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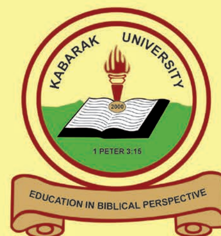

Jurisdiction without the Law: A Response to Walter Khobe's Reflections on the Jurisdiction of the Supreme Court

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Abstract

The jurisdiction of the Supreme Court of Kenya has been a subject of debate since the inception of the court. However, what has raised more questions than answers is the jurisdiction to interpret and apply the Constitution. The Supreme has extended this jurisdiction to mean interpretation and application of a category of statutes it calls "normative derivative legislations". In this response to Walter Khobe's piece, this paper argues that Kenya does not have constitutional statutes that enjoy a special character in the country. In a country with a written Constitution, laws acquire their status not because of their content but because of their formal place in the legal system. This piece posits that jurisdictional clauses should not be interpreted broadly as a matter of policy to avoid courts redefining their functions. It proceeds to demonstrate that normative derivative doctrine emanates from the fallacy of hasty conclusion- that by statutes enacting constitutional provisions they change their character from ordinary statutes to special ones. This piece engages with some of the monumental Supreme Court decisions that have exposed the court as lacking a coherent approach to the issue of the normative derivative.

Key words: Jurisdiction, Normative Derivative, Supreme Court, Legislations

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1. Introduction

Societies around the world have learnt to live with the erratic nature of their apex courts. In Kenya, the Supreme Court has subverted the Constitution in several ways to the extent of redesigning the hierarchy of laws.[1] This subversion has been camouflaged in over-embellished words such as normative derivative. While these words sound attractive and ingenious, they lack constitutional backing. It is this constitutional overreach that Walter Khobe Ochieng, an incisive and thoughtful constitutional scholar, has fallen for. Khobe appears to be too believing of the Supreme Court's invocation of egalitarian concepts such as transformative constitutionalism. This paper will endeavour to dismantle the Supreme Court's contradictory reasoning and, in effect, disagree with Khobe's argument.

In a country like Kenya with a written Constitution, the question of the relationship between the Constitution and legislation is settled.[2] What has dominated the legal debate is the constitutionality of statutes and not their status. Even at the height of constitutional degradation, under the previous constitutional regime, the meaning of statutes was clear.[3] This was the reason that parliament had to pass constitutional amendments to sanitise the constitutional degradation. Now, the Supreme Court has unsettled this longstanding understanding by creating two categories of legislations: the ordinary and normative derivative legislation.[4]

The import of the demarcation of legislations is manifest on the jurisdiction of the Supreme Court on matters of interpretation and application of the Constitution. Contrary to Khobe's argument, the meaning of the interpretation and application of the Constitution has not been the issue. Instead, the thorny question has been the application of the meaning. The original sin was committed in the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*[5] and replicated in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Other*s[6] where the Supreme Court endorsed a strange doctrine giving some statutes a special status.

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[1] *Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others* [2014] eKLR.

[2] Allan James, 'Why New Zealand Doesn't Need a Written Constitution' (1998) *Agenda: A Journal of Policy Analysis and Reform 487.*

[3] Okoth-Ogendo Hastings WO 'The Politics of Constitutional Change in Kenya since Independence, 1963-69 (1972) 71.2 *African Affairs 9.*

[4] *Mable Muruli v Wycliffe Ambetsa Oparanya & 3 Others* [2016] eKLR, para 52 and 53.

[5] [2014] eKLR.

[6] [2014] eKLR

In a sharp turn of events, the Supreme Court is undoing the damage it committed in the decisions arising from the 2013 election petitions.[7] This piece does not condemn the current Supreme Court for the decisions arising from the 2013 election disputes. Rather, it argues that the heresy committed in differentiating statutes has not been expressly disowned by the current Supreme Court. In doing so, the piece argues that Kenya does not have constitutional statutes that justify the ranking of legislations. Additionally, even under the transformative Constitution, a court cannot expand the provisions donating its jurisdiction. The paper posits that the doctrine of the normative derivative is a façade for the unlawful assumption of jurisdiction.

2. The Concept of Constitutional Statutes or Supreme Statutes is not Applicable in Kenya

The words constitutional statutes denote, in legal parlance, the legislations that contain fundamental rules of the society, for example, the creation of state institutions and guarantee of human rights.[8] In the leading case of *Thoburn v Sunderland City Council*[9] the UK's Queen's Bench Court described constitutional statutes as follows:

> In my opinion, a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.

Constitutional statutes are said to have a special character in the legal system.[10] The Political and Constitutional Reform Committee (PCRC) of the UK parliament, which is in charge of examining constitutional matters, has argued for formal recognition of constitutional legislation.[11] PCRC justifies the existence of the constitutional statutes on the ground that 'constitutional legislation is the architecture of the state'.[12] Therefore, without constitutional statutes, fundamental aspects of the society would not be protected by legislation.

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[7] *Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 Others* [2018] eKLR, para 41.

[8] Ahmed Farrah & Adam Perry, 'Constitutional Statutes' (2017)37.2 *Oxford Journal of Legal Studies 461.*

[9] [2002] EWHC 195.

[10] Dorner Dalia, 'Does Israel Have a Constitution' (1999) 43 *Louis ULJ 1325.*

[11] House of Commons Political and Constitutional Reform Committee, 'Ensuring standards in the quality of legislation' (2013) First Report of Session 2013–14 135.

[12] Andrew Blick, David Howarth & Nat le Roux, 'Distinguishing Constitutional Legislation: A Modest Proposal' (The Constitution Society 2014) 14.

The concept of constitutional statutes is found in the United Kingdom because its constitution is unwritten. Due to the absence of a written constitution, the UK has a normative deficit of settled constitutional principles. The constitutional statutes, therefore, surfaced to fill this gap by providing for a stable and detailed constitutional order. This idea has been vehemently opposed by scholars such as A.V. Dicey who advocated for the sovereignty of parliament which translates to equality of legislations.[13]According to Dicey, there are no superior legislations since all Acts of Parliament are products of the same body.[14] Therefore, legislations from previous parliaments cannot bind the subsequent ones and constitutional statutes can be amended impliedly. Dicey's position was upended by the case of *Thoburn v Sunderland City Council*[15] which made the distinction between ordinary statutes and constitutional statutes. The court went on to find that ordinary statutes may be impliedly repealed while constitutional statutes cannot. Therefore, for the constitutional statute to be repealed it must be demonstrated that parliament intended to repeal them in express terms and not through implications.

David Feldman, a British constitutional scholar, has argued that the way to identify the constitutional legislation is by examining the fundamental role of a Constitution.[16] Feldman argues that the Constitution has the essential function of creating and regulating the state's institutions.[17] The constitutional legislation can only be identified through singling out the functions of a Constitution and examining which legislations cover those roles. Since constitutional statutes are fundamental to the operation of the state, they should be interpreted differently from ordinary legislation.[18]

Unlike the UK, Kenya does not have the concept of constitutional statutes that rank higher than ordinary ones. At its most basic, Chapter 11 of the Constitution gives Parliament the power to legislate at the national level. It makes no reference to different 'classes' of statutes. Admittedly, the Constitution provides for certain clauses which oblige parliament to enact legislation on specific issues.[19]

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[13] Albert Venn Dicey, An Introduction to the Study of the Law of the Constitution (1st edn, Macmillan 1885).

[14] Ibid.

[15] [2002] EWHC 195.

[16] Feldman David, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 *Law Quarterly Review 343.*

[17] Feldman David, 'Statutory Interpretation and Constitutional Legislation' (2014) 130 *Law Quarterly Review 473.*

[18] *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, [2013] S.C. (U.K.S.C.) 153, SC, at [14]- [15].

[19] For example, articles 81 and 86 of the Constitution.

This, however, is a far cry from the special legislation argued for by Walter Khobe. Although the Constitution highlights the general constitutional principles, that does not grant these legislations a special character. At the core, these legislations remain Acts of Parliament.

Adolf J Merkl, in the seminal theory of 'hierarchical structure', explains the primacy of the Constitution as the basis of the legal order.[20] The Constitution is, therefore, the basic law with other norms deriving their validity from it. This theory builds on Kelsen's theory of the validity of norms which provides that a norm is valid because it is derived from another.[21] With the Constitution being the highest norm, the other norms must conform to it and together they form the 'unity of the legal order'.[22] What matters then in ranking norms in a legal order with a written Constitution is the character of the norm based on who created it. Olechowski aptly argues that '[t]he questions on which level of the hierarchical structure a norm is situated is not determined based on its content but on its form'.[23] Thus, the Constitution of Kenya is the norm from which all legislations derive their validity as a matter of form without distinction based on substance. This does not mean that the Constitution does not regulate the content of legislations. Rather, it means that legislations do not assume their character because of their content but the process of their formation.

One distinguishing factor between statutes and the constitutions is that a constitution is a fundamental law while legislation is an ordinary one. The constitution enjoys a superior status in the legal system by occupying the place of basic law. A constitution has been described as the "cornerstone of the legal order" because it expresses the "sovereignty of the people" in the purest form.[24] This sovereignty is seen in the manner of enacting a written constitution which is ordinarily through a referendum. The process of enacting the constitution signifies the importance and place of the constitution in the society. The constitution is

[20] Olechowski Thomas, 'Legal Hierarchies in the Works of Hans Kelsen and Adolf Julius Merkl' in Ulrike Müßig (ed.) *Reconsidering Constitutional Formation II Decisive Constitutional Normativity (Springer, 2018) 353.*

[21] Kelsen Hans, *Pure Theory of Law* (2nd edn, Berkeley: University of California Press 1967) 193.

[22] Paolo Carrozza, 'Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes' in Peter Langford, *et al* (eds) *Kelsenian Legal Science and the Nature of Law: Law and Philosophy* (Springer, 2017).

[23] Olechowski (n 21 above) 353.

[24] Sinani Blerton., A Critical-legal Overview of the Concept of Constitution as the Highest Legal-Political Act of the state in the light of Constitutional-Juridical Doctrine." Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta JJ Strossmayera u Osijeku 29.2 (2013): 2442.

the authoritative charter which is the supreme law of the country. Blerton Sinani describes the special character of the constitution as follows '[i]n fact, the highest legal force is an imminent attribute and a prerogative that belongs only to the constitution. That gives the constitution a special, supreme status in the hierarchy of legal acts, but also, differentiates it from laws and other legal acts.' [25] From this understanding, a constitution is distinct from ordinary statutes. The demarcation of the constitution is crucial for the question of hierarchy of laws. As such, constitutional statues will lead to confusion by blurring the longstanding clarity on the relationship between statues and constitutions.

In Kenya the legal system does not provide for constitutional statutes, since it has a written Constitution which situates legislation in the legal order. Both article 2 of the Constitution of Kenya and section 3 of the Judicature Act do not provide for different categories of legislations. The legal system is well organised and hierarchical since norms build on each other in a systematic and unified manner.[26]This is supported by Kelsen's theory which postulates that norms are not categorised based on their content, but the formal process of their formation. Thus, despite the importance of their content, all legislations rank the same in Kenya.

3. Interpreting Jurisdiction Clauses in a Transformative Constitution

3.1 Understanding Jurisdiction and Transformative Constitutionalism

The basic predicate for the concept of jurisdiction is that it is a legalistic concept[27] whose character is legal because it is derived from the law. On the other hand, the project of the transformative constitutionalism is a multidisciplinary notion which is grounded in law.[28] I agree with Khobe that the project of transformative constitutionalism is central to understanding the Constitution of Kenya 2010. The ubiquity of the project of transformative constitutionalism is demonstrated by the numerous literature on the Kenyan Constitution.[29] This ubiquity, notwithstanding, the relationship between transformative constitutionalism and jurisdiction is scanty. Hastily understood, this relationship

[25] Ibid, 2448

[26] Raz Joseph, 'Kelsen's Theory of the Basic Norm' (1974) 19 *Am. J. Juris* 94.

[27] *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others* [2012] eKLR.

[28] *Speaker of the Senate & Another v Attorney General & 4 Others* [2013] eKLR.

[29] Kibet Eric and Charles Fombad, 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017)17.2 *African Human Rights Law Journal 340.*

has the potential of giving rise to tension between the character of jurisdiction and transformative constitutionalism's overarching values. This part will discuss the nature of jurisdiction and warn against an expansive interpretation of jurisdiction clauses.

Courts do not enjoy absolute power. Instead, they exercise a limited authority delegated to them in the Constitution and their founding statutes. This power – jurisdiction - defines the authority of a court to hear and determine cases.[30] Generally, jurisdiction is defined by law which sets the limits of the exercise of judicial powers.[31] This emanates from the culture of accountability where courts are answerable and faithful to the law.[32] The law gives and limits the authority of courts whose confines should be stated in the most precise and clearest of words to avoid confusion. Walsh argues that without the authority of the law, a court cannot exercise powers to hear and determine a matter.[33] If it does, the court acts does not only act illegally but also illegitimately. This is because the office of a judicial officer is a creature of the law and without the law, in a constitutional democracy, the office does not exist. It follows that when the law donates jurisdiction to a court, the same law implicitly prohibits the court from entertaining matters outside its ambit.

On the other hand, transformative constitutionalism is a constitutional project meant to bring radical and massive social change in areas of politics, social, power and economic relations.[34] Under this project, the Constitution is not only an instrument of regulation of power but also an instrument for reordering society in an egalitarian manner. I have previously identified four salient characteristics of transformative constitutionalism.[35] First, it induces massive social change through the tool of law. Second, it is a long-term project which seeks to bring enduring changes. Third, it is a value-based charter which embodies ethos permeating all areas of the society. Lastly, it is a highly social document that transcends the liberal

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[30] John Houston Merrill, Thomas Johnson Michie, Charles Frederic Williams and David Shephard*, The American and English Encyclopedia of Law (1887-96) Vol 19, at 244.*

[31] The inherent jurisdiction need not be provided in the law. *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR. This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.

[32] Peri, Antonina, 'Judicial Independence vs. Judicial Accountability: Judicial Selection Models for Constitutional Courts: A Comparative Analysis' (2012)3 *Comp. L. Rev* 4.

[33] Walsh, John W, 'The True Meaning of the Term"Jurisdiction"' (1901) *American Law Register 346.*

[34] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR 146.*

[35] Ian Mathenge, 'The Delusion of Transformative Constitutionalism: Evaluating Kenya's Luke-warm Social Change in Leadership and Integrity' (LLM Thesis University of Pretoria 2019) 19- 22.

project.

Properly understood, transformative constitutionalism has no tension with the concept of jurisdiction. However, what needs to be handled with care is the generalisation in Khobe's argument that transformative constitutionalism decrees a broad and purposive interpretation of the Constitution. This argument is made without taking into account the nuanced nature of transformative constitutionalism- it is context specific. Thus, not all provisions of the Constitution need to be interpreted broadly- especially the jurisdictional clauses which require a textual approach.

3.2 Jurisdictional Clauses should not be Interpreted Broadly

This part focuses on the manner the jurisdictional clauses should be interpreted. I agree with Khobe that the Constitution of Kenya is a value-centred charter. However, he fails to analyse the nature of the jurisdiction clauses and their relationship with transformative constitutionalism. This analysis gives two categories of provisions: jurisdictional clauses and substantive clauses. The substantive clauses deal with the material of the Constitution and the jurisdictional clauses allow the court to hear and determine certain matters. While the substantive clauses should be interpreted broadly, teleologically, purposefully and liberally,[36] the jurisdictional clauses should be interpreted with strict adherence to the letter of the law.[37] As argued earlier, jurisdiction is a legalistic concept which means that it is excessively engrossed in law. The word jurisdiction comes from the Latin word "ius" meaning law and dicere meaning to speak.[38] Jurisdiction defines both the competence and the limits of the authority of the court t determine cases.

The discourse of jurisdiction is well understood through the lenses of distinction between power and function of the Court. The core argument is that the issue of the jurisdiction concerns the function of the Court. While the issue of the powers deals with 'the ability' of the Court to exercise its function.[39] Power gives the court discretion and potential which can be exercised or not. In dealing with power, the concentration is on the person or office while giving latitude on

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[36] *Njoya and Others v Attorney General* (2004) 1 KLR 232, (2008) 2 KLR (EP) 624 (HCK).

[37] Talmadge Philip, 'Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems' (1998)22 *Seattle UL Rev 695.*

[38] Legal English: Jurisdiction November 13, 2012 Washington University School of Law.

[39] Haugaard, Mark, and Stewart R. Clegg, 'Introduction: Why Power is the Central Concept of the Social Sciences' in Haugaard, Mark, and Stewart R. Clegg (eds.) *The Sage Handbook of Power* (Sage, 2009) 3.

how it is to be discharged.[40] The court can exercise its powers in one way or another to determine a matter.

Function, on the other hand, means the role of the court in the society. A court has no discretion to discharge its function. This is because a function is obligatory in nature and it depicts duty.[41] It also demonstrates some sense of responsibility which entails accountability or answerableness of the court. Jurisdiction, therefore, covers the tasks that the court should discharge. The basis of this piece is that the court cannot interpret its functions broadly. This is based on a policy consideration that judges should not be allowed to redefine their functions through broad interpretation. Interpreting jurisdiction clauses broadly to establish some overarching value system gives courts leeway to manipulate their powers.[42] Judges, like other government officials, exercise limited state power.[43] Interpreting a limited power broadly is oxymoronic. The very logic of the word 'limited' excludes broad application or interpretation. This argument should not be taken to mean that limitation is synonymous with a mechanical approach. Mechanical interpretation does not take into account the consequences of a decision.[44] The realisation that the jurisdiction of the court is limited ensures that the judicial officer remains faithful to the provisions donating jurisdiction. This is important because it shields against courts going 'rogue'.

The major drawback of judicial officers interpreting the jurisdiction clauses broadly is the danger of creating a monster that can recreate, and redefine its functions. The role of defining the functions of the judiciary has been left to the legislature and the Constitution.[45] Obviously, an organ of state cannot be given powers to interpret its function as it wishes because it will soon become an unruly monster. Indeed, the judiciary has an interest in the extent of power and function it wields. Therefore, the degree of discretion on the issues of jurisdiction should be limited to the text. Otherwise, the judiciary will be the legislature and the interpreter of jurisdiction. As Clint Bolick states, '[t]he Constitution's framers

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[40] Haugaard Mark, 'The Concept of Power' (2015) 5.

[41] Bivins Thomas H, 'Responsibility and Accountability' in Kathy Fitzpatrick & Carolyn Bronstein (eds.) *Ethics in Public Relations: Responsible Advocacy (Sage, 2006) 2.*

[42] Cappelletti, Mauro, 'The Law- Making Power of the Judge and its Limits: A Comparative Analysis' (1981) 8 *Monash UL Rev* 15.

[43] Entin Jonathan, 'Separation of Powers, the Political Branches, and the Limits of Judicial Review' (1990)51 *Ohio St. LJ 186.*

[44] Yervant Hovannes Krikorian, 'Mechanical Explanation: Its Meaning and Applicability' (1927) 24.1 *The Journal of Philosophy* 14.

[45] *Kenya Hotel Properties Limited v Attorney General & 5 Others* [2018] eKLR, para 32 and 35.

assured the people that the judiciary would be the least-dangerous branch of government—but only if it refrained from assuming the powers of either of the other two branches.'[46]

When it comes to jurisdiction, the warning that courts are not surrogate of the legislature should be abundantly clear.[47] Besides, the doctrine of separation of power would be rendered otiose if the judiciary can expand its power through a broad interpretation of jurisdiction.[48] In interpreting the law, judges should not assume that the legislature is so incompetent to the extent that it cannot write an important clause such as the functions of the judiciary in clear words. Additionally, the judiciary has the last say on the legality of government actions. It cannot be given leeway to interpret its functions without restraint. This is so, especially, where the court in question is the apex court hence not subject to review. Thus, the court is likely to consolidate its powers knowing that no other body can check it on adjudication. This will create judicial authoritarianism where judges can do whatever they want.

The judiciary is the most elitist branch of government often seen as possessing superior wisdom.[49] Its interaction with ordinary citizens is highly formalised with the courts taking a superiority and powerful position. Yet, judges are unelected which means that they are not directly accountable to the people.[50] Constitutional democracy seeks to create a balance between the counter-majoritarian nature of the judiciary and the need for accountability.[51] This balance is created by public participation in the appointment and removal of judges. However, this does not take away that the judiciary does not answer to the people directly. To ameliorate the adverse effect of the judiciary being unaccountable to the people directly, the judiciary must adhere to its function as defined in the Constitution and the written law.

Courts recognise the legalistic character of jurisdiction by holding that it flows from the law and it cannot be expanded through judicial interpretation and innovation. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia*

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[46] Clint Bolick 'The Case For Legal Textualism'(2018) available at <https://www.hoover.org/research/case-legal-textualism> accessed on 3rd May 2020.

[47] Frederic R. Kellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint* (1st edn, *Cambridge University Press 2011) 30.*

[48] Paul Stevens 'Some Thoughts on Judicial Restraint' (1982)66 *Judicature 179.*

[49] Tan Wang, 'Study on the Elitism of Chinese Judiciary' (2004) *Modern Law Science 2.*

[50] Croley Steven, 'The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law' (1995)2 *The University of Chicago Law Review 702.*

[51] Ibid , p. 701.

v KCB & 2 Others[52] was of the view that the court must adhere to the jurisdiction as donated by law. The law, therefore, becomes central to determining a court's jurisdiction. In the *Matter of the Interim Independent Electoral Commission,*[53]the Supreme Court was of the view that:

> Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

Even under transformative constitutionalism, the jurisdiction of the court remains a highly regulated matter.[54] To avoid assuming jurisdiction through craft and innovation, courts should not interpret the jurisdictional clauses broadly. The reference point must be the Constitution and legislation without the expansion of what the law provides. Otherwise, the courts will arrogate themselves powers exceeding the legal text. Transformative constitutionalism does not postulate for erratic expansion of jurisdiction. Indeed, the nature of jurisdiction as a highly legalistic concept enjoins the transformative Constitution to be interpreted taking into account that these are special clauses. Therefore, the project of transformative constitutionalism does not affect the manner the jurisdiction clauses should be interpreted.

Although scholars of transformative constitutionalism argue for a judicial culture that is not formalistic, their argument should not be applied in context.[55] Kenya has codified its laws on jurisdiction which makes it content-specific and more clear. The detailed nature of legislation together with the nature of jurisdiction defines the context which transformative constitutionalism should take into account. This ensures there is a harmonised application of the jurisdiction of the court. If there is an area of law that requires uniformity and consistency more than any other, it is the jurisdiction of the court. This is because jurisdiction being a preliminary and power issue requires certainty to avoid embarrassment to the court by subjective entertaining of matters. Further, since the court's own power to entertain a matter is what is in question, while interpreting jurisdiction clauses,

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52 [2012] eKLR.
53 [2011] eKLR.
54 *Charles Oyoo Kanyangi & 41 Others v Judicial Service Commission of Kenya* [2018] eKLR.
55 Langa Pius, 'Transformative Constitutionalism' (2006)17 *Stellenbosch L. Rev 353.*

the court must be extra-accountable to avoid abuse of power. It is one thing for the court to broaden its power while interpreting substantive clause -since the law needs to develop- but it is another for the court to reinvent its jurisdiction. The jurisdiction of the court does not grow unless planted afresh by the legislature. In sum, the jurisdiction should not be expanded through interpretation and application even under transformative constitutionalism.

4. Unmasking Normative Derivative Doctrine: a Subversion of article 163(4)(a) of the Constitution of Kenya 2010

4.1 Constitutional Order

To better understand normative derivate and its applicability, it is first paramount to examine the concept of constitutional order.

Despite the importance of the concept of constitutional order in practice and theory of constitutional law, it has no agreed meaning. The most authoritative articulation, however, is by Prof Yash Ghai. Ghai describes a constitutional order as 'representing a fundamental commitment to the principles and procedures of the constitution and therefore emphasises behaviour, practice, and internalisation of norms.'[56] Additionally, the concept is manifested in the entire legal system beyond the text of the Constitution. Ghai further argues that a Constitution is not enough without a permeating constitutional order.[57]

Tushnet argues that the notion of the constitutional order is made up of a 'dormant set of institutions and principles'.[58] What Tushnet is advocating for is a framework defining a constitutional regime. This order provides for the institutions of exercise of government powers and applicable principles. Additionally, the constitutional order combines institutions and principles.[59] These principles are found in court cases, policies, legislation and practices. They are aggregate of norms which give effect to the provisions of the Constitution. Therefore, the constitutional order is the translation of the Constitution from the text to an implementable concept.

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[56] Ghai Yash, 'Decreeing and establishing a constitutional order: challenges facing Kenya' (2009) *The Royal African Society: African Arguments* 2.

[57] Ibid.

[58] Mark Tushnet, *The New Constitutional Order* (1st edn, Princeton University Press 2003) 2.

[59] Heinz Klug, 'The New Constitutional Order by Mark Tushnet' (2009)31 *Journal of Law and Society 280-283.*

On the other hand, Li-ann Thio postulates that a Constitution in books is an unfinished project which should move towards practice for completeness.[60] The constitution is supposed to fulfil the provisions of the textual Constitution by providing for the wider constitutional law principles and practices.[61] A constitutional order encompasses an entire system of the society characterised by legislation, norms, behaviours and culture. This order should be coherent and unified under the auspices of the Constitution. While the Constitution is the document, the order is the system created by that document. Therefore, the success of a constitution is not defined by its provisions. Rather, its ability to establish a constitutional order and the quality of the order it establishes. This concept of constitutional order becomes crucial to assessing the claim that only certain legislations are part of the constitutional order.

4.2 The Normative Derivative Doctrine as an Antithesis to article 163(4)(a) of the Constitution

4.2.1 Understanding the Jurisdiction of the Supreme Court under article 163(4)(a) and the Doctrine of Normative Derivative

The Supreme Court has had numerous opportunities to pronounce itself on its jurisdiction under article 163(4)(a) of the Constitution.[62] The words which have elicited the most controversy state that the Supreme Court shall entertain an appeal as a matter of right on cases 'involving the interpretation or application of this constitution'.[63] In *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another,*[64] the Supreme Court was of the view that article 163(4)(a) allows it to adjudicate matters that only deal with interpretation and application of the Constitution which have been canvassed by courts below. Additionally, the dispute must centre on the interpretation and application of the Constitution. In cases where the dispute has little to do with the interpretation and application of the Constitution, the Supreme Court does not have jurisdiction. In *Gatirau Peter*

[60] Thio Li-ann, 'Soft Constitutional Law in Nonliberal Asian Constitutional Democracies' (2010) 8.4 *International Journal of Constitutional Law 766-799.*

[61] Chilton Adam and Mila Versteeg, 'Small-c Constitutional Rights' (2019) *Virginia Public Law and Legal Theory Research Paper a*vailable at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3490919> accessed on 15th March 2020.

[62] [2012] eKLR; [2012] eKLR.

[63] Article 163(4)(a) of the Constitution.

[64] [2012] eKLR.

Munya v Dickson Mwenda Kithinji & 2 Others,[65] the court went on to state as follows:

> The import of the Court's statement in the *Ngoge case* is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.

In *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others,*[66] the Supreme Court stated that in examining the threshold under article 163(4)(a) of the Constitution, there are no set principles. The Court was of the view that this examination is an exercise of 'discretionary powers'. I fault this decision because the issue of jurisdiction is a matter of law and not discretion. This goes a long way to highlight the unfortunate contradictory jurisprudence emanating from the Supreme Court.

The doctrine of the normative derivative has been invoked mostly in election matters. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*[67] was of the view that not all election disputes can be appealed to it. However, it went on to hold that the Election Act and the Regulations are normative derivatives of the Constitution. Therefore, the court interpreting the Election Act and Regulations cannot detach from the Constitution. The import of this is that in interpreting the Election Act and Regulations the court will also be interpreting the Constitution since they are derived from the Constitution. The reasoning of the court is contradictory because it starts from the premise that not all election matters will find their way to the Supreme Court. It then proceeds to provide that all matters dealing with the Election Act and the Regulations will reach the Supreme Court because these laws are normative derivatives of article 81 and 86 of the Constitution. One would wonder what type of election disputes would not be anchored on election laws so that the Supreme Court would lack jurisdiction.

On the other hand, the Supreme Court in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others*[68] observed that the Election Act

[65] [2014] eKLR.
[66] [2019] eKLR.
[67] [2014] eKLR.
[68] [2014] eKLR.

and Regulations are a 'direct emanation of the relevant constitutional principle'.[69] Interestingly, the Supreme Court agreed with learned counsel, Mr. Abdullahi, for the Respondent, that all laws are normative derivatives of the Constitution. However, the court incoherently went on to justify the special treatment of normative derivative legislation based on the nature of the Constitution as decreeing general principles which demonstrate a value system. Therefore, the court should interpret the principles in the Constitution and norm in the statutes in a manner that develops them. The logic of the court here appears to be convoluted and dwelling on irrelevant matters. Later, the court went on to state that the principles in the Constitution are general and not self-executing until they are filled up with the content from the legislation.

In justifying assumption of jurisdiction in election matters the Supreme Court, in *Fredrick Otieno Outa v Jared Odoyo Okello & 4 Others,*[70] *observed that*

> the Election Act details constitutional principles. The Constitution is therefore fulfilled by the Election Act which provides for crucial parts of election such as the manner of voting, transmission of results and many others. The Election Act and other election laws form part of the Constitution because they contain constitutional principles. It follows that the interpretation of Election Act and other election laws will lead to interpretation of the constitution. The argument that these legislations contain constitutional principles is used to justify normative derivative legislations. On this basis, the Supreme Court concluded that 'Thus, it is for certain, that electoral contestations will involve constitutional interpretation or application'.[71] The Supreme Court made a generalised statement that election disputes will automatically lead to interpretation or application of the Constitution. This conclusion by the Supreme Court also depicts inconsistent jurisprudence because earlier in Munya Case[72] it had concluded that not all election dispute involve interpretation and application of the Constitution.

4.2.2 Dismantling the Normative Derivative Doctrine

The Supreme Court has evaded answering expressly the question of the status of the normative derivative legislation.[73] Although it has treated these legislations as having a superior character, it has shied of declaring them as superior. Khobe argues that electoral law is an ordinary law, but goes ahead to state that it enjoys a

[69] Ibid, para 132.
[70] [2014] eKLR, para *55*.
[71] [2014] eKLR para 55.
[72] [2014] eKLR.
[73] [2014] eKLR.

peculiar status within the legal order. I find this argument peculiar. How can the electoral law be ordinary law and at the same time enjoy a peculiar status? Is that not an oxymoron? However, if we proceed on the premises that these legislations are Acts of Parliament and not a Constitution, a number of inferences will follow: Firstly, since these legislations remain Acts of Parliament, their character cannot be changed by their interpretation or application. Indeed, interpretation and application is not a process of recreating the law and transforming it into another instrument. The legislation does not change its character because of its connection with the Constitution. Secondly, the importance of legislation in society does not affect its character as an Act of Parliament. This is because the role legislation plays is not a component of its definition. Put differently, for there to be a statute, the role of the content of the statute in the society is irrelevant**.**

Additionally, article 163 (4)(a) of the Constitution provides in explicit terms that the jurisdiction extends to interpretation and application of the Constitution. How then does the interpretation or application of normative derivative legislation become interpretation or application of the Constitution? Indeed, the jurisdiction is for the interpretation and application of the Constitution alone and not legislation emanating from it. To argue otherwise raises the question of whether the interpretation or application of a statute emanating or derived from the Constitution turns the statute into the Constitution. Even assuming the argument that the electoral law enjoys a special relationship with the Constitution because it affects the voting and government is correct, does this change the status of electoral law?

The Supreme Court holds that the normative derivative legislations contain the substance of the general constitutional principles. Hence, while interpreting them, the court cannot disengage from the Constitution. The court fails to state what the meaning of to 'disengage from the Constitution' is. Does it mean that these legislation form part of the Constitution? Or does it mean that each provision of the statute must be read together with the Constitution as a matter of formality even when the Constitution has no bearing? These questions are relevant because the term 'disengaged' is vague. This word does not provide much about the relationship between the Constitution and the normative derivative legislation. The role of the Constitution in interpreting and applying the normative derivative legislation is unstated, hence, unclear. Does it mean interpreting normative derivative legislation amounts to interpreting the Constitution? Should the role that the Constitution plays in interpreting and applying the normative derivative legislation not be based on the substance of the case? The Supreme Court assumes

that every dispute dealing with normative derivative legislation will touch on the Constitution. This is pre-emptive of cases that come before the court because the relevance of the Constitution is defined by the nature of the case.

By invoking the doctrine of normative derivative, the Supreme Court ignores the jurisprudence set in its previous cases of *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another.*[74] The court settled that the basis of jurisdiction under article 163(4) (a) of the Constitution is that the Constitution must have been the crux of the dispute. Thus, the mere mention of the Constitution cannot satisfy the jurisdiction of the court. This ignores a crucial examination of a dispute touching on the Constitution and legislation, to wit, what is the dominant character of the case before the court, is it a legislation or the Constitution?

In any case, the concept of constitutional order makes all laws, norms, behaviours and court decisions normative derivatives of the Constitution. These laws, norms, behaviour and practices are the larger Constitution referred to as the small c constitution. This is the rationale behind the constitutional review of legislation and administrative actions to ensure that they conform to the Constitution. This understanding is derived from the fact that the Constitution cannot provide for everything.[75] Khobe adopts the Supreme Court's argument that the electoral law enjoys a special relationship with the Constitution because it is part of the constitutional order. This contradicts the understanding that the Constitution is generally implemented through legislation and administrative actions. Just because the Constitution has explicitly stated that certain legislation shall be enacted to implement its general principles that do not alter the structure of the constitutional order. The fact that the Constitution requires the enactment of certain specific legislations does not alter their character as Acts of Parliament. All legislations, whether decreed expressly by the Constitution or not, are derived from the Constitution. Going by the logic of the Supreme Court, all laws should, therefore, assume a special character because they are derived from the Constitution.

[74] S.C Petition No. 3 of 2012 (2012) eKLR.

[75] Sihanya Bernard, Constitutional implementation in Kenya, 2010-2015: Challenges and prospects (Friedrich-Ebert-Stiftung 2012) 4.

5. Reclaiming Jurisdictional Sanity: the Maraga Supreme Court[76]

The Maraga Supreme Court has departed from the constitutional heresy formed during Mutunga Supreme Court. The court has been hesitant to adopt the doctrine of the normative derivative. In the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 Others,*[77] the court observed that parties should not run away from the sieving under article 163(4)(a) of the Constitution. It went on to remark thus:

> [T]hat the *Munya 1* case did not in any way open a *carte blanche* window so that any appeal can be brought to this Court on allegation that the judgment of the Court of Appeal took a constitutional trajectory. Neither should the phrase *"the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution"* be construed as providing a blanket right of appeal to the Supreme Court in all election petition matters to the Supreme Court from the Court of Appeal.

The Supreme Court has gone ahead to declare that the normative derivative in the *Munya case* was not a holding. In *Lenny Maxwell Kivuti v Independent Electoral and Boundaries Commission (IEBC) & 3 Others,*[78] it stated that:

> We hereby re-emphasize that the oft-quoted pronouncement by this Court in *Munya 1* was neither a "holding" nor was it meant to be a *Carte Blanche* for invoking this Court's jurisdiction under Article 163 (4) (a) of the Constitution in electoral disputes.

The Supreme Court affirmed the principle that not all election appeals will fall under article 163(4)(a) of the Constitution in *Walter Enock Nyambati Osebe v Independent Electoral and Boundaries Commission & 2 Others.*[79] Despite departure in substance from *Munya case,* the Supreme Court has failed to expressly state that it was wrong.

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[76] Mutunga Supreme Court is the Supreme Court between 2011 to 2016 and Maraga Supreme Court 2016 to 2020.

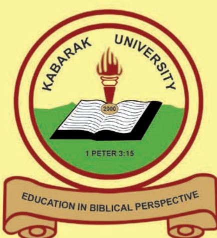
[77] [2018] eKLR.

[78] [2019] eKLR.

[79] [2019] eKLR.

6. Conclusion

The Supreme Court has gone off on the jurisdictional tangent on numerous occasions. Though this raises the question of judiciousness, the more compelling issue is that of legitimacy. The dominant discussion has been on the interpretation of article 163(4)(a) of the Constitution with the court creating a special category of legislation called normative derivative. Although the Constitution is clear that the jurisdiction of the Court is on matters involving the interpretation and application of the Constitution, the Supreme Court has extended its jurisdiction to normative derivative legislations. This piece has endeavoured to dispel the concept of constitutional statute arising from normative derivative character since Kenya has a written Constitution demarcating between legislation and the Constitution. Khobe's attempt to justify the Supreme Court's overreach through the cherished concept of transformative constitutionalism falls flat. This is because he fails to recognise the nature of the jurisdiction clauses as antithetical to broad interpretation. Khobe is engrossed in the concept of normative derivative even after the Supreme Court expressed doubt with its soundness. In sum, the Supreme Court of Kenya is still a growing court which needs legitimacy in order to shape the legal landscape in Kenya. This legitimacy can only be achieved through respect for the law and not by manipulating it.



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