

In search of answers: My reverse education with Prof Chief Justice Willy Mutunga

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Abstract

After listening to Professor Chief Justice (CJ) Willy Mutunga deliver his lectures, I had questions about some of the things he was saying. I later joined a class he was teaching at Kabarak Law School, reached out, and began to ask some of the questions that I had. The question-and-answer sessions resulted in lengthy and substantive intellectual exchanges on various legal subjects. Prof CJ Mutunga suggested that I publish the exchanges. This piece presents the first part of the exchanges. A second part was published by The Platform, November 2023 Issue as 'A conversation on "The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions" by Prof Chief Justice Willy M Mutunga', 20-30.

Keywords: feminism, judicial activism, philosophy, Marxism.

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Introduction

When I reached out to Professor Willy Mutunga, Chief Justice Emeritus of the Republic of Kenya, I set out to engage him on one issue. His responses led me to ask more questions, which led to this intellectual piece borne of our conversations. This piece is in two parts. The first part is about judicial activism and the second part is about feminism, great thinkers, and philosophy.

In the first part, I interrogate Prof CJ (as we affectionately call him) on why he uses the term ‘judicial activism’ to describe judges who, in my opinion, are simply guarding the Constitution. The answers given by Prof CJ lead to the second part. In the second part, I make a follow-up on the great feminists and great thinkers that CJ Mutunga mentions in the first part. While at it, I present my thoughts on the problem of who qualifies to be a great thinker, and who does not.

I argue that great thoughts and great thinkers did not exist only in the ‘good old days’, in fact, they exist even in the present day. Further, I seek to explore what should happen when celebrated ‘great thinkers’ are discovered to have been preaching water and drinking wine. I also try to pick Prof CJ’s brain on why there are little to no women in the thinkers ‘Hall of Fame’. Is it possible that women just never used to think? Or were they ignored? Is there an explanation? The second part also interrogates feminism and religion.

Part 1. Why ‘judicial activism’?

My question

I noted that you use the term ‘judicial activism’ quite often, even in your writings, to refer to when judges make ‘bold’, ‘transformative’, and often ‘innovative’ decisions.¹ For instance, in *Moses Kasaine Lenolkulal*

¹ Willy Mutunga, *In search and defence of radical legal education: A personal footnote*, Kabarak University Press, 2022, 44- 47.

*v DPP (Lenolkulal decision)*² High Court decision, Justice Mumbi Ngugi ruled to deny a governor –accused of graft – access to his office. The *David Ndii & others v Attorney General & others* (Building Bridges Initiative {BBI} decision)³ was met with praise and criticisms for being a show of ‘judicial activism’.⁴ However, it can be argued that it is simply the judiciary guarding the Constitution, not the judiciary being ‘an activist’.

The *Kabarak Journal of Law and Ethics* published a debate between Ken Ogutu and Duncan O’Kubasu, on whether decisions such as the *Lenolkulal decision* were ‘activism’ or a defence of the Constitution.⁵ Duncan O’Kubasu took issue with Justice Mumbi Ngugi’s decision, which he found to be activist and against the rule of law.⁶ JV Owiti responded by defending Justice Mumbi Ngugi and described him as brave and upholding the rule of law.⁷ Ken Ogutu joined JV Owiti in defending Justice Ngugi.⁸ So, I would like to hear your opinion, is it really ‘judicial activism’? And why so?

² *Moses Kasaine Lenolkulal v DPP*, Criminal Revision 25 of 2019, Ruling on Revision of 24 July 2019, eKLR. In the case, Moses Kasaine Lenolkulal, who was the Governor of Samburu County, was accused of four counts under the Anti-Corruption and Economic Crimes Act. The Court reaffirmed the decision of the trial court that since the Samburu County Government Office was a scene of the crime, the governor was barred from accessing the offices without the prior written authorisation of the Chief Executive Officer of the investigative agency, the EACC.

³ *David Ndii & others v Attorney General & others*, Petition number E282 of 2020 and Petition numbers 397, E400, E401, E402, E416, 426 of 2020, 2 of 2021(Consolidated), Judgement of the High Court of Kenya at Nairobi, 13 May 2021 [eKLR]; the decision declared an attempted constitutional amendment, popularised by the political elite, unconstitutional.

⁴ Walter Menya, ‘Kenya: BBI High Court ruling rekindles judicial activism debate’ *AllAfrica*, 23 May 2021.

⁵ Duncan O’Kubasu, ‘Ruinous judicial activism: What a solemn scrutiny of the ruling of Justice Mumbi Ngugi in the Moses Kasaine Lenolkulal case reveals’ 4 *Kabarak Journal of Law and Ethics* (2019) 1-16.

⁶ O’Kubasu, ‘Ruinous judicial activism’, 1-16.

⁷ JV Owiti, ‘A tale of judicial courage: Lady Justice Mumbi Ngugi’s bravery that gave back some life to the dying edicts of Chapter Six of the Constitution’ 4 *Kabarak Journal of Law and Ethics* (2019) 17-30.

⁸ Ken Ogutu, ‘Defending guardians of the Constitution against ruinous criticism: A reply to Duncan O’Kubasu’ 4 *Kabarak Journal of Law and Ethics* (2019) 31-46.

Professor Mutunga's response

Thank you, Marion.

Please read my inaugural lecture⁹ yet again on this issue so that you are clear about my stand. It supports what Professor Gathii writes.

I interrogate Professors Joe Oloka-Onyango and Upendra Baxi. I also make it clear that the Constitution of Kenya (2010) is activist, and judges have to be activists. I state clearly that judges have different intellectual, ideological and political positions that can be conservative, liberal, radical, and even revolutionary. However, the Constitution has its ideology, and politics spelt out in its transformative vision. Therefore, struggles will continue within and outside the judiciary and in society at large. I also dwell on what I call transformative judicial politics in the quest to make our jurisprudence what it should be, and I give various categorisations that you will find in the article and in the Inaugural Lecture.

Thank you, Marion, for referring me to the debate between Ogutu and Duncan Okubasu. I believe it follows hot on the heels of mine with Githu Muigai, which is on YouTube.¹⁰ Once you re-read my article and the debate let me know what your position is and why. Read my analysis of judicial activism in response to Professor Upendra Baxi in the Inaugural Lecture and the article published by Osgoode Law School.¹¹

My response

Greetings CJ!

⁹ Willy Mutunga, *In search and defence of radical legal education: A personal footnote*, Kabarak University Press, 2022, 44-47.

¹⁰ The great debate: Prof. Githu Muigai vs Dr Willy Mutunga at UoN School of Law, Vice-Chancellor University of Nairobi, 5 July 2019 <<https://www.youtube.com/watch?v=6Pxbvmr2IA4>> on 30 November 2023.

¹¹ Willy Mutunga, 'Transformative constitutions and constitutionalism: A new theory and school of jurisprudence from the Global South?' 8 *Transnational Human Rights Review* (2021) 10.

I have re-read your writings on judicial activism. If my question was 'Why judicial activism', it has been answered. I understand you to explain your use of the terms from a historical and contextual perspective. It makes sense that in your opinion, the Constitution itself is activist, and therefore guarding it requires activism. Before I go on; correct me if I am wrong. I do not wish to make a strawman's argument.

Having understood your very sensible reasoning, I think that if indeed the Constitution is activist, then anyone who stands by the spirit of the Constitution is only a guardian of the Constitution, not an activist. Let me highlight that I substantively agree with your reasoning and justification. I only disagree to the extent that sometimes a big spoon is a big spoon, not a spade. I believe that there is nothing extraordinary in bold decisions, they should be viewed as they are; 'the right thing to do' and, not a radical thing to do. So much so that the only extraordinary decisions are those that fail to uphold the spirit of the Constitution, because how dare they depart from what ought to be done as a norm? In my view, upholding the spirit of the Constitution is an activist affair only when compared to the pre-constitutional judicial order. It indeed takes extraordinary courage to pronounce judgements such as the *Lenolkulal* decision, or the BBI High Court and Court of Appeal decisions, because of the nature of the persons on the receiving end, but that should be the norm rather than the landmark.

Professor Mutunga's Response

I see you have an issue with the word 'activism'. Have you understood the origin of the word as discussed by Upendra Baxi? Why would a guardian of the Constitution not be an activist given Baxi's analysis? I salute the notion of the guardian of the Constitution, but it cannot ban activism from the historical contexts it has been used. Activism, transformation, and revolution are words that should be understood in their historical, economic, social, cultural, and spiritual contexts. They are not 'dirty' words as some people, particularly those in opposition to their use, are wont to do. Some politicians called me an activist CJ. I told them that they were activists also, for the status quo and the

dismembering of the Constitution. They were not guardians of the Constitution. As I have written, we are all activists depending on our causes. It is the extraordinary courage of judges, not political and activist given the status quo, that I have given an example of. The extraordinary decisions that fail to uphold the spirit are also activist as I argue.

The debate continues. Let me know why the word activism should be banned from our struggles.

My response

CJ, I am not saying the word should be banned. I think it makes sense once understood in its context. I have listened to what you have said before, and read what you wrote; it makes total sense. Indeed, at the onset of the post-2010 order, it only made sense to label the task ahead 'judicial activism'. However, having substantively changed the reputation and order of the judiciary (in my analysis as Wanjiku, the pre-2010 judiciary is not the post-2010 judiciary, though some judges disappoint, and those judges are the exception to the settled 'general rule'). The task has therefore moved past activism; we are at the 'keep the momentum' stage.

Why do I find the word 'activist' problematic? Activists, as I understand them, are those who question what is and seek to do something about it (for example the 2010 Constitution). Any judge who was an 'activist' in the pre-constitutional order must have been the cure Kenyans were longing for.

Surely, the pre-2010 Constitution judicial order did not make sense (the then judiciary has been described as '...an institution so frail in its structures...so deficient in integrity, so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.').¹² and those who sought to transform that, were truly activists.

¹² Willy Mutunga 'We found an institution so frail...' in Sylvia Kang'ara, Duncan Okello and Kwamchetsi Makokha (eds) *Beacons of judiciary transformation*, Sheria Publishing House, 2022, 14. Prof CJ Mutunga details a brief history of the judiciary in Willy Mutunga, 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' (1) *Speculum Juris*, 2015, 6.

If I were to describe activists, I would borrow (activist) Jerotich Seii's words; that they are those who are 'more than a little bit fed up and doing something about it'.¹³ They seek to transform the status quo. Thus, it is only factual when you term the Constitution 'activist'. It is truly activist. So why then would anyone want to 'do something about that'?

However, I think that the 'judicial activist' mindset is a good one, and those who are against 'judicial activism' are the same ones that make judgements that are not progressive. For instance, before the BBI decision,¹⁴ the Court of Appeal was termed 'the graveyard of progressive jurisprudence'.¹⁵

Walter Khobe wrote that '...if there is a group of people whose ideology is contrary to the spirit, values, and principles of the 2010 Constitution, it is the judges of the Court of Appeal. In fact, if there is a group of people who are irredeemably mired in a legal culture of liberal legalism (formalism, positivism, and rule-bound technical approach to adjudication) associated with the pre-2010 dispensation and are oblivious to the demands of change in legal culture demanded by the 2010 Constitution, it is the judges of the Court of Appeal.'¹⁶

These are connotations I agreed with, for the 'unprogressiveness' witnessed in decisions such as the *Kenya Airports Authority v Mitu-Bell Welfare Society and 2 Others*¹⁷ where the Court of Appeal ruled *inter alia*,

¹³ @JerotichSeii Twitter account bio, accessed via Twitter on 7 February 2023.

¹⁴ *Independent Electoral and Boundaries Commission & 4 others v David Ndi & 82 others; Kenya Human Rights Commission & 4 others (amicus curiae)*, Petition E291 of 2021 and Civil Appeals E292, E293 and E294 of 2021 (Consolidated), Judgment of the Court of Appeal at Nairobi, Tuiyott dissenting opinion, 20 August 2021, [eKLR], where the Court of Appeal substantively upheld the judgement of the High Court that declared the controversial constitutional amendment attempt dubbed the Building Bridges Initiative (BBI) unconstitutional.

¹⁵ Mark Mwendwa also terms it a 'human rights graveyard' in Mark Mwendwa, in the 'The jurisprudence of Kenya's Court of Appeal on socio-economic rights' SSRN, 29 April 2019.

¹⁶ Walter Khobe's remarks cited in Mwendwa, 'The jurisprudence of Kenya's Court of Appeal on socio-economic rights' 29 April 2019.

¹⁷ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Civil Appeal 218 of 2014,

in favour of the Government's right to property and that international law (in the case, the United Nations Guidelines on Evictions and General Comment No.7) is not directly applicable in Kenya despite Article 2 (5) and (6), and, that persons could be forcefully evicted from public land. This decision overturned Justice Mumbi Ngugi's decision on the case at the High Court.

The jurisprudence of the matter of the two-thirds gender rule in *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another* was, in my opinion, painfully ridiculous.¹⁸ The High Court judges stated that the implementation of the two-thirds gender rule had to wait for Parliament to make legislation and that the two-

Judgement of the Court of Appeal, 1 July 2016 [eKLR]. The facts of the case were that, residents of Mitumba village in Nairobi were ordered to vacate the premises, via a notice by the Kenya Airports Authority, in local dailies on 15 September 2011. The village sat on public land and housed the Mitumba Village Primary School. The residents obtained conservatory orders from the High Court to restrain the demolition of their village, but the village was demolished anyway. The High Court decided that the demolitions were unreasonable, unconscionable, unconstitutional and were in violation of the right to housing. The Court further ordered the respondents (the Attorney General, the Kenya Airports Authority and the Commissioner of Lands) to resettle the petitioners and to provide, within 60 days of the judgement, state policies and programmes on provision of shelter and access to housing for marginalised groups such as residents of informal and slum settlements. The latter order amounted to a structural interdict. This decision was appealed to the Court of Appeal. The latter overturned the decision of the High Court, citing *inter alia*, that there was no legislation in Kenya regulating forcible eviction and resettlement of persons occupying public land and UN Guidelines were not directly applicable in Kenya. Thus, there was no framework within which to judge the evictions as unlawful. Further, the Court of Appeal insisted that structural interdicts were unknown to Kenyan law. The case was further appealed to the Supreme Court. The Supreme Court reversed the decision of the Court of Appeal, thereby enforcing the applicability of structural interdicts in Kenya, the applicability of UN Guidelines in Kenya, and deciding that a long occupation on public land crystallised the occupants' right to housing over the property, even though the occupation was a wrongful one.

¹⁸ The facts of the case were that on 15 June 2011, about a year after the promulgation of the Constitution of Kenya 2010, the Judicial Service Commission (JSC) recommended the appointment of five persons as judges of the Supreme Court. Of the five only one was a woman. The petitioners contended that this was short of the two-thirds gender rule and was thus in contravention of Article 27 of the Constitution of Kenya. The Court dismissed the petition on grounds that Parliament was yet to enact legislation to give effect to the two-thirds gender rule and that the realisation of the two-thirds gender rule was to be progressive not immediate.

thirds gender rule was to be achieved progressively. The Court said, ‘... feminists hold your missiles to your launch pads until the state acts...’.¹⁹ The Court also countered the ‘feminist’ argument by bringing up the issue of other groups disadvantaged by their economic, social, political, and environmental struggle, adding that being female is not grounds enough to require affirmative action. These arguments buttressed oppression olympics (a term used to describe the competition between groups wanting recognition as the most oppressed).²⁰ In concluding the case, the Court stated that ‘...if we were to decide this case on moral grounds or if we were conducting a lottery or giving honorary degrees, we would have granted your prayers.’²¹

This, in my opinion, was wrong, because there is a history of gender discrimination in Kenya, which is why gender equality is entrenched in the Constitution.²² Further, the needs of minorities and marginalised groups can all be addressed without requiring the subjugation of one for the other groups.²³ The Constitution of Kenya in Article 100 recognises five marginalised groups i.e. women, persons with disabilities, youth, ethnic and other minorities, and marginalised communities, and mandates legislative action for all of them.

At this point allow me to laud your dissenting opinion *In the Matter of the Principle of Gender Representation*.²⁴ It gives me relief, as Wanjiku, to

¹⁹ *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another*, Petition no 102 of 2011, Judgement of the High Court of Kenya at Nairobi, 25 August 2011, [eKLR].

²⁰ Ange-Marie Hancock, *Solidarity politics for millennials: A guide to ending the oppression olympics*, Palgrave Macmillan, 2014, 4; For an in-depth analysis of oppression olympics in Kenya, see, Lucianna Thuo, ‘Ending the oppression olympics: Promoting the concomitant political participation of marginalised groups in Kenya’ 5 *Strathmore Law Journal* (2021).

²¹ *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another*.

²² See for instance the deliberations in ‘The Final Report of the Constitution of Kenya Review Commission approved for issue at the 95-plenary meeting of the Constitution of Kenya Review Commission held on 10 February 2005’ (Constitution of Kenya Review Commission (CKRC), 2005, 47, 61-64.

²³ Lucianna Thuo notes that oppression olympics derail the inclusivity of the marginalised in the country’s public life and in politics, see, Thuo, ‘Ending the oppression olympics’, 66.

²⁴ *In the Matter of the Principle of Gender Representation in the National Assembly and the*

know that some powerful men support the equality cause. You say you felt the discrimination and did not see how the two-thirds gender rule was a 'progressive' provision; but rather an 'immediate' one.

On the upshot, I argue that if Justice Mumbi Ngugi was an activist in blocking suspect governors from accessing office, then so be it! Until when will the judiciary sit back, fold its arms, and stare at corruption as though the judiciary is a powerless cartoon?

So, do I wish to ban the term 'judicial activism'? This could be a tussle, but 'the end justifies the terms.'²⁵

CJ Mutunga's Response

You write well. You argue well. You read and critique stuff. I adore critics of my work. I love to debate. I like being convinced so that I can change my views. I believe I always tell people that I have a reflective, creative, and undogmatic brain. I want to clarify two points:

1. I do not agree we are past activism. The momentum you talk about is the struggle to implement the Constitution, fundamentally change the status quo, and think of revolution and socialism. My writings make that clear. Both tasks are fundamentally political and that is why I talked at length about alternative and authentic political, social, cultural, and economic leaderships that are anti-imperialist and against the stealing and thieving comprador classes.

Senate, Advisory Opinion number 2 of 2012, Advisory Opinion of the Supreme Court of Kenya at Nairobi, [2012] eKLR, Chief Justice Willy Mutunga dissenting opinion at para 11.5-11.7. In this 2012 matter, the majority opinion of the Supreme Court was that the implementation of the two-thirds gender rule was to be realised progressively and that by 27 August 2015, there should have been passed legislation to realise the rule. CJ Mutunga dissented by advising that the two-thirds gender rule was to be realised immediately, not progressively. To quote CJ Mutunga 'Arguing that the two-thirds gender rule requires progressive realisation flies into the face of this history of struggle by Kenyan women.' Further, CJ Mutunga recognised that the two-thirds rule was only a minimum, progressive realisation was to be aimed at a 50/50 parity (at para 11.4).

²⁵ Inspired by the phrase, 'the end justifies the means.'

2. The theory I am talking about which has become clear to me since the Inaugural Lecture and Issa Shivji's comments is the merger of theories by Marx, Engels, Lenin, Mao Zedong, Rosa, Gramsci, Che, and my African creative Marxists in the name of Samir Amin, Rodney, Issa Shivji, Karim Hirji, Dani Nabudere, and Yash Tandon. All have written on theories that can be anchored to transformative constitutions as small revolutions, revolutions, continuities, and links of past struggles towards liberating our societies. Therefore, a theory can be a merger or creative development of theories by others in different contexts and changing circumstances. I have a roll call of women Marxists and feminists that I can quote besides Rosa. It is just that I confine myself to those who have addressed the issue of the Constitution.
3. The third point is just an observation. As you debate and critique, be persuasive and less dismissive. The latter strategy belongs to those who are full of intellectual arrogance.

Part 2: On feminism, great thinkers and philosophy

My question

Thank you for your substantive engagements. Thank you for your observation, I welcome your critique/advice. I will endeavour to be more persuasive and less dismissive; I think it is a brilliant strategy.

You mention women Marxists and feminists. I have a request in my capacity as an ignorant student, could you please refer me to more women philosophers, Marxists or not, who have made substantive contributions in the field of philosophy and feminism? If you have their works, you can also share them. I am interested in interacting with their works.

Additionally, from a reading of your chapter in Yash Pal Ghai's *Liber amicorum*, and some of your judgments, one can conclude that you

are a person who believes in the substantive equality of men and women. Do you identify as a feminist? What are your views on 'feminism'?

CJ Mutunga's response

You can start with Micere Mugo, Angela Davis, Sylvia Tamale, Nawal El Sadawi, and Bell Hooks... I published a paper, 'Feminist masculinity' that, perhaps, qualifies me as a feminist masculine... a continuous and consistent struggle because we also carry the viruses of patriarchy, misogyny, and male chauvinism.²⁶

My memoir, *Studded justice*²⁷ has a chapter on women that traces my struggles in this subject.

My response

Thank you for your recommendations, you have recommended erudite women! I will definitely check them out!

I have a curious question; why do you think there are little to no female voices being preached as compared to male voices when it comes to theories of law? By that, I mean the levels and the likes of John Austin, John Locke, Karl Marx, Aristotle, Emmanuel Kant, and Hugo Grotius... Is it that there were genuinely no female thinkers at the time? Could there be other reasons?

I am officially looking forward to your memoir! I have not found your paper, yet, but I have come across an interview where you spoke about your type of feminism (feminist masculinity).²⁸ I would quickly

²⁶ Willy Mutunga, 'Feminist masculinity: Advocacy for gender equality and equity' in Makau Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions*, University of Pennsylvania Press, 2009.

²⁷ *Studded Justice* is forthcoming from Mkuki na Nyota, Dar es Salaam.

²⁸ Damaris Agweyu, 'Dr Willy Mutunga on walking in your truth', *Kenya Buzz*, on 15 February 2023.

agree that selfishness is part of the reason why patriarchy still prevails. I mean, who would want to agree to something that takes away some of their privileges? In my little yet large experience, the mere belief in the equality of men and women is in itself very controversial.

It is almost always worse when anyone claims equality in the home setting, which I understand the law may have no business regulating. I am always delighted to interact with male feminists because it then means that someone recognised some of their alleged privileges. Additionally, it is more convincing when a man speaks about equality to their fellow men because it extinguishes the 'them v. us' debate that tends to ensue when a woman is speaking about the same thing. I am not saying women should not speak, I am saying there are inherent or otherwise built-up attitudes that get in the way.

CJ Mutunga's response

I believe there have been women thinkers all the time. I have this conspiracy theory that their works were published by their men. I have no evidence, although I always wonder why brilliant women novelists use pen names, invariably male names so that they can get published. Patriarchy of course.

Feminist masculinity is attacked by women and men. It is seen as hypocritical. I believe it only when it is shared with women who have the same ideological, intellectual, and political positions is it possible to be believed. I have found, in practice, men are 'feminist masculines' when it comes to their mothers, sisters, daughters, granddaughters and aunts, but not to their girlfriends, wives, and other women.

My response

I am happy to interact with someone who believes there have been women thinkers since time immemorial! It always struck me oddly that all mainstream ideologists were male, and if I may add, dead. Well, it is true that old is gold, but a new broom sweeps better. I tend to think

there was a danger in presenting **only** the golden ideas of the ancient men as applicable today. I think it would create a perception, and I think it successfully has, that today's thinkers are not that great, at least not as great as the ones who lived in the golden days. So much so that, the present potential thinkers could judge themselves so harshly, even when they have great ideas, just because they are not in the Plato era.

I never understood what it takes to be a thinker at the level of Socrates. For instance, I think our dean, Prof Ambani, is an exceptional thinker. Our other lecturer Mr Omolo, in my opinion, has simple yet perplexing life philosophies that are evergreen. Our other teacher, Mr Ongoya often has his speeches etched in our minds because the sentiments are well thought out and concisely stated...

John Stuart Mill spoke of the harm principle. He said 'Whatever you do is your business unless you're harming someone else.' In all honesty, I do not believe that Mill came up with an idea that a reasonable person would not have thought about. Anyone today, who has never heard about the harm principle, can speak of its ideas. I suspect a field survey on random people could back me up. Yet, will all those with the same opinion be classified as 'great thinkers'?

Eric Gitari for instance, was another great thinker, as far as his lesbian, gay, bisexual, transgender, intersex, queer (LGBTIQ) cause in *Eric Gitari v NGO Co-ordination Board*.²⁹ In my opinion, a departure from the normal question of the morality of the LGBTIQ to a question of who 'every person' is was genius.³⁰ His argument leads a reasonable bystander, his opinion on LGBTIQ matters notwithstanding, to acknowledge first, that they are persons. What comes after this acknowledgement is left to debate, but Eric scores by simply stating that they are human first before

²⁹ *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 other*, Petition number 440 of 2013, Judgement of the High Court of Kenya at Nairobi, 30 April 2015, [eKLR]: the case argued that in refusing to register an NGO that would champion the interests of sexual minorities, the NGO Coordination Board contravened the right to freedom of association granted to 'every person' in Article 36 of the Constitution. The Court agreed with this argument. This decision was unsuccessfully appealed to the Court of Appeal and Supreme Court.

³⁰ I have since learnt that this qualifies to be called 'strategic litigation'.

they are classified in any other category, and by that, they are entitled to any minimums granted to any other human. However, this is not exactly considered 'genius'.

Law schools authoritatively teach about the morality doctrines of Lord Devlin, even though his immoral conduct hovers around after his death. Lord Devlin was under investigation for sexual molestation meted upon his daughter. The details of his life reveal a man who was drunk in the constructs of perceived classism.³¹ It is often highlighted with caution that HLA Hart was a suppressed homosexual and thus his ideas should be understood in that context.³² Should Lord Delvin too be contextualised so that the entire debate on morality is lost for hypocrisy?

Back to feminism, I want to agree with you, entirely. A story is told of James Barry, who was the first British person to perform a caesarean section that saved both mother and child.³³ It was later discovered that he was a woman, who carried herself as a man, just to beat the gender barriers present at the time in the medical field.³⁴ So, perhaps there is a disguise in philosophical writings? Highly likely. I am happy to hear your thoughts! I want to support your theory. I want to have faith that evidence can be found. If evidence of 'Australopithecus' was found, why not this?

I also believe in feminist masculinity. Which makes me conclude that it is a problem of selfishness. If I may pursue the theory a little further, it is said that a man who greatly loves a woman will do anything for her on and beyond this planet. In light of this, do you then think that the question of 'feminist masculinity' would end at the door of genuine love? And that those who want to oppress their wives don't love them as such? Could it be?

³¹ Beatrix Campbell, 'Our silence permits perpetrators to continue: One woman's fight to expose a father's abuse' *The Guardian*, 25 July 2021.

³² G Edward White 'Getting close to HLA Hart' 29(1) *Melbourne University Law Review* (2005).

³³ Pieter WJ van Dongen, 'Caesarean section - etymology and early history' 15(2) *South African Journal of Obstetrics and Gynaecology African Journals Online*, 2009, 64-65.

³⁴ Wendy Moore, 'Dr James Barry: A woman ahead of her time review - an exquisite story of scandalous subterfuge' *The Guardian*, 15 February 2023.

On a related note, CJ, I worry about the efficacy of laws in bringing societal change. For instance, historical land injustices, how many legal reforms has the country witnessed? As Prof Manji notes, Kenya hosts land legal provisions' reforms but no land reforms.³⁵ I want to believe you have lived through legal regimes that I and most of my peers can only read about, therefore, you would know something I/we don't (I always prefer learning from relatable lived experiences). In light of the above, do you think the two-thirds gender rule would end up being just another reform? Would it really bring about substantive equality?

CJ Mutunga's response

There are women thinkers; and there will always be. Systems do not glorify them, except for some, for various reasons. You know the historical reason for this, the entrenched patriarchy in all systems we have known to date. In addition, the systems cause cracks in solidarity among women as well.

Thinkers are born every day. Intrigued, you mention three men at Kabarak and not a single woman! Thinkers create ideas but they become obsolete if others do not develop them given the changing contexts and environments. Marxism would not be celebrated if Lenin, Engels, Mao Zedong, Rosa, and the African Marxists (women and men) I keep writing about who have also made the Marxist paradigm creative, innovative, and inventive. So, thinking and thinkers are never frozen in time.

You have the right to worry about 'great' thinkers. Who made them great thinkers and why?

You have your list of great thinkers and your reasons for it. I believe that systems glorify the ideas of public intellectuals/thinkers who reinforce their interests while vilifying those thinkers who do not. History has such records. I believe it is Marx who wrote that the ruling ideas of any epoch are the ideas of the ruling classes. I have already responded that the birthing of thinkers does not stop and those who stick to some have both ideological and political reasons for doing so.

³⁵ Ambreena Manji, 'The struggle for land and justice in Kenya', James Currey, 2020, 53.

I believe, in Devlin and Hart, you are bordering on homophobia! Why would their ideas be discarded simply because of who they were? And you think the basis of their sexuality was the basis of their thought? Their ideas have been critiqued by various scholars in various schools of jurisprudence because they are important and help us understand the role of law in society. Even the insane have sane moments if only we listen!

Feminist masculinity and selfishness: It could also be opportunism or hypocrisy. Like everything else commitment is required so that the struggle continues. In my case, I have never claimed success in feminist masculinity. I always see progression and regression because I am a man who does not live in a vacuum of patriarchy. To argue the idea of feminist masculinity is selfishness is to argue that good ideas cease to be good because of their practice. Bell Hooks has shown the falsity of that position. It reflects intellectual laziness and pessimism. Therefore, we glorify the idea and urge its implementation.

Feminist masculinity is ever present in love affairs. A feminist masculine, who is conscious, will consider the feelings and desires of his partner because he knows that mouthing that he is one counts for nothing if the practice counts for nothing. Oppressors do not have a heart to love in my books. They lack humanity. In any case, if we see love outside ideology and politics, we would not have the truth that is the whole truth. Have you heard of Alexandra Kollontai? Google her.

History records that law brings social change. The question that engages my mind always is in whose interests is this social change? History has the answer because the law does not exist in a vacuum. Look at welfare capitalism and social democracy that brought social reforms as concessions extracted from the ruling systems when people rose in struggle. Besides, your position has not been investigated. It sounds like a feeling. Be a critical thinker, always!

My response

Thank you for your illuminating responses! I appreciate your engagement.

CJ, I am not homophobic. I am what the LGBTIQ community would call an 'ally'; I however doubt it is an academic or even indigenous term.³⁶ My mention of HLA Hart and his sexuality was merely a descriptive report. I mentioned Hart just to show the justifiable narrative of 'contextualising the author' in philosophy, and, in comparison I wondered if we should contextualise Lord Delvin, an immoral person by his standards, who preached morality. HLA Hart's alleged homosexuality is used to critique and sometimes dismiss his scholarship as a personal defence. How did that end up being interpreted to mean I am borderline homophobic? I probably need to sharpen my reporting skills.

However, you have said it; 'even the insane have sane moments if only we listen'. I would then ask; can we consume from preachers who do not partake in the gospel they preach? If they do not believe in what they are saying, why should we believe what they are saying? And in so asking, I'm thinking about Lord Delvin. Lord Delvin de-preached same-sex unions by day and sexually abused his daughter by night.³⁷

When Lord Delvin was done writing about morality and the rights society had over two consenting adults of the same sex who want to 'pollute' society with their sexual conduct, he would go home to daunt his little daughter with another immoral act. I may sound like I am perpetuating what has, in modern-day been termed as 'cancel culture'.³⁸ I may even sound like I am blameless but Jesus can attest that I am one among the sinners He died on the cross for. Coincidentally, I write this

³⁶ 'Ally', *Gender & Sexuality Dictionary, Dictionary.com*, 15 February 2023.

³⁷ Beatrix Campbell, 'Our silence permits perpetrators to continue': One woman's fight to expose a father's abuse' *The Guardian*, 15 February 2023.

³⁸ Cancel culture is a 'controversial' trend where public figures get stripped of their public honour and/or support if it is discovered or suspected that they did something that is not generally acceptable, see Merriam Webster dictionary on cancel culture. This is the author's note.

during Easter! Yet I only wonder; should Lord Delvin be one among the people we authoritatively listen to as a legal fraternity, when talking about law and morality? Should we separate the preacher from the preaching? Should the blameless be the first to throw stones at the prostitute? What is your take?

I am guilty of not mentioning great women thinkers in my recent discussion. Yet I have mentioned Chimamanda for a start! Way before I knew of Aristotle and his fellow wise men, Prof Ambani, and colleagues, I knew of Chimamanda. I was taking notes from the Michelle Obama school of thought. I intended to limit my earlier mentions to people I have frequently interacted with in the corridors of Kabarak. Eric Gitari stood out because ever since I read his case, I was mind blown, yet he is barely thought of as a thinker, just an activist. I thought of mentioning Dr Jay³⁹ of the University of Nairobi, she was the first person on this planet to give me the most simplistic answer to a question that had been bothering me all my life. My interactions with her changed some of my perspectives in life. I met a humane genius by the name of Lizzy Muthoni.⁴⁰ I can mention other women who I believe are great thinkers...

CJ Mutunga's response

I apologise if you thought I suggested you are homophobic!

Lord Devlin worries you. Let me agree with you on what you say about him. He was despicable, hypocritical, and an abuser. I ask if his ideas as a thinker should be banned on that basis? If you asked my favourite theologians and philosophers, Mbiti and Tutu, both will tell you not to play God, to let God deal with it. I am assuming here you are a Christian and that you have read Tutu's *God is not a Christian: And other provocations*. Ngugi wa Thiong'o gave us a great idea of how to judge

³⁹ The name has been changed.

⁴⁰ Lizzy was an intern at Kabarak Law School, where I ended up interacting with her.

people: Put them in their lives' trajectory where you can separate the wheat from the chaff. As humans, we are not perfect. In that trajectory which people invariably call legacy, politics, ideology, revolution, radicalism, history, calling, etc., you will find great attributes and great sins, failings, and inhumanities. Such an analysis gives an objective person a great opportunity to judge the person. And a debate about the person continues that is an aspect of their greatness.

What answer did Dr Jay give you? I am curious. It is great you think Gitari is both a thinker and an activist. And in Kenya you know there are narrow-minded people who have given that word an abusive and unthinking definition. It reminds me of public intellectuals who doubt that self-educated individuals, for example Boniface Mwangi, cannot be intellectuals and thinkers!

You have given me a list of women who are great thinkers. I am grateful. I need to engage Muthoni in a debate. I agree with what you say about her. She is also a happy heart. Who are the others? I am very keen on the ones of your generation. For the avoidance of doubt, I am convinced you are in that list.

My response

There is no need to apologise. At least we agree we are not homophobic! I saw an interview where you said you were CJ for all Kenyans, straight or not.⁴¹ God is a God for all. Which reminds me of the greatest commandment, without which, anyone claiming to do right by God is doing absolutely nothing: LOVE.⁴² The discovery of the weight of that commandment blew my mind away. I could compare it to the supremacy of the Constitution: that any law that contravenes the Constitution is invalid. Whether the law was always in place

⁴¹ Damaris Agweyu, 'Dr Willy Mutunga on walking in your truth', *Kenya Buzz*, 15 February 2023.

⁴² Holy Bible, Matthew 22:34-40, 1 Corinthians 13, *New International Version*.

historically, whether it was enacted in good faith, whether it followed the procedures required to be enacted, such a law amounts to nothing if it contravenes the Constitution.

I find the greatest commandment to have similar weight. Assuming being LGBTIQ is immoral – I do not think it is; but for argument’s sake, we assume it is – I often wonder, would Jesus condemn LGBTIQ persons? The same Jesus who prevented a prostitute from being stoned?⁴³ Come to think of it, the prostitute was breaking religious norms. Pharisees were all about following these norms at whatever cost, yet Jesus condemned Pharisees every chance he got and acted lawyer for persons like the prostitute.⁴⁴ Did the lovers of God forget about His greatest commandment? Have we forgotten that all we do, on behalf of God is nothing if it is not founded on love? It is at this point that I confess that I have not read Tutu’s *God is not a Christian and other provocations*, but I will make sure to read it. It would be terrible if I played God on Delvin’s case, so I will not. I find truth in what you have said about Ngugi’s analysis.

I asked Dr Jay about her understanding of the verse that says, ‘Men love your wives... and women submit to your husbands.’ That would be Colossians 3:18-19; Ephesians 5:22-29. These verses are particularly interesting because they are often invoked as proof of male superiority and in worse instances, proof of women being inherently assigned the insubordinate position by God Himself. The latter has in my observation, given both women and men license to treat women as lesser beings, rather than teammates, in a marriage. It is the verse women will invoke to justify why they would be okay with living at the mercy of their husbands, who on the other hand use the verse to veto decisions and actions in the home setting.

⁴³ Holy Bible, John 8:1-11, *New International Version*.

⁴⁴ For example, in Matthew 23:1-12; Mark 12:38-40; Luke 11:37-52; 20:45-47.

Plainly understood (from the dictionaries), the term 'submit' means to 'accept or yield to a superior force or the authority or will of another person'.⁴⁵ I often wondered why Paul settled on that word about a marriage. Did the word have a different meaning then? Did the authors of dictionaries wrongly define that word? Does the Bible need to be historicised and contextualised? I have often asked for an interpretation of the verse and nobody has ever given me sensible feedback. According to Dr Jay, or rather, as I understood her answer, the verse simply tells wives to give in to/accept to be loved by their husbands. Sounds like a fair deal.

Boniface Mwangi is a thinker in his own right. You could tell me more about him since you interact with him more than I do. I share your concerns about activists and thinkers. Conservative minds worry me. They tend to think in one predetermined way. I find danger in that because then they will fail to see new possibilities based on the thinking that they have never seen that before. It is easy to kill creativity and innovation with that mind set. Eliud Kipchoge said before, 'No human is limited', if you ask me, no human is limited, even in thinking!

Muthoni is one who always challenges me, to go ahead and have that debate! Muthoni has a smart colleague named Christine Juma,⁴⁶ I am constantly running to her for advice. I have a friend called Grace Jelimo,⁴⁷ whose life and works keep me inspired. I am not sure you know any of these people. I must mention Ms. Julie Ingrid Lugulu, who has always encouraged us to believe in our abilities and dreams in a warm rather than intimidating way. Her diligence, humility, kindness, and humanity are something that moves me to believe that good people still exist. When I was a student in her class, Ms Lucianna Thuo had us see for ourselves how women shy from acknowledging our achievements

⁴⁵ Definitions from Oxford Languages, 'Submit', *Oxford*, 15 February 2023.

⁴⁶ Christine is a Kabarak Law School alumna.

⁴⁷ Grace is a Kabarak Law School alumna.

often to our detriment, as compared to men, who quickly do.⁴⁸ This highlight made me realise we (women) have a habit we did not even know we had, and needless to say, that was mind-transforming.

CJ Mutunga's response

Brilliant. What a sermon. I will borrow some of the preaching here for some chapter I am writing and acknowledge you. It is called 'The God of the Constitution'.⁴⁹ You have made my day.

Yes, the Bible has to be contextualised, historicised, and problematised. And like our Constitution it has to be interpreted holistically with no verse subverting another. I have always thought seriously about starting a multi-denominational SHRINE in this country.

My response

You truly are open-minded; questions such as mine are not always welcome or at least tolerable. Thou I must say I did not set out to 'preach', the questions and sentiments I put out are merely my thoughts. I look forward to the book! And the SHRINE.

⁴⁸ In one class, Ms Thuo asked group leaders about who was very active in some group assignments she had given. The ladies, including myself, were hesitant to say we were active. We were quick to recognise others, and we mentioned ourselves last, while the lads would quickly mention themselves. For various reasons, this tendency to downplay one's own competencies is common among women; See, Pauline Rose Clance and Suzanne Imes, 'The imposter phenomenon in high achieving women: Dynamics and therapeutic intervention' 15(3) *Psychotherapy Theory, Research and Practice*, 1978, where the authors explain how imposter syndrome is higher among women than it tends to be among men. Women are very likely to attribute their success to external factors such as luck, oversight by selection committees, and everything but their own skills and intelligence. This contributes to slowing the progress of women in various aspects of their lives.

⁴⁹ The "God of the Constitution" is a chapter in the manuscript CJ Mutunga is working on and its tentative title is: *Transformative constitutions and constitutionalism: Another school of jurisprudence from the Global South?*

In lieu of a conclusion

This piece has presented part of a conversation between a teacher and a student. The conversation begun with questions about why Prof CJ Mutunga uses the term ‘judicial activism’ to describe judges who I thought were only guarding the Constitution. As the engagements progressed, I sought to pick Prof CJ Mutunga’s brain on some of the issues that have always bothered my mind. Issues such as judicial activism, feminism; who a ‘great thinker’ is; philosophy and philosophers. As expected, CJ Mutunga gave responses that are nothing short of brilliant, and which deserve to be read by the world.

On judicial activism, I wondered why CJ Mutunga would often use the term ‘judicial activism’ to describe judges that were in my opinion, only guarding the Constitution. In defense of the use of the term, CJ Mutunga pointed me to the origins of the term as discussed by Uprenda Baxi and in Prof CJ’s own writings. Prof CJ explained that the Constitution itself is activist and thus the guardians of the constitution are activist. While I understood the context of the term, I maintained that in light of the post-2010 Constitution order it was no longer necessary to refer to judges who make bold decisions as ‘activists.’ As is common in academic discourses, we did not come to an agreement on the use of the term.

While engaging in the discussion on judicial activism, issues of ‘feminism’, cropped up. I engaged CJ Mutunga on why there were little to no female thinkers in mainstream philosophy. CJ Mutunga stated that he believed women were just not glorified, their works were published by their men, or they got their works published under male pen names so they could beat the patriarchal barriers present during their times. CJ Mutunga also brought to light the idea of feminist masculinity, which I was happy to learn about. That part also discussed great female thinkers within us and some of the religious texts that have been abused to further the suppression of women. Needless to say, there was little to disagree on and a lot to learn regarding the issue of feminism.

On the tracks of discussing feminism, the subject of philosophy and great thinkers came up. I presented my worry on how mainstream philosophy predominantly fronts the ideas of ancient European men, as though they are the only golden ideas that have ever been thought about. I argued that this creates a perception, that today's thinkers are not that great, and eventually the present potential thinkers judge themselves so harshly even when they have great thoughts, just because they are not in the 'Plato' era. I also argued that it was wrong for mainstream philosophy to insist on giving credit to few people for ideas that in my opinion, could have been thought of by any other ordinary person without the influence of the 'fathers' of those respective ideas.

Additionally, I suggested that the conduct of mainstream philosophers like, Lord Delvin, needed to be challenged against the ideas they preached. CJ Mutunga cautioned that this would be playing God, and that, even the insane have sane moments if only we listen.

Last but not least, it is worth restating that this piece was inspired by CJ Mutunga's inaugural lecture. In concluding his inaugural lecture, CJ Mutunga encourages the battle of ideas and intellectual debates to continue. Exchanges, such as the ones presented here, are far from over. Thus, this conversation is yet to be concluded. The search for answers continues.