



THE ROLE OF JUDICIAL ACTIVISM IN TRANSFORMING THE JUDICIARY UNDER THE NEW DISPENSATION:



**MAINA NYABUTI & ADAMS ANUNDA
(LLB KISII UNIVERSITY)**



INTRODUCTION

- ❑ The term “judicial activism” has emerged within the Kenyan corridors of judiciary and in political discourse.
- ❑ What is conceptual meaning of judicial activism?
- ❑ The history and theoretical framework of judicial activism
- ❑ Judicial transformation in the new dispensation.
- ❑ Can it play a role in the ongoing transformation in judiciary?
- ❑ Conclusion and recommendations




THE CONCEPTUAL MEANING OF JUDICIAL ACTIVISM

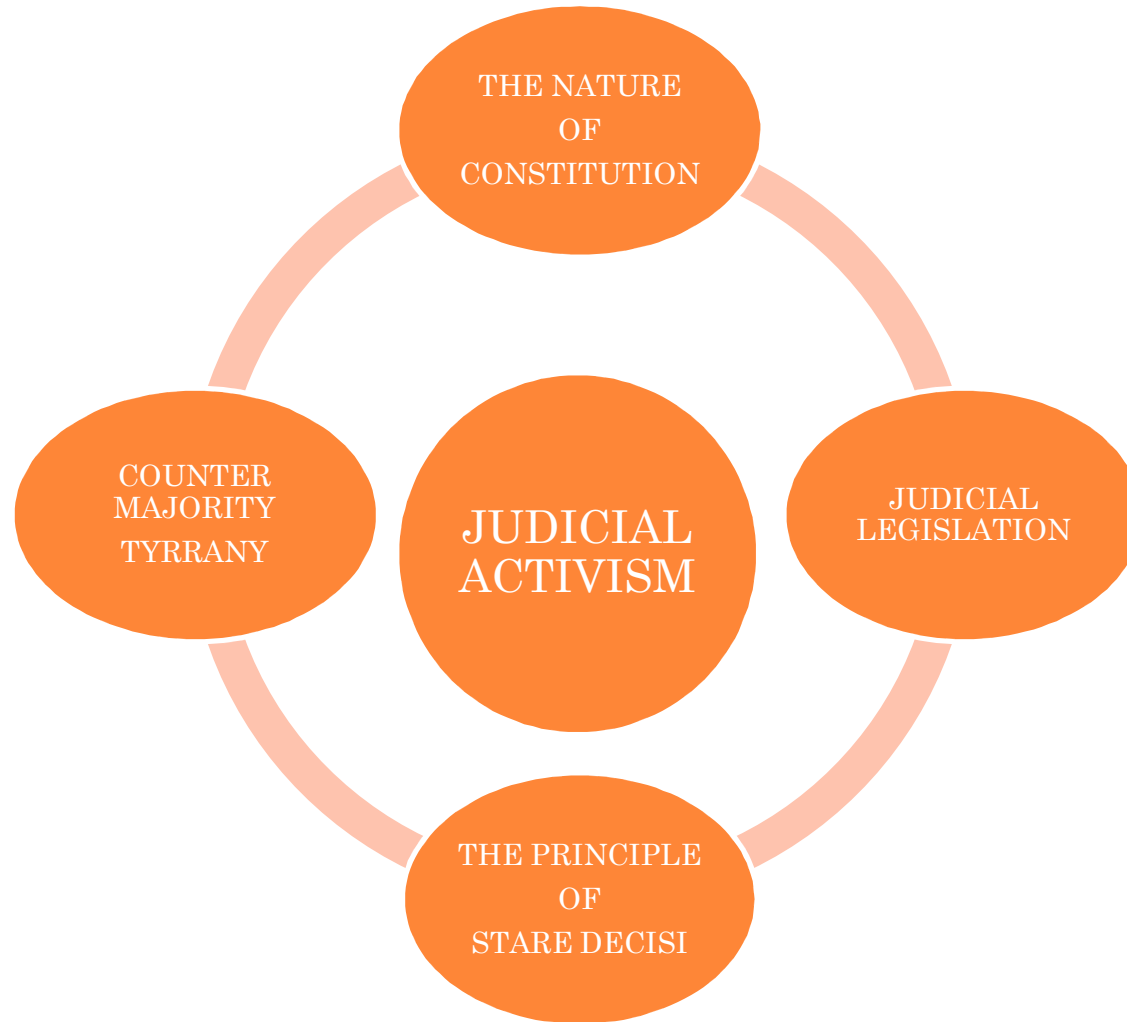
- ❑ There exist neither acceptable nor clear definition of Judicial activism(**Austin Ouko; LSK Journal 2013**)
- ❑ When a judge sets to interpret the meaning of words of a text , or the intent of the authors of a text in a bid to resolve a matter, he or she is associated with either judicial activism or judicial restraint (**Cesare Pinelli, 2007**) .
- ❑ Judicial activism is assumed to be Pejorative with reference to abuse of judicial powers and position in reshaping the law according to the judge's philosophy instead the judiciary plays a passive role (ibid).
- ❑ **Keenan D. Kmiec (2004)** associates judicial activism with overturning of democratically enacted statutes.
- ❑ We view judicial activism as philosophy of interpreting and filling lacunas progressive transformative policies and jurisprudence.



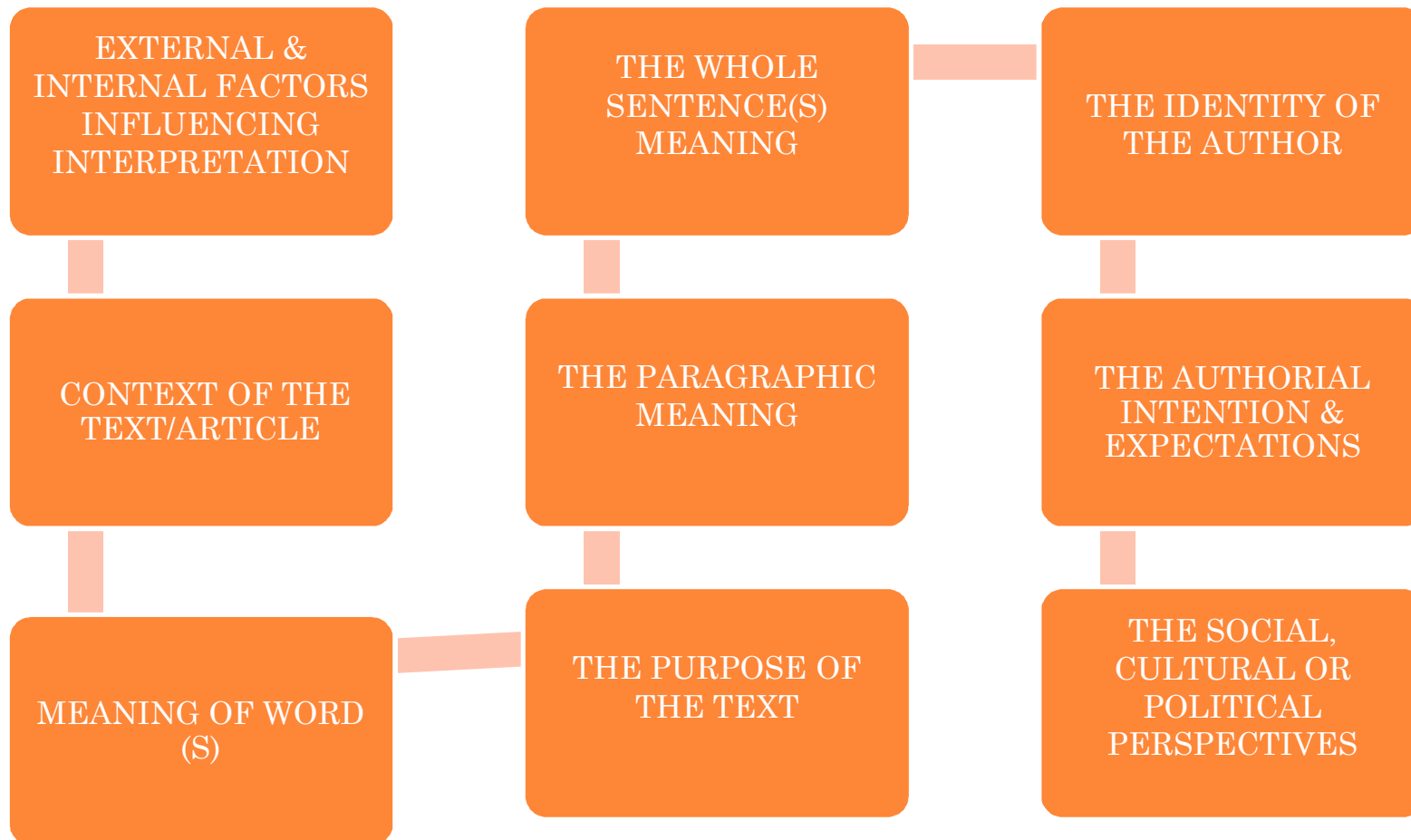
HISTORY OF JUDICIAL ACTIVISM

- ❑ In the past existed as ideology not as terminology
 - ❑ Existed in the times of Bentham, Blackstone and John Austin. Blackstone & Austin favored judicial Legislation as common law pillar while Bentham viewed it as usurping legislative function (**Keenan D. Kmiec, 2004**).
 - ❑ Arthur Schlesinger Jr. (**cited in Keenan D. Kmiec 2004**) introduced judicial activism in a magazine article, profiling all USA Supreme Court judges as either judicial activists, restraint or non-aligned and reasons for each side .
 - ❑ Crept into Kenya after the promulgation of the Constitution – vetting of judges & when courts make controversial decisions.
- 

THE THEORETICAL FRAMEWORK OF JUDICIAL ACTIVISM



THE NATURE OF CONSTITUTIONAL AND RIGHTS FRAMEWORK (CESARE PINELLI 2007)



COUNTERING MAJORITARIAN TYRANNY

- ❑ Constitutions protect unprotected and unpopular individuals that the majority may find morally objectionable. A person whose identity exposes them to ridicule, attack, or discrimination must be the reason for constitutional protection. Constitutions protect individuals from tyranny of the state and oppression from their fellow human beings (**Makau Mutua, Sunday Nation 2008**).
- ❑ Judicial restraint is founded on majoritarian democracy with three pillars; *deferential approach* that avoids decisions ruffling other government branches, *reticent approach* with assumption that judges are not policy makers, and *prudence approach* that avoids decisions incurring political reprisals (**Cesare Pinelli, 2007**).
- ❑ Judicial activism is counter-majoritarian; judges go beyond *common jurisdictional techniques* to correspond with conviction that legislation is *empirical and evanescent* whereas principle is intended to endure, and its formulation *casts large shadows into the future* (**Ibid**).



THE STARE DECISIS VIS-À-VIS THE CONSTITUTION

- ❑ **Keenan D. Kmiec (2004)** avers it is sometimes proper to disregard horizontal precedent that is unconstitutional. This what what some refer as judicial activism.
- ❑ **Akhil Reed Amar & Vikram David, 2002 (ibid)** postulate that stare decisis which encourages deference to past decisions that may be law misinterpretations tends to improperly elevate judicial doctrine over the Constitution.
- ❑ Professor Gary Lawson argues that stare decisis may be unconstitutional if it requires adherence to erroneous Constitution reading i.e where Constitution states something and a prior judicial decision states differently, and thus courts have powers and obligation to prefer the Constitution (**ibid**).



JUDICIAL LEGISLATION

- ❑ Judges are labeled judicial activists when they legislate from the bench (**Keenan D. Kmiec, 2004**)
- ❑ **Michael Kirby (2004)** traces that over a long period of time the fundamental doctrine remained that a judge applied the law and did not make law, and dispells it as myth.
- ❑ **Michael Kirby (2004)** asks: Where else did the common law and the principles of equity come from, if it was not from judicial activity?



JUDICIAL ACTIVISM IN PRACTICE; KENYA JUDICIARY (CASE STUDY)

PETITION NO. 2 of 2012; SUPREME COURT'S ADVISORY OPINION ON GENDER

- ❑ Majority held that gender equity be realised progressively.
- ❑ Dissenting judgement held immediate implementation of the principle.
- ❑ Dissenting opinion held as judicial activism

MARTIN WAMBORA V SPEAKER COUNTY ASSEMBLY OF EMBU & 5 OTHERS

- ❑ impeachment passed all the preliminary stages successfully
- ❑ Barred by a Court order
- ❑ MCAs proceeded with the impeachment
- ❑ Courts reversed decision
- ❑ Politicians accused the Court of activism



THE JUDICIAL TRANSFORMATION IN THE NEW DISPENSATION

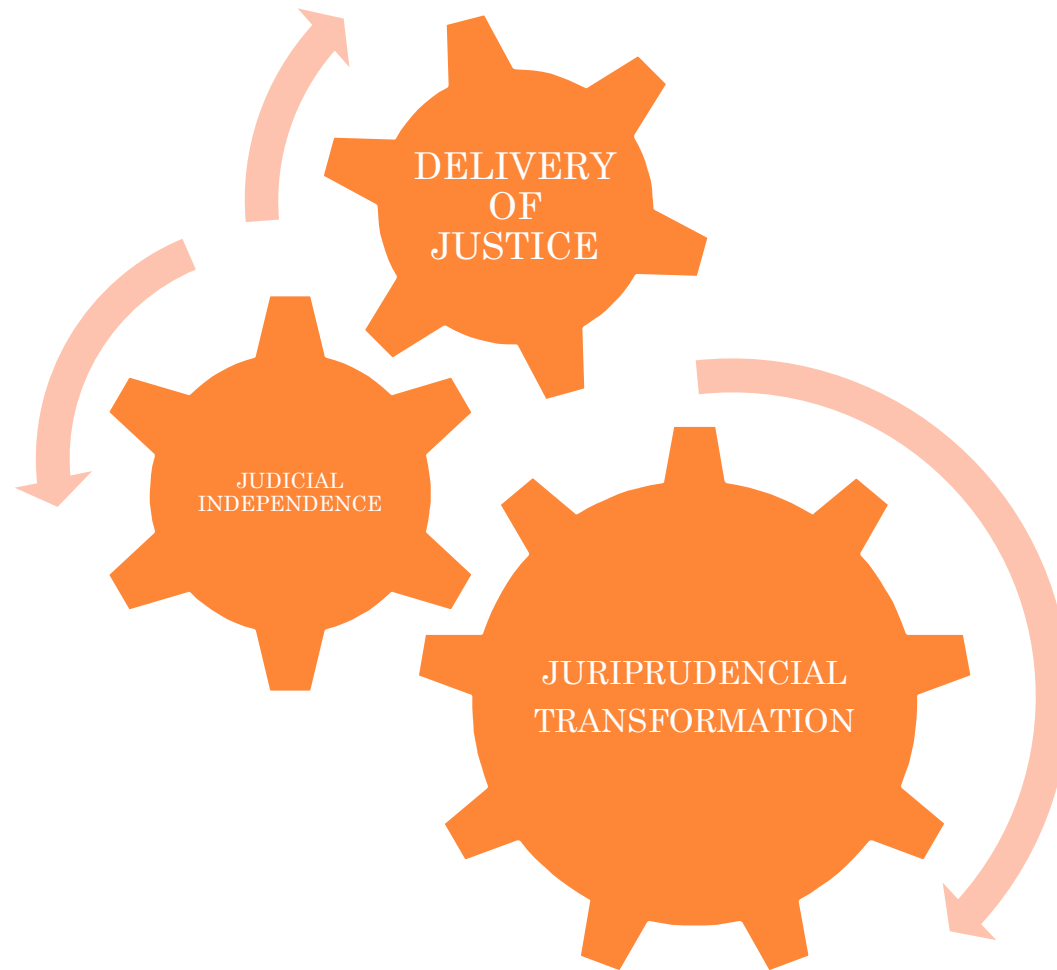
“We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support (...) that is the old order.”

Chief Justice W. Mutunga

- ❑ Transformative blue print's pillars; *justice delivery*, *institutional competence*, *robust infrastructure and resource base* and *harnessing technology in delivery of justice*.
- ❑ The Constitution itself is transformative committed social transformation (Walter Khobe Ochieng; **Kabarak University 2014**) and therefore adherence to its ideals shall bring judicial transformation.



ROLE JUDICIAL ACTIVISM IN THE TRANSFORMATION OF JUDICIARY



JURIPRUDENCIAL TRANSFORMATION

- ❑ Kenya's transformative Constitution requires the Judiciary to develop a robust jurisprudence which is the lifeblood of a transformed Judiciary (**Judiciary Transformation Framework, 2012 – 2016**) .
- ❑ Sound jurisprudence enables it to assert its authority, command respect and distinction among its peers, and earn respect and legitimacy in the eyes of the public.
- ❑ Judicial activism promotes jurisprudential transformation in the aspect of transitional justice



DELIVERY OF JUSTICE

- ❑ **Korwa G. Adar and Isaac M Munyae** unearth impunity in Moi regime; corruption, tribalism and human rights.
- ❑ Existence of courts alone provides no guarantee of justice but rather the aspirations and design of the Constitution that creates them (**Willy Mutunga, 2011**).
- ❑ Judicial activism not helps to inject Constitutional aspirations, liberal philosophy and progressivism but also restores accessibility of justice to the minority that has always been trampled underfoot.



JUDICIAL INDIPENDENCE

- ❑ The upnormal influence wield by President over the judiciary led to 2007-2008 PEV (**Trixie Akpedonu, Ben Lumsdaine and Aminata Sow,2013**).
- ❑ 2010 Constitution removed a number of the executive's controls.
- ❑ Judicial independence and impartiality is expressed in court decisions and processes by which judges arrive at decisions (**Amy Gordon & David Bruce, 2006**).
- ❑ judicial activist cannot be influenced by; status quo, powerful executive and majority tyrrany.



CRITIQUE ON POLITICAL CLASS THAT LASHES OUT JUDICIAL ACTIVISM

- ❑ Judicial activism critics fail to recognise that the philosophy keeps majority degenerating into tyranny and bound to side with the oppressed or threatened by tyranny.
- ❑ Suzanna Sherry (2013) champions judicial activism; constitutional theory suggests a need for judicial oversight of the popular branches, constitutional history confirms that the drafters envisaged need for a strong bulwark against majority tyranny, it is better to have an overly aggressive judiciary than an overly restrained one.



CONT'

- ❑ Critics of Judicial activism in parliamentary legislations fail to acknowledge that are charged with the mandate of interpretation.
- ❑ Critics fail to appreciate that Courts interpret the Constitution with progressivism that has profound social and political implications.
- ❑ The constitution was enacted by people and not political class.
- ❑ Political class to be aware that their attacks to Judiciary not only seeks to interfere with Judiciary's working but breaks separation of powers



CONCLUSION

“...the primary duty of the judges; to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity”

DOW CASE, Justice Aguda

- ❑ Judicial activism is inevitable in the corridors of justice since the Constitution requires broad, purposive and liberal interpretation.
- ❑ Existence of discretionary powers indicate that there must be activist judges who inject progressivism



RECOMMENDATIONS

- ❑ Need for Judicial activism definition neutral; with no political valence
- ❑ Judicial reviews/activism is not judicial supremacy
- ❑ Scholars and judicial officers should give precise meaning of judicial activism
- ❑ Courts encouraged to embrace judicial activism particularly in human rights regime and fight against impunity.
- ❑ political class should respect Judiciary and explore appeals wherever they disagree with the Court decisions.



END

**THANKS
FOR
LISTENING**

