CHAPTER 2

CONSTITUTIONAL FOUNDING OF THE KENYAN AND AFRICAN STATE


2.1 Constitutional Founding of the Kenyan and African State

This Chapter argues that the constitutional founding of the Kenyan and African State, and incipient statehood or nationhood, was based on three variables. First, constitutional or political negotiation for independence. Second, militancy, including conquest, expedition, massacres, assassinations,1 and even post-independence violence.2 And third, an appropriate combination of constitutional negotiation and militancy or violence at independence and in the post-independence period. The reconstruction of the Kenyan and African state and nationhood have followed a similar trajectory in political economy and constitutional sociology.

I adopt an Afro-Kenyanist theory and methodology on statehood as well as the three main components of nationhood and nation building: first, ethnic nationalism including positive or moral ethnicity and negative tribalism. Second, civic or juridical nationalism. And third, progressive territorial nationalism vis-à-vis retrogressive nationalism in transnational relations, law and political economy. All these conceptualize, problematize and conceptualize ethnicity as real, invented and imagined. I thus argue that Kenya African nationalism has three interrelated characteristics: first, real. Second, invented. And third, imagined.3

2.2 Nomenclature and Conceptualization of the Kenyan and African State

“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 nation building.4

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1 For example, Koitalel arap Samoei, Councillor Ambrose Ofaa, Tom Mbotela, and numerous post independence assassinations.
2 The violence motif trope underscores state theory and praxis in the works of Karl Marx, Max Weber, Hans Kelsen, Yash Ghai, Ben Nwabueze, Issa Shivji and Ben Sihanya. See also Chapter 1 of CODRALKA 1 on “Conceptualising People, Sovereignty, Constitution, State, government, Society and Market in Kenya and Africa.”
3 See also Chapters 1 (on Conceptualising People, Sovereignty, Constitution, State, Government, Society and Market in Kenya and Africa), and Chapter 5 (on Theory and Methodology of Comparative Constitutional and Administrative Law in Kenya and Africa: Law and Sustainable Development) in Ben Sihanya (forthcoming 2021) CODRALKA 1.
The Kenyan and African state is about at least three 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 Arabs⁵ on these dates, and in 1920, 1948, 1962, 1969? (Preamble, Article 1...) Second, it is also about certain or ascertainable territory, borders or boundaries. Third, it is about a constitutionally democratic⁶ and effective government (Art. 5).⁷ And fourth, capacity to transact in international relations (Article 4(1), 2(5), 2(6))…⁸

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

Who are the people within Kenyan territory or boundary? Kenyans beyond territory? (Who are Kenyans, Kenyan citizens historically? Who can pass on citizenship?)

2.2.1 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 1920.⁹ 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

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⁶ “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.….⁷


⁹ 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.
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.”

But what is a colony? protectorate? dominion? suzerain? A colony is a country or an area that is governed by people from another more powerful country. It is where a country is under full or partial political control of a foreign power and is occupied by settlers of that power. On the other hand, a protectorate is a dependent territory that has been granted local autonomy while retaining the protection of a greater sovereign state. What of a dominion? A vassal state? A suzerain state?

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The Kenyan Colony comprised the inland territory.\textsuperscript{16} The protectorate comprised the ten-Mile or Ten Kilometers Coastal Strip which was under the control of the Sultan of Zanzibar following treaties signed in 1886, 1895 and 1920. In 1920, “Protectorate” only referred to the 16 km or 10 mile Coastal Strip. What was the “Kenyan” map as at 1895? 1902? 1920? 1926? 1963?\textsuperscript{17}

Three major transitional and global processes have helped define Kenyan statehood and nationhood. First, the scramble for Africa or the quest for spheres of influence in Africa through the Berlin Conference (1884/85).\textsuperscript{18} Second, the economic, political, ideological, cultural, and intellectual cold war between the west and the east. And third, the post Cold War dispensation marked by competition for influence in Kenya and Africa by the US, UK, EU, China, Russia and Japan.\textsuperscript{19}

The formal contact between Europe and Kenya in terms of administration began after the Berlin Conference of 1884 that was convened by Bismarck.\textsuperscript{20} This confirmed the quest for spheres of influence commonly referred to as the “Scramble for Africa.”\textsuperscript{21} At first, Britain used the IBEAC or IBEA Co., a chartered company,\textsuperscript{22} as the main instrument for penetrating East Africa and consolidating British power.\textsuperscript{23} This charter gave British subjects in the East African Protectorate immunity from prosecution and further empowered the subjects to impose taxes including custom duties, make treaties, and act as the administrators of justice as well as the effective overall government of the colony.\textsuperscript{24}

\textsuperscript{16} Cf. The conquest state; the protectorate; the colony; dominion….constitutional development; Kenya under colonialism: Constitutional contests on protectorate, colony…. Rights and freedoms: life, liberty, land, labour, tax…

\textsuperscript{17} See annex….

\textsuperscript{18} Who convened the Berlin Conference? The Berlin Conference was convened under the initiative of Portugal, and chaired by Otto Von Bismarck… Who participated? Some of the countries that participated included Germany, Great Britain, Spain, France, Portugal, Belgium and Italy. The US was invited and declined to attend and/or participate. African participation? What were the objectives? What did it achieve? What dates? The conferences used pencil in drawing lines to carve out Africa from inaccurate maps…They separated tribes, clans…See WR Ochieng”…


\textsuperscript{21} The British were interested in East and West Africa; Germans in South West Africa, French in West Africa., the Portuguese in Angola and Mozambique. According to historian WR Ochieng, the imperial powers laid claim based on an inaccurate map, and the land mass they were not sure about. The drew borders on an inaccurate map, using pencils. That partly explains the location of some tribes in more than one territory, and the disproportionate sharing of cross border resources like lakes, mountains, etc.

\textsuperscript{22} Chartered under… Sir William Mackinnon with its headquarters being established in Mombasa.

\textsuperscript{23} Germany used German East Africa Company (GEACo).


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There were problems with IBEA Co., especially inefficiency in business\textsuperscript{25} and incompetence in political administration or constitutional governance.\textsuperscript{26}

In 1895, the Imperial British East Africa Company (IBEACo) which was a commercial association founded to develop African trade in the areas controlled by the British colonial power, surrendered its management of the Sultan’s dominions.\textsuperscript{27} This paved way for the British Government to take over. Britain declared (what would later become Kenya) an East African Protectorate on June 15, 1895 with its headquarters in Mombasa. When were the headquarters transferred to Machakos? Nairobi (or Enkare Nailobi)?\textsuperscript{28} In 1920, the East African Protectorate was renamed the Kenya Colony and Protectorate.

What were the incidents and consequences of declaration of protectorate and colony over Kenya? Taxes were imposed on the African population particularly the hut tax\textsuperscript{29} and poll tax.\textsuperscript{30} Colonial land alienation,\textsuperscript{31} labour regulation,\textsuperscript{32} and trade regulation\textsuperscript{33} were introduced.

Colonialism also delineated international (or territorial) and internal borders\textsuperscript{34} among African peoples. The internal or intra-territorial borders established exclusive districts or zones. Significantly, the borders prohibited or reduced migration among and within tribes, clusters, or clans…..

\section*{2.3 Peopling Pre-colonial Kenya and Africa on the eve of Anglo-French and German colonialism}

Before British (especially English), French, German, Portuguese and Spanish colonization, the Kenyan and African land mass consisted of largely a cephalous or decentralized groups.\textsuperscript{35} They

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{25} …. \\
\item \textsuperscript{26} …. \\
\item \textsuperscript{27} Douglas Kiereini, \textit{ibid.} \\
\item \textsuperscript{28} Cf. B.A. Ogot & Madara Ogot (2020.) \textit{The History of Nairobi 1899-2012: From a Railway Camp and Supply Depot to a World-Class African Metropolis}, Anyange Press. \\
\item \textsuperscript{29} Attiya Waris (2007) “Taxation Without principles: A historical Analysis of the Kenyan taxation system,” \textit{Kenya Law Review}. \\
\item \textsuperscript{31} …. \\
\item \textsuperscript{32} …. \\
\item \textsuperscript{33} …. \\
\item \textsuperscript{34} See Bethwell Allan Ogot (2009) \textit{A History of the Luo-Speaking Peoples of Eastern Africa}, Anyange Press. \\
\item \textsuperscript{35} See Annex…on map of Africa. European colonial territories…and dates of independence…..
\end{enumerate}
\end{footnotesize}
were heterogeneous internally and externally. Only a few groups like the Wanga of Western Kenya had fairly centralized or cephalous administration or governments in the form of chiefs.\footnote{36 See John Lonsdale, “The conquest state…” in WR Ochieng’ (ed) \textit{A Modern History of Kenya}; Lonsdale, \textit{ibid}, in E.S. Atieno Odhiambo & John Lonsdale (eds) (2003) \textit{Mau Mau and Nationalism: Authority, Arms, and Narration}, James Currey, Oxford, EAEP, Nairobi, Ohio UP, Athens.}

The British were largely centralized especially following the Norman Conquest of 1066.\footnote{37 Cf. British invention of (paramount) chiefs in Kenya, and Uganda Nigeria, Ghana, and other West African States were legally different as they had Kingdoms like Mali, Songhai, Buganda, Bunyoro-Kitara, Toro…} They applied the “dual mandate”\footnote{38 Christopher Daniell (2003) \textit{From Norman Conquest to Magna Carta}, London Publishers, UK; David Bates (1982) \textit{Normandy Before 1066}, Longman Publishers, London, 122-123.} or “indirect rule”\footnote{39 …. See Annex on map of pre-colonial Kenya tribes and post colonial Kenyan tribes} due to pragmatism and as a condescending attitude to Kenyans and Africans. This local or home rule was neither decentralized nor autochthonous. The British did at least three (3) things on centralisation that they were familiar with. First, the British exaggerated centralization where it was limited as among the Wanga.\footnote{40 Albert Ochieng, William (1976) “The transformation of a Bantu settlement into a Luo ruothdom. A case study of the evolution of the Yimbo community in Nyanza up to AD 1900,” \textit{6 Hadith}, 44-64; William Robert Ochieng (1975) \textit{A History of the Kadimo Chiefdom of Yimbo in Western Kenya}, No. 2. East African Literature Bureau.} Second, the British used the Wanga, Baganda and other tribes, clusters or clans to conquer or to lord it over other tribes like Luo and Acholi, respectively.\footnote{41 … Godwin Rapando Murunga (1998) “The evolution of Mumias settlement into an urban centre to circa 1940,” \textit{Geography}, at \href{https://dumas.ccsd.cnrs.fr/dumas-01302363/document}{https://dumas.ccsd.cnrs.fr/dumas-01302363/document} (accessed February 16, 2021).} Third, the British constructed chiefdoms (or \textit{ruothdoms})\footnote{42 Cite Prof Kenneth Dike….; JC Anene (2009) \textit{Southern Nigeria in Transition, 1885-1906}, in \textit{Theory and Practice in a Colonial Protectorate}, Cambridge University Press. The Igbo Nation in West Africa is regarded to be an acephalous or egalitarian society.} and kingdoms where none existed, as among the Luo and Igbo of Nigeria.\footnote{43 See Toyin Falola and E.S. Atieno Odhiambo (eds) (2002) \textit{The Challenges of History and Leadership in Africa: the Essays of Bethwell Alan Ogot}, Africa World Press, Trenton, New Jersey & Asmara; Chinua Achebe (2012) \textit{There was Country: A Personal History of Biafra}, Penguin Books, New York, \textit{ibid}.} Remarkably, the following African states consisted of cephalous and acephalous communities as indicated: Nigeria, Ghana, Uganda, Tanzania, the Democratic Republic of the Congo (DRC), Cameroon, Zimbabwe, and South Africa.\footnote{44 to cite Prof Kenneth Dike….; JC Anene (2009) \textit{Southern Nigeria in Transition, 1885-1906}, in \textit{Theory and Practice in a Colonial Protectorate}, Cambridge University Press. The Igbo Nation in West Africa is regarded to be an acephalous or egalitarian society.}
All Kenyan and African communities\textsuperscript{53} had forms of economic, political, technological\textsuperscript{54} and socio-cultural organization that were closely related to the ecology,\textsuperscript{55} the climate and the organization of their neighbours. Thus the following Kenyan tribes largely practised the economic activities indicated after their names: Kikuyu (farmers); Kamba (long distance traders); Luhya (farmers); Luo (agriculture, fisher folk); Kalenjin (pastoralists), Meru (farmers); Kisii (farmers), MijiKenda and Coastals generally (traders...), and Maasai, Turkana, Samburu and Somali (pastoralists).\textsuperscript{56}

The various forms of leadership, administration, management and governance were organized around age sets, special skills, talents, or gifts, and related to the relevant economic, political, social and cultural activities.\textsuperscript{57} For instance, there were economic, political and religious or spiritual leaders.\textsuperscript{58}

\textbf{2.4 Imposition of Colonial Law and Administration in Kenya and Africa}\textsuperscript{59}

In about 1890, Britain faced the question whether it could exercise sovereign authority, apply, its laws, annex territory, ordinate land and impose taxes in a protectorate. The extant imperial law was that Britain could only have such jurisdiction in colonies.\textsuperscript{60} But what were the differences in

\textsuperscript{52} Zulu, Xhosa, Sotho.....
\textsuperscript{53} Annex on list of the 42 (43? 45?), 75? 109? Kenyan tribes and sub-tribes...Also on composition of the population: men, women, youth, elderly; citizens, foreigners....
\textsuperscript{54} See Annex on technological map of Kenya-historical and contemporary...
\textsuperscript{57} Cf. village elders including \textit{jodong gweng’} (Luo), Kiama (Kikuyu), Njuri Ncheke (Meru); specialities including spiritual and political or administrative leadership like Orkoiyot Nandi....; youth groups such as Maasai morans, women groups....
\textsuperscript{59} [Details in 1st paras to be relocated]....
\textsuperscript{60} ....
African and international law among protectorate, dominion and colony?61 There had been similar situations in Africa62 before Europe invaded.

Sovereignty is related to subjecting the people to English law; annexing or alienating their land; and imposing tax on the people.63

However, the pre 1890 position was revised to the effect that the British monarch could exercise sovereignty whether in a colony, dominion or protectorate.64

There are three main issues on the imposition of colonial law in Kenya and Africa. First, what factors weakened Kenya and African tribes and (generally) predisposed them for colonization? Should all Kenyan African ancestors be blamed for allowing or suffering colonialism?65 There were natural disasters, civil wars, clan or succession disputes. For instance, the Maasai, the century “Lords of East Africa,” were weakened from the last quarter of the 19th century by droughts and disease which decimated their cattle – their socio-economic and cultural, livelihood and infrastructure. There were also inter clan wars among the Purko, …. and other clans; and the succession disputes between Lenana and Sendeyo, among others.66

Second, how was colonial law imposed? internalized and adapted?67

Third, what were the strengths and allure of the colonizing British, French and German civilisation or culture law, education, religion, clothes… Education provided opportunity to read, write and tackle arithmetic. It led to religious clerical vocational jobs. What did colonial

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62 See, for instance, the practice among powerful Kingdoms in East Africa (especially Uganda), West, South and Central Africa….. See…
63 Cf. Chapters 2, 3, and Chapter 4 of CODRALKA 1, debates on popular; state sovereignty; external and internal sovereignty. The debate in ICC; in Munya case (County Government of Meru & Another v. District Land Adjudication and Settlement Officer Tigania East Sub-County & 18 Others [2018] eKLR )…By sovereignty here we mean, that right and power that a governing body in a state or county has over its polity without influence by external powers. It is the right to self/internal government.
Colonial Christianity taught submission to divide British and civil authorities. It taught ascetism and capitalism; happy are those who are poor, you will inherit the Kingdom of God (the Bible was selectively Whiteman’s wisdom). Christianity as preached by the missionaries had some liberating aspects, for instance validation of Osu untouchables among the Igbo.

In such a context, poet Charles Khaminwa criticizes the former Senegalese poet President Leopold Sedar Senghor for romanticizing African traditions and memory. Senghor was pro-French, politically and culturally, hence “near white accents….” Khaminwa writes:

“Do not remind me of things that are gone
Nor of the spendour that was in yesteryears;
Do not sing of my mother’s laughters
Nor of the sensual songs resounding through their tears;
Do not dream of the ancestral hearth
Nor of the piety of communicating ancients;
Do not wake the dead from their wakeful slumber
In the earth,
Nor delve into the base of glories gone:
But look to the unmended rafters of our bondage being.
Let Shaka alone,
And let Sundiata be,
And Samori
And Sumanguru;
Do not utter their immortal names,
For their greatness my enslavements shames;
Do not proclaim your blackness,
For who shall hear your near white accents?
Sing not of the beauty of the sons of Ham,
For this much I know, none can my pride harm
But tell me how to do,
Tell me how to be
Tell me how to become,
Dance to us with your actions,
And sing to us with your actions
That, seeing, we may blend
The noumenal

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69 Cf. Max Weber, The Protestant that Ethic and the Spirit (or Rise) of Capitalism….
With the phenomenal”71

Until 1895 when the power of administration over the modern day Uganda was transferred to the Foreign Office, IBEA Co. still administered the Uganda Protectorate.72

2.5 Kenya Territory and External Borders73

Article 5 of the Constitution of Kenya 2010 states: “Kenya consists of the territory and territorial waters comprising Kenya on the effective date [27/8/2010], and any additional territory and territorial waters as defined by an Act of Parliament.”74

How was Kenya constituted territorially, in terms of its land mass, frontiers, and international borders and boundaries generally? How have boundary disputes with Kenya’s neighbours helped constitute Kenya territorially, normatively and demographically?75

2.5.1 The Uganda and Kenya Railway: The Lunatic Express 1896-190176

Britain embarked on building the Uganda Railway from Mombasa in 1896 as a means of securing control over the Suez Canal.77 Through the device of controlling the source of the Nile (believed to be in Uganda), Britain hoped to control the Suez Canal and the shortest sea route to the near East.78 The railway reached Enkare Nailobi in 1899. The construction paused before embarking on the difficult terrain including the escarpment. The railway reached Port Florence (Kisumu) in Uganda Protectorate in 1901.

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72 ibid. What “treaties” did British agents sign in the East African Protectorate? What treaties did German agents sign with African “chiefs” and leaders in Tanganyika? What was the role of Karl Peters? How did the German East Africa Co. (GEACo) perform in Tanganyika? What was the Maji Maji (1904-07) war of national liberation about? Who were its leaders? Cite constitutional and political historians and poets.
73 Annex…on “Kenyan” borders…1884 to 2020…
75 Some of the boundary disputes relate to Sudan, Uganda (Up to Rift Valley, 1976; Migingo in L. Victoria); Somalia…
77 Controlling the Suez Canal was crucial to both the British and Europeans
2.5.2 The Kenya–Uganda Border and the Constitutional Construction of Kenya

Administering the railway was expensive and inconvenient given that it was under two different protectorates at a time of limited administrative cooperation and communication. Moreover, British tax payers were keen that the railway pays for itself.79

In 1902, the border between the Uganda Protectorate and East African Protectorate was moved westwards to where it is today in order to place the railway under one administration and thereby secure economic and political efficiency.

This partly explains the Kenya-Uganda dispute between Kenyatta 1 (Kamaliza or K+) and Amin in 1976.80 President Idi Amin had claimed that what was formerly known as the Western and Nyanza provinces in their entirety and some parts of the Rift Valley all the way up to Naivasha and Lake Turkana (then Lake Rudolf) were initially Ugandan territory. And that the territory had been transferred to Kenya in an agreement signed by the British colonial secretary Herbert Asquith, for purposes of administration.81

The rift between Kenyatta and Amin was also fuelled by the Israeli incident in Entebbe. Israeli nationals had been held hostage by Palestinian militia in Entebbe and Kenyatta (through the then Attorney-General, Charles Njonjo and the then Minister of Agriculture Bruce Mackenzie) had allowed the Israeli army to overfly Kenya to Entebbe and also to Jomo Kenyatta International Airport, Nairobi to refuel….82

In the 2010s, Museveni made a claim on Migingo Island in Lake Victoria.83 This issue simmered over the years with a lot of suffering for the Kenyans in that island.84 Yet the colonial records in

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81 Idi Amin argued that some parts of Uganda had been transferred to Kenya in an agreement in 1902, and to Sudana in an agreement signed in 1914. In his words, he said that “God was not a fool to have allocated this land to Uganda,”… cf. Wafula Okumu (2010) “Resources and border disputes in Eastern Africa,” Journal of Eastern African Studies…
83 Response by Kenyatta II..Raila...According to Article 1 of the Montevideo Convention (1933), the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states. See Chapters 1, 3, and 4 of Ben Sihanya (forthcoming 2021) Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Bureaucracy and Administrative Justice in Kenya (Revised Teaching Notes and Research Materials on Constitutional Law and Comparative Constitutional Law by Ben Sihanya 2004-2021, Sihanya Mentoring and Prof Ben Sihanya Advocates; Ben Sihanya (forthcoming 2021) “Typology of Constitutions, States and Governments in Kenya and Africa: Sovereignty, Constitutional Democracy and Revolutions in S. Africa,
Kampala, Nairobi and London are clear that Migingo is Kenya. Moreover, Uganda can only dispute colonial borders raising the issues at the International Court of Justice (ICJ) or the United Nations, not through military intervention, sabre rattling, or political rhetoric from President Yoweri Museveni. Did this border problem simmer for so long because of internal ethnicization of the state whereby President Kibaki and President Kenyatta did not stop Museveni’s aggressive expansionism against the Luo....

2.6 The 16 km Coastal Strip of Kenya

The coastal land questions are all or partly associated with the awarding of sovereign rights over the (ten mile) sixteen (16) kilometre strip at the Coast to the Sultan by the British and Germans who were fighting for the control of East Africa. The Sultan’s subject held private property rights over the land and secluded the indigenous communities especially those who were not Muslims and were not his subjects.⁸⁵

At independence in 1963, the 16km Coastal Strip was transferred to Kenyan sovereignty through an agreement among the Sultan Jamshid bin Abdullah of Zanzibar,⁸⁶ the British Queen Elizabeth II and Jomo Kenyatta. Kenyatta promoted the infringement of the indigenous coastal people’s rights to land by taking sides with the British Government and the Sultan and later allocating part of the land to his family, cronies and his Kikuyu co ethnic generally.

The coastal land problem has also been historically complicated by the Mazrui land claims…⁸⁷

As recorded by Karuti Kanyinga:

“At the time of transition to independence, the British government entered into a pre-independence agreement with the Kenyatta administration and the Sultan regarding control of land in Mwambao. Kenyatta conceded to the Sultan’s demands for recognition of private land rights on the Coast and promised to adjudicate and register such rights where they were not adjudicated, notwithstanding the negated land rights of the indigenous groups. Both the agreement and negotiations over independence concluded the process of creating the squatter


⁸⁶ Zanzibar was granted independence by the UK in December 1963 and became a constitutional monarchy under Sultan Jamshid bin Abdullah. He was overthrown a month later during the Zanzibar revolution 1964.

⁸⁷ See Mazrui Lands Trust Act, (Cap 289) of 1914.
phomenon: they transformed the Mijikenda into squatters or tenants of the Arabs and the Swahili landowners.  

Jomo Kenyatta complicated the already complex coastal land question. There are at least four permutations or nuances to the coastal land question: Lamu and Mpeketoni, Taita Taveta, Kwale, and the Mombasa and beach land or sea front generally.

First, Jomo Kenyatta facilitated the settlement of Mpeketoni (or Mpe katoni, give him or her the carton in Swahili?) by the Kikuyu in the Kenyatta Settlement Scheme. Second, in Taita Taveta, Kenyatta acquired large chunks of land that measured at least 30,000 acres in 2013. And in spite of massive landlessness among the Taita where a large population live as squatters or spontaneous settlers in their ancestral land.

Third, in Mombasa and at seafront generally long serving Coast Provincial Commissioner (PC) Eliud Mahihu, a Kikuyu and Kenyatta crony facilitated the allocation of land to the Kenyatta Family and Kikuyus. Indeed the only “public” beaches are appropriately named Kenyatta Beach and Mama Ngina Water Front. Of course some of the initial beneficiaries sold the beach plots. President Daniel arap Moi, President Mwai Kibaki, and President Uhuru Kenyatta II followed the legacy of President Jomo Kenyatta in allocating or retaining the Kikuyu tribal domination over coastal land and business or economic opportunity…. These and other injustices have gave rise to the quest for secession or devolution.

2.7 Kenya-Somalia and Kenya-Ethiopia Border 1926, 1963, 2019, 2020 and Beyond

The creation of the boundary between Kenya and Ethiopia was completed in 1903. In 1926, most of the present North Eastern counties or region (formerly North Eastern Province (NEP)) were brought under Kenya. It was previously known as the Northern Frontier District (NFD).

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89 Ibid.
91 It used to be called Mama Ngina Drive… Ibid.
93 These include Garissa, Wajir, and Mandera Counties (formerly districts).
95 The Kenya-Somali border war was derogatorily and inaccurately called “shifta” war in the 1960s. There has been a border dispute between Kenya and Somalia over whether a straight line should be used or a diagonal line in demarcating the over 100,000 square kilometres disputed area or sea boundary between the two countries. Discuss the claims, the response……This dispute was submitted to the International Court of Justice.
territory was carved out of the Jubaland region of present-day southern Somalia during the colonial period.  

There have been a series of disputes regarding the Kenya-Somalia border since the pre-colonial era. The issue was revisited in 2009 when the two Governments signed a memorandum of understanding (MOU) that recognized Kenya’s claim under international law, but the MoU was later rejected by the Somalia Parliament.

The dispute intensified in August 2014 when Somalia sued Kenya at the International Court of Justice for unlawful operations in her alleged maritime territory. The disputed water is a triangular patch created by projecting the Kenya-Somali border eastwards. It measures about 100,000 square kilometers.

In October 2015, Kenya challenged the jurisdiction of the International Court of Justice (ICJ) at the Hague to hear the case as well as its admissibility. The ICJ then held the first hearing on September 19 to September 20, 2016 of Kenya’s petition. In February 2017, it quashed Kenya’s plea, affirming its jurisdiction to hear the case. In December 2018, Kenya filed a Counter-Memorial, a response against Somalia’s claims. As at this writing in 2019, the disputes is still pending before ICJ, with strained diplomatic relations between the two countries.  

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99 On pacific settlement of disputes, see UN Charter 1945, Statute of the ICJ… AU Constitutive Acts…  

group of Kenyans went to court to have the government compelled not to participate in the case at ICJ. They argued that the case may lead to alteration of Kenya’s territory without a referendum as required by the Constitution.\textsuperscript{102} In their view, the matter should be solved amicably.\textsuperscript{103}

\subsection*{2.8 Kenya under colonialism}

The main impact of colonial status was the loss of sovereignty by the Kenyan people and territory.

What did it mean for Kenya to be colony in the period? (1895-1920, 1920-1963 and 1895-1963 generally?): economic, political social, cultural, technological and environmental?

\subsection*{2.8.1 Loss of Kenyan people’s sovereignty, dignity and self determination}

Significantly, the people of Kenya had rights, liberties, and freedoms as well as duties or objectives. The British now had responsibility for administration and for protecting all within the colony. This included Africans and Arabs who were also “subjects” of the crown; British citizens; other settlers as well as Indians and other immigrants.\textsuperscript{104} In transnational or international law the British had the responsibility of representing Kenya’s interests, for instance, through defence or the borders, trade, sporting activities, and treaties. But the British focused on claiming and enjoying liberties, rights and privileges…..

The colonial administration in Kenya faced discontent due to threats to rights and freedoms of the African majority, and especially life, liberty, land and related property interests.\textsuperscript{105}

\subsection*{2.8.2 Life, Security related human rights in colonial Kenya}

Kenyans lost lives and limbs in colonial Kenya even though the applicable English, European, universal and even colonial law protected the right to life and security. Kenyans were killed on a forthcoming. There are claims that some Kenyan officials discovered that they could benefit from a KES 3B litigation fund.

\textsuperscript{102} Art. 255 Constitution of Kenya 2010


\textsuperscript{105} Discuss poll tax, hut tax……
whim by the “masters.” Numerous Kenyans died in British wars including conquest expeditions, World War I, World War II, in the Mau Mau rebellion.

2.8.3 Liberty and movement in colonial Kenya
Personal liberty was severely constrained in colonial Kenya. Freedom of conscience, opinion, freedom of expression, freedom of religion, freedom of association, freedom of assembly, freedom of movement….

Some of the draconian regulations governed kipande; passes, labour and even created reserves for Africans. There were exclusive European or “White Highlands,” Asian quotas (Southlands) for settlement, business, Asians banned or restrained from accessing agricultural land. Business premises were also segregated…..

2.8.4 Taxation in colonial Kenya
There were also concerns regarding taxation. The colonial government imposed tax on Africans who were insufficiently represented if at all in the Colonial Government. They were neither consulted before the imposition of such taxes and at the same time, their interests were not served when the funds collected were used by the Government. What was the justification for taxation? Revenue collection to pay for services as a measure of civic responsibility; to entice Africans to be employed by whites…. What were the main taxes in colonial Kenya? Poll and hut taxes… meaning? What was the currency in which taxes were paid during the various phases of the colonial period?

How did Africans respond to taxation? Through evasion? Avoidance?

What were the methods?

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107 These included the 1899 killing of Luos during the Uyoma-Sakwa-Seme conquests…

108 July 28, 1914 - November 11, 1918…

109 September 1, 1939- September 2, 1945…

110 See also Chapter 2… below.

111 Article 32 Constitution of Kenya, 2010…

112 What was Kipande? form? Its role in colour bar (only for Africans), freedom of movement, (zones, reserve, resaf… cf. visa, passport… CMG and CMG’s wife… reasons to travel…) labour…

113 Nyatiti on passes to go to Nairobi,…

114 See Ochieng & Ogot….destroying houses, hiding in the lake, on trees…..
2.8.5 Labour in Colonial Kenya
Kenya consisted of largely contended peasants. The British thus introduced inducement for contract labour, forced labour, taxes as incentives, criminalized labour relations….

“Nyanza”, “Western” and “Eastern” counties which comprise mainly the Luo, Luhya, Kisii and Kamba were converted into labour reserves or camps and people were forcibly recruited to work for the White settlers like Lord “Dalmia” (Delamere), Lord Egerton, Fr Egerton Castle, Njoro…. These and other Kenya Africans were also employed in the two worlds was and during the Mau Mau revolt…. Then the British called even 50 year old African men house boy, shamba boy…. following Albert Schweitzer’s racist comment that “the African may be my brother but younger by 400 years…” or that African grownups were like 14 year old Brits? Joseph John Kamotho could say that some people were only cooks and watchmen… Thus, contented peasants were turned into proletariats.

Significantly, the colonial Government was extracting economy’s resources, exploiting labour, and oppressing Kenyans politically. It denied Africans freedoms and liberties including participation or representation. There was poor governance….

2.8.6 The colonial land question in Kenya
The British continued to alienate land and changed land tenure and land law to especially in 1902, 1904, 1908, 1915, 1930, 1938 when a distinction between the Crown land that private titles could be issued against, and the native reserves for Africans, was made…. To what effect? They introduced alien concepts like rights, bona vacantia, terra nullius, tenants at will of the Crown…. Police powers eminent domain…

115 ESAO….Nyong’o…Apolo Njonjo……
117 The Delamare dynasty has been economically powerful into the 2010s.
119 Isaka Wainaina wa Gathomo & Another v. Murito wa Indagara & Others, Colony and Protectorate of Kenya, Law Reports, Vol. IX, Part II (1923), 102. It was held that where natives occupied Crown Land, they became tenants at will of the Crown. …
Then African political and economy process led to agrarian reforms, especially under the Sir Morris Carter Land Commission, 1934, The RJM Swynnerton Plan 1954…. What was the East African Royal Commission about?120

2.8.6.1 Anglo-Maasai Land Agreements 1904, 1911
The British alienation of land and changes to land tenure law, land and agrarian law has dire consequences among the Maasai, Coastals, Kalenjin, Kikuyu and other Kenya people. In 1904 and 1911 the British signed agreements with the Maasai, regarding the alienation of Maasai land and movement of the Maasai to the Laikipia area.121 Discuss – Ole Njogo case Lenana represented the Maasai in the agreement. Did he have capacity? Duration of the agreement? Consideration?122 What was the quid pro quo? Conditionally? Dispute resolution?

The Maasai lost land and suffered health, ecological, economic, social and cultural problems and constraints as a result of the disruption.123 The Maasai land question was a major issue at the Lancaster House conference (1960-63)124 and at the Bomas of Kenya Constitutional Review negotiations (2002-2005)125… In 2004, Maasai demonstrated in Laikipia, demanding lost land on the centenary of the first Anglo-Maasai agreement…. The Kibaki administration through Land Minister Amos Kimunya and security agencies beat up the Maasai.126…The black and a few White settlers had replaced the original White settlers….127

120 See Chapter 4 on Constitutional Values, Principles, Policies and Politics in Kenya and Africa: Agency and Structure
127 …Ibid.
The Maasai land question would re-emerge decades later, as seen in the Maasai protests in 2013 in Narok against further encroachment on their land. The rate of land grabbing in Kajiado and Narok will have far reaching implications. Remarkably, the Kajiado County Government launched a new land policy seen as a move to protect the county from invaders.128 The Maasai in the future may constitute the economic and political minority in the only two counties that were largely Maasai and this may result in the Maasai being unrepresented or under-represented in the elective posts of the state.129 This is also the case in Lamu County where the Kikuyu have a large population and dominate economically and politically.

In primary school, we had a song during football matches: “Lenana, Lenana, Agreementa; there was a young Maasai, Agreementa; 1940, Agreementa…”130

2.8.6.2 The lost Kalenjin lands in colonial and post colonial Kenya
The Kalenjin, the Maasai, Kikuyu and coastal continued to lose land.131

The Kalenjin land especially the Nandi and Kipsigis land question is largely traceable to British colonialism. The British introduced a new system of land tenure and administration among the Kalenjins. …These partly subsequently led to the declaration by Prime Minister Jomo Kenyatta in 1963 that the land of Kenya belonged to all Kenyans and that all citizens had rights to live anywhere.132

Kalenjin have argued that they lost a lot of land in the Rift Valley to the Kikuyus before and after independence. Kenyatta and the outgoing British Government adopted at least four strategies and tactics to settle the Kikuyu in the Rift Valley, and especially Kalenjin land. First, the British persuaded Moi, a Kalenjin nationalist and later leader of the Kenya African Democratic Union (KADU) to work with Kenyatta as part of the land transfer and Kikuyu and White settlement.133

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130 …
131 The lost Kalenjin lands in colonial Kenya: Discuss. The lost Kikuyu land in colonial Kenya: Discuss
132 A running theme has always been that while this is constitutionally and historically supported, how one acquires the land is crucial. Moreover, Kenyans have argued that Kiambu, Murang’a, Nyeri, Nyandarua, and Kirinyaga should be equally available for non-Kikuyu settlements.
Second, the British and Kenyatta negotiated loans from the British Government and the World Bank to buy back the settler farms in the “White Highlands.”

Third, the Kenyatta Government allocated most of the land to Kikuyus who had been deprived of their land through at least three maneuvers. First, through Mau Mau pogroms. Second, through land adjudication, consolidation and registration following the Swnnerton Plan in 1954. And third, through acquisition of Kikuyu land by Kenyatta and the Kikuyu oligarchs, plutocrats, arch acquirers or Kenyatta affiliates or the big boys or 15 families of Kikuyu.

Fourth, the Kikuyu bought land through Government subsidised land buying companies through patronage by Kenyatta and Kikuyu politicians, business and bureaucratic leaders in Central Kenya and in the “Kikuyu and diaspora,” especially the whole Highlands. In the meantime, Rift Valley also attracted other tribes as settlers or workers, including the Kisii, Luhya and Luo. As a result, Kalenjins have had major conflicts related to land, opportunity and other socio-economic resources with other tribes living in the Rift Valley since independence. But the most recurrent dispute or conflict is that between the Kikuyu and Kalenjin.

2.8.6.3 The lost Kikuyu land in colonial Kenya

The Kikuyu land question is mainly attributable to the steps taken by Kenyatta after independence in dispossessing the Kikuyu in Central Province and settling his co-ethnics or tribesmen (“my people”) out Kikuyu land, outside the former Central Province. Presidents Jomo Kenyatta and Daniel Arap Moi used their powers to make land and other national or Government resources and jobs accessible to members of their own ethnic groups, and especially families, political and business affiliates and cronies.

The Kikuyu living in the Rift Valley have had historical land and business related conflicts with the Kalenjins and the Maasai, while those living at the Coast have had conflicts with the native
coastal tribes. And some Kikuyu have apparently claimed Nairobi as part of post independence Kikuyu domination or colonialism, yet it belongs to all Kenyans.

2.9 Decolonisation in Kenya and Africa

The decolonisation of Kenya began in earnest in about 1940. Two issues. First, is the problematique of the dualism between resistant and collaborating tribes. Second, according to the late history of Kenya Professor ES Atieno Odhiambo (ESAO), no fixed date can be ascribed to decolonization. Kenyans were always resisting or collaborating or both, depending on the context. For instance, the Kikuyu cooperated through Waiyaki wa Hinga. Then resisted under Harry Thuku. Then cooperated under Thuku, Senior Chief Waruhiu wa Kungu, and Josiah Njonjo.

The Kikuyu collaborated and resisted at the same time under Senior Chief Koinange wa Mbiyu, and Jomo Kenyatta. Luo, Kalenjin, Luhya, Kisii also resisted and/or cooperated depending on the issues.

The three main forms of decolonization were: First, peaceful negotiation and constitutional discussions. These focused on freeing or liberating Kenya. These were through memoranda, for example petitioning for land rights and against colonial instrument of identification (kipande). This is part of the constitutionalists’ perspective in the Kenyan struggles for independence constitution includes Kenyatta, Achieng’ Oneko, TJ Mboya Oginga Odinga Achieng’ Oneko.

Second, militant and violent resistance included raids on colonial establishments, killing of colonial administrators or their supporters, collaborators, supporters and sympathisers and disabling colonial installations like railways.

Some of the more famous militant leaders in the colonial period included Me Katilili wa Menza, Nandi Warriors and Koitailel Arap Samoei, Muindi Mbingu, Elijah Masinde of Dini ya Musambwa, Dedan Kimathi, Stanley Mathenge (Mau Mau). …

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141 Nairobi was initially a Maasai settlement, Enkare Nairobi. Over time, Nairobi has expanded into Kajiado, Kiambu and Machakos. See Chapter 26 on Amending the Constitution in Kenya Post 2017.
142 …to quote ESAO in Ogot and Ochieng Decolonization and Independence.
144 British colonial injunction…..
145 See Koinange wa Mbiyu v. R on planting coffee by Africans.
146 Cf. Otenyo, Chief Nyanzusi.
The third form was a mix of the two. For instance, most communities generally collaborated and resisted before, during and after the two World Wars, 1914-18; 1939-45. The First World War was fought among the Germans, Austria-Hungary, Bulgaria and the Ottoman Empire on the one hand, and the Great Britain, France, Russia, Italy, Romania, Japan and the United States (the Allied Powers) on the other. Kenya, Nigeria, Uganda, Tanzania, Ivory Coast (Cote d’Ivoire)…were involved in the war directly and indirectly on either side. It was initially called the Great War; the war to end all wars. Did it? Significantly, Germany with its African possessions or protectorates including Tanzania (to the British) and South West Africa (Namibia) to South Africa(?)

What was the Second World War about? Immediate and remote causes?

It has been argued that both the First and Second “World Wars” contributed significantly to the upsurge of tribal or ethnic and territorial African nationalism in Kenya, Nigeria, Uganda and South Africa. It is as an upsurge rather than an emergence of African nationalism as argued by Western scholars, because nationalism among Africans and Kenyans in this case was always extant and antedated colonialism. The major difference was its territorial scope once colonialism and confined more tribes within larger territories…..

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149 Koitalel Arap Samoei was an Orkoiyot (prophet), the supreme chief of the Nandi people. He led the Nandi resistance against British rule, specifically leading the opposition to the construction of the railway.
150 Muindi Mbingu led the Kamba people in the 1930s in resisting colonial rule, although he would later be murdered at the height of the State of Emergency in 1953 for collaborating with colonialists in hunting down Mau Mau.
151 Elijah Masinde also led a number of localised defiance campaigns against the colonial authorities, and was imprisoned many times from 1944. He founded the religious movement, Dini ya Musambwa.
152 Dedan Kimathi was the senior military and spiritual leader of the Mau Mau Uprising.
155 Who were the aggressors? What was appeasement about? Who were the warring states on both sides? Which side did the following countries fight on? Kenya, S. Africa, Nigeria, Cameroon, Senegal, Uganda? What were the key terms of the armistice or peace treaty? Cf. victor’s justice. How did World War II relate to the Cold War in terms of cause, execution and effect of World War I. Cf. DN Pritt’s pro-sociologist analysis…..were the soviets always as selfless in World War II? Portrayed by some?
157 Ibid.
We adopt a three-pronged approach to conceptualizing and problematizing African nationalism. First, by African nationalism, we mean that sense of shared identity common among Africans owing to shared historical experiences such as (pre-colonial expression, cultural norms, racial origins, and traditional social institutions. Second, it describes the shared liking and affinity by a people as regards their origin. Significantly, this African nationalism was always present among the Africans even before the coming of the colonialists as evident in the organized way of life of African communities that shared great identity and defended their territorial and cultural integrity.

Some have argued that Africans learnt about warfare from these wars and used it against colonialism.

Taban Lo Liyong, a Sudanese literary critic and poet, characterized this state of affairs poetically. He credited three (3) white women with the renewed struggle for independence and nationalism among Africans, namely Fredrick Nietsche, Adolf Hitler and Karl Marx. Liyong was simply exhorting Nietsche for coming up with the idea of the superman or the master race, Hitler for putting into action the idea of Nietsche in Nazi Germany based on a master race ideology albeit in the most brutal of means, and Marx for fuelling the idea of emancipation of the masses from economic exploitation by other human beings in the upper social class.

Third, ....

What is not in doubt is that many Kenyans who went to the wars became more politically, socially, technology, and culturally conscious. They became more conscious about the problem of racism or kalaba (colour bar) and the desire for economic, political social and cultural freedom. They learnt that the British were also vulnerable in war. They had behaved as if they were invincible. The two World Wars helped in the deconstruction of the lie and myth that the British were invincible.

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159 To summarise this paragraph into a three pronged typology and cross reference....
160 F. Cooper (1994) “Conflict and connection: Rethinking colonial African history,” American Historical Review, 1516-1545....
161 Cite historians, political scientists.....
163 Source...... See Michael S. Rosenwald (2017) “‘Then they came for me’: A Hitler supporter’s haunting warning has a complicated history,” Washington Post, 19/8/2017, at https://www.washingtonpost.com/news/retropolis/wp/2017/08/19/then-they-came-for-me-a-hitler-supporters-haunting-warning-has-a-complicated-history/ (accessed October 6, 2020); Martin Pastor Niemoller in his speech said “First they came for the Socialists, and I did not speak out/ because I was not a socialist/ then they came for the trade unionists, and I did not speak out because I was not a trade unionist/ Then they came for the Jew, and I did not speak out: because I was not a Jew/ Then they came for me, and there was no one left to speak out for me.”
164 …see also Chapter 5 (on Theory and Methodology of Comparative Constitutional and Administrative Law in Kenya and Africa: Law and Sustainable Development) in Ben Sihanya (2021) CODRALKA 1
White man was superior, which also acted as a huge psychological boost for the African. The Africans also internalized the British rhetoric fighting freedom against fascism including Nazism, yet Africans were not free in Kenya.

The Africans also learnt war techniques and technologies in the two wars…..

2.10 The 1952 Conjuncture in Kenya

In 1952, the young and restless group of militants that had been circumcised in 1940 (the Group of 40s or the “Anake A 40”) took up arms and went to Mt Kenya and the Aberdare, among other forests. Mau Mau struggle was marked by, among others, the declaration of a State of Emergency by Governor Evelyn Baring also the same day that the Kapenguria Six were arrested (October 20, 1952). Then followed the capture and hanging of Field Marshall Dedan Kimathi wa Waciuri (1956; 18/3/1957). This followed his sham trial in R. v. Kimathi wa Waciuri. Numerous people suffered death, injury, torture, restriction of liberty, detention without trial, concentration camps, destruction of and damage to property.

By 1958, rural Kikuyu and Embu were organizing once more under a new secret society known as Kiama Kia Muingi (Society or Council of the People) opposing land consolidation and representing a continued thread of support of Mau Mau. Significantly, the argument that Kenya’s Constitution was an entirely negotiated instrument is not accurate. Nor is the argument that militancy alone brought independence. The literal interpretation of Rudyard Kipling’s

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164 Ndabaniingi Sithole (1968) African Nationalism, Oxford University Press, New York, (2nd Edition) , at 47. The author notes, “This discovery that the white men also bled, were scared and got killed in the world wars, for indeed it was an eye-opening discovery, had a revolutionizing psychological impact on the African.” (emphasis mine). Cf “the rich also cry” a TV series in the early 1990s....

165 Some have contested this, for instance Ngugi wa Thiong’o and Micere Gitahae Mugo (1977) The Trial of Dedan Kimathi (a play), Pearson Education.

166 Legal instrument declaring the state of emergency; the emergency regulations. How many were arrested? Restricted? The state of emergency was finally lifted in January 1960. Most detainees were released and restrictions on Kikuyu movement ended, leading many to travel to the highlands seeking work. Cf - Ocampo Six; especially misplaced analogy with Kenyatta at ICC.

167 See R. v. Dedan Kimathi wa Waciuri...Dedan Kimathi wa Waciuri v. Regina, Her Majesty’s Supreme Court of Kenya at Nyeri, Criminal Case No. 46 of 1956.

168 ... 

169 ... 

170 Does Prof Caroline Elkins appreciate the implication of her exaggerated numbers on death toll and incarceration in a Kenya where Mau Mau is used to post justice...post independence tribal colonization and hegemony... e.g. ESAO, Matunda ya Uhuru? Prof Elkins has been justifying her data and arguments....contra Lonsdale...Anderson...Ogot.....

171 ... 


poetic argument that England should civilize the natives had failed. The message of the “poet of imperial England was taken up by those who the Poet urged the US to take up the “burden” of the empire as had Britain and other European nations.

2.11 Mau Mau Phase I in Kenyan Public Interest Lawyering
The Mau Mau uprising presented one of the earliest contexts for strategic litigation or PIL. Whatever the causes, historians are agreed that Mau Mau was the product of and led to marginalization especially among the Kikuyu. Land deprivation, deprivation of indigenously relevant education, and female circumcision. And there is general consensus that Mau Mau’s outcome is manifested in continued deprivation of the initial Kikuyu under class, as well as a disenfranchisement of a broader spectrum of Kenyans on the claim that only certain individuals or groups fought for independence and are thus entitled to the fruits of independence or Matunda ya Uhuru (in Swahili).

Many Mau Mau supporters or suspects were subjected to mass killings, torture, detention without trial, mass trials, concentration camps hence denial of basic liberties, property and security, and further economic and political deprivation. The six leaders of the Kenya African Union (KAU) consisting of Jomo Kenyatta, Bildad Kaggia, Richard Ramogi Achieng Oneko, Paul Joseph Ngei, Fred Kubai and Kungu Karumba were arrested and put on trial for six months from November 1952 to April 1953.

It was alleged by the settlers, Colonial Government and British Government that between October 12, 1950 and October 20, 1952, the six accused persons had been members of Mau Mau, an unlawful society. Kenyatta was also charged with managing Mau Mau. The other five were also charged with assisting Kenyatta in the management of Mau Mau.

174 Ali Mazrui calls Kipling “the poet of imperial England” in The Africans: A Triple Heritage…..Some argue that the Kipling poem was satirical…..To quote Kipling’s “The White Man’s burden…” and relevant parodies of it.
177 While the five were national officials, Karumba was a local (district) official of KAU.
They were accused of conspiring together and with persons not before the court to commit felony by physical force or by threat or intimidation to compel persons in the Kenya Colony to take an oath to bind the persons to act in a certain way.\textsuperscript{180}

KAU was the nationwide political party and therefore the arrest, prosecution and defence of its leaders was a matter of public interest, even though KAU’s management had been ethnically and culturally insular and its political programmes ineffective.

By September 1952, the courts had jailed more than 500 Mau Mau supporters, most with no legal representation.\textsuperscript{181} A few lawyers came forward to offer PIL and pro bono legal service including Denis N. Pritt, AR Kapila and CMG Argwings Kodhek and what Pritt acknowledges as “junior Kenyan lawyers.”\textsuperscript{182}

The trial of the Kapenguria Six proceeded with heavy pressure from the British Government to have the accused persons convicted.\textsuperscript{183} What were the offences who? What was the law and evidence? Who were the witnesses? Some of the three key issues that negated public interest in the trial included: First, location of the trial in Kapenguria, a distant, inaccessible, “closed” district, rather than Nairobi or Kiambu or Nyeri where the alleged offences reportedly occurred. Second, the appointment and bribery of the retired Judge R.S. Thacker who was the trial magistrate.\textsuperscript{184} And bribing and perjury associated with the principal (or star) witness, Rawson Macharia, the self-proclaimed bush lawyer\textsuperscript{185}……At the end of the trial, the six were found guilty and sentenced to seven years imprisonment with “hard labour.”

On Appeal to the Kenyan Supreme Court (current High Court), Achieng Oneko was acquitted. But they all served term all the same, with the five in prison and Oneko interned in a concentration camp…\textsuperscript{186} For Kenyatta, there would be two years restriction which was partly in Maralal. He could be visited and was released in August 1961. This is where Uhuru Kenyatta was “conceived” according to his entry in a visitor’s book in 2012… He was born on 26/10/1961 and marked his 56\textsuperscript{th} birthday with a tailor made presidential election laws and election date.


\textsuperscript{183} Paul Mwangi (2001) \textit{The Black Bar}, op. cit.

\textsuperscript{184} Montagu Slater, \textit{The Trial of Jomo Kenyatta…}, ibid; D.N. Pritt, “The Kenyatta Cases,”…..ibid.

\textsuperscript{185} Macharia, \textit{The Truth about the Trial of Jomo Kenyatta, ibid}; D.N Pritt, “The Kenyatta cases,” \textit{ibid}.

\textsuperscript{186} D.N. Pritt, “The Kenyatta Cases…,” \textit{ibid}.
2.11.1 CMG Argwings Kodhek’s contribution as “Mau Mau lawyer”
Clement Michael George (CMG) Argwings Kodhek (CMG or Agwingi…) was the first African Kenyan lawyer in Kenya. According to reports, after returning to Kenya from Britain where he had been admitted to the bar, CMG had first sought employment at the Attorney-General’s chambers but was given a salary which was “a third of what Europeans in the same grade were getting.”
He reportedly protested and left to start his own law firm at Church House and was the only African in Kenya with a law firm. CMG would start his practice by taking up the criminal cases which Mau Mau fighters faced.

The pioneer Kenya historian Prof Bethwell Allan Ogot described CMG’s role in PIL in the following words:

“Almost single-handedly, Argwings-Kodhek took on the formidable challenge of defending the rights of ordinary Kenyans during this critical period,”

Ogot adds:

“He argued that human rights are indivisible and universal and that freedom cannot be appropriate in the West and inapplicable in Africa.”

To the Kenya Africans CMG was a liberator and a hero, Chiedo Mor(e) Gem (the frying soil of Gem) as he was referred to by himself and his supporters. To the whites, CMG was an upstart and a demagogue.

Shortly after the 1953 Lari Massacre, in which 150 Mau Mau loyalists, including Chief Luka Kahangara, were killed, Argwings-Kodhek is reported to have helped 48 of those charged to successfully appeal on a legal technicality.

The *Daily Nation* would later describe CMG’s role thus:

“As the sole African criminal lawyer, he made it his duty to defend the Mau Mau, and he did it with gusto traversing Nairobi and Central Kenya courts to the chagrin of colonial settlers and the establishment.”

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187 He waxed Shakespearean in responding to whites who sneered at African lawyers: “Woe and wilt upon Britannia, that she chooses to export to most stupid and vile of her son, oh mistaken queen, come and evacuate these simpletons who understand nothing of you, neither your jurisprudence nor your language” See Coast week online…..;… and 50th Anniversary programme 29/1/19, Nairobi and on.3/2/19 in Gem Nyawara, Siaya County.
The Nation adds:

“The Western media hated him too and dubbed him the “Mau Mau lawyer” — which was supposed to be demeaning.”

CMG also represented Mau Mau suspect, (Yusuf) Waruru Kanja, the would be Nyeri Town MP and Minister in the Kenyatta and Moi administration.

Argwings-Kodhek was married to Mrs Mavin Tate Argwings Kodhek and later Mrs Joan Ominde Argwings Kodhek and had children who would later serve in public life. CMG would later become the first Member of Parliament for Gem in Siaya, serving from independence in 1963 to January 29, 1969 when he died following a “road accident.”

Thus D.N. Pritt, CMG, A.R. Kapila and J.M. Seroney, among a few lawyers established the tradition of public interest lawyering, in the narrow and broad sense that includes litigation, legal advisory, using political process and activism.

2.11.2 Contribution of DN Pritt to PIL in Kenya

Denis Nowel Pritt was a British lawyer and politician. He was a self proclaimed “political Lawyer,” a term he used to describe what is now called strategic or public interest lawyering. Pritt moved from the right (Tom) to the left inspired and occupied by the Labour Party. He was influenced by neo-Marxist, social democratic, socialist and communist movements. He later became independent after expulsion from the Labour Party.

What role did he play in the trial of the Kapenguria 6? In defending TJ and 6 AEMO members DN Pritt’s representation of the Kapenguria 6 of Rawson Macharia (on a perjury charge), and the AEMO 7 (TJ Mboya and Co.) further illustrate the role of public interest lawyering in economic and cultural struggle and emancipation. The challenge is addressing the intra and inter class as well as inter ethnic or gender cleavages.

190 Ibid.
191 Kanja had been charged under the Emergency (or anti Mau Mau) laws and regulations...
195 The public interest demanded that the profiteering villain Rawson be represented. The strategy was to seek nullification or at least discredit the conviction of the Kapenguria 6…which had been mainly based on his evidence, that he had now recanted on oath.
Thus, the legal representation by Pritt and his team helped justify grievances of the accused, of the Mau Mau, and the cause for independence. However, it could not help prevent the future narrow uses of Mau Mau or militant struggle to justify post independence hegemony...

2.12 Mau Mau Litigation Phases 2, 3 and 4 and PIL in Kenya and the UK
The Mau Mau revolt resurfaced in public interest lawyering in the 2000s and 2010s. First, a claim for the Mau Mau killed or injured was brought in London through the law firm of Leigh Day seeking Compensation of 4.5M Pound Sterling.\textsuperscript{196}

The third phase involved a further claim. The court ruled that at least 50 years had lapsed since the alleged atrocities. That the matter can’t be litigated, there would be no fair trial since the defendants may not easily defend themselves.

Contrarily, such arguments may stand with respect to vulnerable, weak, private defendants. Here, the main defendant is the UK Government and Government officials who bore and bear official and personal responsibility. They should be able to have evidence given the matter had never been resolved\textsuperscript{197}…

The fourth phase of the Mau Mau litigation involved the Law Society of Kenya (LSK) making a claim in the Kenyan High Court against the Kenya Human Rights Commission (KHRC), the UK law firm of Leigh Day, and Mau Mau War Veterans Association\textsuperscript{198}

LSK made the claim as a public interest issue. They \textit{inter alia}, faulted Leigh on the manner in which the suit was handled. The legal fee stood at KES 769,680,000 out of the KES 2.5 Billion paid out by the British authorities. LSK argued that the amount is more than 40 per cent of the total benefits, which they claimed is illegal.\textsuperscript{199} Leigh was also faulted for “recruiting clients” in Kenya and practising without a practicing certificate. The Court dismissed the claim on the ground that the public interest issue that the LSK sought to protect was brought too late in the day; and that the advocate client privilege between the Mau Mau victims and their lawyer protected them.\textsuperscript{200}

The four phases of Mau Mau (MM) litigation address the issue of British reparation for colonial atrocities against Mau Mau. What about the British and Kenyan Government reparations for colonial and post colonial murder, assassination, deprivation of liberty, taxation, forced labour,

\textsuperscript{196} Ndiki Mutua & Others \textit{v.} Commonwealth Office, London No. HQ 09XO 2666 of 2012…
\textsuperscript{197} In any event, some UK government officials sought to destroy evidence on 1950s……
\textsuperscript{198} \textit{Law Society of Kenya v. Martin Day & 3 others}, Civil Case 457 of 2013 [2015] eKLR.
\textsuperscript{200} \textit{Law Society of Kenya v. Martin Day & 3 Others}, ibid.
exclusion from public office or opportunity…201 The lessons learnt on the Mau Mau cases and in the PIL cases in the Kenyatta, Moi, Kibaki and Kenyatta 2 administrations have been useful in securing the potential of PIL in matters concerning diverse issues such as class, ethnicity or tribe and gender, as well as in criminal, civil and related cases…

2.12 Kenya’s independence struggle: the radicals v. the constitutionalists v conjunctur and synthesis
An accurate narrative must capture the constitutionalists’ and radicals’ perspectives on the struggle and meaning of Kenya’s independence.

2.12.1 The radicals’ argument on Kenya’s Independence202

The radicals are the militants, politicians, activists, academics, scholars and commentators or pundits who support(ed) the argument that Kenya’s independence was attained through violence and militancy in Mt Kenya and independence was nyakwa-d or grabbed. These include Dedan Kimathi wa Waciuri and his Mau Mau group, various supporters of Mau Mau. What of Elijah Masinde’s Dini ya Musambwa, and other affiliated violent or militant groups?

The scholars or academics include historian Maina Kimani wa Kinyatti,203 novelist Ngugi wa Thiong’o, poetess Micere Githae Mugo,204 historian David Mukaru Nga’ng’a, historian? Mwangi wa Githumo,205 and younger Mau Mau or uthamaki commentators (?)

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201 Compare the perspectives of Prof Carol Elkins, Harvard history professor and one of the researchers who supported the Mau Mau case in London, in Carol Elkins “Britain has said sorry to the Mau Mau. The rest of the empire is still waiting…”


203 Kinyatti helped establish the Mau Mau Research Centre in the US. What are the prog…participants? He used to teach at Kenyatta University and fled after he was imprisoned for sedition. His eyesight was impaired in gaol.

204 Ngugi and Micere are creative writers and literary scholars. See Ngugi’s Detained and the preface to their drama, The Trial of Dedan Kimathi (1976), in which they seek to correct, rewrite (or revise) Mau Mau history. They argue, inter alia, that Mau Mau was the most glorious chapter in Kenyans’ struggle against foreign economic, political and cultural domination; that it was a nationalist movement; that Kimathi never learnt military skills from the (White man’s) Second World War, etc. Cf. Dinesh D’Souza “Two cheers to colonialism: How the West Prevailed”…; Dinesh D’Souza (2002) What’s So Great About America, Regney Publishing, USA, Chap. II…..

205 Cf the defensive Mwangi wa Githumo, “The truth about Mau Mau movement: The most popular uprising…” Most popular compared to other militant movements? Which? Or constitutionalist political make-shifts?
This group regards non-Kikuyu militants like Elijah Masinde and his *Dini ya Musambwa* as irrelevant or unimportant.\(^{206}\)

The argument is that the Kenya African Union (KAU) was taken over by the radical groups (especially the Kenya Land and Freedom Army (KLFA) or the Group of 40 (Anake 40). They did not want roundtable debates but took to arms in fighting through the Mau Mau in the forest and in various sites in Kenya. The strategies and tactics included labour agitation, sabotaging White projects, and guerrilla warfare.\(^{207}\)

On October 20, 1952, some of the African leaders were arrested as Sir Evelyn Baring declared a state of emergency, which many White settlers had demanded for some time.\(^{208}\) The Kapenguria 6 were arrested and tried. Who were they and what were their actual roles in the independence struggle? In the post-independence dispensation? The Kapenguria trial was the closest point of convergence between the Mau Mua militants and the constitutionalists. Three issues.

First, of the Kapenguria Six were being charged with belonging to and managing the Mau Mau, an illegal society.\(^ {209}\) The other five were charged with being members of and assisting in the management of Mau Mau.\(^{210}\).

Second, the Kapenguria Six denied the charge and argued they wishes to secure independence, “by constitutional means”

Third, the key strategic support for the Kapenguria Six came from the constitutionalists, including TJ Mboya and lawyers in including Denis Pritt, A.R. Kapila, CMG Argwings Kodhek, among others. The masses who had been split and the question of militancy or then Mau Mau before the arrest and trial generally supported the Kapenguria Six.

The emergency regulations confined the Kikuyu Embu Meru (KEM) to their homelands. They and others needed passes to travel...\(^ {211}\)

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Poplar also among victims of Mau Mau in Kikuyuland, and in the rest of Kenya? Cf. the book, Mau Mau Children……Some killed by Mau Mau to grab their land…supporters of Ambrose Ofafa….Tom Mamboleo…..Senior chief Wambiu….


\(^{208}\) Mau Mau had been proscribed under the Emergency Regulations 1950….

\(^{209}\) See Ben Sihanya “Public Interest Lawyering and Constitutional Reform in Kenya and Africa since CMG Argwings Kodhek,” presentation at the University of Nairobi and Oxfam International Conference on Strategic and Public Interest Litigation, October 204, 2019.
KAU and nationwide political parties were prohibited.\textsuperscript{212}

Emergency restrictions were lifted in 1960.\textsuperscript{213} But the prohibition of Mau Mau lasted much longer.

How did Mau Mau influence the struggle in other African states, especially with whites like South Africa, Zimbabwe (Southern Rhodesia),\textsuperscript{214} Algeria,\textsuperscript{215} Namibia (South West Africa)\textsuperscript{216}

Since 1960, there has been a more controversial debate regarding the role of the radicals (Mau Mau, etc) as well as the constitutionalists, in the attainment of independence.

Curiously, Prof Macharia Munene made the argument linking the cases facing President Kenyatta and DP Ruto at the International Criminal Court (ICC) with the pre-independence Kapenguria trials. He drew a similarity of the Hague as the new Kapenguria.\textsuperscript{217} The comparison is misplaced and spurious. The comparison is an affront to the Constitution and the direct and indirect victims of post-election violence (PEV).

There are at least six reasons for this. First, the Kapenguria 6 and the Mau Mau confronted a racist, colonial Government. ICC was about a tribal Government using manipulation against non Kikuyus to rig elections and stay in power.\textsuperscript{218}

Second, unlike ICC cases, the trial of the Kapenguria 6 was based on colonial land oppressive law. The ICC cases were based on the Constitution of Kenya, and the statute of the ICC which Kenya had negotiated, signed, ratified, and enacted as the International Crimes Act, (….).\textsuperscript{219}

Third, there was overwhelming evidence on the ICC cases. Part of that evidence was in the ICC website, and included Dr Peter Mwangi Kagwanja’s articles on the criminal and political users of Mungiki. The main challenge was that witnesses kept dying or disappearing (and not because of climate change)? In the Kapenguria 6 case, most of the evidence was fabricated, including by

\begin{itemize}
\item \textsuperscript{213} …
\item \textsuperscript{214} …
\item \textsuperscript{215} …
\item \textsuperscript{216} …
\item \textsuperscript{217} Stephen Muthini (2013) “History don says Kenya ICC cases similar to Kapenguria trials,” \textit{Daily Nation}, Nairobi, 6/12/2013, at \url{http://mobile.nation.co.ke/counties/ICC-cases-similar-to-Kapenguria-trials/-/1950480/2101692/-/format/xhtml/item/0/-/14q6pq/-/index.html} (accessed 21/05/15).
\item \textsuperscript{218} See Commission of Inquiry into the Post-Election Violence (CIPEV) (the 2008 Waki Report)….
\item \textsuperscript{219} ESAO…; W.R. Ochieng…
\end{itemize}
bribing Rawson Macharia who perjured himself. Fourth, most of the ICC suspects controlled the machinery of Government at one point or another before or during the trial and had unfair advantage against the “victims” … Fifth, most of the ICC suspects used state resources to defend themselves, unlike the Kapenguria 6. Sixth, for most of the ICC suspects, lawyers, supporters and the Hague were more easily accessible than what the Kapenguria 6 had faced. So, was Jomo Kenyatta guilty? Not guilty? Innocent?

2.12.2 The Constitutionalists or Liberals arguments on the Struggle for and meaning of Independence

Who were or are the constitutionalists? What did or do they stand for? What did they do?

These are the political leaders, as well as the intellectuals, commentators, analysts, and pundits who advocate(d) peaceful and negotiated constitutional change. They include Kenyatta, TJ Mboya, Oginga Odinga, Ronald Ngala, Daniel Arap Moi, Masinde Muliro, Martin Shikuku, Paul Ngei, Lawrence Sagini, among others.

The intellectuals in this group include Professor Yash Ghai, H.W.O Okoth-Ogendo, J.B. Ojwang, B.A. Ogot, E.S. Atieno Odhiambo, Tabitha Kanogo, John Lonsdale, Godfrey Muriuki, Wunyabari Maloba, Dr Ben Kipkorir, Profs Henry Mwanzi, Gideon S. Were, and William R. Ochieng, among others.

The constitutionalist’s argument focus on constitutional development or advance or at least two major founts. First, peaceful agitation, through petitions and memoranda and repatriation on the land question. And second, broader political participation through welfare and tax payer associations; and on party formation and a parliamentary representation. Third, broad based constitutional reform.

2.13 Contesting the meaning, uses and abuse of the radicals’ arguments on Kenya’s independence

How have the Kenyatta Kamaliza, Moi, Kibaki and Kenyatta Kamwana regimes used and abused Mau Mau in the reconstruction of the Kenyan political economy, cultural politics, constitution and state? Only (political) historians have consistently debated the role of the Mau Mau, violence and military in the reconstruction of Kenya.

Historians have done this as individuals and within the framework of the Historical Association of Kenya (HAK). The most remarkable debates are Ogot’s Presidential address to HAK in 1981.

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221 These are discussed in Chapter 5 of CODRALKA 1 on Public Participation and Representation in the (post) colonial Constitution in Kenya and Africa.
1984 proceedings which were dedicated to Mau Mau. Kenyatta’s role in it and Ngugi’s interpretation of Mau Mau in his novels, plays and essays, novels.

First, some constitutionalists, liberals and moderates argue that Mau Mau was a peasant revolt against White domination and exploitation; and sought the recovery of lost lands.

Second, some scholars like Prof Maina Kimani wa Kinyatti, Prof Ngugi wa Thiong’o, Prof Micere Githae Mugo argue that Mau Mau was a freedom struggle to attain Kenya’s - not just Kikuyu –land, liberty, (including the right to female circumcision) and Karing’a or independent schools. That was the peak of Kenya African nationalism.....the “most popular uprising”.....Kinyatti and others have even edited or revised some Mau Mau songs to read “Kenya” instead of “Kikuyu.”

Remarkably, Kimathi University established Mau Mau research and archiving in the context of the 50th anniversary of Kenya’s independence.

Third, others contend that Mau Mau was an intra-ethnic (Kikuyu) civil or class war between the landless (ahoi), the exploited and frustrated, or essentially the Nyeri Kikuyu and the Meru, on the one hand, and the homeguards of the White man, families of colonial chiefs and other collaborators of the White man, or essentially the Kiambu Kikuyu, etc on the other.

Fourth, historians like the late Dr Ben Kipkorir and Dr Henry Mwanzi contend that national freedom strugglers, unlike Mau Mau, left the forest for State House straight away.

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228 On chiefs who were the collaborators...which location...See Ben Kipkorir ......; cf. ...... (…) Muganda K’Okwako Amoth Owira.................

230 …
those fighting for *national* independence are the ones who eventually become the national leaders.

Some illustrate this thesis by citing Yoweri Kaguta Museveni’s NRM/NRA, Paul Kagame’s Rwanda Patriotic Front (RPF) which led the process in the context of the genocide in Rwanda, respectively. Others also argue that in the same vein, DRC rebels, under the late Laurent Kabila, etc marched to power (after mobutu forces were defeated and after he had refused to renegotiate. They argue that Mau Mau was defeated and its leaders hanged by 1956.

They stress that Mau Mau did not immediately lead to Kenya’s independence because it was defeated 7 years before independence. To them, Mau Mau may have remotely contributed to independence, but was not the decisive or definitive cause of independence. Had it been MM, independence would have been altered in 1957 or 1958, not 1963.

Fifth, it is also argued that Mau Mau had no programme on the meaning of independence or on governance, or on the management of national resources. An example is the fact that MM leaders had no (published) plan on how they wanted to administer or manage land and power had been much occasioned by the Jomo Kenyatta (K1) and subsequent administrations including K+ as well as among majority of Africa’s failed states. A recent case study can be argued to be the Republic of South Sudan.

Sixth, there were many other protest and militant movements in Kenya besides Mau Mau among the Nandi, Luhya (e.g Dini ya Musambwa), Maasai, Luo (cf. Piny Owacho Movement or voice of the people movement).

Seventh, even within Mau Mau many other ethnic groups and individuals contributed to the militancy.\(^{231}\) E.g among the ...in Holla

Eighth, that Mau Mau killed more Kenyan Africans than Whites (e.g. Councillor Ambrose Ofafa after whom Ofafa Jericho is named). Some have asked: who and how would Mau Mau govern given that they were killing and polarising or dividing Kenyans?

At the end of this some people were not accepted in Government. There were arguments only the Kikuyu were in Mau Mau (leadership).

What would Kimathi do with power? Was his declared being the first PM an end in itself for him? Given the limited tolerance that led to splits with (e.g) KAU, Kenyatta and within Mau Mau Gen Mathenge faction), how would Kimathi or Mathenge lead a multi tribal independent Kenya? In 1984 Kenya Historical Association organised a conference on the role of Kenyatta and Mau Mau in historiography. Who was Kenyatta? A fire eating revolutionary or Black Moses.

\(^{231}\) See Ogot,... .... Atieno Odhiambo....., John Lonsdale .....essays in *Mau Mau and Nationalism*........
Ngugi portrayed Kenyatta in *Weep Not Child?* Did Kenyatta change from a revolutionary to a conservative opportunist as Ngugi argued in *Detained*?  

Others argue that Kenyatta never founded anything: not KCA, not KAU, not KANU, but was always a manipulative and opportunistic, follower. But his two strengths appear to be first, reminding Kenyans of Nkrumah’s slogan: seek ye first the political (not economic) kingdom…. And second, preaching the lessons he learnt from Pan Africanists like George Padmore Peter Abrahams, Francis Kwame Nkrumah…..

The emphasis was that power was in the UK, nationalists should focus on addressing metropolitan and colonial Government, not DCs, chiefs…..

There is debate that the UN, US, the Soviet etc contributed to decolonisation and independence in Kenya and Africa. America’s interest was mainly because colonial states like Britain were securing undue economic advantage in terms of access to raw materials and markets in the colonies. Relatively, the US had had an experience with the desire and struggle for freedom, related to America’s struggle for independence, and the civil rights movement.

Independence was attained partly because it had become uneconomical to govern the empire. It was particularly expensive to continue governing Kenya, a resistive people.

Constitutional historians agree that Mau Mau constituted to the difficulties and cost for the British Government and settlers to continue ruling or exploiting Kenya. The lesson is that civil disobedience, protests, boycotts and mass action can lead to the attainment of freedom.

E.S. Atieno Odhiambo emphasizes numerous points, among them:

First, who were the main (not the only) protagonists in Mau Mau? The Mau Mau fighters and their families and the British settlers…..

Second, who were the main winners and main (not the only) losers in the immediate aftermath of Mau Mau? The main “winners” were the collaborators, including colonial chiefs, homeguards,

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234 Cf. Chief’s Authority Act, Cap 128

235 …

236 Issues, actors, leadership years, collaborators….

237 Kenyan resistance in 1980s leading to *saba saba* (seventh of July) 1990. As JFK stated, “if you make peaceful change impossible, you make violent change inevitable…” also see Eugene Kamenka (1983) *Portable Karl Marx* …

238 …
informers, religious leaders, …and their sons, daughters, grandchildren, son-in law. This was because they directly inherited the reigns of power. Second, the value and structure of government had supported and needed their political ideology and orientation, religious faith as well as mission (and secular) education…… Qualification for office would be based on certificates from Alliance, Mang’u, Makerere, Fort Hare…and not machetes or pangas or experience in forests of Mt Kenya or the Aberdares……

Third, how many Mau Maus were there?

Fourth, how has Mau Mau been used to entrench domination or hegemony in post independent Kenya—what Ben Sihanya calls ethnic apartheid, ethnic colonialism, ethnic clones and cloning in Kenya. To illustrate, upon the attainment of independence, the various ethnic groups in Kenya found expression in the major political parties of the time with KANU representing the larger ethnic blocs and KADU representing the minority ethnic groups.

While President Jomo Kenyatta was expected to promote national unity and cohesiveness, he engaged in a consolidation of his political base with the Kikuyu elites in what was formerly the Central Province and improving on the infrastructure network that had been developed by the colonial administration. The subsequent President Daniel Moi did not help matters as he reinforced and continued the trend by officially entrenching political patronage and ethnic jingoism. This was evident in the pouring of funds and projects in his native Rift Valley province and giving of plum jobs to Kalenjins.

Kibaki and the Government re-enforced Mau Mau practice by entertaining Lemma Ayanu, an Ethiopian peasant, as General Mathenge.

Mau Mau compensation case was the product of a long quest. Is it Mau Mau compensation or British compensation to the tortured freedom fighters countrywide?

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239 For instance, during the emergency, some children of loyal colonial chiefs were taken out of the theatre of conflict to study at Fort Hare (Njonjo) or Makerere and LSE (Kibaki)……

240 See Kipkorir on the influence of Alliance High School in Post independence economy….See the motif: Kipkorir: their “parents had seen far”…. they built for future.


245 Ochieng, Ngugi et al…..focus on Kikuyu Mau Mau heroes who had some national statue or name recognition. ….
Can the Kenyan and British Governments facilitate the compensation of victims of forced labour etc? The Constitution and transnational law recognize these rights, and the role of victims in criminal and civil reparation processes. Moreover, can the British acknowledge and apologize for these colonial injustices too?²⁴⁸

Can Mau Mau users and abusers accept that all Kenyan citizens deserve equity, equality, non discrimination, non domination, non subordination and affirmative action, as appropriate? Can President Kenyatta as President and as co-perpetrator and beneficiary apologize to non Kikuyu Kenyans for the post independence and post colonial oppression, exploitation, inequity, inequality, discrimination, domination and subordination?²⁴⁹

A section of the Mau Mau veterans have faulted the erection of the Mau Mau memorial statute at Uhuru Garden’s, Nairobi. Cf- Gitu Kahengere suggesting that the mau mau veterans be hosted in the State House for a national celebration.²⁵⁰

I argue that Mau Mau is part of Kikuyu ethnic (neo)colonialism or ethnic capitalism (Ghai) and ethnic aristocracy (Kagwanja).

There are incidents cases and incidents ethnic inequality, inequity discrimination and lack of decent affirmative after independence: madharau,²⁵¹

²⁴⁷ David M. Anderson (2011) “Mau Mau in High Court and the ‘lost’ British Empire archives. Colonial conspiracy, or bureaucratic bungle?” 39, Journal of Imperial & Commonwealth History, 699-716. Cf. Kibaki and the Government entertaining Lemma Ayu as General Mathenge; On October 20, 2020, it was reported on Daily Nation that Ms Miriam Muthoni wa Mathenge stated that she was gifted a 55- acre land for her participation in the struggle for independence by President Jomo Kenyatta. She said that the Government has not really done enough to recognize and appreciate the role of freedom fighters in the struggled for independence in Kenya. Ms Mathenge was quoted saying, "to date, I have no access road to my home, neither do I have access to piped water in my homestead. We rely on rainfall and a seasonal stream on the farm." This is despite the fact that the Mau Mau went through harrowing ordeals to liberate Kenya from colonialisist including torture, extrajudicial killings, murder, intimidation, rape and marginalization. She was further quoted saying “"We were beaten up like animals. We witnessed deaths in the forest and maiming of people who would be left to be eaten by dogs ... it was terrible and we suffered." See Irene Mugo (2020) “We were betrayed, says veteran of Mau Mau war,” Daily Nation, October 20, 2020, Nairobi, at https://nation.africa/kenya/news/we-were-betrayed-says-veteran-of-mau-mau-war-2485314 (accessed October 28, 2020).


²⁴⁹ The TJRC Report recommended that an apology be made by the President on behalf of the Government for all historical injustices. KNCHR report on 2017 electoral violence launched on 27/11/2018 seeks President Kenyatta's apology limited to the subject of the report........


I took my son by Micere Mugo.....
Towards sunset/ we set out
for home/ my son’s little/
warm hand/ inside mine
he in his world/ me in mine

Mother, he asked

Do we have/ matunda ya uhuru
in our hut?

I laughed foolishly

Mother!/ Yes son
Do we have/ some?

Silence

May I eat one/ When we get there?
Move on son/ darkness is looming fast
around us.\textsuperscript{254}

Jagjit Singh must have also been lamenting about Kenya in his powerful poem, “Portrait of the Asian as an East African.” Singh uses Asian African male persona who laments bout a changing Africa of the 1960s at the beginning of self-rule in post-independent Africa.\textsuperscript{255}


The persona laments: / farewell my dear beloved illusions, for I, too, would have liked to think only the toes of Africa were infected\textsuperscript{256} but the cancer of colour has gathered fresh victims now.

black surgeons, too, have prescribed new drugs\textsuperscript{257} and we, malignant cells, / must fade away soon.

let me not see you now, / ancestral spirits of my race, in the posture of lawino,\textsuperscript{258} lamenting sweetness that has turned sour, for it shall be my western mind alone/ that must summon up an excuse for the brownness of our sins.

and soon we shall be flying, / unwelcome vultures all over the world, only to unsheathe fresh wrath/ each time we land

we are the green leaves/ that must sprout no more, for the roots have thrived/ on black silence and false kindness of the white race.

waste no ceremony/ for the unintentionally corrupted; lead the ram to altar/ and wash away the sins of history

2.18 Western influence and involvement in post-independence Kenya

Historians like Charles Hornsby have argued that Western influence played a major role in founding of the Kenyan state.\textsuperscript{259} He contends that the large foreign investments and foreign citizens living in Kenya at independence acted as stabilising forces, both for good and ill.

When Lonrho (reportedly) took over the ownership of East African Standard and the Tanzania Standard, Kenyatta was unhappy because its sources of wealth were based in white-ruled Rhodesia. Kenyatta later gave in. The talk was that Ronald “Tiny” Rowland said to Kenyatta


\textsuperscript{256} Referring to Okot p’Bitek’s Song of Lawino in which a traditional African wife (Lawino) laments being ignored who prefers Western values and clementine.....See Okoit p’Bitek......Song of Lawino and Song of Ocol

\textsuperscript{257} Asians had been discriminated against during white British colonisation. The Government of Kenyatta (1963-78) and Idi Amin oppressed and exploited some of them......

\textsuperscript{258} Referring to Okot p’Bitek, Song of Lawino...

“The paper is yours to do what you like with, just say the word.” Kenyatta nominated Udi Gecaga, a family member to Lonrho Board.

The contributions by the British finance, military support and advice actively contributed to the establishment and survival of the Kenyatta Government after independence. Foreign aid sustained Kenya’s economy since independence.

This, according to Hornsby, provided a buffer for the errors of its leadership and a safety net that was guaranteed by Kenya’s pro-Western orientation. This pro-Western orientation has since changed especially in the current Kenyan political leadership of Kenyatta II (K+). What has been driving Kenya’s foreign policy including diplomatic relations in EAC, AU, with the West in 2013 and 2014? Was it ICC and personal or ethnic interests?

2.19 Kenya: Post-colonial or neo-colonial state?
Is Kenya independent? dependent? interdependent? post-colonial? neo-colonial? Relate to the key questions: social, economic, political, technological and to the four presidencies….

Some scholars have argued that Kenya is a neo-colonial state; that is, it has attained formal independence but is essentially still dominated in the political, economic, cultural, social, and other spheres by the ex-colonial power or by other states like USA, China and other European countries.

Kenya’s “post colonial” means that there was once a colonial power or historical connection between colonialism and the current state of affairs. Immediately after independence, the political elite in Kenya African National Union (KANU) led by Jomo Kenyatta dismantled the

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261 As a Director….. Udi Gecaga is the father of Jomo Gecaga, and also the ex-husband of President Uhuru Kenyatta’s elder sister Jeni Wambui. Bethwel Mareka (BM) Gecaga, was the father-in-law to Jeni Wambui Kenyatta……and was appointed to key state corporations….


263 Chapter 14 on conceptualization, problematisation and contextualization of Kenya African policy since 1963. Cite Bonaya Godana Katiba collections; Andy Adede, Katiba Collections, JB Ojwang and Luis Francheschi, FD Situma Foreign policy, international relations........

264 Cf. Discussion of Constitution and State in Chapter 1, op. cit.

Independence Constitution in order to implement the Kenyatta-Mboya-Nyerere theory of a unitary state and a singular executive authority.266

What did 50 years of independence celebrations mean to most Kenyans?267 What do the annual celebration of Madaraka, Mashujaa and Jamhuri days mean?268

There is an argument that Mau Mau survivors have been compensated by the British (on a without prejudice basis). Who will compensate Kenyans who have suffered assassinations, massacres, ethnic hegemony and other forms of ethnic apartheid since independence? When will the freedom and compensation come?

Kenya inherited from the colonialists a political structure with a strong executive branch at the expense of other democratic institutions. The two leading nationalist parties (KANU and KADU) for instance were largely loose amalgamations of ethnically homogeneous, district-based political associations under the leadership of local power barons.269 Kenyatta, who had been in prison, did not participate in the establishment of such parties; this made it difficult for him to control the parties.270 This prompted him to resort to the bureaucracy of Provincial Administration. Through this he could exercise direct control.

Also define and conceptualise bureaucratic state, prebendal state (Richard Joseph who focuses on comparative constitutional politics of Nigeria); authoritarian or totalitarian state; rent seeking state; patrimonial state. On the foregoing, see the methodology on conceptualization of the Constitution, state and government, law and development class 4. These only define certain aspects of facets of the state under the generic, Ghaian and Sihanya reconceptualisation or synthesis of constitution, state and government.

Patrimonialism through patronage became the new order of business with the state becoming the single most important dispenser of national resources, rendering state control the primary means of acquiring wealth.271 The role of political parties in democratization was rendered irrelevant with the dissolution of KADU in 1964.

268 In 2018, Moi Day was celebrated again without presidential or state ceremony. This was based on High Court Justice George V. Odunga’s decision in Republic v. Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyachi & 4 Others, Judicial Review 292 of 2017 [2017] eKLR…..  
270 Ibid, at 5.  
271 Ibid, at 5.
Kenyatta instigated numerous constitutional amendments that gave him sweeping executive powers. Under KANU dictatorship and leadership under Moi 1978-2002... Moi in his quest to consolidate power revitalized KANU through mandatory life membership for all MPs and senior civil servants, establishing a powerful party disciplinary committee and through the party’s invasion of electoral processes by introducing mlolongo or queue voting.

2.20 National and transnational obligations after independence in Kenya, Uganda, Nigeria, South Africa, and Africa

One of the major incidents of independence was that Kenya became a sovereign state. In 1964 it became a sovereign republic with power to control its destiny internally and in external relations.

The challenges in the neo- or post-colony include meeting national obligations as well as international responsibility. National obligations include protecting life, people and property within the territory. These include securing equity and reducing or eliminating discrimination, hegemony or preference based on ethnicity, regions, religion, gender or class. International obligations include settling debts, implementing treaties entered into (by the state or former colonial power), state succession, meeting human rights and environmental standards.

Provided that Kenya does not have a very clear and explicit foreign policy. In the Cold War era it argued that its policy was non-alignment (and good neighborliness – or non-interference). Since independence Kenya has joined some supra-national bodies to consolidate its role as a member of the international community. These include the United Nations (UN), Commonwealth, African Union (AU), IGAD, COMESA and the East African Commission (EAC). These qualify Kenya’s state sovereignty given that by virtue of the Constitution, international instruments that Kenya ratifies bind the country to meet the obligations arising therefrom, cf Article 2 (5) and 2(6) of the Constitution.

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The national basis of foreign policy. What is Kenya’s foreign policy? Generic (cf. USA; Nigeria, South Africa, Egypt, Ghana… Is Kenya’s foreign policy explicit? Implicit? Kenya’s foreign policy is guided and driven by a vision of “a peaceful prosperous and globally competitive Kenya” with the mission to protect, promote and protect Kenya’s interests and image globally through innovative diplomacy, and contribute towards just, peaceful and equitable world….

Arguably, Kenya’s foreign policy takes a dependent approach mainly influenced by foreign capital inflows. Notably, whatever constitutes Kenya’s foreign policy is the preserve of the President in power, with the Ministry of Foreign Affairs simply being the facilitative and coordinating arm of the President’s policy. Though Kenya’s foreign policy has been regularly touted to include principles such as non-alignment and non-interference by external powers as well as sovereignty, its policy is frequently dictated by economic interests and the need to have more of foreign capital. Cf. the China-US relations…..

2.21 Constitutionally important dates in Kenya

Precolonial Kenya: 1500-1895? 1920?

Early travelers, visitors, explorers, discoverers, sailors, traders, fortune seekers, missionaries, colonial anthropologists, colonial administrators.

1920 - Kenya becomes a colony

1921 – Harry Thuku forms the Young Kikuyu Association which later draws a petition containing grievances on labour, land and Kipande, which Africans had to carry.

March, 1922 - Harry Thuku is arrested and M.A Desai, President of the Indian Congress is accused by the European press of instigating Harry Thuku.

September 1922 - Kamau wa Ngengi (later Johnstone Kamau and thereafter Jomo Kenyatta) becomes a member of the Committee of the East African Association (EAA)… Choosing a name that would be tribe neutral?

1924 - Harry Thuku stands his position that only elected Africans can genuinely represent African interests.

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278 …

279 The Periluss of the Erythraean Sea. Cf. early writers in Nigeria, South Africa…

280 Tippu Tip.

281 See ES Atieno Odhiambo… etc.

282 ES Atieno Odhiambo, HWO Okoth Ogendo……

283 Cf. HWO Okoth Ogendo……. Berman & Lonsdale…….
1928 - Jomo Kenyatta starts the Kikuyu paper, *Mwigwithania* (The Reconciler)

1929 - Jomo Kenyatta departs for England to make personal representation about grievances of the Kikuyu.

1931 - Harry Thuku is released from detention.

1934 - Kenya Land commission report closes the frontier between the European Highlands and the African Land units. Africans are denied any rights in the White Highlands.

North Kavirondo Central Association is formed.

1935 - Harry Thuku breaks from Kikuyu Central Association (KCA) and forms Kikuyu Provincial Association.

12/11/1937 - The Secretary of State for Colonies, Mr Ormsby-Gore, reaffirms that the White Highlands in Kenya are exclusively for Europeans and that Africans and Asians cannot acquire land there.


1940 - Kikuyu Central Association, the Ukamba Members Association (UMA), and the Taita Hills Association are banned and their leaders arrested.

1944 - Eliud Mathu is nominated the first African member of the LegCo. Kenya African Study Union is formed.

1946- Kenya African Study Union drops the word study from its name to become Kenya African Union (KAU).


KAU president Mr. James Gichuru steps down to make way for Jomo Kenyatta to become KAU president. The number of African members to LegCo is raised to four. Kipande system is abolished and replaced by an identity card system. Who else?

1948 - Kenya, Uganda and Tanganyika form the East African commission. Mau Mau freedom fight begins

1950 - KAU and The Kenya Indian Congress hold public meeting at Kaloleni Hall in Nairobi. Trade unionist Makhan Singh’s resolution demanding for independence for Est Africa is carried.

Mau Mau is declared an illegal society. Makhan Singh is tried by the High Court and detained as “an undesirable British subject”

20/10 1952 - The Governor, Sir Evelyn Baring declares a state of emergency. This followed the killing of a loyalist Kikuyu chief, Waruhiu by Mau Mau freedom fighters.

The ‘Kapenguria Six’ are arrested by the colonial security forces

26/01/1953 - The Kapenguria trial begins

8/4/1953 - The Kapenguria six-Jomo Kenyatta and fellow freedom fighters, Fred Kubai, Achieng Oneko, Paul Ngei, Bildad Kaggia and Kung’u Karumba are found guilty and sentenced to seven years in prison with, hard labour.

1954 - A prominent Mau Mau leader ‘General China’ Waruhiu Itote is captured by Colonial Government forces and imprisoned at Lokitaung.

April 1954 - Colonial Government mounts “Operation Anvil” against Mau Mau elements in Nairobi and arrests 27,000 Kikuyu who are put into detention camps

3/9/1954 - Field Marshal Olekisiso, the leader and organiser of Mau Mau in the Rotin division of Maasailand and second-in-command to Dedan Kimathi since the arrest of General China, is killed in an ambush in Narok.

1956 - “Field Marshall” Dedan Kimathi of Mau Mau forces is shot at, wounded and captured.

The trial of Dedan Kimathi begins before the Supreme Court.

1957 - Dedan Kimathi, the Mau Mau leader, is hanged at Kamiti Prison aged 34.

The state of emergency ends

March 1957 - Elections for eight African Members of LegCo are held for the first time.

1958 - Mr Oginga Odinga asks questions in the LegCo about Mzee Jomo Kenyatta in prison.

Demands for a constitutional conference and release of Mzee Jomo Kenyatta are made

1959 - There are now twenty-five African members, fifteen Asians, five Arab and forty six Europeans in the LegCo representation. Pan African Movement of East and Central Africa (PAFCSA) is founded. Take on how members
March 1959 - Nairobi People’s Convention Party is formed and “Release Kenyatta” campaign launched.284

14/4/1959 - Mzee Kenyatta and his companions complete three-quarters of their sentence of imprisonment and become eligible for release.

A restriction order is immediately applied and Mzee Kenyatta is detained at Maralal.

12/01/1960 - The state of emergency and the emergency regulations declared in 1952 ends after 7 years of war against Mau Mau.

18/01/1960 - Kenya constitutional conference starts at Lancaster House in London. Mr Macleod, Secretary of state for the colonies, refuses to admit Mr. P.M. Koinange as a second special adviser to African delegation. The African elected members led by Mr. Ronald Ngala and Mr. Tom Mboya boycott the Lancaster conference. Date?

25/01/1960 - Kenya constitutional conference at Lancaster House ends and there is full attendance at the talks.

March 1960 - Kenya African National Union (KANU) is formed.

14/5/1960 - Mzee Jomo Kenyatta who is still in prison is elected, in absentia, President of the newly formed party, KANU, while Mr. James Gichuru is elected acting president until Kenyatta is released.

14/03/1961 - KADU Cabinet ministers Mr. Ronald Ngala and Mr. Taitta Towett, protest against Governor Patrick Renison’s refusal to release Mzee Jomo Kenyatta. See also 1958 Oginga Odinga’s struggle to have Kenyatta released and restored into civil society; and Mboya’s campaign in March 1959 above.

12/07/1961 - Mr JD Shah, a member of the Legislative Council (LegCo), criticises the existence of the European and Asian hospital authorities and calls for abolition of racial segregation in schools.

Jomo Kenyatta criticises KADU’s majimbo policy in his first speech since becoming KANU president.

24/11/1961 - Mr Reginald Maulding, the British colonial secretary, arrives in Kenya to hold talks with Kanu and KADU officials on the formation of a coalition government.

12/01/1962 - Mzee Jomo Kenyatta is elected unopposed in a by-election after Mr Kariuki Njiri Legco member for Fort Hall, vacates his seat for him.

14/02/1962 - The Lancaster House Constitutional Conference in London starts with KANU President Jomo Kenyatta demanding in his opening speech that the conference must name a date for Kenya’s full independence.

5/03/1962 - The Kenya constitutional conference in London starts a detailed examination of the Majimbo (regionalism) proposals of the KADU.

2/4/1962 - Colonial Secretary Reginald Maudling presents Kenyan political leaders with his final 23-point draft framework for Kenya’s constitution in London and gives them 48 hours to make up their minds about it.


18/06/1962 - Mr. Bildad Kaggia, the chairman of KANU’s Naivasha Sub-branch, criticises Mr. Bruce Mackenzie’s proposal to settle 2,000 Kikuyu families in Tanganyika, describing the move as indirect deportation.

19/11/1962 - Mr Paul Ngei threatens to leave KANU with his 750,000 Kamba supporters and form a new party following a disagreement with party officials.

2.23 Independent Kenya 1963-2017-20 and Beyond

Major events, processes, actors, dates, constitutional provisions and quotes...Kenya, Nigeria, South Africa, Uganda....


12/12/1963 – independence; much greater authority to determine destiny. However, it is still technically a dominion of the UK. Between 12/12/1963 and 12/12/1964 Kenya is technically a monarchical state. There’s a Prime Minister (Jomo Kenyatta) who exercises some executive or efficient powers. The Governor-General (Malcom MacDonald) exercises ceremonial powers on behalf of the Queen Elizabeth. PM nominates while Governor-General appoints the cabinet.

12/12/1964 – Kenya becomes a sovereign republic in terms of the Constitution. Post of Governor-General is abolished. President is head of government and head of state. See ss. 1, 1A, 23, 24, etc of the Constitution of Kenya, and Arts. 1, 2, 3, and 4 of the Draft Constitution of

Post-2010 calls for a referendum by CORD and the Council of Governors.285


1966- A left-wing faction of KANU led by Oginga Odinga and Bildad Kaggia defected from KANU and formed the Kenya People’s Union (KPU)

1969 – The first single-party elections in Independent Kenya were held with KANU as the sole party. Tom Mboya assassinated and Oginga Odinga was arrested and KPU leader detained. KPU Banned

1975 – The killing of charismatic politician JM Kariuki.

1982 – There was an unsuccessful coup against President Moi which led to a more autocratic regime. KANU officially declared Kenya a one-party state.

1991 – The Forum for Restoration of Democracy (FORD) is formed then banned and Oginga is arrested once again. There was a repealing of section 2A that created room for multi-party elections.

1992 – The first multiparty elections in Kenya were held with Moi winning the Presidency.

1997 – The second multiparty elections were held and there was the introduction of the Inter-Parliamentary Party Group (IPPG).

2002 – NARC coalition under Mwai Kibaki’s DP with the support of LDP led by Raila Odinga triumphed over KANU’s candidate Uhuru Kenyatta, considered a Moi project, marking the end of Nyayoism.

2007 – Kenya conducted elections which led to post-election violence after claims of electoral fraud.


286 E.g. major transitional elections under the Constitution of Kenya 2010; Supreme Court’s controversial decision on Raila Odinga (2013 and 2017); Peter Munya, Mary Wambui; ICC trials; contest on implementation of the Constitution e.g. devolution, colonialism and ethnic chauvinism in government appointments, CORD’s request for a national dialogue on the current crises; threats to governors; referendum etc.
2008–Kenya formed a new coalition government with President Kibaki and Prime Minister Raila Odinga after post-election violence following the amendment to the Constitution creating the premier office.

2010–Kenya adopted or promulgated the new constitution 2010.

2012–The International Criminal Court (ICC) indicts 6 Kenyans for crimes against humanity following the 2007-2008 post-election violence. Britain acknowledges the torture of Mau Mau veterans by its colonial government.

2013 – Uhuru Kenyatta wins a disputed election in the first elections under the new Constitution 2010. Raila Odinga contests the decision in the Supreme Court which confirms Kenyatta as the validly elected President.

2014 – The ICC prosecution drops charges against Uhuru Kenyatta citing insufficient evidence.

2015 – Fifth year of the implementation of the Constitution and call for a referendum by the Council of Governors;

2016 – ICC charges against William Ruto dropped. ICC judges describe the trial process as tainted by witness interference and political meddling hence a weakened prosecution case.

Kenyatta’s (K1) administration is in crisis: lawlessness, paralysis, gridlock, dysfunctional; teachers strike, disobeying court orders to pay teachers, closes schools; insecurity; high cost of leaving; Kenya shilling loses big against world major currencies; Kikuyuism in government-excluding other tribes; Kikuyu ethnic arrogance and impunity by Moses Kuria, Ngunyi encouraged and suffered; corruption and favouritism by punishing some, suspending and shielding Waiguru and shielding ethnic affiliates e.g. on NYS lose of at least KES 791 million.

Police brutality sanctioned by the Jubilee government; reckless shooting of opposition supporters during anti-IEBC protests. No police officers prosecuted for the selected killings; armed militia reemerging? Mungiki? Ethnic cleansing- cf Kimani Ngunjiri calling on Luos to leave Nakuru. Debate on hate speech….

2017: Second General Elections under the 2010 Constitution; Supreme Court nullifies presidential elections; protracted electoral and political crisis.

October 26 resistance.

March 2018 handshake or rapprochement between Raila Odinga of NASA and Uhuru Kenyatta of Jubilee Party.

2019: Demolition of buildings on riparian land.
2019: Lifestyle audit announced by President Uhuru Kenyatta not fully implemented.

Anti-corruption... debates on prosecutions targeting those not affiliated to Uhuru Kenyatta: untouched or manipulated include Managed Equipment Scheme (MES)....at least 38B, without contracts.....expensive, unnecessary health equipment...Mafya tender.....NYS 1, NYS 2 scandals......

Muder of Sharon Otieno, Monica Kimani, Maribe and Mr Irungu charged, both had been close to Jubilee leadership, Migori Governor Okoth Obado charged.....One third gender formula, principle, and rule in parliament again

10/10/2019 gazzetted as a public holiday following a High Court Judgment that reinstated it in 2017.


Among the recommendations proposed by the Taskforce in BBI Report, 2019 was that:

“President Uhuru Kenyatta should commission an official history of Kenya whose production will be led by an Office of the Historian resident in the National Archives. This history should go back 1000 years and provide an accurate and definitive account of the settlement of Kenya by the present inhabitants; the political, economic, and cultural heritage of all ethnic groups in Kenya; the role of women throughout history; an account of the international slave trade and colonialism; the anticolonial struggles; the post-colonial history of every part of the country; and contemporary histories including those of urban areas and newly formed communities in Kenya.”288

2020- COVID-19 pandemic and its effects, debates on the Building Bridges Initiative (BBI), Chief Justice David Kenani Maraga’s advisory to President Uhuru Kenyatta for the dissolution of the National Assembly for failure to pass one-third gender rule. Further, Hon John Waluke, Sirisia MP was sentenced to 67 years in prison on corruption charges. Mr Waluke together with his co-accused were later freed on a cash bail of KSh 10 Million and KSh 30 million, respectively, in September 2020.289

Additionally, the Nairobi Metropolitan Service (NMS) was created on March 18, 2020, after the signing of the Deed of Transfer of Functions between former Nairobi City County Governor

Mike Sonko, and President Uhuru Kenyatta. There were also debates on the Handshake and constitutional amendment process and proposals that resulted therein. Further, referendum debates and 2022 transition, and President Uhuru Kenyatta’s succession were increasingly in focus. Moreover, there was the third-generation revenue formula ‘Third Basis for Revenue Allocation’ impasse at the Senate with Senators failing to agree on at least ten (10) occasions.\(^\text{290}\)

Relatedly, the Building Bridges Initiative (BBI) Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce, 2020 submitted on October 21, 2020, and officially launched on October 26, 2020 at Bomas of Kenya. The BBI Report 2020 proposes policy, constitutional, legislative and administrative reforms...\(^\text{291}\)

2021- IEBC finalized the verification of more than 1.4 million signatures supporting the BBI Report, 2020. The Constitution of Kenya (Amendment) Bill, 2020 is submitted to all the 47 county assemblies. The Bill was subjected to public participation then passed in the relevant County Assemblies as shown in the Annex ...\(^\text{292}\)

January 27, 2021- inquiry by Parliament into the KEMSA COVID-19 items procurement scandal. It was estimated that at least KShs 7.8 Billion was lost through flouted procurement rules, and illegally awarded tenders.\(^\text{293}\)

As at February 16, 2021, at least three (5) county assemblies including Kisumu, Siaya, Homabay, West Pokot and Busia county assemblies have passed the Bill with more counties expected to follow suit, while Baringo County Assembly being the only county so far that failed to pass the Constitution of Kenya (Amendment) Bill, 2020. This has however been challenged due to lack of adequate public participation.\(^\text{294}\)


... Let wisdom flow from the Oracle and back in class through books, articles, online, in the Oracle’s Shrine, and in appropriate fora…


email: sihanyamentoring@gmail.com; info@sihanyaprofadvs.co.ke; (use both)
url: www.innovativelawyering.com; www.sihanyaprofadvs.co.ke