Decolonising Kenya's legal system: The role of legal education, philosophical foundations, and constitutional interpretation

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Abstract

This paper investigates the vital roles of legal education, philosophical foundations, and constitutional interpretation in decolonising Kenya's legal system. It begins by contextualising decolonisation within historical frameworks of colonialism, highlighting the persistent influence of colonial structures on contemporary legal practices. The analysis reveals that legal education in Kenya has largely perpetuated colonial narratives, necessitating a shift towards inclusive pedagogies that integrate indigenous knowledge systems. Philosophically, the paper critiques simplistic notions of integrating indigenous practices, advocating instead for a nuanced approach that recognises the complexities of identity and culture in a post-colonial context. Furthermore, it examines how constitutional provisions can either support or obstruct the integration of customary laws into the national legal framework. Ultimately, this work underscores the necessity for comprehensive reforms across these domains to achieve a truly decolonised legal system in Kenya.

Keywords: decolonisation, legal education, constitutional interpretation, philosophical foundations

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Introduction

The word decolonisation comes from the word colonialism which was the practice of domination where one group subjugates another, often involving the exploitation of resources and imposition of foreign governance. It has roots in ancient times but became prominent during the European expansion from the 15th to the 20th centuries, peaking in the late 19th century when European powers controlled vast territories across Africa, Asia, and the Americas.[1] Despite occurring across several colonies, colonialism has been termed as not only a historical phase but also 'an ideology that perpetuates enslavement even without physical domination'.[2]

From this understanding, decolonisation evolved into a formal process of transferring governance to indigenous populations but also encompasses the broader endeavour of dismantling colonialist power structures.[3] This includes addressing the hidden institutional and cultural forces that sustained colonial dominance long after political independence was achieved.[4] As articulated by Ngugi wa Thiong'o in his 1986 work, *Decolonising the mind*, decolonisation extends beyond reclaiming land to liberating thought and culture.[5]

In recent years, discussions surrounding decolonisation have gained momentum across various fields, including education and legal systems. However, this trend faces criticism. Scholars like Eve Tuck and K Wayne Yang argue that using decolonisation as a metaphor undermines its true meaning, insisting that genuine decolonisation must involve the repatriation of indigenous lands and the restoration of sovereignty.[6]

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1 Stanford Encyclopedia of Philosophy, 'Colonialism', 17 January 2023.

2 Rakesh Sinha, *Swaraj in ideas: A quest for decolonisation of Indian mind*, Indian Policy Foundation, 2016, Preface, x.

3 Monica Butler, Kara Carroll, Patricia Roeser, Rose Soza War Soldier, Scott Walker and Lauren Woodruff, 'Decolonizing methodologies: Research and indigenous peoples by Linda Tuhiwai Smith: Peace, power and righteousness: An indigenous manifesto by Taiaiake Alfred', 29 *American Indian Quarterly* (2005) 289

4 Nasrullah Mambrol, 'Decolonisation', *Literary Theory and Criticism*, 4 October 2017.

5 Ngugi wa Thiongo', *Decolonising the mind,* Heinemann, 1986, 4-30.

6 Eve Tuck and K Wayne Yang, 'Decolonisation is not a metaphor', 1(1) *Decolonisation:*

The argument by Tuck and Yang, raises an important question: can the phrase 'decolonisation' be used as a metaphor in another context? To understand this better, one can give an example of the history of higher education in Kenya. Historically, the narrative surrounding slavery and colonialism has been intertwined with notions of inferiority among the colonised.[7] Olufemi Taiwo, in *Africa must be modern*, argues that Africans were systematically denied access to intellectual education due to the pervasive belief in their inferiority.[8] This framework effectively excluded them from higher learning opportunities, reinforcing the racial hierarchies established by colonial powers. Such dynamics were evident in colonial Kenya where education policies ranked Europeans at the top of the social ladder, followed by Asians, while indigenous Africans were relegated to the bottom.[9]

Moreover, Michael Kithinji asserts that the colonial restrictions on African education were primarily driven by the economic interests of European settlers. By prioritising vocational training over intellectual education, colonial governments ensured a steady flow of unskilled labour for the colonial economy. This was not a reflection of Africans' intellectual capabilities but rather a deliberate strategy to limit their potential and maintain a system that benefitted European settlers.[10]

Yuval Noah Harari echoes this theme in *Sapiens*, where he discusses how narratives of racial and intellectual inferiority were constructed by Europeans to justify their domination and exploitation of other peoples, including Africans. According to Harari, these narratives were not only economically motivated but also used to reinforce the image of Europe-

Indigeneity, Education and Society (2012) 2-4. See also, Richard Fosu, 'Towards a critical decolonial turn/theory: Beyond the binary of the west versus Africa', 0(0) *Africa Spectrum* (2024) 2.

7 Yuval Noah Harari, *Sapiens: A brief history of humankind,* Penguin Random House UK, 2015, 157.

8 Olufemi Taiwo, *Africa must be modern: A manifesto*, Indiana University Press, 2013, 115.

9 Michael Mwendwa Kithinji, 'History of higher education in Kenya', *Oxford Research Encyclopaedia of African History*, 19 April 2023.

10 Kithinji, 'History of higher education in Kenya'.

ans as 'pious, just, and objective'.[11] By framing Africans as intellectually inferior, Europeans could legitimise the inequalities and injustices of the colonial system, while portraying themselves as bringing 'civilisation' to supposedly lesser people. This false narrative provided a moral and ethical justification for exploitation and oppression.[12]

Tuck and Yang present an important argument by cautioning against the metaphorical use of 'decolonisation' and emphasising that it should entail the return of indigenous lands and restoration of sovereignty.[13] However, they fall short of acknowledging the broader structural and institutional dimensions that colonialism affected.[14] For example, in the history of higher education in Kenya, colonial powers did more than take land; they constructed an entire educational system designed to reinforce racial hierarchies, as Olufemi Taiwo[15] and Kithinji argue.[16]

Therefore, the argument by Tuck and Yang is limited. Decolonisation, especially in the context of education, cannot be confined to the repatriation of land alone.[17] It must address the deeper, institutional changes necessary to truly liberate a society from the intellectual and cultural dominance imposed by colonial rule.[18] While African nations gained independence, the retention of colonial educational frameworks suggests that the full decolonisation of education remains an ongoing challenge, not just a metaphor.

Consequently, this paper is structured into several key sections: it begins with an exploration of the role of legal education in perpetuating

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11 Harari, *Sapiens: A brief history of humankind,* 157.

12 Harari, *Sapiens: A brief history of humankind,* 157-161.

13 Tuck and Yang, 'Decolonisation is not a metaphor', 2-4.

14 Irene Wieczorek (ed) *Decolonising legal education at Durham Law School: An introduction to the field and a starting guide on decolonising the teaching of land law, climate change law and policy, and EU law*, Durham Law School, 2022, 7.

15 Taiwo, *Africa must be modern: A manifesto,* 115.

16 Kithinji, 'History of higher education in Kenya', 3-4.

17 Wieczorek, *Decolonising legal education at Durham Law School: An introduction to the field and a starting guide on decolonising the teaching of land law, climate change law and policy, and EU law,* 7.

18 Asikia Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the curriculum', 2(1) *Journal of Decolonising Disciplines*, (2020) 4.

colonial legacies, followed by a discussion on the philosophical foundations underpinning decolonisation, an examination of constitutional interpretation as a means to integrate customary laws, and concludes with recommendations for advancing decolonisation in Kenya's legal system. The objective is to demonstrate how addressing these interconnected areas – legal education, philosophical foundations, and constitutional interpretation – is crucial for dismantling colonial legacies and fostering a more inclusive legal framework reflective of Kenya's diverse cultural heritage. Through this analysis, the paper aims to contribute to ongoing discussions on decolonisation by offering insights into how Kenya can navigate its complex historical landscape while striving for a just and equitable legal system.

Colonial legacies in legal education: Tracing historical influence and modern implications

The role of law in colonialism has historically been fundamental to the dispossession and disenfranchisement of people globally, particularly in the African context. Law and its various institutions provided mechanisms for colonial, imperial and settler colonial programmes to be deployed, reinforced and sustained. Colonisation was justified on the basis that Africans were not as human as the white men. Therefore, they were expelled from jurisprudential subjectivity as in the colonial imaginary, only humans were 'subjects' to the law. Conclusively, indigenous people were not endowed with epistemological agency to philosophise about law because epistemic virtue was strictly a preserve of Europeans.[19]

Western colonising nations of Europe and their settler-colonial states have been sustained by the belief that their cultures, religions, and civilisation are superior to those of non-western peoples. This idea of European superiority legitimised the 'West's mandate to conquer the earth' and is a common theme in anticolonial, decolonial, and postco-

[19] Karibi-Whyte, 'Agenda for decolonising law in Africa', 2.

lonial critique. For this reason, the role of law is seen as 'a respected and cherished instrument of civilisation' and historically served as 'the West's most vital and effective instrument of [the] empire'. It imposed Europe's vision of truth on indigenous peoples worldwide. Euro-Western law and jurisprudence are deeply intertwined with colonial racism, dispossession, and violence.[20]

One would assume that after gaining independence, African countries would do away with the foreign laws. However, in the sixties, when most African countries gained independence, there were few African lawyers hence an urgent need to train lawyers to run courts and various government departments.[21]

Consequently, post-independence arrangements for legal education followed the pattern of colonial education present in the respective states.[22] Predominant in these states is that their legal academy is massively overshadowed by white academics.[23] According to Bizani, 'their whiteness is relevant to the extent that it denotes their structural racial power in knowledge production in the legal academy. Therefore, this whiteness forms the epistemic viewpoint through which they see and interpret the world'.[24] Moreover, African jurists, having been trained under historical colonial legal matrixes, remained keener on propagating the scholarly advancement of the Western thoughts as opposed to developing African customary law jurisprudence.[25]

There have been movements in the recent past like the *Rhodes must fall* in South Africa that sort to dismantle these legacies. It is important

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20 Adebisi Foluke, 'Decolonising the law school: Presences, absences, silences… and hope', 54(4) *The Law Teacher* (2020) 471-72 citing excerpts of a speech by Joel Modiri, 'Cacophony, autocritique and abolition: Impression points on decolonisation and the law school', 13 September 2019, University of Bristol, School of Law.

21 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualisng the curriculum', 9.

22 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualisng the curriculum', 9.

23 Aphiwe Bizani, 'Dismantling epistemic violence in South African law by decolonising jurisprudence', *The Perspective Online* (2019) 3.

24 Bizani, 'Dismantling epistemic violence in South African law by decolonising jurisprudence', 3.

25 Peter Onyango, *African customary law system: An introduction*, LawAfrica, 2013, xi-xii.

to note that in Kenya, unlike South Africa, the move for decolonising education is not as vibrant. However, this does not mean that such movements are absent.[26] In fact, teachers of law have taken upon themselves to decolonise their legal pedagogy. An example would be the hutians of Strathmore University; an intellectual movement known as 'the Hut' at the law school representing a significant departure from traditional legal education in Africa, particularly in its approach to decolonising the teaching of public international law. It serves as a space for critical discourse centred around Africa's triple heritage – indigenous, Islamic, and Western cultures – and its relevance to contemporary legal and societal challenges.[27]

This paper argues that educators play a crucial role in this decolonisation process at the micro-curriculum level. They can facilitate critical engagement and disrupt the reproduction of hegemonic knowledge structures. By fostering an environment where alternative knowledge systems are valued and included, educators can help develop a more just and inclusive academic landscape. This involves moving beyond superficial diversity initiatives and engaging deeply with the political, ontological, and metaphysical questions related to knowledge production and legitimacy.[28]

The decolonial turn in education offers the potential for creating a pluriversity that does not alienate or minoritise non-western perspectives. By centering African and other marginalised epistemologies and recognising the interconnected histories of imperialism and knowledge production, educators can contribute to a more equitable and pluralis-

[26] Liisa Laakso and Kajsa Hallberg, '"The unofficial curriculum is where the real teaching takes place": Faculty experiences of decolonising the curriculum in Africa,' 87 *Higher Education* (2024) 186.

[27] Nciko wa Nciko, 'The hutians: Decolonising the teaching of public international law in African law schools to address a real problem', *Afronomicslaw*, 17 September 2020, 4-5; Nciko wa Nciko, 'The hut at Strathmore: TWAIL for a culturally appropriate teaching of public international law in African law schools,' 6(1) *Strathmore Law Review* (2021) 41-69.

[28] Dina Zoe Belluigi, 'Why decolonising "knowledge" matters: Deliberations for educators on that made fragile' in Laura Czerniewicz and Catherine Cronin (eds) *Higher education for good: Teaching and learning futures*, Open Book Publishers, 2023, 147.

tic academic environment. This approach necessitates a collective effort and the agency of educators to navigate and negotiate the power dynamics within the university, promoting the common good and fostering a field of solidarities in knowledge production.[29]

Consequently, it is important to understand the current happenings pertaining to these legacies and the effect, if any, that it has and that can be improved if negative. The following section seeks to answer these questions.

What is the current situation?

Law school classrooms are one of the sites where the legacies of colonialism are perpetuated.[30] In Kenya, for example, the international law curricula adopted in various law schools is riddled with exclusions and distortions in its narrative and this results in a pedagogy that is less than ideal for students who ought to be engaging in critical thinking. Processes of exclusion in higher education are difficult to unpack as they are underscored by the complex dynamics of class, gender, and race.[31]

Second, Laakso and Adu argue that one of the challenges in decolonising the curriculum in Africa includes difficulties in finding and producing textbooks with locally relevant perspectives and bureaucratic obstacles to accepting new course content. From their studies, they indicated that some faculty bypassed these obstacles by tailoring their teaching to local contexts and examples in the lecture hall.[32]

Third, the prevailing hegemonic structures of global academia and the subordinate position of African universities are evident in the tensions between differing demands of relevance and excellence brought

[29] Belluigi, 'Why decolonising "knowledge" matters', 138.

[30] Florence Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 3(1) *Journal of CMSD* (2019) 16.

[31] Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 16.

[32] Laakso and Kajsa, 'The unofficial curriculum is where the real teaching takes place', 13.

by marketisation with its measurements, rankings, and competition. Quality assurance processes, although national in nature, have affected curriculum review, sometimes maintaining the status quo but also pressing faculty to be more competitive, develop international collaboration, and publish internationally.[33]

What is the consequence as a result?

An example can be given on the nature of the teaching of public international law in Kenya. Shako argues that the mainstream narrative currently dominating the curriculum reflects a colonial legacy, with a heavy focus on the historical background, sources, and fundamental concepts like state sovereignty.[34] Often, this narrative presents international law through a Eurocentric lens, perpetuating the idea that European culture, laws, and practices are the benchmarks of civilisation. Consequently, African perspectives, knowledge, and contributions are marginalised, reinforcing historical injustice where African states and societies were deemed uncivilised and thus excluded from the framework of sovereignty.[35]

To address these issues, Shako suggests incorporating Third World Approaches to International Law (TWAIL) into the curriculum and deconstructing western narratives. This approach involves critically examining the historical context and foundational concepts of international law from an African perspective, thus challenging the dominant Eurocentric viewpoints.[36]

Additionally, integrating African voices, knowledge, critiques, and scholars into the curriculum is crucial for providing a more inclusive and diverse understanding of international law. By adopting these methods, legal education in Kenya can foster a more critical and holis-

33 Laakso and Kajsa, '"The unofficial curriculum is where the real teaching takes place": Faculty experiences of decolonising the curriculum in Africa', 13.

34 Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 18.

35 Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 18.

36 Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya'', 17.

tic approach, empowering African scholars and students to contribute meaningfully to global discourse and ultimately telling a more comprehensive and equitable story of international law.[37]

What is the ideal?

A decolonised legal education will have to show a move from a Eurocentric conception of law rooted in colonialism to a more inclusive legal culture. To counter this, there must be a re-orientation of African intellectuals through the production of knowledge.[38] This can be done through teaching an African lawyer what it is to be African and what is at stake in being African.[39] It will involve a critical recognition of the subjugation of Africa and the challenges Africans face in the form of pedagogical strategies and research methodologies. Inasmuch as the legal curriculum entails the same coursework, it should be tailored to include African perspectives on the same.[40]

It follows that the problems afflicting the African continent and Kenya in particular, are based on complex realities that should be approached at different levels (macro and micro) and by employing different methods and forms of knowledge. For local governments and international communities to find solutions to socioeconomic problems facing African states, there is a need to explore the contribution of culturally based knowledge resources as alternatives to local sustainable development. This requires understanding the capability of indigenous knowledge in the development process of communities, and the ways in which indigenous people strategise their own survival within specific settings.[41]

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37 Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 18.

38 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the curriculum', 10.

39 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the curriculum', 11.

40 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the curriculum', 4.

41 Jenipher A Owour, 'Integrating African indigenous knowledge in Kenya's formal education system: The potential for sustainable development', 2(2) *Journal of Contemporary Issues in Education* (2007) 22.

Research has demonstrated that considering the learner's community and background enhances the effectiveness of learning.[42] An indigenous knowledge system not only has the potential for fostering democratic living but also for liberating individuals. The emancipatory aspect of any educational system is essential for transforming society. Thus, the advocacy for incorporating indigenous knowledge systems (IKS) is a proactive step towards empowering individuals through the utilisation of local knowledge.[43]

Decolonisation of legal education should therefore involve the critical inclusion of epistemologies, ways of knowing, lived experiences, texts, and scholarly works that have been excluded from our disciplines. It asks us to think critically about the relationship between the location and the identity of writers, and their subjects.[44]

Philosophical foundations of decolonisation: Navigating historical dilemmas and future pathways

Often times, when people hear the term decolonisation, there is a tendency to dismiss it for being backward looking and impossible to achieve. The question that becomes crucial is; what is or what should be the philosophy underlying decolonisation of legal systems? Following the discussion on legal education, this section argues that in order to foster a genuine decolonisation process, we must critically reassess legal education and embrace a philosophical approach that acknowledges the complexities of identity and culture. This understanding will guide us in addressing the challenges of integrating traditional values within modern legal frameworks.

It has been suggested by scholars in some post-colonial societies that a return to indigenous languages and practices can restructure at-

42 Vuyisile Msila, 'Africanisation of education and the search for relevance and context', 4(6) *Educational Research and Review* (2009) 313.

43 Msila, 'Africanisation of education and the search for relevance and context', 313.

44 Karibi-Whyte, 'Agenda for decolonising law in Africa', 4.

titudes towards local and indigenous cultures.[45] This suggestion has been critiqued by the likes of Akaash Rathore who urges, in a lecture on decolonising jurisprudence, that major public intellectuals should recognise the absence of philosophical understanding at the heart of how they think.[46] Rathore critiques the notion that decolonisation should be 'backward-looking', aiming to return to an idealised past 'where all was well'. He challenges this view by posing critical questions: 'How feasible is this return to the past? Who actually desires this, and what era are we to return to? In a nation with diverse tribes and traditions, which culture would be chosen? And if one is indeed selected, could this not be seen as a form of re-colonisation?'[47]

Additionally, Gikandi has argued that there is an urgent need to question the ideological foundation on which the narratives of decolonisation were constructed and especially the assumption that African cultures and selves were natural and holistic entities that were repressed.[48]

The question of which direction decolonisation should take can be addressed in three ways: first, a return to indigenous culture or aspects thereof; second, abandoning the pursuit of decolonisation; and third, transcending these binaries. Regarding the third option, Rathore argues that rather than hastily trying to reconcile Eastern and Western perspectives by surpassing this binary, a more viable approach involves a dialectical process. This process would entail recognising the 'otherness' within us, acknowledging both our identities and differences without obscuring distinctions or assuming 'we are all the same' or that 'ideas have no geographical boundaries'.

Rathore believes there is merit in the desire to overcome this binary but emphasises that it should only be pursued after a thorough

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45 Mambrol, 'Decolonisation'.

46 Akaash Singh Rathore 'Decolonising jurisprudence: Contexts and methods', NALSAR University of Law YouTube channel, 1:13:49-1:14:49 –23 October 2019 https://www.youtube.com/watch?v=Y9VBEgi975Q.

47 Rathore 'Decolonising jurisprudence contexts and methods' 46:00-49:33 https://www.youtube.com/watch?v=Y9VBEgi975Q.

48 Mambrol, 'Decolonisation'.

understanding has been established.[49] This boils down to the cruel decolonising dilemma of which the subsequent section aims to clarify by addressing what the philosophy of decolonising legal systems – whether in legal education or the judiciary – should truly entail.

The cruel dilemma

In the complex landscape of post-colonial legal systems, the tension between cultural heritage and constitutional law often gives rise to difficult dilemmas. One such challenge, referred to as 'the cruel dilemma', is evident in Kenya's judicial history, where the interplay between African customary law and modern legal frameworks has led to significant legal and social conflicts. At the heart of this dilemma lies the question of how traditional values can coexist with contemporary constitutional mandates, particularly when these values are perceived to be at odds with human rights or national law.

The 'cruel dilemma' manifests within our judicial systems, particularly when legal frameworks have to balance between tradition and modernity. A striking example is found in Kenya's repealed constitution (1969 Constitution), which came into effect shortly after the country gained independence from British colonial rule. At the time, culture was central to the nation's identity and the 1969 Constitution permitted discrimination based on customary laws.[50] This can be clearly seen in the *SM Otieno* case which has been considered the most significant decision in the post-colonial era.[51] A family is torn by modernity; one side clinging to the their cultural beliefs while the other claiming that those beliefs were primitive and inapplicable to them since they were educated.[52] One of the impacts of this case on the African customary system

[49] Aakash Singh Rathore, *Indian political theory: Laying the groundwork for svaraj*, Routledge/Taylor and Francis, 2017, 149.

[50] Constitution of Kenya (1969) Section 82(1)(4).

[51] John Osogo Ambani and Ochieng Ahaya, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era', 1(1) *Strathmore Law Journal* (2015) 55.

[52] Roy Carleton Howel, 'The Otieno case: African customary law versus western jurisprudence' in Alison Dundes and Alan Dundes (eds) *Folk law*, Routledge, 2019, 829.

has been said to be the fact that it shows that African law could still have a place in Kenya's legal system.[53] However, it also raised lingering questions about the true significance and future position of African law within the broader legal framework.

While recognising culture as a foundation of the nation and as the cumulative civilisation of the Kenyan people, the Constitution of Kenya 2010 (the Constitution) mandates the state to promote all forms of national and cultural expression through traditional celebrations. Further, Article 159(1)(c) mandates the courts and tribunals to be guided by principles such as traditional dispute mechanisms.[54] This shows that the Constitution is pro-culture since Kenya boasts of many tribes with their own ways of living. However, Article 2(4) sets a limitation by stating that such customary laws should be consistent with the Constitution.[55] Further, the Judicature Act creates a hierarchy of norms in which African customary law is of least significance and a non-binding source of law.[56]

One such custom rendered void by Article 2(4) is female genital mutilation (FGM). In the case of *Dr Tatu Kamau vs Attorney General and others* (2017), one of the questions for determination was whether the Act prohibiting FGM was unconstitutional to the extent that it denied adult women the right to freely choose whether or not to undergo the rite before a trained medical practitioner. The court held that inasmuch as the Constitution grants the freedom to exercise one's culture, the latter has to be carried out in line with other constitutional provisions. Therefore, any expression that will cause harm to a person or by a person to another is unconstitutional.[57]

The court further concluded that despite the fact that FGM was central to the culture of some communities in Kenya including the Ki-

53 Ambani and Ahaya, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constituion era', 56.

54 Constitution of Kenya (2010) Article 159(1)(c).

55 Constitution of Kenya (2010) Article 2(4).

56 Judicature Act (No 16 of 1967) Section 3(2).

57 *Dr Tatu Kamau v Attorney General and 2 others; Equality Now and 9 others (Interested Parties); Katiba Institute and another (Amicus Curiae)* (Constitutional Petition 244 of 2019) Judgement of the High Court at Nairobi on 17 March 2021 [eKLR] para 215.

kuyu to which the petitioner belonged, the court was not convinced that one can choose to undergo such a harmful practice based on the medical evidence produced on both the long term and short-term effects of the practice.[58]

Cases like *SM Otieno* and *Tatu Kamau* illustrate the ongoing struggle to balance cultural heritage with constitutional principles within a legal system still influenced by its colonial past. This struggle raises a broader question: How should the decolonisation of legal systems be approached? To answer this, we must examine the philosophy of decolonisation and explore differing perspectives, such as 'thick' and 'thin' approaches to decolonisation, as potential pathways for reimagining legal systems rooted in African identities.

The thick and thin Svaraj

Understanding the approaches to decolonisation requires a nuanced consideration of both political and cultural dimensions. Just as legal frameworks must balance modernity with tradition, the philosophy of decolonisation must navigate the tension between cultural identity and governance reforms. Here, the concept of Svaraj, with its thin and thick interpretations, offers an insightful framework for understanding the balance between practical political sovereignty and a deeper reclamation of cultural identity.

Akaash Rathore defines Svaraj as a concept of self-governance and authentic autonomy that emphasises active participation and self-expression within modern contexts, equating it to decolonisation.[59] He further distinguishes between two approaches to *Svaraj*: a 'thick' and a 'thin' version. The thick version of Svaraj demands a deeper level of commitment, exemplified by Mahatma Gandhi. Gandhi drew a sharp contrast between what he saw as the opposing values of Western civilisation and Indian civilisation. In his view, Western civilisation promoted immorality and lacked religious grounding, while Indian civilisation

[58] *Kamau v Attorney General and 2 others,* para 215.

[59] Rathore, *Indian political theory*, 12.

was morally elevating and spiritually superior, likening Western ideals to a corrupting force and Indian values to a higher moral realm (God). [60]

In contrast, the 'thin' version of Svaraj is less demanding and more accessible, focusing primarily on political aspects rather than a comprehensive philosophy. Rathore points to Ambedkar's vision of Svaraj as an example of this approach, where he defines it as governance of, by and for the people. For Ambedkar, Svaraj is a tool for achieving a democratic society rather than an end goal. Its value lies in how it helps to build a society where government serves all – regardless of social status – and empowers them to participate in their own governance. A crucial point in Ambedkar's thought is that Svaraj is not about returning to an idealised past; rather, it is about traveling down to the present lived experiences of the masses and addressing their realities. [61]

A thick Svaraj in the African context would exhibit at least two or more of the following: exclusivist notions of spirituality, profound anti-modernity, exceptionalistic moralism, essentialistic nationalism and a purist orientation.[62] An example would be Negritude, a political and literary movement that was very instrumental in the liberation of Africa and the black world from colonial subjugation and racial segregation in the early 1930s through the 1960s.[63]

Leopold Sedar Senghor who gave Negritude its philosophical content articulated that it was the awareness, defence, and development of African cultural values. He further urges Africans to opt for Negritude and subscribe to it and by so doing, African people will contribute to the growth of Africanicity and the construction of 'civilisation of the universe'.[64]

However, Negritude has been heavily criticised for this same reason, being 'thick'. Its main critic is directed towards its presentation of

60 Rathore, *Indian political theory*, 10.

61 Rathore, *Indian political theory*, 12.

62 Rathore, *Indian political theory*, 17.

63 Beaton Galafa, 'Negritude in anti-colonial African literature discourse', 12(4) *The Journal of Pan African Studies* (2018) 287.

64 John S Mbiti, *African religions and philosophy*, Heinemann, 1990, 267.

Africa as a land free of social, economic and political squabbles before colonisation as opposed to the depiction of the West as a restless society that thrives on violence and racism against black people.[65] In fact Mphahlele argues that the image of Africa which simply shows pride in our ancestors and celebrates our purity and innocence is an image propagated by liars.[66]

Mbiti critiques Negritude on the basis of it being an elitist ideology. He says that 'nobody in the village understands or subscribes to its philosophical expression' and that Negritude is a comfortable exercise for the elite who wants, seeks and finds it when he looks at the African *[z]amani* and hopes for an African future.[67] He concludes that all the political and economic ideologies at the time like Negritude, Pan Africanism, African unity and socialism attempts, point to a progress being made in Africa: one that lacked concreteness, historical roots and a clear practical goal for the individual to be able to have a sense of direction worthy of personal identification and dedication.[68]

Additionally, Olufemi Taiwo, introduces the question of modernity. He argues, in the context of decolonisation, that colonialism enforced a hierarchical and static worldview that relegated Africans to the 'infancy of the human race'.[69] Colonial administrators denied Africans the possibility of self-determination and progress, framing them as incapable of managing their own affairs.[70] The tragedy, according to the author, is that postcolonial Africa has failed to fully interrogate this colonial legacy, mistakenly equating colonialism with modernity and rejecting both.[71] To truly decolonise, African societies must disentangle modernity from colonialism and reclaim the concept of progress, which involves constantly renewing and remaking both individual identities and societal structures in pursuit of a hopeful, dynamic future.[72]

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65 Galafa, 'Negritude in anti-colonial African literature discourse,' 295.

66 Mbiti, *African religions and philosophy,* 268.

67 Mbiti, *African religions and philosophy,* 268.

68 Mbiti, *African religions and philosophy,* 268-269.

69 Taiwo, *Africa must be modern,* 187.

70 Taiwo, *Africa must be modern,* 187-190.

71 Taiwo, *Africa must be modern,* 187-190.

72 Taiwo, *Africa must be modern,* 187-190.

In the context of law, Chikosa Mozesi Silangwe offers a thin approach: he argues that if the descriptor 'African' legal theory, jurisprudence or philosophy suggests a purist conception, then the intellectual enterprise so undertaken is futile and impossible.[73] He contends that it is more plausible to envision 'African' legal theory, jurisprudence or philosophy under Homi Bhabha's idea of 'cultures in between' which denies a purist conception of culture and emphasises the diversity of influence.[74]

With such an approach, scholarship must first acknowledge that the violence of modernity on knowledge or thought has been far reaching and deep rooted. Second, that the de-Europeanisation or de-Americanisation (decolonisation) in the authorship of African legal theory, jurisprudence or philosophy does not necessarily imply that the underlying conceptions of the resultant scholarship are not rooted in modernity.[75]

To effectively decolonise, Africa must balance both pragmatic governance reforms and deeper cultural transformations. The 'thin' approach, like Ambedkar's vision, focuses on political sovereignty and democratic governance, while the 'thick' approach, seen in movements like Negritude, emphasise cultural revival and identity. As seen above, these thick movements face criticism for idealising the past and alienating ordinary people.

Therefore, the question of how do we decolonise lies in striking a balance between these thick and thin approaches to decolonisation. The path forward for Africa, as Taiwo suggests, is not in rejecting modernity wholly but in reclaiming it. This requires a dual approach: addressing the structural legacies of colonialism through governance reforms while also engaging with the deeper cultural and philosophical transformations necessary to create a future rooted in African identity, values, and progress.

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73 Chikosa Mozesi Silangwe, 'On "African" legal theory: A possibility, an impossibility or mere conundrum?' in Oche Onazi (ed) *African legal theory and contemporary problems*, Springer, 2014, 17.

74 Silangwe, 'On "African" legal theory', 18.

75 Silangwe, 'On "African" legal theory', 19.

Constitutional interpretation: A 'thin' approach to decolonising constitutional interpretation in Kenya

As the discussion on decolonisation moves from the broader philosophical exploration to practical applications, it is important to ground these concepts in real-world frameworks. The tension between modernity and tradition, or between 'thick' and 'thin' approaches to decolonisation is particularly relevant in postcolonial legal systems like Kenya's. This balance is not only theoretical but also deeply practical, particularly in areas like constitutional interpretation, where colonial legacies still exert significant influence. Understanding how to decolonise legal structures in a country like Kenya involves navigating this tension. This is most evident in how legal systems interpret and enforce the constitution.

Therefore, in continuing the broader conversation on decolonisation, one must also consider the legacies of colonial structures that still shape the present. The Kenyan judiciary, as pointed out, remains deeply influenced by a colonial inheritance of the common law system.[76] This raises important questions: how do we reform such institutions to shed the vestiges of colonialism while retaining structures necessary for governance? Below is a discussion between former Chief Justice Professor Willy Mutunga and former Attorney General Professor Githu Muigai on whether there exists a theory of constitutional interpretation in the Constitution of Kenya (2010).

Mutunga vs Muigai: A theory of constitutional interpretation?

Constitutional interpretation refers to the process of 'clarifying the legal content or meaning of constitutional provisions' to resolve disputes.[77] For constitutional democracy to be legitimate, constitutional interpretation must be consistent; based on a sound theoretical founda-

[76] Karibi-Whyte, 'Agenda for decolonising law in Africa', 4.

[77] Maxwell Miyawa, 'The genesis of mainstreaming the theory of interpreting the Constitution of Kenya, 2010: An analysis', 15 *The Platform*, February 2016, 36.

tion.[78] Ambani and Ahaya argue that African customary law has been undermined since independence.[79] The requirement for consistency of customary laws with the Constitution marginalises African customary law, placing it at the bottom of the hierarchy.

This raises a crucial question: Can a theory of constitutional interpretation that promotes decolonising jurisprudence exist in Kenya?

The Mutunga argument

First and foremost, although this theory lacks a specific name, the author refers to it as decolonising jurisprudence. According to Mutunga, the theory aims to decolonise jurisprudence, and he outlines six ingredients intended to achieve this goal; this paper will focus on two. The first ingredient is Article 159 of the Constitution of Kenya (2010) which mandates the courts to carry out reforms tailored to Kenya's needs and aims at doing away with colonial and neo-colonial inefficiencies and injustice.[80] Second, the need to develop new, highly competent but also indigenous jurisprudence linked to the constitutional value of patriotism. Here, he proposes that judges are required to develop the law in a way that responds to the needs of the people and national interest that is robust, indigenous and patriotic as decreed by the Constitution and the Supreme Court of Kenya.[81]

According to him, Article 259 of the Constitution provides for its own theory of interpretation. This article states that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the bill of rights, permits development of the law, and contributes to good governance.[82] Further, that Section 3 of the Su-

78 Githu Muigai, 'Political jurisprudence or neutral principles: Another look at the problem of constitutional interpretation,' 1 *The East African Law Journal* (2004) 1.

79 Ambani and Ahaya, 'The wretched African traditionalists in Kenya', 48.

80 Constitution of Kenya (2010) Article 159.

81 Willy Mutunga, 'The Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions', 1 *Speculum Juris* (2015) 5.

82 Constitution of Kenya (2010) Article 259.

preme Court Act, 2011 obligates the Supreme Court to develop a rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.[83]

In the matter of the principle of gender representation in the National Assembly and Senate, Mutunga argued that when searching for principles or guidance on how to interpret the Constitution, one needs to look nowhere else than the open texture of the Constitution.[84] He emphasised that the Kenyan Constitution is unlike many constitutions since the framers intended that the courts would not have fashioned any requisite principle or approach or rules of constitutional interpretation aside from what is provided under Article 159(1) and (3).[85]

Furthermore, he argued that the constitutional theory does not favour a formalistic or positivistic approach as exemplified in Articles 20(4) and 259(1).[86] Second, it puts into consideration non-legal phenomena which, according to him, must be considered by judges while exercising their jurisdiction. These non-legal considerations are those values and principles articulated in the preamble, Article 10, Chapter 6 amongst others.[87]

Third, that it contributes to the development of both the prescribed norms and the declared principle or policy hence care should be taken not to substitute one for the other. He emphasises that 'such dichotomy of prescribed norms, values, principles, purposes and policy enriches the theory of interpreting the Constitution'.[88] Fourth, that it espouses a holistic approach as the interpretation involves contextual analysis of a

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83 Supreme Court Act (No 7 of 2011) Section 3.

84 *In the matter of the principle of gender representation in the National Assembly and the Senate*, Advisory Opinions Application 2 of 2012, Advisory Opinion of the Supreme Court at Nairobi on 11 December 2012 (with dissent – Willy M Mutunga, Chief Justice and President of the Supreme Court) [eKLR], Mutunga dissent, para 8.1 and 8.2.

85 *In the matter of the principle of gender representation in the National Assembly and the Senate*, Mutunga dissent, para 8.3.

86 Constitution of Kenya (2010) Articles 20(4) and 259(1).

87 This was emphasised in, *In the matter of the Interim Independent Electoral Commission*, Constitutional Application 2 of 2011, Ruling of the Supreme Court, 20 December 2011, para 86.

88 Mutunga, 'The Constitution of Kenya and its interpretation', 11.

constitutional provision, reading it alongside and against other provisions so as to maintain a rational explanation of what the Constitution must be taken to mean in light of its history of the issues in dispute and of the prevailing circumstances, this was espoused in the case; *In the matter of Kenya National Commission on Human Rights*.[89]

Additionally, 'constitution making does not end with its promulgation. It continues with its interpretation'.[90] However, the constitutional text and letter may not properly express the minds of the framers. Further, the minds and hands of the framers may fail to properly express the aspirations of the people. As such, the court must invoke the spirit of the Constitution as the guiding principle for illuminating and eliminating legal ambiguities. [91]

This emphasis was underscored in the case; *In Re the Speaker of the Senate and another v Attorney General and 4 others*.[92] As a result, the Supreme Court serves as the custodian and guardian of the Constitution, ensuring the coherence, certainty, harmony, predictability, uniformity, and stability of this theory. This mandate is derived from Article 163(7) of the Constitution, which stipulates that all courts other than the Supreme Court are bound by the decisions of the latter.[93]

Muigai's argument

Muigai blatantly states that there is no theory of constitutional interpretation.[94] He argues that the 'interpretation of the constitution has

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89 *In the matter of Kenya National Commission on Human Rights*, Advisory Opinion No 1 of 2012, Ruling of the Supreme Court on 27 February 2014 [eKLR] para 26.

90 Mutunga, 'The Constitution of Kenya and its interpretation' 13 citing *Speaker of the Senate and another v Attorney General and another; Law Society of Kenya and 2 others (Amicus Curiae)*, Advisory Opinion Reference No 2 of 2013, Advisory Opinion of the Supreme Court on 1 November 2013 [eKLR] (with dissent - NS Ndungu, SCJ) para 156.

91 Mutunga, 'The Constitution of Kenya and its interpretation', 13 citing *Speaker of the Senate and another v Attorney General and another*, para 156.

92 *Speaker of the Senate and another v Attorney General and another*, para 155.

93 Constitution of Kenya (2010) Article 163(7).

94 The great debate: Prof Githu Muigai vs Dr Willy Mutunga at UoN School of Law, 5 July 2019, YouTube https://www.youtube.com/watch?v=6Pxbvmr2IA4, 10:36 to 10:50.

been largely unprincipled, *ad hoc*, eclectic, vague, pedantic, inconsistent, contradictory and confusing'.[95] Furthermore, he cautions that 'without a coherent and principled approach to the interpretation of the Constitution, constantly changing and conflicting interpretation undermines its legal authority and political significance'.[96]

He articulates the importance of a comprehensive theory of constitutional interpretation, citing several compelling reasons: first, the absence of a coherent framework which undermines the legal authority and political significance of the Constitution due to fluctuating and conflicting interpretations. Second, the predominantly political nature of constitutional jurisprudence in Kenya, shaped by judges' personal preferences and public pressures. Third, the necessity for lawyers and judges to harmonise the judiciary's legal technical role with its inherent political dimensions to foster a robust constitutional jurisprudence in Kenya.[97]

He contends that the assertion that Article 259 establishes a theory of constitutional interpretation is unfounded. Article 259 stipulates that the constitution must be construed in a manner that fosters its objectives, values, and principles, upholds the rule of law, protects human rights, promotes good governance, and allows for legal development. He supports his stance by asserting that these principles align with the fundamental duties of any judge or court of law. His argument pivots on the premise that a theory of constitutional interpretation, applicable to any constitution, must possess clarity, coherence, objectivity, and be subject to critique.[98]

Despite the aforementioned considerations, he concedes to the challenges inherent in constitutional interpretation, by listing the following: first, he recognises the duality of the Constitution as both a legal instrument and a political manifesto, thereby presenting a potential for controversy in interpretation. Second, he acknowledges that controversy

95 Muigai, 'Political jurisprudence or neutral principles', 2.

96 Muigai, 'Political jurisprudence or neutral principles', 1.

97 Muigai, 'Political jurisprudence or neutral principles', 3.

98 The great debate: Prof Githu Muigai vs Dr Willy Mutunga, 28:11 to 28:41.

often arises from judicial interpretations given the counter majoritarian nature of courts which, by virtue of being unelected, possess the authority to review and potentially overturn actions of elected representatives, leading to debates on legitimacy. Third, he notes the complexity of the Constitution comprising doctrine, text, values, and institutional practices, thereby allowing for varied yet equally plausible interpretations. Fourth, he highlights the existence of conflicting provisions within the Constitution, necessitating the courts to reconcile inconsistencies and, in some instances, determine the hierarchy of institutions or values. Lastly, he points out situations where the Constitution may lack precision, contain vagueness, or exhibit gaps, requiring the courts to offer guidance on unarticulated aspects.[99]

Nevertheless, Muigai contends that the constitutional interpretation jurisprudence in Kenya is in urgent need of revitalisation. He asserts that the judiciary must recognise this need and cultivate a coherent and rational system of values, which can only be achieved through the adoption of an imperative theory of constitutional interpretation. He advocates for theories such as those propounded by Robert Bobbit, encompassing doctrinal, prudential, textual, and historical approaches to constitutional interpretation.[100]

A critique of both

The major problem with Mutunga's argument is that, although he speaks of a theory of constitutional interpretation being in existence, it is very difficult to conceive what the theory entails and its coherence. His argument that Article 259 entails a theory of constitutional interpretation has been dismissed for being what any ordinary judge in any ordinary court ought to do.[101]

However, he retaliates by arguing that there is always a danger that unthinking deference to cannons of interpretation, the rules of common

[99] Muigai, 'Political jurisprudence or neutral principles', 1.

[100] The great debate: Prof Githu Muigai vs Dr Willy Mutunga, 15:33 to 16:58.

[101] The great debate: Prof Githu Muigai vs Dr Willy Mutunga, 13:26 to 13:57.

law, statutes and foreign cases can subvert the theory of interpreting the Constitution. He buttresses this argument with the subject of judicial review in Kenya which is clearly outlined by Article 20(3) as a remedy to an aggrieved party or parties. He also refers to the case of *Marbury v Madison* and further warns against the development of a two tracked system of judicial review; one influenced by the old cases of the common law and the other influenced by the Constitution of Kenya (2010).[102]

On the other hand, Muigai's insistence on a lack of a theory of constitutional interpretation fails to take into consideration the known theories of constitutional interpretation, the fusion of several known theories or the creation, by people, of their own theories.

Despite the existence of these reasons mentioned by Muigai, compelling arguments persist: first, that any theory of constitutional interpretation that disregards consequences and solely fixates on text or original intentions is inherently flawed. Second, a theory that neglects either text or original intentions and prioritises consequences exclusively is similarly flawed. Third, certain contexts may favour one theory of constitutional interpretation over others. Fourth, a diverse composition of justices with varied interpretative approaches is essential, as a court devoid of dissenters fails to offer a comprehensive understanding of the implications of its decisions. Fifth, a pragmatist judge maintains that constitutional interpretation entails a creative engagement with the framers' intent rather than rigid adherence to their every dictate.[103]

Therefore, the debate on decolonising constitutional interpretation in Kenya reveals the challenge of balancing flexibility with coherence. While Mutunga advocates for a Kenyan-focused, adaptive approach, Muigai warns that a lack of structure risks inconsistent rulings. A hybrid model that draws on multiple interpretive frameworks while rooted in Kenya's unique context could provide the judiciary with both the adaptability and consistency needed to build a decolonised, legitimate legal system that reflects Kenya's postcolonial identity and aspirations.

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[102] Mutunga, 'The Constitution of Kenya and its interpretation', 15-16.

[103] Doug Linder, 'Theories of constitutional interpretation', *Exploring constitutional law*, 9 January 2023.

A theory of constitutional interpretation in Kenya

This theory, as evidenced above, encompasses the following: first, it does not endorse formalistic or positivistic approaches, as exemplified by Articles 20(4) and 259(1).[104] Second, it considers non-legal considerations that judges must weigh when exercising their jurisdiction. These considerations encompass the values and principles outlined in the Preamble, Article 10, Chapter 6, among others.[105] Third, it contributes to the evolution of both the prescribed norms and the declared principles or policies.

Care should be exercised not to conflate one with the other, as the dichotomy between 'prescribed norms, values, principles, purposes, and policies enriches the theory of constitutional interpretation'.[106] Fourth, it advocates for a holistic approach, whereby interpretation entails a contextual analysis of a constitutional provision. This involves reading it alongside and against other provisions to ensure a rational elucidation of what the Constitution ought to signify, considering its historical context, the issues in contention, and the prevailing circumstances.[107]

The theory described above is often referred to as purposive interpretation or teleological interpretation. This approach assigns meaning to the text in accordance with the purpose of constitutional provisions or the entirety of the Constitution.[108] Its theoretical foundation rests on the basis that every piece of legislation inherently serves a purpose; that is, it is crafted to achieve specific effects.[109]

According to Mutakha Kangu, this is the essence of the Kenyan Constitution. Referring to Mutunga's arguments, he recognises that the

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104 The Constitution of Kenya (2010) Article 259(1).

105 This was emphasised *In the matter of the Interim Independent Commission* (2011) para 86.

106 Mutunga, 'The Constitution of Kenya and its interpretation: Reflection from the Supreme Court decisions', 11.

107 *In the matter of Kenya National Commission on Human Rights*, para 26.

108 Zoltan Szente and Fruzsina Gardos Orosz, 'On the art of constitutional interpretation' in Fruzsina Gardos Orosz and others (eds) *Populist challenges to constitutional interpretation in Europe and beyond*, Taylor and Francis Group, 2021, 82.

109 Szente and Gardos, 'On the art of constitutional interpretation', 82.

theory is rooted in the aforementioned articles of the Constitution and is aimed at discerning the purposes, core values, and principles which the Constitution endeavours to realise, uphold, or safeguard.[110] Furthermore, he contends that this theory seeks to uncover the purpose behind each provision, rather than solely focusing on the literal meaning of the words used to convey those purposes. He also emphasises that it incorporates various other methods of constitutional interpretation, including grammatical, systematic, teleological, and historical approaches.[111]

Does the theory of constitutional interpretation further decolonise law?

The foundational philosophy of decolonising jurisprudence incorporates several key principles: It is not strictly purist, it acknowledges the profound impact of modernity's violence on thought, it remains grounded in modernity without being insular, and supports indigenous communities in developing their jurisprudence based on local needs and best practices, thereby reflecting its hybrid nature. The adoption of the approach to constitutional interpretation championed by Mutunga provides a viable and exciting path toward decolonising law since this approach aligns with the above principles.

Thus, the Supreme Court plays a central role in safeguarding this approach as its decisions set the standard for all other courts, ensuring consistency and fidelity to the constitutional spirit. Through this lens, the theory not only challenges traditional formalistic approaches but also embraces a more holistic and inclusive method of legal interpretation, one that is anchored in the lived experiences and needs of Kenyans.

110 John Mutakha Kangu, *Constitutional law of Kenya on devolution,* Strathmore University Press, 2015, 28-64.

111 Kangu, *Constitutional law of Kenya on devolution,* 28-64.

Roots of resistance

The judiciary

Given that the Constitution of Kenya (2010) under Article 259(1), mandates the judiciary to interpret the Constitution in a manner that promotes its purposes, values, principles, advances the rule of law, human rights, contributes to good governance, and permits the development of law, it follows that the judiciary bears the responsibility to interpret the constitution accordingly. Therefore, the discourse on decolonisation can only advance if judges engage in profound philosophical reflection on a theory that would further decolonise jurisprudence. Mutunga's suggestion of envisioning a progressive African jurisprudence based on our transformative constitutions, often referred to as the 'gospel' according to the Africans, underscores the need for a jurisprudential framework aligned with the transformative spirit of African nations.[112]

Law schools

Law schools play a pivotal role in shaping the future professionals of the legal field, including teachers of law, advocates, lawyers, paralegals, judges, chief justices, and leaders. It is imperative that law schools in Africa and former colonies undergo a transformation towards decolonised legal education. Law schools must tailor their curriculums to prepare students for this task. This shift entails moving away from a Eurocentric conception of law, which is deeply rooted in colonialism, towards a more inclusive legal culture.[113]

To meaningfully engage with decolonisation in Kenyan law schools, the approach must be comprehensive, touching on curriculum design, teaching methodologies, academic support, and institutional backing. Structured recommendations for Kenyan law schools to fos-

[112] Mutunga, 'The Constitution of Kenya and its interpretation: Reflections on the Supreme Court's decisions', 19.

[113] Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the classroom', 10.

ter a decolonised, inclusive, and critical approach to legal education include: the contextual teaching of colonial-era laws in a way that includes their historical context, origin, and impact on marginalised communities rather than presenting them as neutral, universal principles. This can be done by addressing the social, political, and cultural dimensions of the law and its effects on Kenyan society.[114] Furthermore, expanding reading lists to include works by African scholars, authors from the Global South, and indigenous thinkers would expose students to alternative perspectives on subjects like property law, human rights, and sovereignty, offering a more inclusive narrative.[115]

Integrating critical legal theories is also essential. This includes Third World Approaches to International Law (TWAIL), postcolonial theory, and African legal philosophies, especially in international law, property law, and constitutional law courses.[116] A key aspect of this is encouraging lecturers to address the idea that law is not neutral, engaging students in questioning the interests that specific laws serve and the impact on different communities.[117]

Embracing a reflexive teaching approach, as recommended by Rigney, involves lecturers acknowledging their own educational biases and presenting the law with a critical lens. This can be achieved by comparing Kenyan law with jurisdictions from the Global North and South, fostering a more nuanced and relativistic understanding.[118] To deepen this contextual approach, legal education should integrate historical, political, and economic analyses, showing how these contexts shape and influence legal principles. For instance, a property law course

[114] Sandra Mogeni, Summer Ahmed and Chris Beran, 'Decolonising and diversifying land law: A critical analysis of current issues in the modern land law curriculum' in Wieczorek (ed) *Decolonising legal education at Durham Law*, 30.

[115] Mogeni and others, 'Decolonising and diversifying land law: A critical analysis of current issues in the modern land law curriculum', 30.

[116] Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 18.

[117] Decolonising SOAS Working Group, 'Decolonising SOAS learning and teaching toolkit for programme and module conveners,' Decolonising SOAS, May 2018.

[118] Wieczorek, *Decolonising legal education at Durham Law School,* 19.

could explore how colonial laws shaped land ownership and economic disparities in Kenya.[119]

Implementing project-based learning (PBL) in core modules allows students to examine legal issues from social, historical, and legal perspectives, promoting a comprehensive understanding of how laws intersect with societal issues.[120] Moving beyond traditional exams, alternative assessment formats, such as reflective essays, oral presentations, and critical analysis papers, gives students room to explore legal issues from decolonial perspectives. Adding self-assessment and peer review components further enables students to critically reflect on their learning journey, moving beyond exam-focused preparation.[121]

Decolonisation-focused modules should also be mandatory for first-year students, providing foundational knowledge on jurisprudence, critical theory, and the interplay between law and colonialism.[122] This early introduction ensures that all students start their legal education with a solid grounding in decolonial perspectives. Teaching about 'lawlessness' within legal education also highlights how laws can fail marginalised groups when enforcement is biased or absent, helping students critically assess gaps within legal systems and consider reforms for more equitable application of the law.[123]

Incorporating the experiences of laypeople and litigants, through panels or roundtables, brings real-world perspectives into the classroom. Such firsthand accounts deepen students' understanding of the lived impact of legal decisions, fostering empathy and practical aware-

[119] Natalie Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum of the Law School at the University of Exeter', 56(4) *The Law Teacher* (2022) 544.

[120] Mogeni and others, 'Decolonising and diversifying land law: A critical analysis of current issues in the modern land law curriculum', 32.

[121] Mogeni and others, 'Decolonising and diversifying land law: A critical analysis of current issues in the modern land law curriculum', 35.

[122] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 543-544.

[123] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 544.

ness of the societal effects of law.[124] Ongoing faculty training on inclusive teaching methods, project-based learning, and facilitating sensitive discussions is crucial. Appointing a decolonising curriculum officer can further support faculty, providing resources and guidance for embedding decolonial practices.[125]

Finally, promoting the sharing of best practices among institutions through forums, workshops, and collaborative resources can create a supportive network for decolonising law curricula. This collaborative approach helps institutions exchange effective strategies, enhancing their collective capacity to deliver inclusive and critical legal education.[126]

Conclusion

This paper has critically examined the roles of law schools, philosophical foundations, and constitutional interpretation in the decolonisation of Kenya's legal system. The colonial legacy continues to influence legal education and practice, necessitating a comprehensive re-evaluation of how law is taught and understood in Kenya. As Ngugi wa Thiong'o articulates, true decolonisation extends beyond reclaiming land; it involves liberating thought and culture, particularly within educational frameworks that have historically marginalised indigenous perspectives.[127] This assertion highlights the need for transformative change in legal education to dismantle colonial ideologies that persist in contemporary curricula.

The analysis reveals that law schools are not merely institutions for training legal practitioners; they are pivotal sites for challenging and transforming colonial narratives embedded in legal education. Bizani

[124] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 544.

[125] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 545.

[126] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 545.

[127] Wa Thiongo, *Decolonising the mind*, 4-30.

emphasises that the dominance of white academics within these institutions perpetuates a Eurocentric epistemic viewpoint, undermining the development of African customary law jurisprudence.[128] Furthermore, Laakso and Adu identify significant challenges in decolonising curricula, including bureaucratic obstacles and the scarcity of locally relevant textbooks.[129] The philosophical exploration of decolonisation underscores the complexities inherent in reconciling traditional values with contemporary constitutional mandates.

The 'cruel dilemma' faced by Kenyan courts illustrates this tension, where cultural practices can clash with human rights standards. The Constitution of Kenya (2010) attempts to address these issues by promoting cultural expression while imposing limitations to ensure alignment with constitutional principles.[130]

In conclusion, the journey toward a decolonised legal system in Kenya is fraught with challenges but also rich with opportunities for transformative change. By reimagining legal education, embracing indigenous philosophies, and engaging in critical constitutional interpretation, Kenya can move closer to achieving a legal framework that is just, inclusive, and authentically representative of its diverse populace. This endeavour is essential not only for the advancement of justice but also for the broader goal of societal transformation in post-colonial contexts.

[128] Bizani, 'Dismantling epistemic violence in South African law by decolonising jurisprudence', 3.

[129] Laakso and Kajsa, '"The unofficial curriculum is where the real teaching takes place": Faculty experiences of decolonising the curriculum in Africa', 13.

[130] Constitution of Kenya (2010) Articles 11 and 2(4).