra Baxi's 'juristic adjudicatory leadership'[4] is close to home, and useful to explain the work of critical and oppositional judges in Kenya. Jurisprudential or adjudicatory leadership 'refers to the influence of a given judge on the decisions or jurisprudence of the court, in a specific area, or more generally',[5] and may involve 'influence over time, as well as persuasion in individual cases ... the development of a line of thought at odds with the court's general position but which is nonetheless jurisprudentially important'.[6] Baxi writes that adjudicatory leadership 'serves as a marker of the emergence of a dialogic adjudicative leadership between/amidst the voices of human and social suffering'.[7] He argues that adjudicatory leadership is an enormously complex task, directing attention to organisational and hermeneutic leadership and the political 'as sites of constitutional striving by the Court producing changing meanings of rights, development, governance, and justice'.[8] Baxi gave the example of India's Supreme Court that has become an 'institutional political actor' that practises both juristic activism (producing jurisprudence), and democracy-enhancing jurisprudence.[9] Obviously, this seriously challenges the notion that courts should not engage in

politics (public policy), a position mostly endorsed in the Anglo-American liberal constitutionalism, so famously pronounced in *Marbury v Madison*.

The way jurisprudential leadership works is that:

> […]a top court may contain judges who, while not holding one of the court's formal leadership roles ... nevertheless emerge either in discrete areas of case law, or vis a vis a 'block of the court', or perhaps even more expansively in most cases, as the court's intellectual leader.[10]

Put simply, these judges influence their peers by the sheer force of their intellect and the clarity of their thinking.[11] Jurisprudential leadership sometimes overlaps with administrative leadership, so that formal administrative leadership 'may provide tactical advantage, or respect for the formal role may translate into informal powers of persuasion in decision-making'.[12] Both scenarios are applicable to the Kenyan scenario of judicial leadership studied in this paper. The first two Chief Justices of Kenya (CJ David Maraga, 2016-2021, and most notably CJ Willy Mutunga, 2011-2016) have provided some form of jurisprudential and extrajudicial (community) leadership overlapping with their formal administrative role as Chief Justices, to preserve the gains of constitutional reforms under the 2010 Constitution so constantly under threat of dilution by the political elite class.

The overlapping jurisprudential/administrative form of leadership leads me to consider more critically the role that Chief Justices play in developing democracies such as Kenya. For instance, Stephanus Hedrianto argues that the Constitutional Court of Indonesia needed a visionary leader to 'maximise the structural advantage of the court ... and to deal with the challenges and pressures from the Government'.[13] This leadership was provided by the first two Chief Justices of the Indonesian Constitutional Court: Jimmy Ashidique (2003-2008), and Mohammed Manfud (2008-2013). Moeen Cheema undertakes a similar study in the developing democracy of Pakistan, examining the role of Chief Justice Iftikhar Muhammad Chaudhry

(2005-2013), as 'the Supreme Court of Pakistan underwent a remarkable transformation in its institutional and constitutional position'.[14]

Okoth-Ogendo charged African postcolonial nations with having 'constitutions without constitutionalism', characterised by a 'commitment to the idea of the constitution, but rejection of the classical notions of constitutionalism'.[15] Okoth-Ogendo and others have argued that most African leaders have valued constitutions solely for their international significance, conferring sovereignty on the state, and immunity for its head – *not* sovereignty for its citizens. By the time Okoth-Ogendo published his seminal text on 'constitutions without constitutionalism', the 1963 Independence Constitution had been amended numerous times. Such abundantly amended post-independent constitutions upholding presidential autocracies have plagued many African countries – described in Nwabueze's 'Presidentialism in Commonwealth Africa'.[16]

Nwabueze describes how the African countries with post-independence constitutions in his study (Nigeria, Ghana, Gambia, Sierra Leone, Zambia, Tanzania, Uganda, and Botswana, Lesotho, and Swaziland) eradicated the constitutional safeguards of post-independence Westminster models in favour of American presidentialism – but without its accompanying precautions. He described this presidentialism as 'personal, permanent, mystical and pervasive';[17] so much so that in 1957, Ghana's Minister of Interior Krobo Edusei declared in Parliament that, 'there is nothing in the country of Ghana that the Government cannot do, except to change a man into a woman and a woman into man'.[18] Ghana was, after all, the pioneer in enacting American presidentialism. Without even covering military regimes in his study (there were 20 military regimes in commonwealth Africa at the time), Nwabueze concluded that:

> Presidentialism in Common-wealth Africa has tended towards dictatorship and tyranny, not so much because of its great power, as because of insufficient constitutional, political and social restraint upon that power, and because conditions in Africa, with the opportunities for total mobilization of the nation and the greatly

> enhanced authority which they give to the President, are particularly favourable to the growth of dictatorship.[19]

Makau Mutua described Kenya as a Leviathan postcolonial state that is 'rotten to the core'.[20] Because 'while independence brought African rule, from the point of view of the state, little changed, the colonial state survived, but it morphed into a postcolonial variant', Mutua saw a 'culture of governance' created, that rewards sycophancy, loyalty, and subservience, and punishes innovation, merit and critical analysis.[21] Through constitutional amendments, imperial presidencies such as those of Kenyatta and Moi consolidated executive power, removed any pretence of democracy, and created a state of repression and accumulation, that 'spawned mass atrocities, corruption, economic deprivation, and denial of basic rights'.[22]

My 2018 empirical study in Kenya showed that only a handful of judges can truly be described as exercising jurisprudential leadership. These judges were uncomfortable with labels such as 'activist' or 'feminist', preferring simply to be seen as doing their job in guarding constitutionalism. These judges push the margins of public law remedies, sometimes borrowed from other Global South jurisdictions, such as South Africa and India, to ensure their judiciary pronouncements will be effective and fully implemented by government. Some of these public law remedies involved a dialogic activism[23] between the executive and the judiciary of structural interdicts,[24] continuous *mandamus,*[25] and the suspension of invalidity orders[26] to ensure that the executive complies with their judgments – despite the applicability of these public law remedies being contested in Kenya.

Most of these judges are concentrated in the High Court, for no special reason other than those relating to the structure of the judiciary, as it is the court of first instance with original jurisdiction to determine constitutional and human rights matters. As most matters are made of a single judge (or rarely, three-judge-benches), their adjudicator leadership is unlikely to be drowned out by other conservative voices in mandatory and larger collegiate benches in the

Court of Appeal and Supreme Court. It is therefore no accident that these judges were mostly in the constitutional and human rights divisions; such cases rarely find their way to the Court of Appeal, or Supreme Court – which is in essence a "political" court, with very limited jurisdiction related to presidential elections, petitions and advisory opinions.

My claim is not that judicial leadership will always be a prerequisite to a successful constitutional dispensation. Rather, judicial leadership matters especially for Global South developing democratic contexts, where courts are not *designed* to serve the masses, or even uphold the rule of law. Judicial leadership is not an enviable role – it can involve huge personal and professional sacrifices. Scholars of judges in developing democracies warn that their efforts 'can be met with backlash that can undo some of their achievements'.[27] Indeed, the critical and oppositional judges in this study have faced retaliatory repercussions and blatant disobedience of their court orders, as well as other undermining tactics from the other two arms of government. These setbacks point to the wider discourse on the limitations of judicial activism to bring about large-scale redistribution of power and wealth, but also that there is real value in the exercise of judicial leadership (even just by a few minority judges) for the rule of law and justice.

Thus, while the exercise of judicial leadership is congruent with the ongoing global expansion of judicial power,[28] such critical and oppositional judicial leadership often leads to a victimisation of the judges exercising critical or oppositional judicial leadership. Judges are criticised and vilified publicly in political discourse. However, we must also be careful not to glorify the effort or power of a single judge – much lobbying and advocacy happens outside court, and we may reflect on Marc Galanter's 'justice in many rooms'.[29] Although he was writing about private orderings and indigenous law, I borrow Galanter's concept to show that judicial leaders do not work in isolation – before a case comes before the judge, often much

advocacy, lobbying, civic education, and public-interest litigation has occurred to build momentum, as may be seen in the cases of the two-thirds gender principle and *BBI*.

The following section of the paper provides the context of the Kenyan judiciary, in line with the methodological law-in-context approach of the paper. This framework will show that the exercise of judicial leadership is a result of constitutional and judicial reforms geared towards empowering a previously timid institution. This is followed by two substantive sections titled 'judicial leadership in the battle for constitutional rights', and 'judicial leadership on constitutional amendments'. The paper concludes with reflections on the retaliatory repercussions that these judges have faced for exercising judicial leadership.

Kenya's judiciary in context

Judicial leadership in Kenya post-2010 can be described as a project and a product of judicial empowerment.[30] This can be achieved either through the actions and decisions of powerful local, regional and international actors at decisive moments[31] – such as civil society activism,[32] international peace-keeping and reconciliation efforts that resulted in the Agenda IV constitutional and institutional reforms following the 2007-8 post-election violence[33] – or through judicial reforms.[34] James Gathii's detailed exploration of constitutional and judicial reforms (especially post-2007 to 2010) is particularly worth consideration, for deeper background on the process; likewise Loughlin's analysis of *Njoya*,[35] in which the courts signalled a more liberal and purposive approach to constitutional interpretation than judicial review alone, offering 'a powerful example of the judicial branch offering prescriptive, and decidedly creative, guidance on the legitimate wielding of constituent power'.[36]

Kenya's judicial empowerment signalled its receptiveness to a global trend of judicial empowerment 'signified by the increasing reliance upon courts to solve core political

controversies or public policy questions'.[37] This global context provides a useful framework and explanation for the retaliatory backlash that the minority of judges exercising judicial leadership have faced, consistent with the findings in this study – what has been termed as the 'politicisation of the judiciary'.[38]

Okoth-Ogendo was a central figure in Kenya's two-decade journey of constitutional reform that culminated in the 2010 Constitution, as the vice-chairperson of the first review commission (the Constitution of Kenya Review Commission, or CKRC) of 2001. CKRC enacted the first constitution draft of 2004 at Bomas of Kenya, popularly known as the *Bomas Draft.* Perhaps it should come as no surprise that a central concern for Okoth-Ogendo and chairperson Yash pal Ghai was for the new Constitution provisions to be so tight it would be virtually impossible for the endless whims of ruling politicians to amend it. Another concern for the CKRC was to ensure a robust Bill of Rights capable of implementation, following the decades of a scant and meaningless Bill of Rights with serious clawbacks designed primarily to protect property interests of British white settlers and African elites. Socio-economic rights under Article 43 (including the right to housing) and the two-thirds gender principle in Articles 27(8) and 81(a), which state that 'not more than two-thirds of the members of elective and appointive bodies shall be of the same gender' are part and parcel of such robust constitutionalised rights.

The *Bomas Draft* was one of three draft constitutions consolidated into the final 2010 draft by the 2008 Committee of Experts on Constitution Review (CoE), alongside the 2004 *Wako Draft* and the CoE's 2009 *Harmonised Draft*. The CoE ensured it was practically impossible to amend the Constitution without a rigorous process involving the sovereignty of the people. These sovereignty provisions, and provisions on the rigorous process of constitutional amendments were part of several entrenched constitutional provisions first to be

attacked by politicians in their pursuit of endless amendments. The constitution review process in Kenya is contained in the final Report of CKRC, as well as the CoE's Final Report, of October 2010. So far, there have been 14 constitutional amendment attempts however, through several unsuccessful legislative bills, including President Uhuru Kenyatta's *BBI,* the *Constitution of Kenya (Amendment) Bill 2020.*

Judicial leadership in the battle for constitutional rights

The battle for constitutional rights in the courts has been evident mostly in relation to the right to housing and the two-thirds gender principle. The right to housing issue has been raised following multiple evictions of inhabitants of informal settlements on public land by the Kenyan Government. The Government has failed to implement the two-thirds gender principle to date. Both constitutional problems have involved immense public-interest litigation in the Constitutional and Human Rights Division of the High Court.

Justice Mumbi Ngugi, Justice Lenaola and Justice Odunga are the judges accredited by study participants as exercising foremost judicial leadership in developing the new socioeconomic jurisprudence in Kenya on the right to housing, during their tenure as members of the Constitutional and Human Rights Division of the High Court between 2011-2018. Justice Mumbi Ngugi and Justice Lenaola were singled out by participants as having pioneered and developed the right to housing jurisprudence in Kenya in the cases of *Satrose Ayuma*[39], *Mitubell*[40] and *William Musembi.*[41] Based on evidence from existing case law, I would also add Justice Muchelule in *Ibrahim Sangor,*[42] Justice Odunga in *Kepha Omondi Onjuro,*[43] *Ngara Open Air Market Nairobi Case*,[44] and *Francis N. Kiboro,*[45]*and* Justice Musinga in *Susan Waithera Kariuki.*[46]

The adjudicatory leadership provided by all these judges has been specifically on the justiciability of socioeconomic rights. The judges required alternative housing for some thousands of informal settlements dwellers evicted from their homes by the Government and private entities for 'development' purposes, relying on Article 23 of the Constitution to order the Government to report back to the court on their progress within a set time. A leading public-interest lawyer (identified as PIL#1 in my interviews) observed:

> Article 23 [of the Constitution] has been used by the courts to considerably increase the types of orders they're asking for. In the scope of socio-economic rights for example, ... courts in *Satrose Ayuma,*[47] *Mitubell*[48] ... gave orders of structural interdicts ... 'after 30 days come back to us with policies!' ... *Satros Ayuma* was first by Justice Lenaola, *Mitubell* by Justice Mumbi Ngugi, and *Ibrahim Sangor*[49] by Justice Musinga ... And in *Mitubell* and *Satros Ayuma*, they used Article 23.

The judges borrowed the public law remedy of *structural interdicts,* popular in South Africa as in the case of *Grootbom*,[50] and *continuous mandamus,* popular in India. This sort of judicial leadership is particularly effective – applying a Global South-South judicial collaboration / borrowing, shifting from traditional North-South borrowing of past judges.

Satrose Ayuma, *Mitubell,* and *Wiliam Musembi* were the most contentious cases. In *Mitubell,* these were some 3065 households of 15,325 inhabitants of Mitumba Village near Wilson Airport. In *Satrose Ayuma,* there were thousands of tenants of Muthurwa Estate, and in *William Musembi* several hundred occupants from Moi Educational Complex Centre. All three cases involved thousands of evicted children, whose education was disrupted in the middle of a school year.

Mitubell and *William Musembi* were the subject of appeals all the way to the Supreme Court. The Court of Appeal overturned Justice Mumbi Ngugi's application of structural interdicts in both cases, but the Supreme Court affirmed Justice Mumbi Ngugi's adjudicatory leadership. It is extremely impressive that the efforts of a single judge sitting alone in the High

Court could have such a ripple effect on the entire justice system, causing a shift in socioeconomic rights jurisprudence, and adopting remedies not exactly stipulated in Kenyan law.

The applicability of structural interdicts in Kenya's courts was the subject of appeal in the Court of Appeal in *Mitubell 2*[51] and *Mitubell 3*.[52] The points of appeal were the justiciability and enforceability of socioeconomic rights, the tension between the right to housing and the right to private property, interpretation of the scope of supervisory powers of the High Court under Article 23 of the Constitution, whether outstanding issues can be handed by the court after it has delivered its judgment, and the extent to which courts can adopt foreign comparative jurisprudence.

Even amongst public-interest lawyers, the applicability of structural injunctions and post-judgment supervisory authority over the other two branches of government was controversial.

> *Mitubell* was unfortunately overturned in the Court of Appeal when the court stated that 'oh, we are a common law country ... you can't issue a judgment and expect the court to come back ... on what basis are we coming back to rule? (CSRA#5).

This view was supported by CAJ#3: 'the excuse is that we don't have it in our law – we don't have it in our system'. CSRA#5 was not convinced: 'how do you move the court based on that advisory opinion? Who then can come to move the court? ... What will you go under? ... Contempt of court?' PIL#3 agreed:

> according to our laws, once the court has delivered its judgment, that's it. The only thing you can now do is to file another suit to say that they failed to comply with court orders. But other than that, the court itself does not have a mechanism after it has delivered its judgment ... there is no specific provision for that. I don't know whether that will be the court giving itself sort of a new supervisory power.

Judges were roughly divided into two ideological camps on the extent of judicial supervisory powers over the Executive and Parliament. The first view, expressed by PIL#2, was

that 'the court does not have supervisory role or jurisdiction *per se* ... the court does not ... have those powers or functions after the judgment'. Two judges and about half of public-interest litigators were of the view that follow-up mechanisms should be included within the judgment:

> We have done that in the High Court ... the court would say that 'I have given you three months from this particular date – so when you come on this particular date, I want to be given a report of the following issues 1, 2, 3'! (CAJ#1).

SCJ#2 observed:

> You've heard of 'dialogic activism'...That comes from Colombia. In India, they call it 'Continuous Mandamus', particularly in relation to socio-economic rights, 'You say you don't have resources – find the resources within six months!' ... And then you use the community – the people – to monitor. ... That's why it's a dialogue between the court, the State and the people ... dialogic activism means just that – the judiciary takes part in pressurising and mitigating the *status quo*.

The adjudicatory leadership exercised on the implementation of the two-thirds gender principle did not share such a success story, however; despite immense public-interest litigation, it has not yet been realised, more than a decade later.[53] Justice Musinga, Justice Mumbi Ngugi, Justice Mativo, Justice Onguto and Justice Mwita have been at the forefront of affirming the principle and providing judicial direction to Parliament and the Executive on its implementation.

The first wave of constitutional litigation on the two-thirds gender principle was on the public appointments to new public offices established under the 2010 Constitution. *Constitutional Petition No. 16 of 2011*[54] was filed by eight women's rights organisations, challenging four nominations by the President on 28 January 2011 to the offices of the Chief Justice, Attorney General (AG), Director of Public Prosecutions, and Controller of Budget – none of the nominated candidates was a woman. Justice Musinga ruled that

> it will be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28th January, 2011.

This process was followed by intense advocacy and lobbying, leading the AG to apply for an advisory opinion in the Supreme Court in 2012. The Supreme Court advised that the principle was to be realised progressively by 27 August 2015 in Advisory Opinion No. 2 of 2012, – widely perceived as a means of delaying the implementation of the principle for five years.[55] Public-interest lawyers in focus groups were also of the view that the AG was:

> ... buying himself time ... he was very noncommittal on what he had been advising, as the legal advisor of the Government prior to filing the suit ... If the AG was genuine, he would have gone to court to ask for the formula of implementation. How do we achieve this? It should have been a question of how it should be achieved ... and not when. It's the how, not whether and when. (PIL#2).

Nonetheless, the principle was not realised by the Supreme Court's date. With the 27 August 2015 deadline just 60 days away, Centre for Rights, Education and Awareness (CREAW) and Community Advocacy and Awareness Trust (CRAWN Trust) filed a case asking the High Court to compel the AG and Commission for the Implementation of the Constitution (CIC) to draft legislation to implement the principle.[56] On 26 June 2015, Justice Mumbi Ngugi ordered the CIC and AG to table legislation in Parliament in 40 days to be discussed and put in place by 27 August 2016.

As a direct consequence of Justice Mumbi's Ruling and adjudicatory leadership, various legislative proposals were tabled in Parliament, all proposing constitutional amendments. These included: the *Constitution of Kenya (Amendment) Bill 2015*, National Assembly (commonly, '*Chepkonga Bill')*; *Two-Thirds Gender Rule Laws (Amendment) Bill 2015*, National Assembly; *Constitution of Kenya (Amendment) Bill*, Senate (commonly, *'Sijeny Bill'*); *Constitution of Kenya (Amendment) (No.4) Bill 2015* (commonly, *Duale Bill*), National Assembly; and *Election Laws (Amendment) (No.2) Bill 2015*, National Assembly.

In essence, Justice Mumbi Ngugi's judgment led to four constitutional amendment bills crucial for implementing the two-thirds gender principle. Justice Mumbi Ngugi delivered the

foremost adjudicatory leadership on the two-thirds gender principle, and the greatest results in Constitutional Petition No. 2015. The order was directed at another arm of government, with a clear deadline, which in turn gave public-interest litigants a reason to go back to court should the order or deadline not be respected.

However, Parliament still failed to put in place the legislative mechanisms, and a third wave of litigation ensued between 2015-2017. The first case related to the composition of Cabinet on 8 January 2016 – Marilyn Muthoni Kamuru (Twitter campaign #Weare52percent), CRAWN Trust and CREAW took issue with the President's 2015 reconstitution of his Cabinet to 18 men and 5 women.[57] Justice Onguto excused the invalidity of Cabinet's irregular composition for eight months, until general elections on 7 August 2017, after which the two-thirds gender principle would have to be complied with in Cabinet's composition. Justice Onguto imported public remedies known in *legalese* simply as *suspension of invalidity orders* directly from South Africa and the *Teddy Bear* case.[58] *Suspension of invalidity orders* give a public body a chance and a timeline within which to comply with a legal requirement.

In *Constitutional Petition 317 of 2016,* CREAW, CRAWN Trust and KNCHR sought to enforce orders granted by Justice Mumbi Ngugi (*Constitutional Petition 182 of 2015*) to compel Parliament to enact legislation to implement the principle. Justice John Mativo granted an order of *mandamus,* compelling Parliament to do so within 60 days, and report progress to the Chief Justice. Judgment was delivered on 29 March 2017, roughly five months before the general elections in August. Parliament was dissolved 120 days after the judgment without having enacted the legislation. Parliament appealed against the Mativo judgment to the Court of Appeal, which dismissed the appeal.

Judicial leadership on constitutional amendments

On 26 October 2020, just over a decade after Prof. Okoth-Ogendo was laid to rest in April 2009, President Uhuru Kenyatta launched a report on constitutional and legislative amendments, complete with a draft *Constitution of Kenya (Amendment) Bill 2020*, draft legislative bills and a programme roll-out to collect signatures for popular support for constitutional amendments. This would likely have greatly mortified Prof. Okoth-Ogendo.

After the heavily contested presidential elections of 2017, Kenyatta and opposition leader Raila Odinga (who filed a presidential petition to challenge the results leading to Kenyatta's presidency in the Supreme Court) had the (in)famous *handshake* to signal reconciliation and peace. This handshake led Nic Cheeseman, Karuti Kanyinga, Gabrielle Lynch, Mutuma Ruteere and Justin Willis to reflect that constitutional changes, such as the 50%+1 threshold for presidential elections, devolution and the Supreme Court (charged with adjudicating presidential disputes) *did* change the political landscape – but it was a personal deal (*the handshake*) that ended the post-election impasse of 2017.[59] Although the Supreme Court was the first judicial institution to annul a presidential election in Africa, displaying its institutional independence, it did little to sustain democratic legitimacy. According to Cheeseman *et al*., '[The 2017] elections therefore demonstrate how formal institutions alone cannot change political logics and reveal the continued significance of individual politicians and informal institutions that may compete with or complement their formal counterparts'.[60]

Shortly afterwards, President Kenyatta appointed a 'Building Bridges to Unity Advisory Taskforce' to make recommendations and proposals for lasting unity in Kenya. On January 3, 2020, the President launched an interim report of the Taskforce and appointed a Steering Committee to implement it, seeking public consultation on various policy, administrative, statutory, or constitutional changes. In essence, this would be making constitutional changes by popular initiative, therefore culminating in the *Constitution of Kenya (Amendment) Bill 2020,*

complete with signatures submitted to the Independent and Electoral Boundaries Commission (IEBC) for verification, and to all 47 county assemblies and Parliament for approval.

Justices Joel M Ngugi, Odunga, Jairus Ngaa, Mwita and Mumbua Matheka exercised judicial leadership in perhaps the most contentious cases on constitutional amendments in Kenya.'s history. The five judges presided over the *BBI Case comprising eight* petitions filed in court to challenge *BBI* and the *Constitution of Kenya (Amendment) Bill 2020*.[61] All petitions centred mainly around the application of the imported *basic structure doctrine* of the Constitution – whether some clauses are so basic to the constitution that they cannot be amended.

The five judges were not the first to consider the basic structure doctrine, having been applied by Justice Lenaola in *CIC,* and Justice Ringeera in *Njoya*. However, it was in *BBI* that the foremost courageous form of judicial leadership was exercised, in safeguarding the rule of law and constitutionalism in Kenya. The five judges in *BBI* anchored their judicial leadership on *transformative constitutionalism*. These judges imported the basic structure doctrine into Kenyan law from the Indian case of *Kesavananda,*[62] in which the Supreme Court of India had held that Parliament's power to amend the Constitution does not include the power to amend the basic structure or identity of the constitution. The applicability of the Basic Structure Doctrine in Kenya generated much debate and dispute, around which all the litigation on *BBI* centred.

In holding that Kenyans could only have intended that the constitutional order they so painstakingly made could only be fundamentally altered or re-made through a participatory process, the judges reiterated Kenya's historical context of numerous amendments on Kenya's 1963 independence constitution. They therefore held in paragraph 474(g) that the Basic

Structure Doctrine is applicable to Kenya as it 'protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amenable for amendment in as long as they do not fundamentally tilt the Basic Structure'. The judges observed further that the Constitution's basic structure can only be amended through an exercise of the constituent power of the people, which must be seen to have been exercised in four ways: civic education, public participation and collection of views; constituent assembly debate; consultations and public discourse; and referendum.

Aggrieved by the High Court's decision, the IEBC, AG, BBI Steering Committee, and President Kenyatta appealed. The appellants' lawyers responded with derision: one lawyer complained that the High Court 'wants us to be subject to an academic doctrine invented by the Indian Supreme Court'. Another decried the concept that the people as sovereign can exist without or outside the Constitution. He dismissed and derided the five judges, stating that 'they were so anxious to apply the basic structure doctrine that they invented it', which he termed a 'trip to Wonderland'. The judges were further accused of being 'merely ideological' and having 'failed to notice that even the Indian judges were not agreed on what constitutes basic structure', arguing that 'every article of the Constitution is amendable so long as it is done constitutionally'.

The Court of Appeal upheld the High Court decision in a five-judge bench (Justices Daniel Musinga, Roselyne Nambuye, Hannah Okwengu, Peter Kiage, Steven Gatembu Kairu, Fatuma Sichale, and Francis Tuiyott). Seven judges of the Court of Appeal wrote separate judgments, and each spent considerable time addressing the applicability of the Basic Structure Doctrine in Kenya, particularly citing scholarly material.[63] Like their High Court and Indian Supreme Court counterparts, the Court of Appeal took the American approach of limiting amending-power, to ensure that the identity and core structure of a constitution remains intact.

The Supreme Court disqualified the applicability of the Basic Structure Doctrine in Kenya, yet agreed with the Court of Appeal and High Court that the *Constitution of Kenya (Amendment) Bill 2020* was unconstitutional, as the President could not initiate a constitutional amendment by popular initiative.[64] Whilst the Basic Structure Doctrine applicability was shut down, the High Court's judicial leadership maintained its ripple effect all the way to the Supreme Court – agreeing that, through the unamendable constitutional provisions of the sovereignty of the people, making, remaking and amending the Constitution is reserved for the people alone

Retaliatory backlash and politicisation of the judiciary

Participants discussed at some length that oppositional judges have faced serious retaliatory repercussions. First, they have been targeted for transfers to far-flung stations, following their consistent critical and oppositional stance to the Government on socioeconomic rights (and other cases not examined in this paper). Public-interest lawyers spoke openly and frankly about the transfer of three judges:

> *PIL#5:* I think even the transfer of judges ... if you look at when Odunga was transferred, in my view I tend to think…
>
> *PIL#1 & PIL#2 (chorus):* It was a political move.
>
> *PIL#2:* [Odunga was transferred to] Machakos.
>
> *PIL#3:* He was one of those judges who ... if it was something against Government, and you give him actual meat to grab on, he will go with you wherever!
>
> *PIL#5:* Kwisha![65] *(general laughter)*
>
> *PIL#3:* The political class, they're like: 'what do you mean – you are just going to go whichever way? Take him to Machakos'!
>
> *PIL#3:* There was a stream of cases – one after the other, after the other – and he kept going Left, Left, Left! … they were like – 'take him to Machakos where there is no one challenging any Government action' ... [some]where really there is not much, other than the chicken theft! *(general laughter)*

Justice Odunga was singled out by participants as having been consistently oppositional, delivering judgments against the Government. Odunga was moved from the Judicial Review Division of the High Court of Kenya at Milimani (Nairobi) to Machakos as presiding judge in April 2018 after delivering some high-profile cases against the Government. He was in 2020 also a member of the judicial panel in the *BBI* judgment.

In 2018, Justice Mumbi Ngugi was transferred from the Constitutional Division of the High Court at Nairobi to Kericho – in one of those 'chicken thefts only' court stations. Particpants reported that this move did not stop her from passing some landmark judgments. Justice Lenaola was seconded to the East African Court of Justice Lenaola was later promoted to the Supreme Court, where it's difficult for a judge or two to make much impact, as CRE#2 explained:

> If you look at the Supreme Court, it's a collegiate institution. So, you can have the most progressive Chief Justice in the world ... which is why the politicians are comfortable having the Willy Mutungas. Because they know when it comes to judicial decisions, if they dominate, it doesn't matter, it doesn't matter if you have one or two people.

CRE#2 explained that appointments to the Supreme Court were designed in the Constitution in such a way that politicians would have a say in most of them, leaving only one or two 'independent' Supreme Court judges who could not seriously undermine the quorum of 'safe' judges, passing decisions preserving government political and economic interests. CRE#2 described the careful crafting by the political elite class on Supreme Court appointments, and the politics behind the selection of the Chief Justice and Deputy Chief Justice.

Perhaps the most far-reaching retaliations – in the context of interference in judges' appointments, promotions and transfer – has been the President's refusal to promote six High Court judges following recommendations for their appointment from the Judicial Service Commission in June 2021 - Justices Joel Ngugi, George Odunga, Aggrey Muchelule, Weldon

Korir, Judith Omange, and Evans Makori.[66] This prompted outrage from public-interest lawyers,, the Law Society of Kenya,[67] and retired Chief Justices Mutunga and David Maraga.[68] There have been speculations that the motivation for declining to promote two of these judges (Ngugi and Odunga) was in connection with the High Court's *BBI* judgment against constitutional amendments.

PIL#5 spoke of the Executive and Parliament's scheme to undermine the effectiveness of the judiciary in terms of by restricting its resourcing in the national budget. Although there is an independent Judiciary Fund, the national budget is still prepared and controlled by the other two arms of Government, after all. A great source of disappointment has been the blatant disobedience of courts orders by both Parliament and the Executive. HCJ#1 revealed:

> ... in terms of decisions by the Judiciary, sometimes Parliament defies. ... And we have disengaged with Parliament, we've had lots of fights, not just on the area of the two-thirds …about socio-economic rights, about review orders ... because the Judiciary tries to implement the provisions of the Constitution – we try to be progressive and it's not taken well by Parliament... defying the two-thirds is just one of the problems that we have... it's unfortunate… The major hurdle we have is with Parliament and the Presidency ... even when we have appointments that are done by the President, there's no check on the two-thirds requirement. Parliament doesn't check also to see that that is happening.

The disobedience of court orders has caused disillusionment, to an extent that one study participant active in civil society stated:

> maybe the only thing that the courts can do is refuse to hear any matter that the State brings – boycott the State. Because the State is ignoring court orders. ... We have a Constitution, but we don't have a political class that are doing anything! (CSRA#1)

CSRA#1 reported that the *Mativo Judgment* on the two-thirds gender principle has been openly defied by Parliament:

> Parliament categorically stated that they will not implement the *Mativo* judgment. When we got our order in 2016 on the two-thirds gender principle, Aden Duale called a press conference on the steps of Parliament and said 'who the hell do they think they are? ... we're not going to implement!'[69] (CSRA#1).

The President also defied the court order on the composition of Cabinet, which to date has not complied with the principle.

Individual judges sometimes face direct attacks and backlash from politicians who find themselves the subject of adverse court orders. Judges faced verbal abuse and threats from the incumbent President, after the Supreme Court nullified the 2017 general elections for election irregularities.[70] Defiance of court orders and retaliation against judges confirms Issa Shivji's discussion of African politicians' 'rule by law' rather than rule of law,[71] and a politicisation of the judiciary that I reflect on further in drawing some concluding thoughts on judicial leadership.

Motivations for judicial leadership

Judges' motivations for judicial leadership cannot be accounted for simply using the labels 'activist', 'feminist', or other value-laden categorisations. Judges in this study expressed discomfort with such definitions, viewing them incompatible with their judicial oath of impartiality. Whilst conducting both interviews and focus group discussions, I found participants very keen to discuss the wider politics of judging, to which they devoted a significant amount of their time. All participants referred to the question of the extent of the supervisory role of the courts over the political branch in constitution-making, and the extent to which politics influences judges' constitutional adjudication.

Participants unanimously agreed that a judge's stance on judging and politics depended largely on their ideological or philosophical orientation. Participants were unanimous that in constitutional adjudication, 'the whole philosophical orientation of the judges' is significant (SCJ#3). SCJ#2 observed:

> Every judge uses their own politics and philosophy to interpret the law ... under common law, judges pretend that they don't make law; they also pretend that their intellectual, ideological and political biases are not in their judgments… – not true. We all got biases and so forth… the Supreme Court of the US put themselves in pigeonholes – whether you are conservative, you're liberal, you're radical, or depending on your own philosophy; and so, you bring that into a case.

Similarly, CRE#4 advised:

> Don't forget that judges are not automatons. Judges have life philosophies [that] inform their world view, and therefore inform the way they see the law and the Constitution… on certain things there will be certain agreement. But there are certain areas where you see divergence, and that's how jurisprudence develops, because you have diversity of views ... judicial philosophies differ. Some are conservative, and some are… the opposite of conservative, and that would be reflected in their decisions.

These observations reinforce American classic literature on judicial behaviour in the US Supreme Court, such as Herman Pritchett: 'justices are motivated by their own preferences'.[72] The multidimensional-ideological model posits that 'judges have ideal points in multidimensional ideological spaces',[73] and that 'the decision of the Court in any case will depend upon whether the case dominates, or is dominated by, a majority of ideal points'.[74] This model's basic assumption is that 'each member of the Court has preferences concerning the policy questions faced by the Court, and when the Justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences'.[75] SCJ#2 observed that:

> There is an intersection between judges' philosophies and some clear biases. Like somebody coming from a marginalised county will think that this devolution has to be protected, it's got to be my legacy!

CRE#5 observed:

> … Justice A is not totally bad, and he's bright, but he's fundamentally conservative. And of course, he did write at one point in time in support of the one-party state… – it tells you something about their certain temperance towards the structures or systems of authority. He's not a person who likes to upset the apple cart (laughs). Whereas Justice B was all in the business of upsetting the apple cart, and Justice C and D seem to be reasonably interested in some degree of change in society. They're not always coming out in their rulings, but theyre not lacking in some elements of progressiveness.

One High Court judge was singled out as consistently liberal:

> The judge doesn't colour within the lines, Justice E just goes to whatever direction the judgment is going to take them. Justice E specifically went to the Left and stayed there! ... If you have a bench of five and Justice E is there, you have a chance – one out of five judges – that Justice E might go your way if you are advancing something that is very radical (PIL#3).

SCJ#2 explained about their own philosophy:

> I come from a tradition of radicalism. ... A lean towards what I call 'Creative Marxism' ... So that's what prompted me to look at the Constitution – I didn't think that it was Marxist or anything like that, no! I thought it was socialist democracy. It was there to mitigate a *status quo* that was terrible ... And I was also very active in the reform processes [...] in terms of changing the Constitution. I was in it for four decades! And that's why I applied for that job because I thought – well, I could get in and make a contribution in the Supreme Court.

Therefore, these ideological and philosophical orientations fall roughly in three major camps. In the Conservative Camp, SCJ#1, SCJ#3, and CAJ#4 were of the view that politics has nothing to do with constitutional adjudication. SCJ#2, the sole judicial representative of the Radical Camp took the opposite view – but was supported by CRE#3. In Camp 3 were judges who took the view that it doesn't matter *what* the judge thinks about politics and constitutional adjudication, the Constitution gives them no choice but to be activist, since the Constitution itself is activist; I see this camp as essentially a moderate form of judging that stays within the confines of the constitution and does not push its boundaries too much, and possibly sometimes leans almost towards conservatism. Given another constitution, would they take an opposite 'anti-activist' view?

Participants in FGDS discussed liberal and radical judges interchangeably as those who seek to challenge the status quo and bring about societal change– those who 'do not colour within the lines'. Conservative judges are those who do *not* strive to challenge the *status quo* – those that 'don't want to upset the apple cart'. This is in line with Upendra Baxi's avatars of judicial activism: that all judges are *active,* in either seeking to change or maintain the status

quo – while not all judges are *activist* (those who seek to change the status quo).[76] Understood this way, Baxi is of the view that all judges take part in politics, whether they acknowledge it or not. Conservative judges are active in maintaining the *status quo*, as Ginsburg and Mustafa note that particularly in the context of authoritarian regimes, there is compatibility between legal positivism and authoritarian rule. The notion that law should serve as the faithful agent of the 'political' sphere is a form of ideology that can serve to uphold whatever government is in power'.[77]

Within the Conservative Camp 1 Judges – CAJ#3 observed that 'the players out there may be influenced ... but the judges, no! As far as the parties are concerned, everything is political – but not for the court' and SCJ#3 was of the view that 'judges should never look through the window to see what is happening outside. It shouldn't matter ... you should never look out there'.

> A court should really take a neutral position… if the court becomes activist, it's now playing the same politics as those people are playing. And politics can be a mad game… it is not right for judges to get into a mad game. (SCJ#1).

In Camp 2 – radical or liberal judges – SCJ#2 supported by CRE#3 explained that

> If it's the debate that judges are not political, I basically rubbish it and show that it's not the case ... Upendra Baxi did say that judges are either active or activist, that some are to preserve the *status quo* – so all are active, but not all are activist.

Supporting this view, CRE#3 observed that 'the court can be an agent of transformation or can join with the reactionary forces that advocate for the *status quo'*.

In the third, 'no-choice' camp, SCJ#2 was of the view that 'judges in Kenya ... have to be activist – because of what the Constitution requires them to do. Well, the activism for me – the criterion is if they are following the Constitution'. Only a minority of judges in my study

were content to be perceived as activists; the majority prefer that they are seen only as performing their duty of preserving the rule of law, as required by their judicial oath.

Conclusion

I began with the claim that judicial leadership is key for taming 'constitutions without constitutionalism', where self-serving politicians 'rule by law', rather than adhering to the rule of law. The Kenyan experience shows the potential of (even a few) judges taking a critical and oppositional stance, safeguarding the rule of law against ruling politicians' self-interest. Judicial leadership is in line with global trends towards a 'judicialisation of politics', where courts are increasingly venturing into matters of public policy traditionally preserved for parliament and the executive.

This paper summarises fundings from a 2018 empirical study on the judiciary's role in implementing constitutional rights, namely gender equality (affirmative action), and the right to housing for dwellers evicted from informal settlements on public land. I have supplemented this work with a longitudinal study of the few judges singled out by participants in 2018, who then went on to exercise a courageous form of judicial leadership involving safeguarding the 2010 Constitution against unconstitutional amendments by popular initiative, namely President Kenyatta's *Building Bridges Initiative.*

These few judges had a range of motivations for exercising judicial leadership: liberal or radical ideological standpoints; life experiences that attract them to defend the plight of the suffering; or simply a desire to adhere to their judicial oath to preserve the rule of law in adjudication. Whatever their motivations, these judges have exercised judicial leadership amidst immense backlash and retaliation from Government. These retaliatory repercussions comprise verbal abuse, derision and vilification in public media, open defiance of court orders,

budgetary cuts, and interference in appointments and redeployments of these judges, calculated to stifle their critical and oppositional stance to Government in their judicial pronouncements.

The conclusions that can be drawn from the study to inform future studies on judicial leadership are twofold. The first is that judicial leadership is often accompanied by a 'politicisation of the judiciary', calculated to undermine the credibility of oppositional judges. This supports existing literature that links the 'judicialisation of politics' and the 'politicisation of the judiciary.' The former is not necessarily synonymous with judicial leadership, however. The *judicialisation of politics* is about courts increasingly venturing into matters of public policy, trumping the traditional separation-of-powers paradigm; *judicial leadership* is an actively critical and oppositional stance to self-serving politicians' efforts to water down the rule of law. This suggests that judicial leadership is much more context-specific, as different judges in different courts will exercise judicial leadership in different ways, countering rule-of-law attacks by unscrupulous politicians. For Kenya, this meant borrowing foreign public law remedies from other Global South developing democratic contexts (India, South Africa and Latin America) in the battle for constitutional rights implementation – particularly structural injunctions, dialogic activism, and the Basic Structure Doctrine in *BBI* on unconstitutional constitutional amendments. This makes judicial (adjudicatory) leadership an intriguing concept to study, in how it is exercised in different contexts where rule of law is politically threatened, and the different ways in which retaliatory repercussions flow. Thus, while 'constitutions without constitutionalism' – hallmarked by unconstitutional constitutional amendments – is an ongoing threat to the rule of law, the 'politicisation of the judiciary' is an equally potent force with which to contend.

This paper's second conclusion is a warning on the danger of placing on a pedestal those oppositional judges exercising judicial leadership. Such influential adjudicatory leadership

happens alongside sustained and vibrant public-interest litigation and dialogic conversations outside court corridors. These tools might well remain defenders of true democracy in Africa, keeping alive the seed of judicial leadership, amidst the weeds of self-serving political whim that constantly threaten to choke the Constitution.

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Notes

[1] Charmaz, *Constructivist grounded theory*
[2] Braun and Clarke. *Thematic analysis*
[3] Ndii v Attorney General (Petition E282, 397, E400, E401, E402, E416 & E426 (Consolidated) of 2020) [2021] KEHC 9746 (KLR) (Constitutional and Human Rights) (13 May 2021)
[4] Baxi, *Demosprudence versus jurisprudence*
[5] Hunter and Rackley, *Judicial leadership on the UK Supreme Court*, 193
[6] Ibid.
[7] Baxi, *Demosprudence versus jurisprudence*, 8
[8] Ibid, 11
[9] Ibid, 10-11
[10] Cornes, *The leadership function in the United Kingdom's Supreme Court*, 512
[11] Paterson, *Final judgment,* 148
[12] Hunter and Rackley, *Judicial leadership on the UK Supreme Court,* 194
[13] Hedrianto, *The rise and fall of heroic chief justices in Indonesia,* 490
[14] Cheema, *The "Chaudhry Court"*, 447
[15] Okoth-Ogendo, "Constitutions without constitutionalism", 150
[16] Nwabueze, *Presidentialism in Africa*
[17] Ibid, 107
[18] Ibid, 335
[19] Ibid, 435
[20] Makau, *Taming leviathan,* 60
[21] Ibid*,* 75
[22] Ibid.
[23] Rodríguez-Garavito, *Beyond the courtroom*
[24] Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others, Nairobi High Court Constitutional Petition No. 65 of 2010; Mitu-Bell Welfare Society v Attorney General & 2 others [2013] eKLR, Nairobi High Court Petition 164 of 2011.
[25] Borrowed from India, such as in the case of Vineet Narain v. Union of India, AIR 1996 SC 3386
[26] Marilyn Muthoni Kamuru & 2 others v The Speaker of the National Assembly & 2 Others [2016] eKLR, Constitutional Petition No. 566 of 2012; Katiba *Institute v Independent Electoral and Boundaries Commission* [2017] *eKLR,* Constitutional Petition No. 19 of 2017
[27]Abeyratne and Porat, *Towering judges*, 3
[28] Neal and Vallinder, *The global expansion of judicial power*
[29] Galanter, *Justice in many rooms*
[30] Gathii, *The contested power of Kenya's judiciary*
[31] Ibid
[32] Mutunga, *Civil society and transition politics in Kenya,*
[33] O'Loughlin, *Kenya's constitution in a global context*
[34] Gainer, *How Kenya cleaned up its courts*; Akech, Kameri-Mbote and Odote, *Judicial Reforms and Access to Justice in Kenya*
[35] Njoya and Others v Attorney General and Others (2004) AHRLR 157 (HeCK 2004)
[36] Loughlin, *Kenya's Constitution in a global context*, 846
[37] Ibid, 847
[38] Malila, *The Zambian Judiciary on Trial*
[39] Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others, Nairobi High Court Constitutional Petition No. 65 of 2010
[40] Mitu-Bell Welfare Society v Attorney General & 2 others [2013] eKLR, Nairobi High Court Petition 164 of 2011

[41] Teddy Bear Clinic for Abused Children v Minister for Justice and Constitutional Development and National Director of Public Prosecutions, Case CCT 12/13 [2013] ZACC 35.
[42] Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security & 3 Others [2011] eKLR, Constitutional Petition No. 2 of 2011.
[43] Kepha Omondi Onjuro & others -v- Attorney General & 5 others, Petition No. 239 of 2014
[44] In The Matter of Illegal Demolition of Residential Houses and Business Premises Erected on Ngara Open Air Market Nairobi.
[45] Francis N. Kiboro & 198 Others.
[46] Susan Waithera Kariuki & 4 Others –vs- Town Clerk Nairobi City Council & 2 Others, Petition 66 of 2010.
[47] Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others, Nairobi High Court Constitutional Petition No. 65 of 2010.
[48] Mitu-Bell Welfare Society v Attorney General & 2 others [2013] eKLR, Nairobi High Court Petition 164 of 201 .
[49] Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security & 3 Others [2011] eKLR, Constitutional Petition No. 2 of 2011.
[50] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).
[51] Kenya Airports Authority vs Mitubell Welfare Society & 3 Others, Civil Appeal No. 218 of 2014.
[52] Mitubell Welfare Society v Kenya Ports Authority & 2 Others (Institute for Strategic Litigation as *amicus curiae),* Petition No. 3 of 2018 [2021]eKLR.
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[54] Centre for Rights Education and Awareness & 7 Others vs the Attorney General, Constitutional Petition No. 16 of 2011.
[55] Baraza N, 'Supreme Court of Kenya Advisory Opinion on the Two-Thirds Gender Principle
[56] Centre for Rights Education and Awareness & Another v Attorney General & Another, Constitutional Petition No. 182 of 2015.
[57] Marilyn Muthoni Kamuru & 2 Others vs The Attorney General & Another, Constitutional Petition No. 566 of 2012.
[58] Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013).
[59] Cheeseman, Kanyinga, Lynch, Ruteere and Willis, *Kenya's 2017 elections: winner-takes-all politics as usual*?
[60] Ibid.
[61] Ndii & others v Attorney General & others (Petition E282, 397, E400, E401, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 9746.
[62] Kesavananda Bharati vs State of Kerala [1973] 4 SCC 225: AIR 1973 SC 1461.
[63] Kangu, *"We the people' as the sovereign"*; Albert, *making, breaking and changing constitutions*; Roznai, *Unconstitutional constitutional amendments*; Fombad, *Constitutional entrenchment of decentralization in Africa* ; Landau, *Abusive constitutionalism*; Landau and Rosalind, *Constraining constitutional change.*
[64] Supreme Court Petition 21 of 2021.
[65] Meaning 'Bingo!'
[66] M. Mutunga, "Mr. President, in the name of the Constitution, please swear in the judges", *The Elephant,* 9 June 2021. https://www.theelephant.info/op-eds/2021/06/09/mr-president-in-the-name-of-the-constitution-swear-in-the-judges/
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[68] G. Keter, “Keep to your lane, Maraga tells Uhuru over rejection of six judges”, *The Star,* 10 June 2021. https://www.the-star.co.ke/news/2021-06-10-keep-to-your-lane-maraga-tells-uhuru-over-rejection-of-six-judges/
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[70] Kanyinga and Odote, *Judicialisation of politics and Kenya's 2017 elections*.
[71] Shivji, "The Changing State: From an Extra-Legal to an Intra-Legal State in Tanzania"; *Okoth-Ogendo, “Constitutions Without Constitutionalism”*.
[72] Pritchett, *The Roosevelt Court*, xiii.
[73] Schubert, *The Judicial Mind*, 38.
[74] Ibid.
[75] Rohde and Spaeth, *Supreme Court decision making*, 72.
[76] Baxi, *Demosprudence Versus Jurisprudence*.
[77] Ibid.

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