

Critiquing the Supreme Court of Kenya's Jurisdictional Decisions to Listen to Matters of General Public Importance

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Abstract

*The Supreme Court of Kenya, as per Article 163 (4) (b), has the appellate jurisdiction to listen to appeals from the Court of Appeal that have been certified to be matters of general public importance. In *Hermanus Phillipus Steyn v Giovanni Gnnechi-Ruscone*, the Supreme Court put forth the *Hermanus* test that aimed at demystifying the concept of matters of general public importance. The prevailing understanding at the Supreme Court seems to take public interest to be an idea that is homogenous, applying to the country as a whole, ignoring the vast diversity in society. Hence, through the *Hermanus* test, the Supreme Court narrowly interprets its appellate jurisdiction to listen to matters of general public importance, going against transformative constitutionalism. This article aims to prove, through Court decisions, that the current interpretation of the 'public interest' in the *Hermanus* test goes against the purposive interpretation expected by the Constitution and access to justice. The article proposes reformulations to the *Hermanus* test that would meet the transformative aspect of the Constitution and fulfil the visions espoused by the constitution's drafters.*

Keywords: *Supreme Court of Kenya, Matters of General Public Importance, Public Interest, Appellate Jurisdiction, Hermanus Test.*

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I. Introduction

The Constitution of Kenya (2010) (hereinafter referred to as 'the Constitution' or '2010 Constitution') has been hailed as a transformative charter alongside those of Brazil, South Africa and India.¹ The promulgation of the Constitution was seen as a chance to reflect on past mistakes as a nation and find a way to fix them as transformative constitutions show a commitment to social and political change.² The 2010 Constitution serves as a mirror to both the present and the future, forcing us to recall past misgivings while the nation marches on to a better future.³

Closely associated with the concept of a transformative constitution is transformative constitutionalism.⁴ In his seminal article, 'Legal Culture and Transformative Constitutionalism', Karl Klare defines transformative constitutionalism as a long-term project of constitutional enactment, enforcement and interpretation committed to transforming a country's political and social institutions and power relationships in a democratic and egalitarian direction.⁵

Under this theory, there is a keen focus on adjudication. Adjudication reveals ways in which law-making could generally be a medium for accomplishing justice.⁶ It is then up to the judiciary to ensure that the country's transformative constitution is fulfilled, as it has a critical role in its interpretation and shaping.⁷ Legal texts do not give meaning to themselves and as a result they need to be interpreted.⁸ This further shows the importance of the judiciary under a transformative constitution. Constitutions are filled with apparent gaps and contradictions that ought to be interpreted by the adjudicator. In the interpretation practice, judges knowingly or unknowingly are influenced by their personal beliefs and values,

¹ Mutunga W, 'The 2010 Constitution of Kenya and its interpretation: Reflections from Supreme Court decisions' *Speculum Juris* 29 (1), 2015, 1. See also *In the Matter of the Speaker of the Senate & another* (2013) eKLR, para. 51- para 53; Abungu C, 'Revisiting the place of preparatory documents in the interpretation of transformative constitutions' 13(1) *Vienna Journal on International Comparative Law*, 2019, 65.

² Hailbronner M, 'Transformative constitutionalism: Not only in the Global South' 65 (17) *American Journal of Comparative Law*, 2017, 529.

³ The 2010 Constitution's Preamble, 'honours those who heroically struggled to bring freedom and justice to our land'; Kgabo T.O, 'Re-imagining a culture of justification through transformative constitutionalism and the philosophy of Ubuntu' 11(1) *Pretoria Student Law Review*, 2017, 28.

⁴ Abungu C, 'Revisiting the place of preparatory documents', 66.

⁵ Klare K, 'Legal culture and transformative constitutionalism' 14 (1) *South African Journal on Human Rights*, 1998, 150.

⁶ Klare K, 'Legal culture and transformative constitutionalism', 148.

⁷ Klare K, 'Legal culture and transformative constitutionalism', 149.

⁸ Klare K, 'Legal culture and transformative constitutionalism', 157.

and it is close to impossible to detach these beliefs or values from the judge.⁹ In the act of interpretation, the adjudicator does not apply fixed materials in a definite way, but they do so in a medium and this medium is constraining.¹⁰ Klare then proposes a post-liberal reading a transformative constitution, this means that it must be understood and interpreted in lines with its aims and aspirations.¹¹ Michaela Hailbrunner, in turn, argues that transformative constitutionalism is much broader and should not only involve the judiciary, but it should also involve the entire state for greater social change an impact.¹²

Before the promulgation of the 2010 Constitution, the judiciary took a restrictive view when it came to cases that involved constitutional interpretation and human rights violation.¹³ The courts enforced the claw back clauses that were found in the repealed constitution and there was little attempt to protect the rights and freedoms of the people as the primary concern was procedural technicalities.¹⁴ The misgivings of the judiciary under the old constitution are too many to state, however, with an attempt to make amends, the Constitution provided for the creation of the Supreme Court of Kenya (hereinafter referred to as ‘Supreme Court’).¹⁵ The Supreme Court was to be the new apex court taking over the Court of Appeal which previously held this position, The Supreme Court, as per Article 163,¹⁶ has various jurisdictions but of particular

⁹ Klare K, ‘Legal culture and transformative constitutionalism’, 157.

¹⁰ Klare K, ‘Legal culture and transformative constitutionalism’, 160.

¹¹ Klare K, ‘Legal culture and transformative constitutionalism’, 153; Narotam K, ‘The impact of transformative constitutionalism in addressing the marginalisation of domestic workers in post-apartheid South Africa with specific reference to *Mablangu and another v Minister of Labour and others (Commission for Gender Equality and another as Amicus Curiae)* [2020] JOL 48996 (CC) 15(1) *Pretoria Student Law Review*, 2021, 208.

¹² Hailbrunner M, ‘Transformative constitutionalism’, 530.

¹³ Ambani J and Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 1st ed, Claripress, Nairobi, 2012, 158. The El Mann doctrine of constitutional interpretation states that a constitution is to be interpreted as an Act of Parliament where the words are clear and unambiguous and take the words in their natural and ordinary sense. See also *Reverend Dr. Timothy M Njoya and 6 others v Honourable Attorney General and another* (2004) eKLR, para 14- para 18. Ringera J, in rejecting the El Mann doctrine, stated as follows:

‘It is a living instrument with a soul and a consciousness; it embodies certain fundamental values and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.’ (Emphasis mine).

¹⁴ Ambani J and Mbondenyi M, *The new constitutional law of Kenya*, 156. See for example, *Koigi wa Wamwere v Attorney General* (1990) eKLR, where it was held that Section 72 of the Repealed Constitution protected the right to liberty, but it did not specify as to how arrests could be made or effected. The Court was silent on the issue of how police officers are to conduct their duties; *Maina Mbacha and 2 others v the Attorney General* (1989) eKLR; *Kenneth Stanley Njindo Matiba v Daniel Toroitich arap Moi* (1994) eKLR.

¹⁵ Article 163, *Constitution of Kenya* (2010).

¹⁶ *Constitution of Kenya* (2010). Under Article 163, the Supreme Court has been vested with three types of jurisdictions:

importance to this article is its appellate jurisdiction.¹⁷ Regarding this appellate jurisdiction, this study focuses only on the court's appellate jurisdiction to listen to matters of general public importance.¹⁸ The article focuses on matters of general public importance due to the vagueness of the phrase 'matters of general public importance' and the implications of the numerous interpretations that could arise.

In *Hermanus Phillipus Steyn v Giovanni Gnechi Ruscone* (hereinafter referred to as the *Hermanus Steyn* case), a case where the main issue was the award of damages to an agent for an alleged breach of a commission note for a brokerage on an actual piece, the Supreme Court declared that a matter of general public importance under Article 163 (4) (b) was intended to be one that is broad-based and transcends the interests of the parties and has a significant bearing on public interest.¹⁹ In an attempt to determine the court's jurisdiction, the court stated that an understanding of public interest is critical in understanding general public importance.²⁰

In linking the two concepts, the court developed a test to be used in assessing whether a matter is of general public importance, known as the Hermanus test. Below, the author has selected the most contentious²¹ elements of the Hermanus test, that have proven to cause issues in their interpretation:²²

- '(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case and has a significant bearing on the public interest.
- (iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme

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- i) Exclusive original jurisdiction to listen and determine presidential election petitions;
 - ii) Appellate jurisdiction to listen to appeals from the Court of Appeal regarding interpretation or application of the Constitution and matters that the Court itself or the Court of Appeal classifies as matters of general public importance; and
 - iii) Giving advisory opinions at the request of the national government, any state organ or any county government.

¹⁷ Article 164(4), *Constitution of Kenya* (2010).

¹⁸ Article 163 (4) (b), *Constitution of Kenya* (2010).

¹⁹ 2013 (eKLR), para 58.

²⁰ Black's Law Dictionary, 7th ed.

²¹ In the selection of the most contentious tenets of the Hermanus test, the main criteria deployed was the kind of resistance the interpretation of the tenet has against transformative constitutionalism. For instance, the first tenet, on the matter having a significant bearing on the public interest, has shown quite some inconsistency with the expectations of transformative constitutionalism, as shall be seen in the case law that will be discussed in subsequent parts of this article.

²² *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* 2013 (eKLR), para 60. The remainder of the Hermanus test can be seen in Part II of this article.

Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination.

- (vi) the intending applicant has an obligation to identify and concisely set out the specific elements of 'general public importance' which he or she attributes to the matter for which certification is sought'

Majority of the bench was of the opinion that the matter in the case did not have a bearing on the general 'public' interest, so it could not be a matter of general public importance.²³ Ibrahim SCJ and Ojwang' SCJ dissented saying that the matter was of importance to a class of people who are brokers and commission agents and should have been allowed and it would be the first time such a matter would be heard in a Kenyan Court.²⁴ The essence of the Hermanus test is the public interest, a concept that the Supreme Court seems to have misunderstood in this case and such misapprehension occasioned not only regarding what 'public interest' is, but also what exactly the 'public' is.²⁵ The test has been interpreted in a manner that shows an understanding of the public interest to be an idea that is homogenous, ignoring the vast diversity in today's society. Homogeneity in this case is seen by how the Supreme Court only allows its appellate jurisdiction on cases that represent the public as the entire country and disallowing legitimate claims from smaller sections of the public, separate from the general public.

In *SAJ v AOG & 2 others*, a case involving international abduction of a child, the Court dismissed the appeal maintaining that since there was no precedent, there was no uncertainty for the Supreme Court to solve.²⁶ This case would have been of great jurisprudential value because it would be the first-time international abduction by the parent would be heard in the country but yet the court declined to hear the matter. Other than being of great jurisprudential value, such a case would seek to provide reprieve to a class of people in society. In asking for a broader interpretation, this article asks the Supreme Court to take into account its obligations under the Supreme Court Act and its duties to the people as per the Constitution.²⁷ This article reminds itself that jurisprudential value should never be given more concern over the jurisdiction of the court and that in this matter, the jurisprudential value is measured in line with the expectations of the

²³ *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* 2013 (eKLR), para 41.

²⁴ *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* 2013 (eKLR). Dissenting opinion, para 13.

²⁵ In *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* 2013 (eKLR), para 41 the Supreme Court narrowly interprets what the term 'public' means and leaves no leeway for other sub-sections of the public to arise.

²⁶ 2013 (eKLR).

²⁷ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011); Article 163, *Constitution of Kenya* (2010).

objectives of the court as per the Supreme Court Act.²⁸ This sentiment has been carried over the entirety of this article.

It is interesting to see the Supreme Court denying itself a chance to fulfil one of its objectives under Section 3(c) of the Supreme Court Act based on a test that was intended to help it solve such issues, and where such a ruling would serve to fulfil the public interest, in particular for people who are commission agents and brokers.²⁹ It is important to note that the court declined to listen to the matter despite it stating that it has a significant bearing on the public interest and that it has transcended its circumstances.³⁰

In *Salim Juma Ali and another v Joyce Ningala Mwamutsi*, a decade-spanning case on adverse possession, the court stated that they could not allow the appeal from an interlocutory order of the Court of Appeal without a definite judgement. In a dissenting opinion, Ojwang SCJ stated the important aspect of this case that was being overlooked was whether granting the injunction was deemed as finality in the case as it evicted the appellants from the land they had occupied for years and it would be seen as the end of the case- such a matter was a substantial point of law that had a bearing on the public interest and the appeal should have been allowed.³¹ As seen from the cases, the Hermanus test fails to take into account surrounding circumstances and treats the public interest as something cast in stone. Through the Hermanus test, Article 163(4)(b) is narrowly interpreted as opposed to the broad interpretation expected by transformative constitutionalism. Article 259(1) calls for a purposive interpretation of the Constitution and whether a broad or narrow interpretation is taken, it must promote the values of the Constitution.³²

This article calls for a broad interpretation of Article 163(4) (b) and the Hermanus test as such an interpretation shall give the court a chance to remedy the mistakes made under the previous Constitution and a narrow interpretation would deny citizens justice, rendering it incompatible with the aims of the 2010 Constitution. From our country's history, it would seem that a broad interpretation is what is best but, in some instances, a narrow interpretation may do the job of fulfilling Article 259 (1).³³ A broad interpretation leaves room for more cases to be heard and as a result more people getting justice but an ever-looming problem

²⁸ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

²⁹ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

³⁰ *SAJ v AOG & 2 others* (2013) eKLR, para 33.

³¹ 2019 (eKLR).

³² Article 259(1), *Constitution of Kenya* (2010).

³³ Article 259(1), *Constitution of Kenya* (2010); Abungu C, Constitutional interpretation of rights and court powers in Kenya: Towards a more nuanced understanding, 27(2) *African Journal of International and Comparative Law*, 2019, 203-206.

is that a broad interpretation gives the judge too much power which may in turn be abused.³⁴ This is where, now, a narrow interpretation would come in to play to limit the power of the judge. In the case at hand, a narrow interpretation has resulted in more questions than answers and as a result a broad interpretation shall serve to remedy the issue and give more clarity on the matter.

The attempts to link public interest and general public importance should have given a chance for the Supreme Court to create rich jurisprudence as per the Supreme Court Act³⁵ and fulfil its transformative role, but what it has resulted in is a narrow interpretation of the court's appellate jurisdiction. The linking that has happened between the two concepts limits the court's jurisdiction resulting in an interpretation of the court's appellate jurisdiction that does not align itself with transformative constitutionalism.

This article attempts to examine public interest as provided for in the Supreme Court case of *Hermanus Steyn* and the implications of the current restrictive interpretation of the Hermanus test on the Court's jurisdiction as seen from various jurisdictional decisions; thus, attempts to reconcile the issues presented with a reformulation to the Hermanus test and the creation of new test to take effect alongside the Hermanus test. Part I is this introduction and provides the relevant background for understanding the problem. Part II contains a detailed analysis of the Supreme Court jurisdictional decisions on matters of general public importance and gives an apt explanation on *Hermanus Steyn* case. Part III explains the public interest gap that exists within the Supreme Court and critiques the court's current interpretation of the public interest as seen in the Hermanus test. Part IV proposes the way forward by reformulating the Hermanus test while proposing the creation of a new test, the 'how public is public' test to work concurrently with the Hermanus test and finally, Part V concludes the article.

II. The Ascension of the Hermanus Test

i. The Hermanus Test

In *Hermanus Steyn*, the applicant and the respondent had entered into a commission agreement in 1982 with regards to the applicant's assets being seized by the Tanzanian government during the government's nationalization

³⁴ Abungu C, Constitutional interpretation of rights and court powers in Kenya, 216.

³⁵ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

process.³⁶ Meanwhile in Tanzania, through the Arusha Declaration, there was the implementation of African Socialism and all private property, including the applicant's, was seized.³⁷ Thereafter, the government enacted the Companies (Acquisition and Management) Act which stated that owners of property that was nationalised by the Tanzanian Government were entitled to full and fair compensation.³⁸ The appellant was unable to secure the compensation for a period of 10 years.³⁹ The applicant tried to seek assistance from the government, but nothing came of it. The respondent came to aid of the applicant by assisting in the negotiations. As a result, they got into a Memorandum of Understanding with the Tanzanian Government on 8 November 1993.

The agreement stated that the applicant would pay the respondent a commission of ten percent of any sums that may be paid to the applicant from the United Republic of Tanzania, then disputes arose out of the said commission agreement.⁴⁰ At the High Court, the trial judge stated that the respondent ought to be paid his commission of \$1,206,015.52 and this amount was calculated as ten percent of the amount that was paid to the applicant, which was \$12,060,155.53.⁴¹ At the Court of Appeal, the court went on to state that the damages being claimed were neither special nor liquidated.⁴² Furthermore, it stated that it was more of a claim made on a contractual sum.⁴³ The Court of Appeal did not give guidance as to what kind of damages could be claimed.

The appeal at the Supreme Court was based on Article 163(4) (b) which allows for appeals from the Court of Appeal on the grounds that the appeal contains a matter of general public importance and has been certified as such.⁴⁴ While considering the facts before it, the Supreme Court, in an attempt to demystify the concept of 'a matter of general public importance', came up with a test to assist and eliminate the vagueness of Article 163(4) (b).⁴⁵ Before the test is tackled, it is imperative to perceive the reasoning that the court uses to come up with the test. The Supreme Court links the public interest to matters

³⁶ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2010) eKLR, para 2.

³⁷ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2010) eKLR, para 2.

³⁸ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2010) eKLR, para 3.

³⁹ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2010) eKLR, para 3.

⁴⁰ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2010) eKLR, para 7.

⁴¹ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 5.

⁴² *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 15.

⁴³ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR.

⁴⁴ Article 163(4) (b), *Constitution of Kenya* (2010); *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR.

⁴⁵ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 35- para 60.

of general public importance by using the definition of public interest as seen in the Black's Law Dictionary.⁴⁶ Briefly put, the dictionary defines the public interest as that which qualifies for protection and recognition as the public has stakes in it and as a result that ought to allow for government intervention and regulation.⁴⁷ The definition could be argued to be one that takes the public interest as something that affects the entire country. It seems to give little leeway for the court to anticipate scenarios of other public interests aside from the national public interest, for instance in matters affecting a class of commissioners and broker agents⁴⁸, alleged international child abduction⁴⁹ or even matters affecting a particular class of litigants.

In paragraph forty-one of the judgement, the majority of the bench states that it is important that the term 'public' be defined, as such its understanding shall prove to be vital to the concepts of public interest and matters of general public importance.⁵⁰ The court defines 'public' as that which concerns or affects all the members of the community.⁵¹ With this definition the court places itself right in the centre of the debate concerning the definition of the public interest that has been going on for a while and makes no attempt to give an update or to give its own conception of the public interest.

The Supreme Court then goes on to give a test (the Hermanus test), as seen below, with the aim of trying to address the vagueness of Article 163(4) (b)⁵²:

- (i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
- (ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
- (iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
- (iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme

⁴⁶ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR; Black's Law Dictionary, 7th ed.

⁴⁷ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 41.

⁴⁸ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR.

⁴⁹ *S.A.J v AOG & 2 others* (2013) eKLR.

⁵⁰ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 41.

⁵¹ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 41.

⁵² Article 163(4) (b), *Constitution of Kenya* (2010).

Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

- (v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior Courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;
- (vi) the intending applicant has an obligation to identify and concisely set out the specific elements of 'general public importance' which he or she attributes to the matter for which certification is sought;
- (vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.⁵³

As has been alluded to, the case was not accepted by the entire bench. Ibrahim SCJ and Ojwang' SCJ gave a dissenting opinion which added the following elements to the test:⁵⁴

- (i) issues of law of repeated occurrence in the general course of litigation;
- (ii) questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or of litigants;
- (iii) questions of law that are destined to continually engage the workings of the judicial organs;
- (iv) questions bearing on the proper conduct of the administration of justice.

Ultimately, the majority of the bench held that the case did not meet the test that was set out in the case as it had failed to transcend its circumstances so as to have a bearing on the public interest.⁵⁵ Counsel for the applicant stated that this would be the first time that such a matter would be heard in courts, and it would be very helpful to brokers and commission agents.⁵⁶

The following section of the article investigates the most contentious elements of the Hermanus test, and their impact as seen through Supreme Court jurisprudence.

ii. *Contentious elements of the Hermanus test*

The Hermanus test attempts to make sense of matters of general public importance as per Article 163(4) (b) by giving guidelines on how to approach

⁵³ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 60.

⁵⁴ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 17.

⁵⁵ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 71.

⁵⁶ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 36.

such matters and the test makes some attempt to be as broad as possible.⁵⁷ On the flipside, the test does not give a proper understanding of what the court means when it includes the public interest in the test and from the interpretation.

In this part, attention is given to the two main tenets of the *Hermanus* test that have proven to be an area of contention and their current interpretation could be detrimental to Kenya's transformative constitution and its application.

a. Significant bearing on the public interest

As the Supreme Court meted out its judgement in the *Hermannus Steyn* case, it stated that the dispute between the parties does not transcend into the public realm to have a significant bearing on the public interest.⁵⁸ This means that the court did not see any way in which the issues would have a bearing on public life while the applicant had said that this decision would greatly impact brokers and commission agents and also the commercial lives of Kenyans.⁵⁹

The court stated that it would be difficult to see how the questions presented would have a significant bearing on the public interest. It is worth noting that in the applicant's submission, it was stated that the issues before the court would be important to a class of litigants, brokers and commission agents, as it would be dealing with the awarding of damages that were neither specific nor liquidated.⁶⁰

The Supreme Court, it would seem, was not interested in answering the question as to the type of damages that would be given. By failing to take up this question, the court not only deprived justice to brokers and commission agents who would have benefited from such precedent, but also, it denied the country and the judiciary rich and progressive jurisprudence in line with the Supreme Court's duties.⁶¹

The court stated that the categories that entail the public interest are not closed, and they place the burden on the applicant to show the matter in the

⁵⁷ Article 163(4) (b), *Constitution of Kenya* (2010). In *Hermannus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 50, the Court stated as follows: '... that there will be *broad guiding principles* to ascertain the particular nature of the case.' (Emphasis mine).

⁵⁸ *Hermannus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 75. Wanjala SCJ, in his dissenting opinion of *Republic v Ahmad Abolfathi Mohammed & another* (2019) eKLR, para 115 stated that the main principle in governing matters of general importance is that it must transcend its circumstances and have a significant bearing on the public interest.

⁵⁹ *Hermannus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 75.

⁶⁰ *Hermannus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 36.

⁶¹ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

case is one of general public importance.⁶² Yet, from various court decisions, it can be seen that the public interest that the Supreme Court appreciates is one that affects the entire country, as seen in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others: Initiative for Strategic Litigation in Africa (Amicus Curiae)* and *MNK v POM*.⁶³ The Supreme Court ought to have taken into account the fact that a class of litigants (in this case, brokers and commission agents) could have their own public interest aside from the national interest.⁶⁴

To further show the issue with this part of the test, the article delves into various Supreme Court decisions that touch on matters of general public importance.

b. Public interest relative to the entire country

This part of the article focuses on Supreme Court decisions that demonstrate the public interest as that of the whole country.

Mitu Bell involved the unlawful evictions and demolition of homes of over 3000 families who were residing in an informal settlement, which is in Mitumba Village near Wilson Airport, for the past 19 years.⁶⁵

This article focuses on the application to the Supreme Court on grounds as a matter of general public importance.⁶⁶ The court stated that the Court of Appeal did not identify the points of law that the Supreme Court was required to pronounce itself on and as a result they were now to assess the case in line with the Hermanus test.⁶⁷

The Supreme Court in its analysis, looks at select parts of the Hermanus test. They were: i). That the case must transcend the circumstances of the particular case and must have a significant bearing on the public interest and ii).

⁶² *Hermannus Phillipus Steyn v Giovanni Gnechi-Ruscone* (2013) eKLR, para 58.

⁶³ (2021) eKLR and (2020) eKLR.

⁶⁴ Jordan S, 'The public interest in public administration: An investigation of the communicative foundations of the public interest standard', Texas A&M University, Austin, 2007, 25; Wheeler C, 'The public interest we know it's important, but do we know what it means' 48 (12) *Australian Institute of Administrative Law Forum*, 2006, 36.

⁶⁵ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (2021) eKLR; Miyandazi V, 'Setting the record straight on socio-economic rights adjudication: Kenya Supreme Court's judgement in the Mitu Bell case', Oxford Human Rights Hub, 1 February 2021, <<https://ohrh.law.ox.ac.uk/setting-the-record-straight-on-socio-economic-rights-adjudication-kenya-supreme-courts-judgment-in-the-mitu-bell-case/>> on 12 November 2021.

⁶⁶ Article 163(4) (b), *Constitution of Kenya* (2010).

⁶⁷ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (2021) eKLR.

Require a demonstration that a substantial point of law is involved that has a bearing on the public interest.⁶⁸

The application was allowed but the court did not go into further detail on whether the other tenets of the test had been met. From the court's analysis, it would seem that the Hermanus test is a disjunctive one, but as will be explained further in the article, the classification of the test as disjunctive or conjunctive one adds more to the lack of clarity in interpreting the test.⁶⁹ This article aligns itself with the thought that the case was approved on the stated parts of the test because of the expected progressive realization of socio-economic rights under the 2010 Constitution (of which the right to accessible and adequate housing falls under).⁷⁰ Furthermore, under transformative constitutionalism, socio-economic rights cannot only exist on paper only, they need to be interpreted in line with the constitutional vision.⁷¹

In *MNK v POM*, the main issue before the court was whether parties to a union arising out of a cohabitation can file proceedings under the Married Women's Property Act.⁷²

In allowing the application, the court stated that issues presented in the case were not superficial and that they did in fact, transcend the specific circumstances of the parties in the case.⁷³ Specifically, the court said that the query into the property acquired during such an unrecognised marriage is a critical one for the general public and the court could not shut its eyes to the need to settle the law in that regard.⁷⁴

⁶⁸ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (Amicus Curiae) (2021) eKLR.

⁶⁹ The discussion as to whether the Hermanus test is a conjunctive or disjunctive test shall occur towards the end of this part of the article.

⁷⁰ Article 43 (b), *Constitution of Kenya* (2010).

⁷¹ *The Government of the Republic of South Africa and 3 others v Irene Grootboom and others* (2000) Constitutional Court of South Africa, para 20. In the landmark *Grootboom* case, a group of 900 people living in squatter settlements, in Wallacedne, on land intended for a low-cost housing project were evicted. The group argued that they had a right to immediate access to dignified housing under the South African Constitution. The Constitutional Court held that the State had fell short of its obligations under the right to adequate housing (as seen in Section 26 of the South African Constitution). See more here, Samtani S, 'The international impact of Government of the Republic of South Africa v Grootboom' IACL-AIDC Blog, 7 June 2022 < <https://blog-iacl-aidc.org/new-blog-3/2022/6/7/the-international-impact-of-government-of-the-republic-of-south-africa-v-grootboom-rwblg>> on 1 February 2023.

⁷² *MNK v POM* (2020) eKLR, para 25. With the enactment of the Marriage Act (No.4 of 2014), the Married Women's Property Act was repealed but it is stated in the aforementioned case as it was heard in the High Court in 2013.

⁷³ *MNK v POM* (2020) eKLR, para 24.

⁷⁴ *MNK v POM* (2020) eKLR, para 24.

It is interesting to note that according to the court the only cases that truly transcend their own circumstances are those that affect the general public. Arriving at this conclusion, this article is guided by the understanding of the term 'public' obtained from the Supreme Court's ruling in *Hermanus Steyn* where the court stated that 'public' is what concerns or relates to all the members of the public.⁷⁵ This could be why the court allowed both the *Mitu Bell* case and this case to pass. From the above analysis, the Supreme Court shows no indication as to accepting varying definitions of the 'public', at least with reference to appeals relating to matters of general public importance.

This begs the question that underlies the entire article, should the Supreme Court update its understanding of the 'public' in order to ensure the proper fulfilment of Article 163(4) (b)?⁷⁶ With an updated view, the court will remedy the mistakes made in *Hermanus Steyn* allowing a purposive application of its appellate jurisdiction.

c. The proper approach to interpret the public interest

In *Salim Juma Ali*, a case involving adverse possession, the court stated that an inchoate issue cannot be a matter of general public importance as per Article 163 (4) (b) as the court risks making premature assessments on the merits of the case presented before it.⁷⁷ Wanjala SCJ dissented and stated that the granting of the interlocutory injunction amounts to a finality in the case and as a result such the matter ought to have a bearing on the public interest.⁷⁸ Ultimately, the majority of the court decided that the matter does not have a bearing on the public interest. This begs the question, what is the proper way to interpret the public interest? Justice Wanjala looks at the impact of granting the interlocutory injunction in light of the matter at hand and states that the injunction granted would essentially bring an end to the case and that is a matter that would have an impact on the public interest. The majority of the bench looks only at the injunction as an interim measure and does not want to interfere with the case by making premature judgements but by refusing to acknowledge the impact of the injunction on the case, does this result in an injustice to the parties?

In coming up with the proper way to interpret the public interest, this article calls on the court to understand that the public interest is not one homogenous

⁷⁵ *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* (2013) eKLR, para. 41.

⁷⁶ Article 163(4) (b), *Constitution of Kenya* (2010).

⁷⁷ *Salim Juma Ali and another v Joyce Ningala Mwamutsi* (2019) eKLR, para 2- para 9.

⁷⁸ *Salim Juma Ali and another v Joyce Ningala Mwamutsi* (2019) eKLR, para 22 and para 23.

concept, and all factors must be taken into account.⁷⁹ For example, in *Salim Juma Ali*, the court should have looked at the impact of the injunction of the case before dismissing the case. Other considerations the court should take into account are factors like geographical context, operational context and the political context.⁸⁰ It is up to the court to weigh all the factors surrounding the merits of the case before adjudicating whether the matter will have a bearing on the public interest.

In *Peris Wambui Matiru v Commissioner of Lands & 2 others*, it was stated that human society forms clusters bound together by their common interest and such clusters will constitute the ‘public’ for the specified cluster’s common interest. As these clusters continue to multiply, the various ‘publics’ that emerge will then be taken to be the general public.⁸¹ This judgment, despite being delivered before the advent of the 2010 Constitution, shows the kind of understanding that the Supreme Court ought to emulate in interpreting what entails the ‘public’ in matters of general public importance.

With the advent of the 2010 Constitution, there is an expectation on the Supreme Court to ensure that they broadly interpret it and ensure that all its actions are in line with transformative constitutionalism, as envisioned by the drafters of the constitution.⁸² The ideal way of interpreting the public interest is one that is in line with the 2010 Constitution and takes into account the existence of various types of ‘public’ and surrounding circumstances of each case.

iii. State of uncertainty in the law

a. Inexistence of precedent as a crucial factor

To exemplify the issue with this part of the test, the study assesses the case of *SAJ v AOG & 2 others*, which involved international child abduction by the parent.⁸³

The applicant framed the issue as a matter of international abduction by the parents and as there was no law in the country on this. The court was then called

⁷⁹ Wheeler C, ‘The public interest’, 36.

⁸⁰ Wheeler C, ‘The public interest’, 37.

⁸¹ *Peris Wambui Matiru v The Commissioner of Land & 2 others* (2008) eKLR.

⁸² As has been discussed earlier in this article, the 2010 Constitution calls for a purposive interpretation and for Article 163(4)(b), such an interpretation will be fulfilled by a broad interpretation of the Hermanus test. See generally, Abungu C, Constitutional interpretation of rights and court powers in Kenya: Towards a more nuanced understanding, 27(2) *African Journal of International and Comparative Law*, 2019.

⁸³ (2013) eKLR.

upon to provide clarity on this issue.⁸⁴ In defence of the respondent, counsel stated that the matter presented before the court was not one of general public importance as there was no uncertainty arising from contradictory precedent as per the Hermanus test but due to the lack of precedent and as a result the appeal should not be allowed. They also stated that there was a misapprehension in the law between the High Court and the Court of the Appeal and that in granting the appeal the Court of Appeal considered matters outside of its limit in allowing the appeal.⁸⁵

The court examined all the tenets of the Hermanus test and the case failed on grounds of uncertainty.⁸⁶ Unsurprisingly, the bench stated that the matter was not one of general public importance since there was no contradictory precedent involved, hence the lack of precedent nullified it in line with the Hermanus test.⁸⁷

The court's interpretation of this part of the test seems quite peculiar. It makes little sense to argue that the Supreme Court cannot adjudicate over a matter because there exists no precedent in relation to the case at hand. This is not a convincing argument from the country's most superior court where jurisprudence is expected to take its deep root.⁸⁸ Such a case would give the court a chance to provide guidelines regarding child abduction and even specify a test on how to properly identify a scenario of international child abduction involving the parent-fulfilling its role of creating rich jurisprudence under the Supreme Court Act.⁸⁹ In the Supreme Court's defence, the matters in the case were scattered in various courts and jurisdictions, including the UK and the Children's Court. The Supreme Court stated that it could not pronounce itself on the matter as it was yet to be determined by the Children's Court.⁹⁰

The Supreme Court here seems to want to avoid undermining the role of subordinate courts. Paragraph forty-one of the judgement states that the Supreme Court should exercise its powers strictly and safeguard the autonomous nature of the respective jurisdictions of its subordinate courts.⁹¹ While the author somewhat agrees with this line of reasoning from the court, there ought to be a way for the Supreme Court to fulfil its duties under the Supreme Court Act and

⁸⁴ *SAJ v AOG & 2 others* (2013) eKLR, para 13.

⁸⁵ *SAJ v AOG & 2 others* (2013) eKLR, para 22.

⁸⁶ *SAJ v AOG & 2 others* (2013) eKLR, para 33- para 43.

⁸⁷ *SAJ v AOG & 2 others* (2013) eKLR, para 41.

⁸⁸ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

⁸⁹ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

⁹⁰ *SAJ v AOG & 2 others* (2013) eKLR.

⁹¹ *SAJ v AOG & 2 others* (2013) eKLR, para 41; *Peter Oduor Ngoge v Francis Ole Kaparo and 5 others* (2012) eKLR.

also ensure that justice is provided to those who seek it and at the same time also ensure that it avoids undermining the roles of other courts. While creating a new jurisdiction not provided for, the court is faced with either refusing to a case still pending in a lower court or it could only accept a particular part of the appeal that is of general public importance and transcends its circumstances. The court should be granted a chance to pronounce itself on matters that it does believe are of a particular importance to the public (general or otherwise).⁹²

This is a difficult question that needs to be answered by the Supreme Court in order to ensure the fulfilment of the public interest as per the Hermanus test and also upholding transformative constitutionalism. While the Supreme Court requires those, who appeal under Article 163(4) (b) to show the matter having a bearing on the public interest⁹³, there should be a requirement that the Supreme Court make its attempts in stating what or how best to analyse the public interest.

b. Why inexistence of precedent is irrelevant

On lack of precedent, it is important that the issue in contention must have been brought up in previous stages during litigation so as to avoid having the court listening to a matter that is outside its jurisdiction as per the Constitution. This article is cognisant of the fact that the Supreme Court only has exclusive original jurisdiction when it comes to presidential elections and that without the requisite jurisdiction, a court cannot perform its duties.⁹⁴ Nevertheless, this article takes the position that for a robust judiciary, there needs to be judicial creativity so as to increase and fulfil the vision of access to justice in the country.⁹⁵

To some, judicial creativity is also known as judicial activism. Judicial activism is defined as a philosophy of judicial decision making whereby judges allow their personal views on public policy to guide their decisions.⁹⁶ Brice Dickson argues that judicial activism carries a pejorative connotation as compared with judicial

⁹² While in *MNK v POM* (2021) eKLR, there was no matter pending in a lower court, it is interesting to note the Supreme Court's acceptance and reframing of the issue to be heard on appeal, a matter involving division of property in a union arising out of cohabitation and stating that the matter raised is not frivolous and transcends the circumstances of the parties involved. See *MNK v POM* (2021) eKLR, para 24.

⁹³ Article 163(4) (b), *Constitution of Kenya* (2010).

⁹⁴ '*Jurisdiction is everything. Without it, a court has no power to make one more step*'. See, *Owner of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* (1989) KLR 1.

⁹⁵ Holladay Z, 'Public interest litigation in India as a paradigm for developing nations' 19(2) *Indiana Journal of Global Legal Studies*, 2012, 570. A robust judicial system plays a critical role in the thriving of democracy, and it ought to enjoy greater latitudes in judicial creativity. See Ambani J and Mbonenyi M, *The new constitutional law of Kenya*, 72 and 76.

⁹⁶ Black's Law Dictionary, 7th ed.

creativity.⁹⁷ It is expected that with the court applying judicial creativity in its rulings shall align itself with Article 259, on interpretation of the Constitution in a manner that promotes its purpose, values and principles and allowing for the positive progression of jurisprudence produced in the Supreme Court.⁹⁸

The matters brought under general public importance ensure that it does not require the court to listen to matters that it has no jurisdiction over. In *SAJ*, the issue of international abduction has been in contention since the onset of the case and its various jurisdictions. In line with the vision of the drafters of the constitution, lack of precedent should not be a factor to decline listening to the case as long as it is in line with the Supreme Court's appellate jurisdiction. The Hermanus test should consider the lack of precedent as a crucial factor in the realisation of Article 163(4) (b) because it gives a chance for the Supreme Court to create rich jurisprudence in line with Section 3 (c) of the Supreme Court Act.⁹⁹

c. Conjunctive or disjunctive?

In the interpretation of the Hermanus test, there is a lack of clarity when it comes to classifying it as conjunctive or disjunctive test.¹⁰⁰ In *SAJ*, it shows that it is conjunctive, meaning that the matter must meet all criteria as set out in the case.¹⁰¹ It passed on the grounds of transcending the circumstances of the case while having a bearing on the public interest, it would be assumed that would be enough for the court to adjudicate over the matter, but it was declined because it failed the other parts of the test.¹⁰²

A look at the *Mitu Bell* case reveals that the court did not provide a comprehensive analysis of the test as it only assessed two parts of the test.¹⁰³ In *Absa Bank Kenya PLC v Domestic Taxes (Large Taxpayers Office)*, the Court only assessed whether the matter presented in the case transcended its specific circumstances to have a bearing on the public interest, not looking into any other

⁹⁷ Dickson B, 'Judicial activism in common law Supreme Courts' in Dickson B (ed) 1st ed, *Judicial activism and New Zealand's appellate courts*, Oxford University Press, 2007, 273.

⁹⁸ Ismail A, 'The state of judicial activism in Kenya' Nairobi Law Monthly. 12 February 2019 < <https://nairobiawmonthly.com/index.php/2019/02/12/the-state-of-judicial-activism-in-kenya/>> on 30 January 2023.

⁹⁹ Article 163(4) (b), *Constitution of Kenya* (2010).

¹⁰⁰ A conjunctive test is one where all elements must be proved while in a disjunctive test, proof of any of the elements is sufficient. Conjunctive tests are typically identified with the word 'and' while disjunctive tests are identified with 'either/or'. See more here < <https://law.stanford.edu/wp-content/uploads/2018/04/ILEI-Forms-of-Legal-Reasoning-2014.pdf>> on 10 July 2022.

¹⁰¹ *SAJ v AOG & 2 others* (2013) eKLR.

¹⁰² *SAJ v AOG & 2 others* (2013) eKLR.

¹⁰³ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (2021) eKLR, para 114.

of the tenets, thus showing further the disjunctive nature of the test.¹⁰⁴ With the burden of proving whether a matter is one of general public importance, the court ought to provide some clarity on the nature of the test so as to aid litigants in their appeals.

This article opines that the best way to interpret the Hermanus test as either conjunctive or disjunctive; would have to be disjunctive as this will allow cases not to get thrown out when they meet the main tenet of having a bearing on the public interest and miss on another part of the Hermanus test.¹⁰⁵ With a disjunctive interpretation of the test, this will increase the chances of an appeal going through to the Supreme Court and hopefully further contributing to the creation of rich jurisprudence in the Supreme Court.

III. The Public Interest Gap

‘Definitions are vital starting points for the imagination. What we cannot imagine cannot come into being.’¹⁰⁶

In attempts to demystify matters of general public importance, the Supreme Court looks to the public interest. The concept of public interest is quite difficult to define with some scholars saying that it is a phrase that is used regularly and carelessly.¹⁰⁷ This part of the article seeks to investigate the validity of the link between public interest and matters of general public importance.

i. Public interest according to the Hermanus test

The concept of public has been in a constant state of flux and confusion.¹⁰⁸ It has become increasingly difficult to find a one-fits-all definition of the public interest, it is used in various sectors of normal life such as political campaigns, media, and economic regulation.¹⁰⁹

¹⁰⁴ (2022) eKLR, para 8 (iii). The subject matter in the aforementioned case was whether withholding tax is payable on payments made to card companies by acquiring banks as well as interchange fees assigned by acquiring banks to issuing banks.

¹⁰⁵ See Wanjala SCJ’s dissenting opinion in *Republic v Ahmad Abolfathi Mohammed & another* (2019) eKLR, para 115 on the main principle governing the Hermanus test.

¹⁰⁶ Hooks B, *All about love: New visions*, William Morrow & Company Inc, New York, 2000, 14.

¹⁰⁷ Marshall G and Choudry E, ‘Public administration and the public interest: Re-presenting a lost concept’ *Public Administration Faculty Publications*, 1997, 72.

¹⁰⁸ Jordan S, ‘The public interest in public administration: An investigation of the communicative foundations of the public interest standard’, Published Ph.D. Thesis, Texas A&M University, Austin, 2007, 25.

¹⁰⁹ Martin P, ‘Defining and refining the concept of practising the public interest’ 28 (1) *Alternative Law Journal*, 2003, 4.

In the *Hermanus Steyn* case, the court states that there is no definition of public importance in the Constitution and in the Supreme Court Act.¹¹⁰ The court seems to endorse the Black's Law dictionary, using the following definition:

'...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation'.¹¹¹

The court goes on to state that the above definition has its link to matters of general public importance.¹¹² It states that in order to fully comprehend the public interest, an understanding of the term 'public' is very critical, an assessment which this study agrees with.¹¹³

The court's understanding of the public interest is that which concerns or relates to the people as a whole.¹¹⁴ The court also places the onus on proving that a matter is one of general public importance on the applicant and reassures them that the categories falling under the public interest are not closed.¹¹⁵

Interestingly, the Supreme Court does not go into a detailed account as to what public interest entails. This ought to have been done, considering the surrounding discourse on the public interest, as the concept continues to be vague and ambiguous.¹¹⁶ Such an analysis would be useful to see where the Supreme Court lies with its understanding and interpretation of the public interest. The importance of the public interest in the Hermanus test is when it is stated in the first two elements, meaning that one truly must show that their case has a 'significant bearing on the public interest'.¹¹⁷

It is however important to note that it is not lost on the author that such an account will lead to the court possibly creating a list of 'what is in the public interest' that would eventually result in other emerging matters being locked out, on the premise that it does not align with the existing list. But it is imperative that the account is made whilst allowing future amendments to the understanding of the public interest.¹¹⁸

¹¹⁰ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 13.

¹¹¹ Black's Law Dictionary, 7th ed; *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 41.

¹¹² *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 41.

¹¹³ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 41.

¹¹⁴ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 41.

¹¹⁵ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR, para 58.

¹¹⁶ Bezemek C and Dumbrovsky T, 'The concept of public interest' Working Paper No 01- 2020, III, <<https://rewi.uni-graz.at/en/research/working-paper-series/>> on 20 February 2021, 1.

¹¹⁷ *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (2013) eKLR. See also *Republic v Ahmad Abolfathi Mohammed & another* (2019) eKLR, para 115.

¹¹⁸ Heo S, 'The concept of 'public interest' demonstrated in Korean Court precedents' 63 (1) *Journal of Korean Law*, 2006, 109.

From how the court links the two concepts, or how it includes the public interest, the article takes a closer look as to what the public interest is, what is the court's understanding of the public interest and also try to see if the court's understanding is beneficial in our new constitutional regime of transformative constitutionalism.

ii. *Critiquing the Supreme Court's use of the public interest*

The definition of the term and what entails the public interest is an area where academics are yet to come up with a comprehensive answer. It has also been a critique of most scholars that those who critique the definition and the interpretation of the public interest usually do not provide alternatives and there is no progress in furthering the conversation.¹¹⁹ Adding to the difficulty is the incommensurability of the public interest. This means that there is no set standard metric for the term.¹²⁰ The difficulty in this definition is that it leads to the use of the public interest either as an impenetrable shield or an unchallengeable sword.¹²¹ To put this into context, this can be seen through the *Hermanus Steyn* and *MNK* cases. Showing the use of the public interest in allowing and disallowing certain kinds of cases.¹²²

Public interest has been used over time to connote some sort of interrelationship between and among the people of a particular community.¹²³ This could be understood as that which the people have in common and what brings them together despite their vast differences. The Supreme Court ought to update its thinking on the public interest in line with the vast diversity that exists in society. It could be argued that the public interest has been used as a national and social principle and this can be seen by the level of importance that the Supreme Court places on the public interest in attempts to better understand matters of general public importance.¹²⁴

The Supreme Court needs to be cognisant of the fact that the public interest has been used to the point that it is now in doubt what it means.¹²⁵ With half-

¹¹⁹ Stokes E, 'Mike Feintuck, The Public Interest in Regulation', 16 (1) *Social and Legal Studies*, 2007, 157. See also Merriam Webster Online Dictionary.

¹²⁰ Heo S, 'The concept of 'public interest' demonstrated in Korean Court precedents', 91.

¹²¹ Rycroft A, 'In the public interest' 106 (172) *South African Law Journal*, 1989, 172.

¹²² (2013) eKLR and (2020) eKLR.

¹²³ King S, Chilton B and Roberts E, 'Reflections on defining the public interest' 41 (8) *Administration and Society* 2010.

¹²⁴ Heo S, 'The concept of 'public interest', 93.

¹²⁵ Stokes E, 'Mike Feintuck, The Public Interest in Regulation', 157.

baked reasons and arguments, there is yet to be a fully realised understanding of the public interest from the court.¹²⁶

This article aligns itself with the opinion that the court should come up with a test or regulations to assist litigants in identifying if their cases form part of matters that will have a bearing on the public interest. The test should work alongside the *Hermanus* test and should give the Supreme Court a chance to consider other cases falling outside the general public interest, this can be seen in Part IV of this article.

Simply put, the Supreme Court should remember that it has an obligation to the public interest as well, the burden should not fall solely on the applicant. With an updated understanding of the public interest and a broader interpretation of the *Hermanus* test can ensure that both the court's appellate jurisdiction and its duties as per the Supreme Court Act will be fulfilled in line with the constitutional vision as intended by its drafters.¹²⁷

In *Hermanus Steyn*, the court defines public as follows:

'Public *is thus defined*: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g., public land.'¹²⁸

From the above definition, it would seem that according to the Supreme Court, only matters that meet this definition of public that shall be accepted on appeal. The court seems to give no leeway or gives little consideration for matters that would affect a small section of the public, outside of their definition of public as seen above.

The court needs to clarify and update its stance on the public interest by first expanding its definition of 'public' to fit our current times. It is not lost on this study that defining 'public' in constantly changing times is extremely challenging, but an attempt must be made, as it is a term that can serve as a liberation for the people or their yoke.¹²⁹ This study suggests a broader and more inclusive interpretation of the term public, getting rid of any terms that would make it seem it is only for the general public as a whole. Ideally, allowing more sub-sections of the public to rise.

¹²⁶ *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* (2013) eKLR, para 41- para 62.

¹²⁷ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

¹²⁸ *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* (2013) eKLR, para 41.

¹²⁹ Heo S, 'The concept of 'public interest' demonstrated in Korean Court', 109.

The term is critical in the understanding of what is in the public interest, in an Australian High Court decision, it was held that the interest of a section of the public will not affect its quality but what will be affected is its quality against another interest.¹³⁰

IV. A New Test for a New Age

i. Reformulating the Hermanus test

This part of the article seeks to reformulate the test so as to allow for a broader interpretation of the Hermanus test. It has been stated in this article that the issue at hand is the interpretation of the test and in order for this to be remedied, a few changes must occur in the Hermanus test but the crux of it shall remain the same.

1. State of uncertainty: Contradictory precedent or lack of precedent

On this portion of the reformulating of the Hermanus test, the article suggests a reformulation to the Hermanus test that will allow the Supreme Court to listen to important matters even in the inexistence of contradictory precedent. Such a reformulation will help to avoid making the same mistakes that happened in the *SAJ v AOG & 2 others*, in which the reasons that the appeal was denied is that the matter was pending in the High Court and the Children's Court and also it is interesting to note that it failed the tenet on 'contradictory precedent'.¹³¹ This reformulation will also ensure that the Supreme Court fulfils its duties to provide rich jurisprudence for the development of the country.¹³²

The author, offering a compromise, suggests that should the court in addition to the phrase 'contradictory precedent' it would also be prudent to include 'lack of precedent in extremely important issues' to this tenet of the test. This addition ensures that the Court will answer to scenarios where the lack of precedent would result in a grave miscarriage of justice.

This article defines an extremely important issue as issues that are issues of critical and pressing concern or of utmost importance in its functioning for a particular section of the public or a group of litigants. The article acknowledges the inherent ambiguity of the term 'extremely important issue' and effectively places the burden on the applicant to show the impact of the 'extremely

¹³⁰ *Sinclair v Maryborough Mining Warden* (1975), The High Court of Australia.

¹³¹ *SAJ v AOG & 2 others* (2013) eKLR.

¹³² Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

important issue' on their section of the public. A matter shall be deemed to be one of extreme importance if it affects an important function of that section of the public.¹³³

This step shall happen concurrently with the 'how public is public' test that is explained further in this part. This shall prove to the court that they qualify as a niche part of the public warranting the appeal and proving that the matter is critical to their section of the public.

The inclusion of this phrase gives the court a leeway (or, loophole) to listen to matters that do not have any conflicting precedent but are matters of grave concern to a group of litigants.

The proposed formulation would therefore read: 'where the applicant for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedent or the lack of precedent in extremely important issues affecting the general public as a whole or a group of litigants, the Supreme Court may resolve the uncertainty (or lack thereof) or refer the matter to the Court of Appeal for its determination.'

2. Questions of law arising from lower courts

On this tenet of the test, the Supreme Court should consider revising it to include scenarios where the questions raised before the court (which have not been raised in courts below) as long as they have a bearing on the public interest. This will then give the court some flexibility when deciding some of the cases that will touch on this part of the test.

It would be illogical, in the author's opinion, if a case is declined due to the fact that it has presented questions that were not adjudicated in the courts below. While the author is cognizant that the Supreme Court, as the apex court, should not entertain itself all and sundry matters under our new constitutional dispensation, more is expected from our judiciary.¹³⁴

The proposed reformulation ought to be as follows: 'such question or questions of law must have arisen in the court or courts below and must have been the subject of judicial determination and also, the Supreme Court will allow questions that have not been decided by courts below so long as it has a significant bearing on the public interest.'

¹³³ Take for example, if a matter is lodged at the Supreme Court by advocates on an issue touching on how advocates should be paid as per the Advocates (Remuneration) Order, 2014. Such a matter would certainly be classified as a matter of general public importance, to the practice of advocates in the country.

¹³⁴ *Nirmal Singh Dhanjal v Joginder Singh Dhanjal and 4 others* (2020) eKLR, para 6.

3. Having a significant bearing on the public interest

With this part of the *Hermanus* test the main reformulation is a test that can be done when the applicant reaches this point in order to see if the matter brought to the court shall have a bearing on the public interest. Here, a rewording of the tenet will not suffice, the author proposes a test that shall assist in determining how ‘public is public’ which in turn shall assist courts and applicants in identifying whether their matter contains some aspect of the public interest.

The test is as follows:

- I. Can the applicant prove that they belong to either but not limited to, people of a certain geographical area, a relatively small group of people that share similar interests or a class of litigants and that the claim they bring before the Court is of a legitimate nature to their section of the public.

While this tenet, in part, is included in the dissenting opinion of the *Hermanus Steyn* case, it is the addition of the legitimate nature of the public interest that makes this section critical.¹³⁵ It is not enough that the applicant has proved that they are part of a particular subset of the public. They also need to prove that the matter is critical to their section of the public and thus having an impact on their public interest.

- II. Can the applicant prove that this matter of general public importance is of vital importance to the public they represent, and it has a bearing on their public interest, or it shall be of public interest in the near future?

This part of the proposed test seeks to give the court a chance to exercise its jurisdiction a bit more freely and in a transformative manner by adjudicating on matters that will have an impact on the public interest but in the future. The author anticipates that the court will be reluctant to implement such a change and understandably so, but the author reminds the Supreme Court that under transformative constitutionalism, courts will get into trouble for doing such acts, but it is the price they have to pay for fulfilling the spirit of the 2010 Constitution.¹³⁶ The author seeks to push the court for a more creative interpretation of the test that will further enforce transformative constitutionalism in the country.

¹³⁵ *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* (2013) eKLR. Dissenting opinion, para 17.

¹³⁶ Hailbronner M, ‘Transformative constitutionalism’, 528. Hailbronner states that when Courts deviate from the expected forms of judicial process and reasoning, because they let a new group of people speak their burden of justification increases and as a result they may get into trouble.

Finally, the article looks into a legislative amendment. For this particular point, the article will focus on the Supreme Court Act. Section 3(c) which talks about the court ensuring that there is creation of rich jurisprudence, there could be an amendment to the act that would ensure that such jurisprudence should be created for the benefit of the public interest, the amendment could provide a definition as to what the public interest is.¹³⁷

ii. *Expected implications of reformulating the Hermanus test*

Should the reformulations be implemented by the Supreme Court, there shall be a rise in appeals, and it is the hope of the author that this shall translate into the creation of rich jurisprudence in line with Section 3(c) of the Supreme Court Act.¹³⁸ Such jurisprudence will go on and cement our Supreme Court as the one of the most transformative in light of possibly producing more progressive and creative judgments.

The reformulations and with the proposed 'how public is public' test will ensure that the Supreme Court follows transformative constitutionalism giving the court a chance to ensure that there is a liberal and broad reading of the constitution (as well as the Hermanus test).

V. Conclusion

This article set out to examine the court's interpretation of its appellate jurisdiction to listen to matters of general public importance through the Hermanus test. In the test, the court introduces the concept of the public interest and links it to matters of general public importance. Through Supreme Court decisions, it is seen that the court only considers matters that encompass the entire nation as ones that meet the criteria of matters of general public importance. The court, in this interpretation, fails to accommodate legitimate matters that affect smaller sections of the public (for instance, brokers and commissioner agents in *Hermanus Steyn*).

The court's interpretation also seems to ignore cases that would greatly contribute to the country's jurisprudence, as seen in *SAJ v AOG & 2 others*, going against the court's role to create rich jurisprudence for the country as per the Supreme Court Act.¹³⁹ Through the various cases discussed, the article attempts

¹³⁷ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

¹³⁸ Section 3(c), *Supreme Court Act* (Act No. 7 of 2011).

¹³⁹ (2013) eKLR.

to show that the current interpretation of the court's jurisdiction as per Article 163 (4)(b)¹⁴⁰ though the Hermanus test does not align itself with transformative constitutionalism and as a result it strays further away from the vision of the constitution's drafters. The article addresses the vagueness of the test in terms of whether the test is conjunctive or disjunctive and that this unclarity does little to aid the current predicament with the Hermanus test.

In reformulating the Hermanus test, the article proposes the addition of 'lack of precedent in extremely important circumstances' so as to allow the court to answer critical questions that have not been raised in lower courts. Additionally, the article proposes an extra test that seeks to aid the court in clarifying what the 'public' ought to be constituted by. Finally, the article suggests a legislative amendment to reflect the reformulations proposed by the author. Such reformulations would allow the Supreme Court to properly align itself with transformative constitutionalism. For the goal of an effectively robust judiciary to be fulfilled, the Supreme Court needs to take a step back and assess how its current interpretation of its appellate jurisdiction would lead to the fulfilment to this goal.

¹⁴⁰ *Constitution of Kenya* (2010).