CHAPTER 1
CONCEPTUALISING PEOPLE, SOVEREIGNTY, CONSTITUTION, STATE, GOVERNMENT, SOCIETY AND MARKET IN KENYA AND AFRICA


1. Introduction to People, Sovereignty, Constitution, State, Government, Society and Market in Kenya and Africa

This Chapter conceptualizes, problematizes and contextualizes some of the most important variables or parameters in constitutional democracy in Kenya and Africa: people, sovereignty, constitution, state, government, society, and market in sustainable development and constitutional democracy.¹ The main point of reference or departure is the constitutional text, structure, experience and …theory?… of Kenya, Nigeria, South Africa, Uganda and Tanzania. Other states from Africa, North America, Latin America, and Asia are also studied, especially Ghana, Ethiopia, USA, UK, Germany, France, Australia, China and Japan.

This book seeks to develop an Afro-Kenyanist conceptual and theoretical framework. Thus, the following three (3) sets of founding and contemporary values, principles, theories, philosophies and perspectives are problematized, interrogated and integrated. First, justice as shield and defender². Second, mutual social responsibility a contextualized “African Socialism,”³ harambee (let’s pool and pull together).⁴ Third, shared prosperity which is also rendered as “I am because we are and since we are, therefore I am….”⁵

From March 9, 2018 when Raila Odinga, the ‘People’s President’ had a ‘handshake’ or rapprochement with President Uhuru Kenyatta, Kenyans have been engaged in constitutional reform discussions. This book therefore engages the debates on the Building Bridges Initiative

¹ See also Chapter 5, CODRALKA 1 on “Theory and Methodology of Comparative Constitutional and Administrative Law: Law in Sustainable Development [3 pronged ecological or environmental, economic and socio-political and cultural Afro-Kenyan constitutional democracy; KM, MW, HK; Afro-Kenyanist constitutional sociology, theory, and methodology,…… ..…”] [cf. chapter 12- admin….].” What is to Con? Pro? …..
⁴ Republic of Kenya, ibid.
⁵ Ubuntu an African philosophy. It is also one of the nine (9) major proposals contained in the report by the Presidential Taskforce on Building Bridges to Unity Taskforce, released on October 2019, and the Building Bridges Initiative (BBI) Report 2020.

1.1 Conceptualizing People and Kenya in Afro-Kenyanist Constitutional Democracy

What is Kenya? Who are the people of Kenya?

1.1.1 Kenya in Afro-Kenyanist Constitutional Democracy


“Kenya,” got that name in 1920 when it became a British Colony following complex social, economic, political, social, technological, military, and juridical adventure, misadventure, and related processes in statecraft and (limited) nation building.6

The Kenyan and African state is about at least four (4) key variables or phenomena. First, it is primarily about the people. What was the composition or diversity of the population in 1895, 1920 (colony and protectorate), 1963 (independence)? What was the population size and diversity in terms Africans, Whites, Indians and Arabs7 on these dates, and in 1920, 1948, 1962, 1963, 1969, 1979, 1989, 1999, 2019 (47 Million?), 2020? (See the Preamble, Article 1...). Second, it is also about territory, borders or boundaries and constitutionally democratic8 and effective government (Art. 5).9 What is the territorial scope of Kenya? Third, it is about a constitutionally democratic and effective government (my reconceptualization) (Art. 4(1). And fourth, capacity to transit in international relations (Article 41, 2(5), 2(6))….10

The Constitution is key in (re)constituting Kenya historically in terms of law, rules, principles, policies and norms.

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7 Relocate: Pre-school children sang, at independence: “zamani tuliwekwa hadi namba foo (four)…. ….sasa aboutani tuko namba wani...Kenya,
8 “Constitutionally democratic” is part of the Sihanya reconceptualisation of the constitution, state and government, partly based on the Constitution of Kenya 2010, UN Charter, Universal Declaration on Human Rights (UDHR), as well as United Nations(UN) and African Union (AU) instruments and popular understanding....
9 See this Chapter 1 of Ben Sihanya (2020) Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya (CODRALKA 1) on the classical formal or (neo) liberal classification, what I call the Ghaian, Nwabuezean and Shivjian typology, and Sihanyan reconceptualisation of the constitution, state, government…; Chapter 5 of this book on Theorizing and Methodology of Comparative Constitutional and Sustainable Development. See Articles 51, 2(5), (6) …and 4(1) “Kenya is a Sovereign republic.” ....
Who are the people within Kenyan territory or boundary? Kenyans beyond territory? Who are Kenyans, Kenyan citizens historically? Who can pass on citizenship?

1.1.1 How did Kenya become the East Africa Protectorate and Kenya Colony and Protectorate?

“Kenya” was initially the British East African Protectorate from June 15, 1895 then Kenya Colony and Protectorate from 1920. United Kingdom (UK) constitutional law, English regulatory and administrative law, and English understanding of the law of nations (or international law) were applied in constructing the protectorate and colony including the East African Order-in-Council 1897 which would be amended over the years to the current section 3 of the Judicature Act, 1967 (as amended). Section 3 of the Judicature Act, 1967 states:

“3(1) The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with— (a) the Constitution; (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule; (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.”

Section 3 continues:

“Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary; (2) The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

Who are the people in Kenyan and African constitutional democracy?

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11 See the legal instruments including East African-Order-in-Council, 1897 which evolved into sections of the Judicature Act, 1967, Cap 8 (on sources of constitutional law in Kenya; Independence Constitution of Kenya 1963...what international law rules governed colony and protectorate status....? Nigeria was given its name by Lord Frederick Lugard’s girlfriend (later wife), Dame Flora Shaw in 1898. See Chinua Achebe (2012) There was a Country: A Personal History of Biafra, Penguin group, London, England; African Today, Nigeria at 100: A nation searching for its soul, Vol. 20, No 04/05.


1.1.1.2 People in Afro-Kenyanist Constitutional Democracy

Who are the People? What about persons (legalistic?); citizens, wananchi (wa kawaida), masses, peasants or (poor, middle, rich) or peasantry or hoi polloi; (lumpen) proletariat; cf. upper middle, lower or under class in liberal vis-à-vis neo-Marxist political economy; students? What other concept?

A concept which is closely related to civil society is “people.” This may refer to the population in the definition of the liberal state. Population forms part of the definition of a state under the Montevideo Convention on the Rights and Duties of States (1933).14

Civil society, people and population have different meanings in every day politics, or on the other hand, political science, history, sociology, or constitutional theory and process as well as practice.

Politicians and Government officials tend to use the term in a pejorative, heuristic and rhetorical science. For instance, Government officials tend to use “people” to mean the masses without the Marxist Leninist content and in contradistinction to the middle class or the elite.15

Questions that arise include: Who are the people? Class? Middle class petit bourgeois? “we the people,” rulers, aristocrats, clergy? It is instructive that historians agree that even after decades of debate, scholarship is yet to accurately secure consensus on who or what the people are.16

If that is the brief construction of Kenya, who precisely are the people in Afro-Kenyanist political economy and constitutional sociology?

Further, the Constitution, law, policy and administration are primarily concerned about the people, their Human Rights and Bill of Rights (e.g. in Chapter of the Constitution of Kenya, 2010).

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15 There is still debate in Kenya, Nigeria and South Africa generally and in the West regarding how “people” are defined and treated by Presidents, Governments and public bodies. Are supporters of the President or Government “people” for purposes of Art 1? Art 10? Art 37? Or are their interests already catered for directly or indirectly by their consent to rulers? These relate to access to political power, socio-economic resources, opportunity and the question of participation. Issues in Kiambu, Kericho, Kisumu…etc. on Governor’s decision v. popular participation in 2013/2014; debates on threshold of public participation on the Constitution of Kenya (Amendment) Bill, 2020 in Siaya and Kisumu counties in 2021. See Kepher Otieno (2021) “Kisumu County Assembly passes BBI bill in record three hours,” Standard, Nairobi, February 9, 2021, at https://www.standardmedia.co.ke/nyanza/article/2001402864/kisumu-becomes-second-county-to-pass-bbi-bill-after-siaya (accessed February 10, 2021). Some Bills and Acts have been questioned; Some governors have been threatened with impeachment because of problems of participation.

16 See the preambles to the 2010 Kenyan and 1787 US Constitutions….

17 See review by Prof William R. Ochieng in Weekly Review of Prof Trevor-Roper’s book... and views which Prof Ochieng and Prof BA Ogot have expressed in their books.
1.2 Conceptualising and Contextualizing the Validity, Legality, Legitimacy and Supremacy of the Kenyan Constitution

What is the Constitution? Is the Constitution a law?

First, the title of article 2 of the Constitution of Kenya is “supremacy of the Constitution.” The title captures the essence of the article, and the significance of the Constitution in the constitutional and legal system. However, the title does not cover all the major rules, principles and values embodied in Arts 2(1), (2), (3) and (4) (i) (a) and (b). It is thus inaccurate. Happily, it captures the essence. The titles or headings are not primary but are secondary aids of interpretation or construction.

Article 2(1) significantly provides that “this Constitution” is the supreme law. Three issues. First, it is this and not any other Constitution (e.g. not the 1969 Constitution). Second, it is a law. Third, it is the supreme law.

Section 3 of the 1969 Constitution was arguably clearer and more logical on two issues. It stated: “this is the Constitution of the Republic of Kenya and shall have the force of law.”

Moreover, the Constitution binds all persons (all natural and juristic or legal entities) and all state organs (most of these are legal persons anyway; this is for emphasis) at both levels of government, (another emphasis: state organs capture this).

The second major point is that Article 2(2) states: “No person may claim or exercise State authority except as authorised under this Constitution.”

All (public) power or authority must emanate from specifically guaranteed or enumerated constitutional provision. This may be directly found in a constitutional provision or it may be under the Constitution, that is, in a statute, rule, regulation or practice and tradition that is specifically authorized by or indirectly derived from and inconsistent with the Constitution.

There is a difference between the exercise of power and the enjoyment of liberty. On the one hand, power or authority must have a constitutional force, and hence the President, Speaker, Chief Justice, or Governor or any other official must cite the source of authority in appointment, disappointment or any conduct (action or omission).

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18 I.e. it is not just a political or moral charter or code….

19 A person in law. A ‘person’ is an entity with rights and duties in legal theory or jurisprudence, constitutional, administrative…., and company law, among others. Human beings are natural persons. Arms of Government, ministries, departments, and agencies (MDAs) are sometimes legal or juristic persons. Other important persons are corporations, inter-governmental bodies, and incorporated civil society organizations (CSOs)….It depends also on the objective. This may be through … insanity…..personality can be limited or lost by natural and juristic persons.

20 The drafters or framers were acting with extreme caution – ex abundant cautela partly because in Kenya and in many African states, some have cast doubt on whether the Constitution or the law binds some state agencies or officials. That is part of the rumour that a President or Prime Minister (PM) is “above the law.” See Chapter 11 of CODRALKA 1 and Chapter 4 of CODRALKA 2 (on “Presidency and Public Authority in Kenya’s Emerging Constitutional Order,” presidential immunity).

21 The creation of Nairobi Metropolitan Service (NMS) was declared unlawful in Okiya Omtatah Okoiti v. Nairobi Metropolitan Service & 3 Others; Mohamed Abdala Badi & 9 Others (Interested Parties) [2020] eKLR, Petition 52 of 2020.
Three problematic examples: First, President Uhuru Kenyatta appointed Dr Fred Matiang’i as Chairperson and Deputy, National Development Implementation and Communication Cabinet Committee on January 22, 2019. Second, President Kenyatta appointed County and Regional Coordinators without (sufficiently) addressing section 17 of the Sixth Schedule. Third, in 2013/2014, President Kenyatta and the then Devolution Cabinet Secretary (CS) Anne Mwaiguru separately appointed Mr Abduba Dida to the same office but cited different laws. Moreover, they were criticised for assuming that Dida would assume office immediately. Yet vetting by National Assembly was required.

On the other hand, the people have liberty, unless it is constitutionally limited in the Bill of Rights, especially under Arts 21, 24, and 25.

The third major point is that Article 2(3) states, “the validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.”

The point is that this Constitution should be accepted as valid and legal in at least two senses. First, that its substantive provisions or clauses are in totality or as a whole valid and legal. Second, that the procedure used to adopt it was valid and legal. This means that courts should not entertain an action invalidating the Constitution as a whole or substantive grounds. Remarkably, there was an attempt to question the validity of Kadhi’s Courts before the Interim Independent Dispute Resolution Committee (IIDRC). Nor should courts entertain any invalidation proceedings that question the procedure or process that was used to adopt this Constitution as happened in Njoya v. A-G. 24

Remarkably, there may be issues of unconstitutionality, inconsistency or ambivalence between or among specific constitutional provisions. Examples include: on ethnic and regional inclusion and balance; on gender equity in appointive and elective offices; the powers and functions of the National Police Service Commission (NPSC) vis-a-vis Inspector General of Police (IG)(P). 25

My argument is that whenever there is inconsistency between the Bill of Rights and a provision of power, the Bill of Rights clause generally trumps power.

23 In the foregoing 2 issues, see Ben Sihanya (2020) “Constitutionality of President Kenyatta’s appointment of CS Dr Fred Matiang’i as Chairperson, National Development Implementation and Communication Cabinet Committee,” working paper at Sihanya Mentoring & Innovative Lawyering, at www.innovativelawyering.com (accessed 28/2/2019).
26 See the contestation between the Johnstone Kavuludi-led National Police Service Commission (NPSC) and the then Inspector-General of Police IG(P) David Kimaiyo on appointments, transfer of some police officers in 2013-2014.
An example is that section 2A of the 1969 Constitution provided that “there shall be only one party....” And yet the Bill of rights chapter (sections 70-85) had provisions on the freedoms of conscience, opinion, expression, assembly and association, among others. To the extent that section 2A was inconsistent with the Bill of Rights, and in fact, it contravened numerous provisions of the Bill of Rights and therefore, section 2A was to that extent unconstitutional. This is in spite of the refusal of courts to entertain invalidation cases. Section 2A was repealed in 1991.

Compare the cases from Nigeria, Uganda, Zimbabwe, and other states regarding the sudden change of the constitution (or “grund-norm); overthrow of the President or Prime Minister; and dismissal of (senior) Government officials. Examples include: Lakanmi;27 Ex-partere Matovu;28 Opoloto;29 Grace Stuart Ibingira;30 Madzimumbo v. Lardner Burke.31

Fifth, Art 2(4) states: “Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.” Five issues arise: First, why single out customary law? Second, what are the other sources of law (to which the Constitution is supreme) under Art 2(1), (4),?). The Constitution does not have a list of all the sources of law applicable in Kenya. These are to be found scattered in Art 2, other provisions of the Constitution and statutes such as section 3 of the Judicature Act, 1967, Cap 8.

There was intention at the Bomas National Constitutional Conference (NCC) to list the sources of law (not list of statutes) in an article. However, it was abandoned. Such a clause is necessary. Hence the sources of law in Kenya are (or include) the Constitution; statutes of the National Assembly, Senate, and the 47 County Assemblies; statutes of the UK Parliament of general application (which ones? even in 2021 and beyond?);32 certain applied statutes of India (still?) (one of these was the Indian Transfer of Property Act (ITPA)); rules, regulations and bylaws which are also called delegated, subordinate, legislation; Islamic law; Hindu law; customary international law; treaty law.

Third, apart from the Constitution which is supreme and at the top of the hierarchy of Kenya’s constitutional, juridical or legal and judicial system, do the other sources of law relate hierarchically under the Constitution and/or under section. 3 of the Judicature Act? Yes and no.

Remarkably, customary law is custom, tradition, or practice that has received judicial recognition under the Constitution, the Judicature Act, the Evidence Act, Civil Procedure Act and other laws. The sixth major point is that there is need to develop the following three sets of laws. First, Kenyan

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27 Lakanmi & Others v. Attorney-General (West) & Others (1970) Vil. 6 NSCC
28 Uganda v. Commissioner of Prisons, ex parte Michael Matovu [1966] 1 EA 514
30 Grace Stuart Ibingira and Others v. Uganda (1966) EA 306; 445
31 See also Chapter 13, CODRALKA 2.
32 E.g. the British Nationality Acts 1948 and 1958, Admiralty Offences (Colonial) Act 1849, and Evidence by Commission Act 1859....
common law of marriage, custody, succession, and burial, contract, real property, intellectual property, and torts, among others. Already, some judges, magistrates and Kadhí’s are developing the law in family, succession and burial areas and in contract, conveyancing and procurement, among others. These will facilitate pan-Kenyan relations. Second, there is need to develop Kenyan customary law in these and related fields. This will facilitate inter tribal relations. Third, there is need to continue developing the relevant customary laws of the respective tribes or ethnic groups.

The seventh point is that Art 2(4) also invalidates “any act or omission in contravention of this Constitution...” What is the difference between a void law and an invalid act or omission? What is “voidable,” “null and void”? What is the difference between “inconsistent law” and “conduct in contravention” of the Constitution? Inconsistency is a lower level of non-compliance than contravention, which suggests negation. Thus, laws must strictly comply with the Constitution.

Art 2(4) should thus be the basis of (almost) all actions regarding constitutional non compliance. Arts 21, 22, 23, 24, 25 and 47 then reinforce the constitutional supremacy. In spite of such clarity, some debate persists on supremacy and sovereignty with regard to the people, Constitution and Parliament.

Sovereignty underpins and links such fundamental questions as the production, reproduction, use and sharing or (re)distribution of resources and public power in Kenya, Nigeria, South Africa and elsewhere. The conceptualization, problematisation and contextualization of sovereignty is key to the operationalisation of the Constitution and the proper demarcation of the role of the state and the ruler, especially the Kenyan, Nigerian or South African President.

Three broad tendencies have emerged. First, the progressive state or President. This is absent in these three states and most African states after the retirement of President Nelson Mandela and Julius Nyerere. Second, the retrogressive or rent-seeking state and president are dominant. Kenyatta’s case is an unmitigated case study. Third, there are a few states and presidencies in Africa, like Ghana or Botswana that gravitate between the two: What are the trends and why? Yet most neo-or post-colonial states claim that they are governed by illiberal constitutional values, principles, processes and procedures.

They have also been called parasitic, patronimal, predatory, rentier, or prebendal partly because of the commitment of the rulers and their tribal affiliates to focus on primitive accumulation. This

33 These issues are discussed in detail in Administrative law, Judicial Review, and Chapters 2, 5 and 13 CODRALKA 2 and Chapters 2 and 31 of CODRALKA 1.
34 See Chapters 6, 7, 8 in CODRALKA I.
trend has been captured most dramatically, and in a display of the arrogance of power and impunity by President Uhuru Muigai Kenyatta on numerous occasions before the “handshake.” It is remarkable that all the four key political players in this context apologized to one another after the handshake namely, President Uhuru Kenyatta and Deputy President William Ruto; Raila Odinga and Kalonzo Musyoka….

Two quarrels from the presidential bully pulpit stand out. At the funeral of William Ole Ntimama, the former Cabinet Minister and Maasai leader who for over thirty (30) years championed Maasai land rights, including against Kikuyu encroachment of Maasailand, Raila Odinga challenged the Kenyatta administration to release the report of the Truth, Justice and Reconciliation Commission (TJRC) which addresses land dispossession of the Maasai and other Kenyans. Kenyatta retorted:

“nyinyi mnang’ang’ania kiti na sisi tumekalia na hatuna haraka ya kutoka…” (you people are struggling to have a seat (public power; the presidency…) but for us we are seated and we are not in a hurry to leave)

Mr Kenyatta added:

“kumeza mate sio kula nyama ... endeleeni kumeza mate, lakini nyama tutakula (swallowing saliva is not the same as eating meat… keep on salivating but we will continue eating meat).”

Remarkably, both Kenyatta I and Kenyatta II (+) administrations have promoted Kikuyu colonialism, dictatorship, ethnic politics, rent seeking, and primitive accumulation. What Kenyatta told Raila Odinga and non-Kikuyus is reminiscent of what Kenyatta I told Bildad Kaggia and non-Kikuyus in Kaggia’s Kandara Constituency in 1966:

“Kaggia, we were together with Paul Ngei in jail; if you go to Ngei’s farm, he has planted a lot of coffee and other crops. What have you done for yourself? If you go to (Fred) Kubai’s, he has a big house and a nice shamba. Kaggia, what have you done for yourself? We were together with Kung’u Karumba in jail, now he is running his own buses. What have you done for yourself?”

Kenyatta I demonstrated his arrogance of power and disdain for a constitutional right, freedom, and

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liberties guaranteed to Jaramogi Odinga and the non-Kikuyu while on a tour to open a new hospital in Kisumu on October 25, 1969. The tour choreographed to provoke Odinga, shoot children, women and men dead or injure them; then was to ban the opposition Kenya Peoples Union (KPU) and detain its leaders. Kenyatta said, *inter alia*:

“...for my part I do say this. If these people are dirty, if they bring about nonsense, we shall show them that Kenya has got its government. They dare not play with us, and you Bwana Odinga as an individual, you know that I do not play around...”

The second occasion was Kenyatta II’s characterization of all Kenyans as whiners and thieves (including himself? Or he as the leader?). He said:

“*Wakenya ni kulia na kuiba hiyo ndio tukona ujuzi* (Kenyans are expert thieves and nags)”

And this is in spite of the fact that most of the developing country states underwent constitutional reconstruction in the late 1980s and 1990s partly because of the collapse of communism or authoritarianism and the advent of neo-liberalism, neo-con(servative), or “globalization.” There was a long and rhetorical debate that Kenya belonged to the group classmatic societies while Tanzania, for instance, was classless. Jomo Kenyatta’s partial response was that Kenya followed African socialism or communitarian mutual social responsibility.

In the 2000s, Kenya, Nigeria and South Africa have largely pursued the policy of constitutional reversal even where the constitutional texts are largely progressive.

The Nigerian presidential elections of 2015 were adjudged relatively free, fair and verifiable. And President Muhammadu Buhari, a retired general, took some measures to address incompetence, corruption and poor governance. Yet critics argued that the regime focused more on (alleged) corruption by the former regime or the opposition; not by those in Government at that time.

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The Constitution thus largely adopts a three-pronged approach in defining the relationship between the individual or groups, on the one hand, and the State (or National and County Government), corporate and unincorporated associations, and other individuals or groups, on the other hand. First, the Constitution broadly guarantees the right, liberty or freedom. Second, the Constitution states that the right may be limited by the interest of third parties. Third, the Constitution makes a broad statement that the right may be limited by the public interest and especially through legislation.

The most comprehensive formula on balancing rights and obligations is probably Kenya’s Article 24(1) of the 2010 Constitution:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

Kenyan and African Courts have developed a methodology of balancing constitutional rights and obligations based on contemporary experience as well as ancient and classical constitutional scholarship.

1.21 Ancient and classical typology or classification of Constitutions

How has constitutional typology developed and influenced governance from the ancient and the classical to the contemporary context in Kenya, Nigeria and South Africa? How have the following three and other Constitutions influenced the debate on typology? We focus on three states. First, the transformative and revolutionary Constitution of Kenya 2010. Second, the South African

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45 Article 24(1) of the Constitution of Kenya.


1.2.2 Ancient typology of Constitutions

The earliest form of classification of constitutions has been attributed to Plato and Aristotle. According to Aristotle, constitutions are the essential structures of an organization. In this essay, the focus is the Constitution of territories recognised under law, including state, nation, or country, and sub state units like counties or provinces. They define what the parts of an organization are, what these parts do, and how the parts are related to each other. Aristotle attempted to classify constitutions along two dimensions. The first one had to do with the number and the types of persons in the ruling group. The second dimension had to do with whether the ruling group followed aims that are “proper,” that is, intended for the good of all, or “perverted,” that is, only for the rulers’ benefit. Aristotle argued that the best constitution is one where anyone may prosper and live the good life.

Increasingly, the Kenyan, Nigerian and South African experiences indicate a lot of concern regarding access, sharing and governance of resources, as well as the production, reproduction and distribution of power. Thus, South Africa has had relatively free, fair and verifiable elections since the Interim Constitution 1994. Nigeria had the first generally free, fair and verifiable elections in 2015 since the 1999 Constitution. And Kenya only had relatively free, fair and verifiable elections in 1963 and 2002 when Jomo Kenyatta and Mwai Kibaki, and the Kikuyu generally, were direct and indirect beneficiaries.

Significantly, Nigeria, South Africa and Kenya have had serious problems with the distribution of power and resources.

Aristotle also offered some hints and suggestions about a type of a mixed constitution which should
be the best. He opined that many people, taken collectively, have more wisdom than the few, even though each member of the many will not be as an individual wise enough. There is danger, therefore, in giving individual members of the lower, poorer classes offices of state. Does this validate the marginalization of the poor in governance? For instance, in colonial Kenya, voting rights and power in elections or referenda was partly based on and qualified or graduated depending on classmatic considerations, property ownership, residence, employment (in the largely inaccessible Government bureaucracy), and education.

But there are risks as well in denying the lower orders as a whole any share in political power. Therefore, one should consider giving the many a share in deliberation, but not office holding. By this, it can be properly inferred that Aristotle’s ideal constitution is that which is mixed that is, it should entail all the elements of an orderly society.

Aristotle made two more observations that indicate the direction he wanted to take in building a set of practical ingredients for the best constitution. He observed that there is no natural sense in which just or “expedient” can be applied to the rule of a tyrant. He advocated for two components of a polity. First, an oligarchic component of polity where there is the rule of a free people over themselves and the citizens are financially well-off. And second, a democratic component of a polity where office-holders would be selected according to merit and not wealth.

According to Aristotle, most writers on constitutions fall short on the question of practicality, whereas what is really needed is a system that could be legitimized and become stable on the basis of the circumstances that already exist. This is the essential subject of political science – for him.

Scholars, judges, lawyers, law makers and administrators have developed important typologies of constitutions, states and governments. It is clear that the typologies or classifications are neither comprehensive nor mutually exclusive.

1.2.3 Classical typology of constitutions in Kenya and Africa
What is a constitution in the classical and contemporary theory and praxis? Prof K.C. Wheare explains that most scholars and researchers of constitutional law use the term “constitution” in two different meanings. First, a narrow view used when describing a selection of rules that control the government and are embodied in a document. Second, a broader view is used when describing the

53 Ibid.
55 Cf. development of House of Lords and Commons in England; Senate and House of Lords Representatives in the US and Nigeria; and the House of provinces in South Africa.
whole system of government in a country and the rules that bind that government and controls its powers.

Thus, in this paper, a two-pronged model summarizes the definition of a constitution, by capturing fundamentals. First, a constitution is a set of norms including rules, policies, principles and values that govern a state or polity, and even community, clan, club, chama... we will focus on the Constitution of the State, even though we will also interrogate state or national entities like countries (Kenya), states (Nigeria), or provinces (South Africa); sub-states or national units like East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), Intergovernmental Authority on Development (IGAD), African Regional Intellectual Property Organization (ARIPO), African Union (AU) and United Nations (UN). Second, a constitution is the written document or instrument that captures the norms, including rules. It may be one document or several.

According to Prof HWO Okoth Ogendo, there is no single authoritative definition of what a constitution is; nor is there “a minimum set of principles that defines the content of a model constitution.” He observes that throughout history, different societies at particular stages of development have pronounced varying factual, philosophical, or theoretical conditions as equivalent to a constitution. He has defined a constitution using a six-pronged typology, which I have generated, adapted and elaborated:

First, a single constitutive act [constituting an independent Kenya in 1963, a Republic in 1964, and reconstituting Kenya in 2010]

Second, a fundamental norm, value, or moral principle [1969 and previous Constitutions focused on rules; not principles, not values, not policies…]

Third, a set of common aspirations or expectations;

Fourth, a social and economic programme [cf. constitution of China, ex-socialist states]

Fifth, an important juridical fact.

Prof JB Ojwang argues that the constitution is the scheme of organization of public responsibilities which must be performed in any community. It identifies or prescribes the public organs of the community and vests in them (or recognizes in respect of them) particular roles which are to be performed in the interest of the people as a whole.
A constitution is a normative system and a way of life. It embodies core juridical or legal, cultural, economic, political and social values of the society concerned. Every constitution has written and unwritten components i.e. concrete and abstract aspects. The abstract aspects are sometimes called the intendment or the spirit of the Constitution. The core values have:

(a) legal and constitutional character  
(b) embody institutional and structural relations  
(c) are moral and ethical norms and standards  
(d) constitute political culture.  

The emphasis is that the constitution is way of life; it is living law. This idea was emphasized in numerous cases. In Njoya & Others v. A-G and Others Justice Aaron Ringera went even as far as problematically stating that the constitution has a soul and has consciousness.

Prof Nwabueze and other scholars of comparative African constitutional democracy have adopted an essentially political perspective in defining a constitution. In a passage worth quoting in extenso, Nwabueze states:

“A constitution is a mode of organizing a state and its government. It is, in other words, a body of fundamental principles according to which a state is structured. This emphasizes its character as essentially political, with an authority and sanction sounding in the realm of politics. This was its original meaning and effect. Even today this approach to the purpose and function of a constitution has its adherents.”

Nwabueze adds:

“There are many countries that still consider the appropriate function of a constitution to be a political charter of government, consisting of largely declarations of objectives or directive principles of government and a description of the organs of government in terms that import no enforceable legal restraints. Such a constitution has no more than a political existence; its provisions are political, not legal, serving merely to exhort, to direct and inspire governmental action, and to bestow upon it the stamp of legitimacy.”

I problematize this “political determinism” of constitutions and propose a model and reconceptualization that appreciates the social and political economy as well as the change problematique in Kenya and Africa. I also problematize the Montesquieuan model of limitations and restraints that informed classical English constitutional democracy, and propose a more nuanced

University of Nairobi Law School. He later became Dean, then High Court Judge and then one of the inaugural (seven) Supreme Court Justices.

64 On the foregoing, see works of Prof Ben Obi Nwabueze, Yash Pal Ghai, Okoth-Ogendo, J.B. Ojwang and Ben Sihanya.
65 This was from the case of Ndynaho v. Attorney-General [2001] 2 EA 485.
67 Nwabueze, ibid.
facilitative theory that captures the practices in emerging or contemporary strand in British (not just English) and American constitutional democracy (especially variants among some democratic and progressive US scholars).

1.3 Nomenclature in Constitutional Democracy: Constitution, State, Government, Governance and Cognate Doctrines
The quest for an appropriate Constitution has been the quest for the rule of law, due process, equity, inclusion, participation human rights and democracy. That quest is captured by constitutional democracy. Constitutional democracy is clearer because it captures the foregoing concerns. It is also the product of interdisciplinary and multi-disciplinary engagement.

1.3.1 Constitutional democracy in Kenya and Africa
Constitutional democracy is an omnibus concept or doctrine. It captures, incorporates and deploys numerous concepts including constitution, constitutionalism, democracy, separation of powers, checks and balances, human rights and the rule of law. Thus constitutional democracy relates to the constitution in its normative, documentary and instrumentalist sense; to the State and state structures; and to government.

Constitutionalism, the rule of law, democracy and human rights assumes or deploys important concepts such as sovereignty, nations, nationalism or the national question, nation states, government and governance.

An illustrative definition of constitutional democracy may take three perspectives. First, a state or polity may have a constitution but no or limited democracy. This may be because the text includes anti-democratic rules, principles or values, or because the practice or operationalization abrogates or undermines a progressive or transformative constitution. Kenya under Jomo Kenyatta and Daniel Arap Moi fall under the first sub-typology.

The Constitution was amended to concentrate power in the President directly or to institutionalize the Kenya African National Union (KANU) as the sole party and to nullify freedoms of expression, association and assembly while creating an imperial president. Kenya under MwaiKibaki and Uhuru Kenyatta (Kenyatta Plus) fall into the second sub-typology.

Second, a state may have no Constitution (in the sense of a written text); and still enjoy democracy. Greek city states are a leading example. Moreover, following the Inter Parties Parliamentary Group (IPPG) of 1997, Kenya enjoyed a limited measure of constitutional democracy without an appropriate constitutional text in some matters.

For instance, the appointment of members of the Electoral Commission of Kenya (ECK) was embodied in a “gentleman’s understanding” or social norms, between President Moi and the opposition leaders like Mwai Kibaki of the Democratic Party (DP), Raila Odinga of the National Democratic Party (NDP), and Wamalwa Kijana of Ford Kenya. There was also greater freedom of expression, association and assembly even through the one-party Constitution and legal system had
Third, constitutional democracy thus means the convergence between democracy and constitutionalism. There is a constitution in both senses; it embodies democracy; and the state or polity practices constitutionalism and democracy. The majority have their way. The individuals or minorities have their say, respectively.

Ben Nwabueze has dedicated five volumes to the quest for constitutional democracy in Africa. Nwabueze’s work on constitutional democracy is original and insightful. But there are some challenges. What is clear, which I pursue in this Chapter is that the Constitution of Kenya 2010 is change-oriented, transformative and revolutionary to an extent that even Nwabueze could not have anticipated it when he wrote.

Some of the key contributions to the quest for constitutional democracy in Kenya and Africa have been (constitutional) lawyers. Some emphasize normative or rule-based, regulatory perspectives, including how (constitutional) rules related to (socio-economic) factors. Political scientists focus on agency or institutional processes. Political and social historians call attention to the history and contemporary development or relevance of ideas about constitutional democracy and governance. Sociologists emphasize the significance of social structures in constitutional democracy. Anthropologists focus on social or identity politics and relations. Anthropologists share some concerns with sociologists.

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1.3.2 Constitutionalism in Kenya and Africa

According to Jackson & Tushnet, constitutionalism involves having the rule of law applied to the governed and government officers; judicial independence and the observance of human rights. It is a commitment to limitations on ordinary political power. It revolves around a political and socio-economic process, one that overlaps with democracy in seeking to balance state power and individual and collective rights. It draws on particular cultural and historical contexts from which it emanates; and it resides in public consciousness. It involves three main rubrics: First, application of constitutional state power to organise and structure government. Second, applying constitutional and state power to expand rights, liberties, power construction and rights protection as well as promotion. Third, limiting the power of state agency and officials.

Prof HWO Okoth-Ogendo views constitutionalism as a struggle which cannot be achieved through the promulgation of a constitution, per se (as such). As noted, the Constitution should limit the powers of the government, establish the rule of law, protect human and people’s rights and foster democracy.

However, most African constitutions were enacted and have been amended or applied to remove any checks on governmental power, to limit the power of the sovereign people, to subject them to the will of the president and his government, and to restrict or deny them most fundamental human rights. And even Kenya’s progressive Constitution is suffering and threatened by reversals.

Okoth-Ogendo describes constitutionalism thus:

“The idea of constitutionalism must, in the very first instance imply that a society acknowledges its constitution as a living standard with which the conduct of public behaviour should conform and against which it must be evaluated. The minimum evidence of adherence to the principles of constitutionalism is therefore public respect for the constitution, in whatever form, of the society of which one is a member. Other elements must include – fidelity of life under law i.e. respect for the rule of law and – protection of human rights, including those of communities and minorities.”

And Prof JB Ojwang’ principally defines constitutionalism in terms of government restraint:

“Constitutionalism really means government that is subject to restraint, in the interest of the ordinary members of the community; government that is not arbitrary or totalitarian… A constitution may or may not embody the principle of constitutionalism. Where a constitution contains clear checks and balances to the exercise of public power, it will serve as an underpinning for the principle and practice of constitutionalism.”

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74 This section has been refined from Ben Sihanya (2013) “Constitutionalism and the Rule of Law in Kenya’s Electoral process,” Handbook on Elections Disputes in Kenya under the auspices of the Judiciary Working Committee on Elections Preparation (JWCEP) and the Law Society of Kenya, at 22-56.
Constitutionalism is thus the habitual acceptance of the rules enshrined in the constitution or consistent with constitutional values and principles as the ultimate bases of political choice. Where there is habitual acceptance and adherence to principles and rules in the Constitution, the rule of law and the supremacy of the Constitution as stipulated under Article 2 of 2010 Kenyan Constitution, constitutionalism, will be achieved.\(^\text{77}\)

Okoth-Ogendo and other scholars have emphasized that there is the emergence in Africa of the phenomenon of constitutions without constitutionalism. And in a later essay, he described the phenomenon as constitutionalism without constitutions. This is where in some cases progressive constitutional principles, values and practices have evolved without a change in text.\(^\text{78}\) Some US scholars call this translation.\(^\text{79}\)

1.3.3 Autochthony and the development or typology of the Kenyan Constitution, State, Government and Governance

Autochthony relates to the idea of a homegrown, indigenous, nationalist constitution; one that captures a common history or origin of the people duly constituted into a state; their present or contemporary challenges and opportunities, and their common future applications.\(^\text{80}\)

Constitutional autochthony is the process of asserting autonomy and hence constitutional nationalism vis-a-vis an external legal or political power. It is concerned with instilling sentiments of patriotism, pride, national consciousness and identity in the people of a given state.\(^\text{81}\)

According to Ben Nwabueze, autochthony, constitutionally, has two main aspects: First, it relates to the source from which the constitution derives its authority as law e.g. from imperial authority or colonial masters or from the local enacting body.\(^\text{82}\) Second, it relates to its content i.e. the frame of government which it establishes and to its contents.\(^\text{83}\)

On constitutional origin, K.C. Wheare writes:

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“for some members of the commonwealth, it is not enough to be able to say that they enjoy a system of government which is in no way subordinate to that of the United Kingdom. They wish to be able to say that their constitution has force of law and if necessary of supreme within their territory through its own native authority and not because it was enacted or authorized by the parliament of the United Kingdom – that is to speak, ‘home-grown,’ sprung from their own soil, and not imported from the United Kingdom.”\(^\text{84}\)
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The emphasis given by K.C. Wheare as elaborated by Ben Nwabueze is that since the constitution

\(^\text{77}\) Cf. sec 3 of the 1969 Constitution. Article 2 provides, in material part, as follows: “The Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.”

\(^\text{78}\) See the discussion on Inter Parties Parliamentary Group (IPPG) consensus above, and discussions below.


\(^\text{83}\) Nwabueze, ibid.

is the foundation of the state, it is necessary that this foundation should be made locally. This is to remove any possible misunderstanding about the status of the country that might arise from the fact that its constitution was enacted by a former imperial power.\(^\text{85}\)

The importance of constitutional autochthony, relates to the content and the origin of the constitution. Whether legal autochthony requires that the constitution be enacted by a native authority or by an imperial or colonial authority, people’s aspirations can work in both circumstances.\(^\text{86}\) Constitutional reforms can be initiated and realized through implementation of the constitution. Originalism supplies the historical experiences, precedent and the \textit{travaux preparatoires} (or record of proceedings that attended the negotiation and adoption).\(^\text{87}\) Nationalistic sentiments can be instilled as the citizens look back to the origin, the present state and future and the future optimistically.\(^\text{88}\)

Autochthony has sometimes been interpreted as Africanisation, Kenyanisation or ethnicisation, in terms of conceptualising, designing, implementing, enforcing or reforming the Constitution. But it has sometimes taken the negative connotation of ethnicisation, depending on the ethnic oligarchy, dynasty, aristocracy or kleptocracy that is controlling.\(^\text{89}\)

At independence, autochthony was a broad-based concept captured in terms of “African” dignity by the leading theorist, architect and tactician of Kenya’s Independence Constitution and nationhood, Thomas (Tom) Joseph Odhiambo Mboya.\(^\text{90}\)

\section*{1.4 Typology of constitutions, states and governments in Kenya and Africa}

The methodology for studying constitutions may fall into a three pronged. First, constitutions may be studied in terms of a dichotomy which focuses on similarities and differences among liberal, socialist and developing country constitutions. Second, they can be studied in reference to the internal or supranational organization (or “constitution”) under the various state constitutions. Under the second typology, there are republican constitutions, federal constitutions, confederal

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\(^{86}\) Hans Kelsen’s argument that what matters is the efficacy of the grund norm (or constitution); the fact that it is habitually obeyed. Remarkably, Kelsen affirms that validity is not (necessarily) based on the grund norm’s popular legitimacy or technical validity. It may have originated from a conqueror, or an usurper. The main argument for the Constitution of Kenya 2010 was autochthony in terms of local origin and local content. It was about popular sovereignty or popular participation in process and content

\(^{87}\) That is one of the reasons why the US and South African constitutional experiences are increasingly important in the incorporation, implementation, enforcement and reform of the Kenyan 2010 Constitution.

\(^{88}\) Ben Nwabueze (1974) \textit{Presidentialism in Commonwealth Africa}, \textit{op. cit.}

\(^{89}\) Kikuyunisation of the political economy and hence the constitutional process.

\(^{90}\) Tom Mboya (1963) \textit{Freedom and Africa}, Little Brown, London; Chinua Achebe characterized Mboya and Nyerere as clear-minded and progressive thinkers as compared to Obafemi Awolowo and Nnamdi Azikiwe (“Zik”) who were consumed by ethnic bigotry (especially Awol), and mediocrity. See Chinua Achebe (1983) \textit{The trouble with Nigeria}, Heinemann publishers, London; Chinua Achebe \textit{There was a Country: A Personal History of Biafra} Heinemann Publishers, London. But was Kenya’s independence constitution largely modeled on or drafted or recommended by Sir William Ivor Jennings? Cf. William Ivor Jennings (1993) \textit{The Law and the Constitution}, University of London Press.
constitutions and regional or majimbo, provincial, or devolved (county- national governments) (or regional, quasi-federal), constitutions. There is also presidential executive, parliamentary executive or the hybrid, semi-presidential executive that is an amalgam of the two. This focuses on how the state, state structures and governance are organized.

The third typology is whether the constitutional text is written or not. It has been debated in classical and in the contemporary context. It is useful to ask how many written texts have constitutional value and effect. These three typologies are themselves problematic. At this point, they are work in progress.91

There are serious overlaps among these classifications. They are sometimes conflated, convoluted, confused and obscure.

There is therefore a difficulty in finding an exhaustive typology and classification of constitutions. In this study, I seek to review the emerging methodology or formulate appropriate constitutional typology based on research on comparative practice and analysis focusing on Kenya and the following, among others: South Africa, Nigeria, Egypt, USA, UK and Germany, China and Japan.

1.5 Broad or General categories of Constitutions, States and Governments

The contemporary, non-ideological, but perhaps formal and liberal conception of state is largely traceable to the Peace Treaty of Westphalia in the 17th century of 1648.92 The leading Kenyan comparative constitutional law scholar Prof Yash Pal Ghai, and other scholars have worked with a three-pronged typology of constitutions and states: liberal, socialist and developing states. Remarkably, the socialist category is now mainly important as critique of the (theoretically) dominant liberal-oriented state.

The key parameters are two: First, economic organization or the role of the government and the market in resource allocation. This includes property rights and how they are held; and the role of contract v. the national or sub-national development plan). Second, is the political organization, especially the production, reproduction and distribution of political power, including the form of Government and the quality of governance, the rule of law and human rights.

A state can be conceptualized as a distinct set of political institutions whose specific concern is the organization of domination, in the name of the common interest, within a common territory.93 Max Weber and Weberians also define a state in terms of the entity with the authority for the legitimate use of violence. The precise definition of a state has been the subject of scholarly, political, and

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91 A clearer and finer typology of constitutions, states, and governments must await ongoing research at Sihanya Mentoring and Prof Ben Sihanya Advocates under the CODRALKA series: Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa (CODRALKA).
92 The treaty was signed between May and October1648.
popular contestation.\textsuperscript{94}

The generally accepted formal definition of the state is embodied in Art. 1 of the Montevideo Convention of 1933 on the Rights and Duties of States. A state is defined to have the following four characteristics.

First, a permanent or stable population, constitutions, international law, and state(hood) are primarily about people.\textsuperscript{95}

Second, a defined territory – boundaries are certain, can be established or ascertained.\textsuperscript{96}

The borders are certain or can be ascertained using maps and instruments. The boarder may be water, or land. Some are clear with beacons. Why walls as proposed by Trump and Kenyatta-Ruto? Security? Tenderpreneurship? Paranoia? International colonial borders are to be respected.

They may be questioned only peacefully under international law through the UN Security Council or the International Court of Justice (ICJ), an agency of the UN.\textsuperscript{97}

Third, there must be an effective government;\textsuperscript{98}

Fourth, the capacity to engage in international relations, transactions and exchange with other states or international persons. This includes protecting its citizens within the state and abroad; protecting non-citizens within the territory;\textsuperscript{99} recognizing other countries’ passports; trade, as well as incur and settle debts, among others. This is closely related to the presence of an effective government.\textsuperscript{100}

Once an entity fulfils the above, it will be recognized in international law or transnational legal

\textsuperscript{95} E.g. Kenya had about 38.5 million people in the 2009 census about 43 million in 2013 and about 46 million people in 2016. The growth rate is estimated at 2.61 \% per annum. Some officials say Nigeria has a population of between 120-150 million. Why is the total and the voting population in Kenya, Nigeria, and other African states usually a matter of conjecture? Why are censuses always generally or ethnically and regionally? Is it to manipulate the resource allocation and the electoral outcomes?
\textsuperscript{96} This also means that national, state, domestic or municipal laws only apply within the state territory. A few exceptions are the conflict of law rules in private commercial and social transactions; and in public law where USA sanctions illegally applies extraterritorially its trade, competition, IP and security and tax laws.
\textsuperscript{99} Cf. USA advisory and evacuating its citizens from Kenya because of insecurity; USA planning to keep low staff levels and send in marines to protect its embassy.
\textsuperscript{100} This is a big issue in many African failing and failed states. Cf. Somalia. Since 1981 when Somalia collapsed under dictator General Said Barre. The UN and the African Union Mission in Somalia (AMISOM) have been the main guarantors of security.
process (TLP)\textsuperscript{101} as an international person in this case a state.

As indicated, Ghai uses a three-pronged typology in problematizing the constitution and state.\textsuperscript{102} We emphasize that the state and government are creatures of or reconstructed by the constitution and international law, especially in terms of (internal) popular sovereignty (Art 1) and (external) state sovereignty (Art 4).

I begin with the main generic classifications of constitutions and states by the leading African constitutional scholar, Prof Yash Pal Ghai.

\textbf{1.6 The Ghai model on Constitution, State and Government in Kenya and Africa}

Yash Ghai published the chapter on his typology in 1993 while serving as a professor at Warwick Law School. He is the co-author with Prof JWPB Mc Auslan of the classic treatise on Kenya’s constitutional and public law: \textit{Public Law and Political Change in Kenya: A study of the legal framework of government from colonial times to the present}. Prof Ghai has kept fidelity with constitutional democracy in theory (scholarship) and practice.\textsuperscript{103}

Ghai developed a three pronged typology of constitutions: liberal, socialist and developing state.\textsuperscript{104} This was in the context of the quest to understand an emerging global order in the wake of decline in the Cold War following the collapse of the Berlin Wall and the socialist Soviet empire. Second was Afro-pessimism. And third, was Afro-optimism based on the upsurge of liberal or libertarian values that gave so much optimism for progressive socio economic, political and constitutional development in Kenya and Africa.\textsuperscript{105}

First, there are liberal constitutions. These are largely associated with the Western (liberal) societies and reflect the social, economic and political struggles in those countries. They focus on individual liberties. They emphasize justiciable rights and presuppose a well-functioning judiciary. The US Constitution 1787 and 1791 is a good example. Constitutional instruments which undergird the British government especially some written fragments of British constitutional law such as the Magna Carta of 1215 (The Great Charter),\textsuperscript{106} the Act of Settlement, the constitutional

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\textsuperscript{101} Transnational Legal Process (TLP) has been popularized by leading scholars like Yale Law Professor Harold Hongju Koh who was the 15\textsuperscript{th} Dean (from 2004 until 2009). See Harold Hongju Koh (1996) “Transnational Legal Process,” \textit{Yale Law School Legal Scholarship Repository}, Nebraska Law Review, at \url{http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2902&context=fss_papers} (accessed 8/8/2016).


\textsuperscript{103} See for instance, his stewardship of the Constitution of Kenya Review Commission (CKRC), and his role in the Katiba Institute. He has also been active as an amicus curiae (or a friend of the court; in penning important newspaper articles and participating in civil society organisation demonstrations or related activities. among others.

\textsuperscript{104}Ibid.


instruments regulating or governing devolution of power to Scotland or Wales and the European Union Constitution and related treaties.

Second, there are socialist (oriented) constitutions which are largely a by-product of the Soviet socialist (or Bolshevik) revolution of 1917 which helped diffuse them throughout the world.\textsuperscript{107} Subsequently, China played a great role in the globalization of socialist constitutionalism. They tend to emphasize the rights and duties of the citizen rather than (only the rights of) the individual.\textsuperscript{108}

In Africa, most of the socialist constitutions were by products of the Cold War which was marked by competition for turf or territory and influence between the liberal West and socialist East. Socialism was at the core of the Constitution in Mozambique, Ethiopia and Tanzania.\textsuperscript{109} And it also influenced constitutional praxis in African states that claimed to be liberal.

Third, there are developing country constitutions. These constitutions mainly borrow from the two types above. They are a reflection of the liberal and socialist experiences. They try to make them indigenous by incorporating developing country values, constitutional safeguards and experiences.

But these are also contrived to serve local tribal, dynastic class or related socio-economic and political interests. For instance, the Kenyan and Tanzanian constitutions have been influenced by German and British traditions on Parliament and then either or both administrative system, process, bureaucracy and justice on the one hand, and security or policing on the other, among others.\textsuperscript{110} Developing country constitutions try to address the dichotomy between the individual and the communities as far as rights and interests are concerned.\textsuperscript{111}

1.7 Applying Ghai’s Generic, Ideological or Developmental Model
The Ghai methodology on classifying constitutions (and/or states) has been very useful. I have modified or elaborated on it using two parameters: economic organisation, and political organisation.

But the typology above has at least three (3) problems. First, Socialist states, for instance, have largely disintegrated especially after the collapse of the Berlin Wall from about 1989 that marked the withering or end of the Cold War.\textsuperscript{112}

\textsuperscript{107} On Bolshevik dissemination.
\textsuperscript{108} Ibid.
\textsuperscript{109} Constitution of Tanzania, 1977, Constitution of Ethiopia, 1995, Constitution of Mozambique, 2004. These have been amended or superseded following neoliberal trends.
\textsuperscript{110} Kenya was British Protectorate and Colony from 15/6/1895 and 1920, respectively. Tanzania (Tanganyika and Zanzibar) was a German, then British colony.
\textsuperscript{112} The end of the Cold War is as debatable as the end of history and (ideological) conflict that was propounded by Prof Francis Fukuyama, a Japanese American scholar. See Francis Fukuyama (1992) The End of History and the East Man, op. cit.
Second, the typology is also not sufficiently representative. It is arguably unbalanced because during the climax of the Cold War, there were very few (only about 7-20) confirmed liberal constitutions and more than 160 developing country constitutions.

Remarkably, the United Nations (UN), World Bank, IMF and the World Trade Organization (WTO), among other transnational organizations divide states (or countries) into developed, developing and Least Developed Countries (LDC). But now there are also G7 or G8 (G7 Plus Russia), G20, BRICS (Brazil, Russia, India, China and South Africa, the five major emerging national economies). More recently, there are the MINT (Mexico, Indonesia, Nigeria and Turkey) which are regarded as developing very first economically.\(^{113}\)

These typologies focus on econometric models with limited reference to information on the UN Development Programme’s (UNDP’s) human development index (HDI) takes into account governance and related parameters in constitutional democracy such as liberty, equity, gender, literacy, among others.\(^{114}\)

Third, there were, and still are, major differences among developing country constitutions themselves e.g. Kenya and Mozambique.\(^{115}\) In the 1963-2010 period, the Kenyan and Commonwealth African constitutions were largely aligned to the British Westminster export model. Arguments for autochthony led to neo-presidential or semi-presidential as well as (quasi) federal models.\(^{117}\)

### 1.8 Typology of Governments in Kenya and Africa

What is a government? Serikali in Kiswahili and Sirkal in (Dho)Luo? The Black’s Law Dictionary and relevant authorities define government in six ways. First, government is defined as an organ of the state in terms of its traditional Western organization or structure in terms of the three arms:

> “The government is but an agency of the state distinguished as it must be in accurate thought from its scheme and machinery of government. In the US interpretation government consists of the executive, legislative and judicial branches in addition to administrative agencies ….”\(^{118}\)

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\(^{113}\) There is debate in African constitutional democracy and political economy whether Botswana, Ghana, and Nigeria are democratizing faster while the largest economies are Nigeria, Egypt and South Africa in that order. There is also an argument that Nigerian economy is now the largest in Africa when the informal sector is taken into account. And that the South African economy remains the most sophisticated. See the discussion on BRICS and MINT in part 2.2.


\(^{115}\)Ibid.

\(^{116}\) This is the Anglophone African constitutional tradition. Cf. the works of Ben Nwabueze and Yash Ghai cited elsewhere in this paper.


\(^{118}\) Henry Campell Black (eds) *Black’s Law Dictionary*, op. cit. Are the administrative agencies part of the executive? Or independent? Cf. on the dependence of the 13 or so constitutional commissions and the two independent offices on
Second, there is also a broad conceptualization of government under the Constitution of Kenya 2010. The Government in Kenya includes the National and the County Government. The County Government has two arms: the County Executive led by the Governor and County the County Assembly presided over by the Speaker of the County Assembly.

Third, government also includes the thirteen (13) commissions and two independent offices, namely Controller of Budget and the Auditor General.

Fourth, government is “the system of a polity in a state; that form of fundamental rules and principles by which a nation is governed or by which individual members of a body politic are to regulate their social actions.” It refers to the institutions, rules and administration of state authority.

The fifth definition focuses on the administrative bureaucracy as a unitary category: “The whole class or body of office holders or functionaries considered in the aggregate, upon whom devolves the executive, judicial, legislative, and administrative business of the state.”

Sixth, is a pejorative and represents the perception of government as a coercive agency: “In a colloquial sense the US or its representatives, considered as the prosecutor in a criminal action; as in the phrase, the government objects to the witness.”

Seventh, Government is not equivalent to the Executive, which is one of its three arms.

Eighth, Government is not equivalent to the President who is only the head of one the three arms (the Executive, and who can constitute or nominate or appoint a small part of the Government under the 2010 Constitution.


121 Henry Campbell Black, Black’s Law Dictionary, op. cit., at 545.


Departments and Agencies (MDAs) like security (especially internal security) and, finance treasury. Thus other MDAs which are also part of Government wrongly refer to only these two as “the Government.” Intriguingly, commissioners in one of the constitutional commissions once declared to be in a debate in a university conference that commissioners were not part of Government. Eighth, Government is conflated with the A-G partly because the A-G used to represent the Government in civil and criminal matters. Moreover, the powerful and long serving A-G Charles Njonjo often talked of “my Government.” Thus judges, magistrates and other judicial officers wrongly refer to the A-G or DPP as Government in a manner suggesting that the judicial officers are not Government. Even first lady (e.g. Mama Lucy called it “my Government”).

Eighth, some politicians mislead the people that the people are the government.

There are other examples given to further define government. These are closely related to the conceptualization and operationalisation of the constitution and state, among others. They are numerous and tentatively include the following four:

First, federal v. confederal v. unitary governments
Second, central or national governments v. decentralized or local governments
Third, monarchical v. republican government.
Fourth, military v. civilian governments.

I have noticed the following problems in defining government: First, government to mean executive. Second, government to mean the President or presidency. Third, some refer to the “executive” or coercive or more visible or powerful offices or agencies like (internal) security and Finance or Treasury as the government. Fourth, some presidents, the former Kenyan Attorney-General (A-G) Charles Njonjo and even the late Mrs Lucy Kibaki have referred to “my government” in possessive sense. Some think it is better that the president refers to “my Administration,” rather than “my Government” in the ownership or the possessive sense given that even the President may only tweak the administration and in any event in consultation with Parliament and Judiciary or the relevant agencies.

The terminology on government is thus often confused, conflated or obscure especially in relation

\[124\]…
\[125\] Cf. typology or classification of constitutions and states in Part 6 of this essay.
\[126\] The speakers, MPs, Judges, magistrates, and members of the executive, among others, refer to executive or executive officials, especially those in security and criminal justice, the National Treasury and Finance as the “government.” As if the former are not (part of) the government.
\[127\] This is partly because of the raw power that these agencies exercised under the 1969 Constitution, which some still unconstitutionally exhibit under the 2010 Constitution.
\[128\] Cf. Speeches by President Uhuru Kenyatta, former Presidents Mwai Kibaki and Daniel Toroitich Moi.
to constitution, state and in comparing the various forms of governments *inter se* (or among themselves).

1.9 Markets in Afro-Kenyanist Constitutional Sociology

What is market? Markets mechanism? Demand and supply? Hidden hand of the market? Role of the people and state in the market? Sub-national, national, regional and international market…. economy? Are there people who are not “in the economy” David Murathe 2017/18? How does political economy relate to political economics, cultural politics, and legal sociology in Kenya and Africa? Have Constitutional law and lawyers ignored and only intestinally, rhetorically addressed market, the economy, political economy and legal sociology in Kenya and Africa? What is to be done?

1.10 Sub-typologies of State?

Are there sub-typologies of state?

1.10.1 Predatory State in Kenya and Africa

A predatory mean a state that promotes the private interests of dominant groups within the state (such as politicians, the army and bureaucrats) or influential private groups with strong lobbying powers.

1.10.2 Patrimonial State in Kenya and Africa

Patrimonialism is a form of political domination described by Max Weber in which authority rests on the personal and bureaucratic power exercised by a royal household, where that power is formally arbitrary and under the direct control of the ruler.

1.10.3 Rentier State in Kenya and Africa

The term rentier state is most frequently applied to states rich in highly valued natural resources such as petroleum but can also include states rich in financial instruments such as a reserve currency. In rentier state theory, the state derives most of its revenue from renting resources (such as oil) to foreign powers.

1.10.4 Prebendal State in Kenya and Africa

Prebendalism refers to political systems where elected officials and government workers feel they have a right to a share of government revenues, and use them to benefit their supporters, co-religionists and members of their ethnic group. How has prebendalism been manifested in in Kenya and Africa?

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130 If market, state, people in (neo) liberal, weberian, neo-marxist…political economy and legal sociology…. 
133 …. 
135 Cf. Prof Richard Joseph, a Scholar of Nigerian political process….
1.11 The Liberal Constitution, State and Government and Market in the Kenyan and African Context

We use economic organization (and especially the market mechanism or principle) and political organisation. The main categories of political organizations revolve around liberal v. illiberal v. social democracy.\textsuperscript{137}

The liberal constitution, state is largely regarded as the guarantor of property rights and enforcer of contracts. It is largely based on market principles i.e. supply and demand and supply. It is supposed to have very little control role in the market. Regulation of transactions by the state or government is regarded as the exception rather than the rule or the norm.

However, in certain situations the state may intervene to correct market failure, imperfections or distortions. There are four common causes of market failure. First, abuse of market power through monopoly of monopsony. Second, asymmetrical information or informational asymmetry. This is where parties to a contract do not have equal information in terms of quality and quantity.\textsuperscript{138} Third, the public goods problem.\textsuperscript{139}

1.11.1 Economic Organization under the Liberal constitution, State or Government and Market

Although the rulers of Kenya, South Africa and Nigeria are fond of calling these states liberal and democratic, the liberal states have historically been 7 to about 20, including the US, UK Germany, Western Europe, Japan, Australia and Canada.\textsuperscript{140} The economic organization of the US, UK and Germany has been characterized by economic competition. The constitution’s state’s or government’s main role is to establish a regulatory, social, economic, cultural and political system that respects (property) rights and enforces contracts. The state or government largely focuses on governance; not doing business. The market mechanism, market forces, or hidden hand of the market is expected to allocate goods and services to the most efficient or optimal users.\textsuperscript{141}

This model has been contested by left-o -centre parties like the Labour and the Democratic parties in the UK and US, respectively.\textsuperscript{142} Thus President Barrack Obama successfully sought the American

\textsuperscript{136} Fareed Zakaria’s work….
\textsuperscript{137} Cf. Raila Odinga’s and CORD’s ODM’s socio-democracy in market and politics in the context of the 2007 and 2013 presidential election cycles.
\textsuperscript{138} Economists focus on these four main types of market failure. See Ben Sihanya (2016; 2020) \textit{Intellectual Property and Innovation in Kenya and Africa: Transferring Technology for Sustainable Development}, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya, especially Chapter 2 “Conceptualisation and political economy of intellectual property and technology transfer law in Kenya and Africa.”
\textsuperscript{139} The public goods problem has two components. First, the idea that public goods are largely non rival (nons). Second, that public goods are largely non excludible. See Ben Sihanya (2016; 2020) \textit{Intellectual Property and Innovation in Kenya and Africa: Transferring Technology for Sustainable Development}, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, especially Chapter 2 on “Conceptualisation and political economy of intellectual property and technology transfer law in Kenya and Africa,” 43-81.
\textsuperscript{140} Thus, although Japan is in the (East) and in Asia, and Australia is in the South, they are often regarded as “Western or Northern.”
\textsuperscript{142} Some of these parties recognize that there are significant socio-economic and political disparities as well as marginalisation and that the constitution envisaged a facilitative, engaged and responsive state or government; not just
state’s engagement in providing health care to Americans who opt for it or who cannot afford it, under the Affordable Health Care Act 2010 (aka Obamacare Act). The Act was challenged by some republicans with the Supreme Court ruling is constitutional in a 5-4 decision. See Barack Obama (2015) “United States Health Care Reform: Progress to Date and Next Steps,” Vol 316, No. 5, Journal of the American Medical Association, at http://jama.jamanetwork.com/article.aspx?articleid=2533698 (accessed 25/9/2016). Chief Justice John Roberts, a George W. Bush nominee and Republican or conservative leaning was one of the 5.

143 ObamaCare followed and was succeeded by supportive and unsupportive work from President Teddy Roosevelt and Bill Clinton, on the other hand, and President Donald Trump, on the other, respectively.

1.11.2 Political organisation under the Neo-liberal or Neo-conservative Constitution, State or Government
Political organisation under the neo-liberal or neo-conservative constitution, state or government is also based on competition among the political actors. There is freedom of conscience, opinion, expression, association, assembly and choice generally. The free market of ideas. Individuals and parties compete for power. They are free to belong to, form, or vote for, or lead (other) individuals or political parties. Political liberties are now guaranteed by Art 38. Articles 33, 34 and 35 of the Constitution of Kenya 2010 guarantee freedom of expression, freedom of the media and access to information, respectively. Article 37 nullifies previous public order or law and order doctrines and breaks new ground and provides that

“Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.”

The neo-liberal constitution, state and government tends to be a dual – rather than a multi-party system. Although there are many parties, only Labour and the Conservative Party have been the constitutionally and politically significant in terms of presence in parliament and impact in British Constitutional Democracy. The Liberal Democratic Party (LDP) has been part of the third party politics and became a significant player in the 2010 British elections when they secured enough seats to the extent that whichever of the two parties they formed a coalition which would form government. They supported the conservatives.

American constitutional democracy has also been characterized by dual party politics, with the occasional independent presidential candidate. These are Republican party (Grand Old Party GOP)) and Democratic Party. Important third, and especially independent presidential candidates have been Ross Perot (1992) and Ralph Nader (2000).

1.11.3 Neo-Marxist, Socialist or Socialist-oriented state and the Kenyan and African experience
We use the two-pronged typology of economic organization and political organization in discussing the socialist-oriented state and government. Neo-Marxists political scientists, political sociologists,
political anthropologists and legal scholars usually favour a broad definition of the state. This draws attention to the role of coercion-wielding organizations who exercise clear priority in decision-making and claim paramountcy in the application of naked or brute force to social problems within territorial boundaries.\(^{146}\)

The Marxist state is largely a by-product of conflict in society. The state arises to resolve some of these.\(^{147}\) The state is apparently impartial but in actual fact the state is biased because of its class structure or content.

Prof Eugene Kamenka renders the definition of the Marxist state as follows:

\begin{quote}
“The political power of society separated from the rest of society and controlled by the ruling class of that society in its own interest. The complete obstruction of the state from society is the work of the bourgeoisie. The claim of the state bureaucracy to be a universal class serving the public interest and not sectional interests is false.\(^{148}\) Marx does not emphasize the independent power of the state, although his concept of the Asiatic mode of production concedes that such independent power in certain conditions is possible. His analysis of the regime of Napoleon III suggests that a stalemate in the class struggle made it possible for an adventurer to capture and use the state.”\(^{149}\)
\end{quote}

The neo-Marxist state is the manager or implementer of the development plan. Contrary to the position held by critics of neo-Marxism (and vulgar or unreconstructed Marxists)\(^{150}\) some evidence and scholarship suggest that even in the neo-Marxist state, the state is not necessarily a committee of the ruling class and may in fact be relatively autonomous from the dominant class.\(^{151}\) Indeed, in Kenya and Nigeria, the tribal component is much stronger that class in state and governmental exclusion, repression and exploitation.\(^{152}\)


\(^{147}\) Cf. the Thomas Hobbesian and the John Locke analysis on the movement from the state of nation to civil society and the problematic notion of social contract. Hobbersian and Lockean theories are summarized and discussed in Michael Freeman (2001) *Lloyd’s Introduction to Jurisprudence*, Sweet & Maxwell, London.


\(^{149}\) Kamenka, *ibid*, at 138, other quotes from Karl Marx, Kamenka....


1.11.4 Political organisation under the Neo-Marxist or Socialist (inspired) Constitutions, State, or Government

The ideology and political organisation under socialist-oriented constitutions were largely hortatory on freedom of conscience, expression, association and assembly. In practice, there were structural and normative constraints including ideological indoctrination. Political party organization in a neo-Marxist or socialist state by the time the Berlin Wall collapsed in 1989 was largely monopolistic, or monolithic. These include China, Russia, (the former Union of Soviet Social Republic (USSR) or Soviet Union Cuba, Tanzania, Mozambique or Angola. Individuals had no choice but to subscribe or be bound by the policies of the Communist Party, the assumed vanguard of the revolution.

Leadership of the party, and access to state power or resources was through the party, and largely by way of selection or appointment by the party leadership. There has been no fundamental change in China or Russia, where only limited local leadership is open to party competition while national leadership is controlled by one party: the Communist Party. Remarkably, at least 50% of the World’s population lived in states or was led by governments that claimed to be socialist.

1.11.5 Economic Organisation under the Socialist Constitution, State or Government

The Soviet Union (Russia), China, Cuba, Tanzania, Mozambique and Angola were historically regarded as the leading socialist or communist constitutions, states or governments.

1.12 The Developing Country State and the Kenyan and African Experience

Developing country constitutions have largely embodied the characteristics of the liberal and neo-Marxist (or socialist) state or government. States which are neo-or post-colonial like Kenya embody or pursue some liberal democratic and market oriented policies associated with Britain, the US, and Germany and Japan. They also emphasize the role of the state in the economy, on the other hand. In many situations, therefore the developing country state is a mixed economy pursuing

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155 Liberal v. socialist are not categories in the Cold War period...

liberal democratic and Marxist\textsuperscript{157} constitutional principles.

The search or quest for a new constitutional dispensation in Africa and particularly in Kenya seeks to rationalize and secure equity regarding the role of the state in the economy and particularly to address the problems of primitive accumulation, oppression and ethnic exclusion by state or political elite.

Moreover, the quest for constitutional democracy also seeks to end or reduce authoritarianism and secure liberties through the rule of law, due process, human rights, social justice and participation. Briefly, the search for a new constitutional dispensation in Kenya was the quest for economic, political and social egalitarianism equity and efficiency.

1.12.1 Economic Organisation under the Developing Country Constitution, State or Government: Kenya, Nigeria and South Africa

The (African) developing countries focused on this study have had a chequered history and development trajectory in terms of economic organisation.\textsuperscript{158} Even within the East African Community (EAC 1),\textsuperscript{159} the experiences have been varied. Kenya started off at independence in 1963 as an aspiring liberal economy oriented to the West, and especially the British economy model of state managed rather than the US laissez-faire economy.\textsuperscript{160} This was in spite of the Kenyatta rhetoric that Kenya was part of the Non-Aligned Movement (NAM) led by his friend Joseph Tito of (former) Yugoslavia.\textsuperscript{161}

Ideenological, political and personality clashes between the group led by Kenyatta and Vice President Jaramogi Oginga Odinga led to the formulation by Kenyatta\textsuperscript{162} of Sessional Paper No 1 of 1965 on \textit{African Socialism and its Application to Planning in Kenya}. This policy paper established a mixed economy in at least two senses. First, mixed in terms of Government control and/or management of the “commanding heights” of the economy through parastatals and private sector participation. Second, mixed in the sense of agriculture, industry, commerce and services. But there were significant clauses that focused attention on “high potential areas” and excluded cultures that were not supportive of development.\textsuperscript{163}

\textsuperscript{157} In the sense of populist.

\textsuperscript{158} Another challenge regarding the generic or Ghai typology is that China may be placed under (erstwhile) neo- marxist and developing country constitution, state or government at the same time.

\textsuperscript{159} There has been EAC 1 and EAC 2. EAC 1 was established in 1967 and consisted of Kenya, Uganda and Tanzania. EAC 2 was established in 1999 and consists of Kenya, Uganda, Tanzania, Rwanda and Burundi. Is EAC 3 in the offing? To include South Sudan (wholly) and the Democratic Republic of Congo (DRC)(pending)? The BBI 2020 report proposes to introduce an amendment in the form of Article 10A: “(1) this Constitution embraces the goals of African unity and political confederation of the eastern Africa region as integral towards attainment of sustainable development, prosperity for all and stability (2) the state shall take legislative, policy and other measures to give effect to this Article.”


\textsuperscript{161} Cf. Group of 77 states that belonged to the Non-Aligned Movement (NAM) which became 111. They were led by President Tito of Yugoslavia and President (Mwalimu) Julius Kambarage Nyerere of Tanzania. Cf. Mannaraswamighala Sreeranga Rajan (1990) \textit{Non-alignment and Non-aligned Movement}, Vikas Publishing House, New Delhi, India.

\textsuperscript{162} Actually this was led by Mwai Kibaki and John Michuki.

\textsuperscript{163} The Kenyan territorial nationalism that had guided the independence structure was being dismantled by Kenyatta’s “ethno-nationalist” state. See E.S. Atieno-Odhiambo (2002) “Hegemonic enterprises and instrumentalities of survival:
1.12.2 Political Organisation under the Developing Country Constitution, State and Government: Kenya, Nigeria and South Africa

Kenya, Uganda, Tanzania, Nigeria and South Africa have gone through at least three phases in political organisation since Ghana became independent in 1957, Nigeria in 1960 and Kenya in 1963. This relates mainly to freedom of (political) expression, freedom of the media, and freedom to join, contest in, and form a political party.

The first phase was the period of de jure and de facto multi-partyism, even though it was largely de facto dual partyism. In Kenya, the Kenya African National Union (KANU) and Kenya African Democratic Union (KADU) were predominant.

In Nigeria it was three parties led by Dr Nnamdi Azikwe (Nigeria People's Party (NPP)) and by Chief Obafemi Awolwo (Action Group) and Sir Tafawa Balewa (Northern People's Congress (NPC)).

The second phase was marked by multiparty de jure and single party de facto. The pioneers were Dr Kwame Nkrumah’s Convention People's Party (CPP), Julius Nyerere’s Tanganyika African National Union (TANU) and Jomo Kenyatta’s KANU. Yoweri Museveni introduced a curious and personalized or patrimonial model in the 1980s: the non-party state.

The third phase is the re-introduction of multi-partyism – de jure and de facto in the early 1990s.

These phases were marked by appropriate changes in the text or practice of the Constitution in Kenya, Uganda, Tanzania, Nigeria and South Africa. The reversal of the gains is the fourth phase, with serious implications for constitutional democracy in the Kenyan and African nation state.

1.13 Nation in Kenya and Africa

A nation refers to the population within, sharing a common culture, language, and ethnicity with a strong historical continuity. This manifests itself in most members in a sentiment of collective, communal identity. Nation was largely a term in cultural studies, anthropology, sociology, and political science. It means ethnic, linguistic, cultural or political group or community.

Scholars argue that most ethnic groups are real and historical, constructed or imagined or invented,
or are a product of a combination of these. This was mainly done by politicians or the political elite, missionaries,168 and academics, who emphasized common origin, current challenges and future destiny.169

Analyse Kikuyu, Luo, Luhya, Kalenjin, Mijikenda, Maasai. They are real, v constructed and imagined? Some have been imagined or constructed through myths and legends or fiction.

First, the Kikuyu who have (mis)ruled Kenya for 33 (15+11+7) years since 1963 through 3 Presidents. The myth of Kikuyu creation has been presented as history. That Murungu or Ngai created Gikuyu na (and) Mumbi and placed them in Mt Kirinyaga or Mukurwe wa Nyagathanga in Murang’a as ancestral home. That Gikuyu na Mumbi then had (perfect) 9 daughters. Any male? And that the Kikuyu had a centralized Government with a king and with Wangu wa Makeri as ruler of the entire tribe. That female Government was dictatorial and overthrown through phallic power.170 Fact versus myth: Like all Kenyan tribes, Kikuyu migrated into Kikuyuland. Only two Kenyan tribes are indigenous: Dorobo, Njemps.171 Remarkably, only the Wanga were partially cephalous or centralised.

Second, myth of centralized rule, even a King Kikuyu, Wangu wa Makeri (semi mythical), Fact and history: Like Kenyan tribes, the Kikuyu, we acephalous. Thus, in Facing Mt Kenya Jomo Kenyatta also formally launched or invented the (m)uthamaki which Uhuru Kenyatta operationalized and contextualized about 2012 and especially from about 2012 and particularly during the 2013 and 2017 elections, and in administration and governance.

Third, the myth of linguistic and cultural homogeneity. There were among the Northern and the Southern Kikuyu…. Linguistic homogeneity has evolved through interactions and via the work of missionaries, a common Bible which sought to standardize Kikuyu language, schools, increased and commerce172 through markets, improved infrastructure and communication….

Second, the Kalenjin (mis)ruled Kenya for 24 years and have had a powerful DP for 7 years major

168 E.g. Bible translation – one standardized one Bible per tribe….Luo Bible, Kikuyu Bible etc.
170 Those myths are in Jomo Kenyatta, Facing Mount Kenya….
171 BA Ogot, Kenyans, who are we, op. cit., at 159.
172 Jomo Kenyatta, Ngugi wa Thiongo, Godfrey Muriuki, Peter Mwangi Kagwanja, Mutahi NgunyI etc.
Molize whose antidemocratic legacy is still being felt. The myth of common origin. The myth of common historical challenges. Fact: there are at least 15 Kalenjin (sub) tribes: myth by Moi and historians.

Third, the Luo are descended from different ancestors. Not all come from Ramogi… In some cases, they assimilated Bantus. Remarkably, tribal myths like Lwanda Magere have been treated as such: myths and not history. This is unlike Jomo Kenyatta, Ngugi wa Thiong’o, and some Kikuyu(ist) historians or historical anthropologists who treat myths as history.

In summary, none of the Kenyan tribes is “pure.” Moreover, many are in mixed relationships or are a product of such. But some identify more with the tribe that has greater access to economic resources and political power. Let us build Kenya.

Increasingly, and significantly, Kenyan and African constitutions, statutes and emblems or symbols use the term nation as if they are conterminous with state. For instance, the Kenyan Constitution refers to nation (taifa), and national values and principles. Speeches by politicians also focus on Kenya as a nation.

1.14 “Nation state” in Kenya and Africa

A nation refers to the population within, sharing a common culture, religion, language, and ethnicity with a strong historical continuity. This manifests itself in most members in a sentiment of collective, communal identity. Nation and hence the national question is largely an anthropological, sociological and political term. It is also used in literary and cultural studies or cultural politics. It means ethnic, linguistic, cultural or political group or community.

Scholars argue that most ethnic groups are real but are also invented, constructed or imagined. This was or is mainly done by the political elite and academics, scholars or intellectuals who emphasize(d) three key ingredients of nationalism: common origin, current challenges and destiny or aspirations.

174 Onyango Ogutu and Adrian Roscoe, Keep my Words: Luo Oral Literature…
176 Hence the significance of values, principles and policies in the context of constitutional or legal rules.
177 E.g. African traditional religion, Christianity, Islam, Hindu…
A nation-state is sovereign entity dominated by a single nation. A nation may suggest a country or a state where there is a high degree of ethnic, cultural, linguistic and religious homogeneity. Thus, Somalia was treated as a nation state until 1991 when it collapsed during the presidency of dictator Siad Barre.

The term nation and nation state are not coterminous although many use them as if they are identical. Kenyan politicians political science and law scholars of Kenya increasingly use the terms as if they are coterminous with state.

Remarkably, nation is now an acceptable reference to the state, self-governing territory or country. First, the Constitution of Kenya 2010 now uses it interchangeably with state. Second, the concept of nation is intended politics, literature, sociology, anthropology, and legal academy to help foster nation building, especially in ethnically divided states like Kenya, Nigeria, South Africa, Ghana, Uganda.

1.15 Nationalism and nationhood (vis-à-vis statehood and the “national question”) (cf. citizenship; ethnicity...tribalism...)

Nationalism has been divided into three territorial (or state-wide) and civic citizenship; ethnic


182 See, for instance, the Preamble (indivisible sovereign nation); Art 1 (sovereignty at national and county level); Articles 4 and 10 (national values, principles and policies); Article 6 (national state organs); Article 7 (national language); Article 9 (national symbols: national flag, anthem, court of arms, public seal, public holidays. See also Kenya’s national Anthem, anthem “Oh God of all creation /Bless this our land and nation, Justice be our shield and defender”


184 Cf. ethnic nationalism; territorial nationalism, both within the (nation) state; vis-a-vis nationalism in international law and relations (Nazi nationalism; Trumps, Americas first (and only) Mobutu’s “authenticity”…cf. Sankara on Burkinabe nationalism, Patrice Lumumba on Congolese self determination; This is an important discourse in constitutional theory and process, identity politics, cultural politics, sociology, and political science. See also Chapter 2 Constitutional founding of the Kenyan and African State; See ES Atieno Odhiambo(2004)


nationalism and nationalism (as exceptionalism or populism) in international relations, including diplomatic and consular relations.

First, territorial nationalism was probably at its peak in the struggle for independence in Kenya, Uganda, Tanzania, Nigeria, South Africa.

Second, positive or moral ethnicity versus negative tribalism. Nationalism was described by Ernest Gellner as follows:

“It is a primarily political principle, which holds that the political and the national unit should be congruent.”

It is a project intended to build a nation or nation state out of the diverse ethnic, linguistic and cultural differences. It may take two major forms: ethnic or cultural nationalism (or positive ethnicisation or tribalism); and, political or politicized ethnicity or nationalism (or negative tribalism).

In certain contexts, this may promote the virtues of one’s kinship, ethnicity or other sense of belonging without compromising the national interest or public good. Political ethnicity or tribalism involves foisting one’s ethnicity above other ethnic identities. It invokes ethnic discrimination. It can be used in an exploitative, dominating, hegemonic, intimidating or oppressive manner.

The decolonization process, or the struggle for independence and self-government especially from

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187 E.g. Nazi and Aryan nationalism under Adolf Hitler; US nationalism under George W. Bush, Trump (“America First,” or “only”? What of his dealings with or allegiance to Putin and Russia e.g. Roger Stone, Michael Cohen cases and testimony....Trump’s Anti Mexican, anti-African sentiments e.g. “shithole” countries.......

188 “moral ethnicity” has been conceptualized and contextualized by John Lonsdale, ES Atieno Odhiambo, and other scholars.


190 The Head of State was expected to be the father of the nation. Nyerere, Senghor and Mandela performed this role relatively well. Jomo Kenyatta, Mobutu Sese Seko, Iddi Amin, Obafemi Awolowo, Nnamizi Azikiwe, Sani Abbacha and Jacob Zuma and their successors were largely fathers of their tribes, relatives and friends.

the 1940s, marked a turning point in Kenya African nationalism. At independence and after the President or Prime Minister and head of state was also referred to as the father of the nation in Kenya, Tanzania and other African states; the president and the state were expected to build the nation. The struggle for the benefits of independence have been undermined through negative ethnicity.

1.15.1 Another Typology on the People, Sovereignty, Constitution, States, Court?
There is another three-pronged typology on Constitutions and States that needs to be reviewed in light of the discourse in this Chapter: neo liberal, ethnic, and consociational constitutional democracy.

First, the neo liberal state or constitution has been discussed here. Second, the ethnic constitution or state....Third, the consociational constitution and state relates to negotiated or mediated constitutional democracy.

1.16 Powers of National Government in Kenya and Africa
Consider the following powers and functions and responsibilities, duties and obligations of the National and County Governments in Kenya, Ministries, Departments and Agencies (MDAs) as well as the hands of the organs of Government among others, in the context of the typology of people sovereignty constitutions, states, and Government and markets....

1.17 Summary of Findings, Conclusion and Recommendations on Sovereignty, Constitutions, States, and Governments in Kenya and Africa
The central argument in this chapter is that Kenya and Africa have suffered under rulers and governments that do not observe and actually reverse and negate constitutional democracy. Kenyans and Africans need to develop an Afro-Kenyanist approach and methodology on constitutional, regulatory and administrative law.

The Building Bridges Initiative (BBI) 2019 and 2020 Reports and proposals provide an opportunity for reform. The people, scholars, experts, politicians and interested parties, other stakeholders should drive the agenda of reform and implementation of constitutional democracy in Kenya and Africa.

194Yash Ghai (2005) A Journey Around Constitutions. Cf. also Colonial Constitutions, independence constitution, post-communist constitutions is the new wave of democratization ….
...Let wisdom flow from and back to the Oracle’s Shrine and back in class, and through books, articles, online, and in appropriate fora…

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19/10/2020; 3/11; 5/11/2020; ;10/2/2021; 20/2/2021

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