

Using transformative constitutions to build counter-hegemonic consciousness in society: Response to Professor Justice Willy Mutunga's inaugural lecture at Kabarak School of Law, *In search and defence of radical legal education: A personal footnote on 28 January 2022*

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To start with, Vice Chancellor, Professor Justice *ndugu* comrade Willy Mutunga, eminent academic community, distinguished guests and participants, and friends and comrades. I'd like to start off by congratulating the Vice Chancellor for 'capturing a person of Professor Mutunga's calibre'. As it has been said, Professor Mutunga comes with a lot of experience at the bar, at the bench, in academia, and in civil society. And I am sure any university in the world would be proud to be able to get a person like Professor Mutunga on its faculty and staff.

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Professor Mutunga has all the usual qualifications in terms of a string of degrees and publications that we demand of our professors. But Professor Mutunga has an additional degree which not many professors have, and many of us do not have. And the degree that Professor Mutunga has is called 'PG' – prison graduate. So, he comes with additional experience of a detainee of the Nyayo State, which was as you know, one of the most oppressive states in the history of Kenya.

I do not want to spend a lot of time, because mine is not a rebuttal – mine is much more a confirmation. I really agree with many things that Willy Mutunga has said. However, I would like to underscore two take aways, and make another request for greater reflection on one issue.

First, is on the limits of legal radicalism, whether that legal radicalism is in terms of teaching, the bar or the bench. There are limits to this which Prof Mutunga recognises and which he has mentioned in his lecture. But one thing he urges us to do is to stretch these limits to the extreme. In other words, not to give up. And I think that is a very important emphasis: that those of us who are trained in this field, and who are involved in this field, while recognising the limits, must stretch them to extremes. Stretching limits to their extremes means struggle. But it also serves a very important pedagogical function for the society as a whole, to bring out in the open what law actually is, and what the legal struggles are actually about; and how do these legal struggles directly or indirectly, ultimately or immediately, reflect real life social struggles in our society. In other words, these struggles are not abstract. What goes on in court is not abstract. It relates directly or indirectly as I said, to the social struggles which go on in our society. That is the first point I would like to underscore and that I would like particularly the academic community to reflect on.

The second point that Willy has made again and again is that law is a terrain of struggle. Law is not simply some kind of neutral instrument which can be used by anyone who likes to use it. It is actually an arena of struggle. Law embeds in itself an ideology, a world outlook. But unlike other ideologies, like for example religion, the ideology of law cannot be too abstract, because it also regulates relations on earth not in heaven.

And to that extent its level of abstraction, ideological abstraction, is at a lower level.

I have always said that law is one of the majestic inventions of the bourgeoisie. It both legitimises and hegemonises, while serving the status quo in the interest of dominant interests. Its ideology is not always apparent, it is subtle. In fact, law is used to legitimise a class society, and in doing so, of course law is political. So, we must recognise from the outset that law is political. That does not mean that judges consciously recognise law as such or go out of their way to make political decisions. Of course, they will make decisions, and arrive at those decisions using all the techniques of law, but while perhaps unaware that it is a political decision. And as we all know, in practice, the decisions are not made simply by legal reasoning. Decisions are contextualised and situated and localised in a particular society and particular struggles which are ongoing at the time. I would therefore want to summarise by saying that law is a concentrated form of politics.

Finally, and this is where I would like to make a few more remarks, specifically on the last 15 or 20 pages of Professor Mutunga's lecture, which I had the privilege of reading beforehand, and I enjoyed it a lot. It is really a magisterial lecture covering a lot of ground and raising lots of issues which demand our reflection – and very thoughtful reflection at that – and continued debate.

My remark is on what is called the transformative constitution. I asked myself, and Willy Mutunga has done his best to answer the question, what exactly is a transformative constitution? Is it that the constitution can bring about social transformation? And by social transformation here I am talking about fundamental transformation. Can constitutions bring about fundamental social transformations in society, because they are transformative constitutions? Can they for example, transform the existing social order to a new social order? Or they are transformative only to the extent that they facilitate some social change, some transformation, or provide the ground for what Professor Mutunga calls small revolutions or ordinary revolutions towards a grand revolution.

And if so, how do we characterise this in terms of social theory? How do we theorise this particular role of constitutions, of what we call transformative constitutions? Let me say the obvious. If you are talking about a fundamental social transformation, or revolution, then obviously law or the constitution does not do that or cannot do it by itself, because that means taking on the state, politically. And the state is the real defender, the real organ of class rule – an organ which legitimises the existing social order. The state is the one which defends and protects the existing social order and, law and courts are part of the state. So, unless we are developing a theory, which is not logically impossible, that one part of the state overthrows another part of the state, then we have to think of those transformative constitutions within the existing social order and within the existing state.

Now if we agree on that, how do we characterise the role of the constitution and law? Because constitutions are a terrain of struggle. There's no doubt about that. And, undoubtedly, constitutions and law are a site of social struggles. My question though is: can constitutions or law by themselves bring about a fundamental change? My answer is no. Nevertheless, they do work, hand in glove, towards a transformation accompanied by, and in the context of other social struggles. If we accept that, then how do we theorise that. Here is what I would like to suggest for all of us to reflect on, and hopefully for Mutunga to elaborate on. I find that the two theorists he refers to and whom he obviously admires and accepts, are Rosa Luxemburg and Antonio Gramsci. In combination, they provide us probably some pointers towards helping us to characterise, theoretically characterise, what we call transformative constitutions or the social role of transformative constitutions.

Rosa Luxemburg, to summarise her article on reform and revolution, in my reading, is that she distinguishes between two types of reforms: reformist reform and revolutionary reform. And this distinction is already in Marx's writings. What is a reformist reform? A reformist reform essentially reinforces the status quo, while revolutionary reform works towards a larger revolution of the society. So, combining that with Gramsci's theory of hegemony and counter-hegemony, I would

like to suggest that transformative constitutions and the struggle at the level of the terrain of constitutions and law help us towards building a counter hegemony. That is an important point. In other words, they help us towards a pedagogy of developing the consciousness of civil society to understand that only revolutionary reformism helps us to build the elements of counter hegemony against the hegemony of the existing social order.

It is a very important insight of Gramsci that a state or ruling class in a capitalist world or in a capitalist social order does not simply rule by coercion. Hegemony and instruments and apparatus of hegemony like education, law, and various elements of ideology play a very important role. In other words, bourgeois hegemony is exercised not only at the level of the state but also at the level of civil society. The rule of the oppressive class is accepted and internalised by the oppressed. Revolutionary situation occurs only when the oppressed refuse to be ruled. And that happens only when there is a whole period of insurrection of counter-hegemonic ideas. As someone said, 'insurrection of arms is preceded by insurrection of ideas, insurrection of thought'. It is here, I suggest, that we should locate the role of transformative constitutions. In other words, in building counter hegemony. Gramsci said that you have to win the battle of hegemony at the level of civil society before you can take it to the level of the state. And this is the insight which many of us, including revolutionaries and Marxists, miss out resulting in adventurism, insurrection and putchism.

In short I am arguing that one should locate the place of legal radicalism and legal struggles at the level of building elements of a counter-hegemonic consciousness and ideology. We should push for understanding of law and the constitution on the agenda of a kind of revolutionary reform, number one, and number two, towards building a counter hegemony. To raise the consciousness of the society in terms of counter hegemony and for the society to accept that the hegemonic ideas they have internalised are not common sense. This indeed is the important role of bourgeoisie hegemony, that bourgeoisie ideas are made common sense. They are taken for granted. You don't challenge them.

They are obvious. And we know through analysis that what is obvious is not really obvious. It is the outlook of a particular class or social order. And that is where we should be pushing society towards, towards an acceptance that what is obvious is not really obvious, there is a different view, and there is a different outlook. In other words, for society to help move away from what they consider to be common sense.

I would like to leave you with this thought: whether Gramsci's and Rosa Luxemburg's ideas can be woven together to help us to theorise what we have been calling transformative constitutions, in analytical terms. I think it is high time we moved from description to theory, to analyse – how do we theoretically characterise the role of transformative constitutions.

With those few remarks, let me thank you all for giving me this opportunity, and let me thank profusely and sincerely my friend Willy Mutunga, first for going back to the academy from the bench, which is not easy for many of us. And secondly, for delivering a magisterial lecture covering so much ground, including his own personal intellectual journey which was really fascinating.

Again, *asanteni sana, nawashukuru sana*. Thank you!