CONSTITUTIONALISM AND DEMOCRATISATION IN KENYA, 1945-2007 pdf

1: Constitutionalism

The Kenya constitution is a derivation of the familiar Westminster model bequeathed to many former British colonies. Constitutionalization is widely perceived as a power-diffusing measure often associated with limiting government action and protecting basic rights.

Usage[edit] Constitutionalism has prescriptive and descriptive uses. Law professor Gerhard Casper captured this aspect of the term in noting, "Constitutionalism has both descriptive and prescriptive connotations. Used prescriptively, its meaning incorporates those features of government seen as the essential elements of the Then in carrying the story forward, he identifies revolutionary declarations and constitutions , documents and judicial decisions of the Confederation period and the formation of the federal Constitution. While hardly presenting a straight line, the account illustrates the historical struggle to recognize and enshrine constitutional rights and principles in a constitutional order. Prescriptive[edit] In contrast to describing what constitutions are, a prescriptive approach addresses what a constitution should be. As presented by the Canadian philosopher Wil Waluchow , constitutionalism embodies the idea This idea brings with it a host of vexing questions of interest not only to legal scholars, but to anyone keen to explore the legal and philosophical foundations of the state. One recent assessment of American constitutionalism, for example, notes that the idea of constitutionalism serves to define what it is that "grants and guides the legitimate exercise of government authority". Wood described this American constitutionalism as "advanced thinking" on the nature of constitutions in which the constitution was conceived to be a "sett of fundamental rules by which even the supreme power of the state shall be governed. Fundamental law empowering and limiting government[edit] One of the most salient features of constitutionalism is that it describes and prescribes both the source and the limits of government power. Hamilton has captured this dual aspect by noting that constitutionalism "is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order. Although frequently conflated, there are crucial differences. A discussion of this difference appears in legal historian Christian G. Fritz notes that an analyst could approach the study of historic events focusing on issues that entailed "constitutional questions" and that this differs from a focus that involves "questions of constitutionalism. However, These political and constitutional controversies also posed questions of constitutionalismâ€”how to identify the collective sovereign, what powers the sovereign possessed, and how one recognized when that sovereign acted. Unlike constitutional questions, questions of constitutionalism could not be answered by reference to given constitutional text or even judicial opinions. Rather, they were open-ended questions drawing upon competing views Americans developed after Independence about the sovereignty of the people and the ongoing role of the people to monitor the constitutional order that rested on their sovereign authority. Dicey noted a difference between the "conventions of the constitution" and the "law of the constitution". Constitutional economics is a field of economics and constitutionalism and describes and analyzes the specific interrelationships between constitutional issues and the structure and functioning of the economy. Buchanan as a name for a new academic sub-discipline. Buchanan received in the Nobel Prize in Economic Sciences for his "development of the contractual and constitutional bases for the theory of economic and political decision-making". This philosophical position is, in fact, the very subject matter of constitutional economics. A constitutional economics approach allows for a combined economic and constitutional analysis, helping to avoid an unidimensional understanding. Buchanan believes that a constitution, intended for use by at least several generations of citizens, must be able to adjust itself for pragmatic economic decisions and to balance interests of the state and society against those of individuals and their constitutional rights to personal freedom and private happiness. Concurrently with the rise of academic research in the field of constitutional economics in the U. The Russian school of constitutional economics was created in the early 21st century with the idea that constitutional economics allows for a combined economic and constitutional analysis in the legislative especially budgetary process, thus helping to overcome arbitrariness in the economic and financial decision-making: In the English language , the word "constitution" possesses a whole number of meanings,

encompassing not only national constitutions as such, but also charters of public organizations, unwritten rules of various clubs, informal groups, etc. The Russian model of constitutional economics, originally intended for transitional and developing countries , focuses entirely on the concept of the state constitution. In , the Russian Academy of Sciences officially recognized constitutional economics as a separate academic sub-discipline. These ideas, attitudes and patterns, according to one analyst, derive from "a dynamic political and historical process rather than from a static body of thought laid down in the eighteenth century". Indeed, a routine assumption of many scholars has been that understanding "American constitutionalism" necessarily entails the thought that went into the drafting of the federal constitution and the American experience with that constitution since its ratification in This underlying premise, embraced by the American revolutionaries with the Declaration of Independence unites American constitutional tradition. A variety of developments in 17th century England, including "the protracted struggle for power between King and Parliament was accompanied by an efflorescence of political ideas in which the concept of countervailing powers was clearly defined," [23] led to a well-developed polity with multiple governmental and private institutions that counter the power of the state. The "principle of liberum veto played an important role in [the] emergence of the unique Polish form of constitutionalism. Two observations might be offered about its prescriptive use. There is often confusion in equating the presence of a written constitution with the conclusion that a state or polity is one based upon constitutionalism. As noted by David Fellman , constitutionalism "should not be taken to mean that if a state has a constitution, it is necessarily committed to the idea of constitutionalism. In a very real sense Constitutionalism not only establishes the institutional and intellectual framework, but it also supplies much of the rhetorical currency with which political transactions are carried on. In assessing the "meaning that critical scholars attributed to constitutional law in the late twentieth century," Professor Seidman notes a "new order They have, in short, used legal reasoning to do exactly what crits claim legal reasoning always doesâ€”put the lipstick of disinterested constitutionalism on the pig of raw politics. For instance, they describe the document as a document that may specify its relation to statutes, treaties, executive and judicial actions, and the constitutions or laws of regional jurisdictions. This prescriptive use of Constitutionalism is also concerned with the principles of constitutional design , which includes the principle that the field of public action be partitioned between delegated powers to the government and the rights of individuals, each of which is a restriction of the other, and that no powers be delegated that are beyond the competence of government. It was designed to redress longstanding political defects of the Polishâ€”Lithuanian Commonwealth and its traditional system of "Golden Liberty". The Constitution introduced political equality between townspeople and nobility szlachta and placed the peasants under the protection of the government, thus mitigating the worst abuses of serfdom. Constitution of the United Kingdom Constitutionalist was also a label used by some independent candidates in UK general elections in the early s. Most of the candidates were former Liberal Party members, and many of them joined the Conservative Party soon after being elected. As opposed to said movement, the Anticonstitutionalist movement was also born. Bosch had to depart to Puerto Rico after he was deposed. The Constitutionalists had a new leader: Constitutions are not just about retraining and limiting power; they are about the empowerment of ordinary people in a democracy and allowing them to control the sources of law and harness the apparatus of government to their aspirations. That is the democratic view of constitutions, but it is not the constitutionalist view Of course, it is always possible to present an alternative to constitutionalism as an alternative form of constitutionalism: But I think it is worth setting out a stark version of the antipathy between constitutionalism and democratic or popular self-government, if only because that will help us to measure more clearly the extent to which a new and mature theory of constitutional law takes proper account of the constitutional burden of ensuring that the people are not disenfranchised by the very document that is supposed to give them their power. But, as we have discovered in the past century, no constitution can interpret or enforce itself; it must be interpreted by men. Furthermore, the highly touted "checks and balances" and "separation of powers" in the American government are flimsy indeed, since in the final analysis all of these divisions are part of the same government and are governed by the same set of rulers. Authors such as Ann E. Mayer define Islamic constitutionalism as "constitutionalism that is in some form based on Islamic principles, as opposed to constitutionalism that has developed in countries that happen to be

Muslim but that has not been informed by distinctively Islamic principles". The constitutional changes initiated by the Arab spring movement have already brought into reality many new hybrid models of Islamic constitutionalism.

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Kenya, before enrolling for the LLM (Human Rights and Democratisation in Africa), presented at the Centre for Human Rights at the University of Pretoria, in

Professor Dudley rightly observed that: Akanki ed 19 In , Nigeria was rated the second most corrupt nation out of a total of all 91 countries assessed. In Nigeria retained its number two position as the most corrupt country out of a total of However, by Nigeria was ranked number six out of countries. Rankings available online at http: Aniagolu, The Making of the Constitution of Nigeria. Since the attainment of independence, corruption and abuse of office have enjoyed steady growth. They have consequently become cankerworms reaching the dimension of epidemic in our body politic. While admission and examination scandals are examples of corruption in our educational institutions, payment of salaries to ghost workers, over invoicing of goods and services, and the raising of fictitious local purchase orders, are examples of corruption in our private and public sections. It suffices to state that a nation where corruption is an accepted norm is bound to suffer economic backwardness and isolation. We therefore support the view that lawless and unaccountable government not only guarantees economic backwardness, it insures societal breakdown. These anti-corruption legislations have been complimented by several legislations aimed at engendering transparency and accountability, and combating corruption in governance, by the successive administraions. N 51 WRN C on May 18 What Does Obasanjo Want? See also Paul D. The leadership assumes voluntary associations are coopted or disbanded. Strangely, Nigeria, and other African countries like Kenya, have defied this line of reasoning, and the converse has been the case, as corruption has been on the increase even in the face of enactment of more anti-corruption statutes! The paper is divided into four sections. The first section provides a normative and practical analysis of constitutionalism in Nigeria; the second, an exposition of good governance theory and praxis in the country; the third, on the corruption phenomenon and its challenges; and fourth and final section present the recommendations and conclusion. FORM AND SUBSTANCE Generally there is a basic assumption of a conceptual connection, not so much between the constitution as a document and democracy, but between modern constitutionalism and the idea of liberal democracy, especially as codified constitutions are valued as a means to the end of limiting governmental power; and in a democracy, limiting also the power of the people to whom government is responsible. An Eastern and Southern African Perspective, supra, at p. A Comparison The doctrine of constitutionalism suggests, according to Hilaire Barnett, at least the following: A first observation on the democratization in Nigeria, is the flawed electoral system and rigged elections that produced the elected officials in the executive and legislature to operate the Constitution, and thereby impacting negatively on the operation of the constitution. C the supremacy of the Constitution was affirmed to declare the provisions of the Electoral Act on formation of political parties void ; A-G Federation v. C; 20 WRN 1 the removal of the Vice President through the declaration of his seat vacant for changing his political party by the President was declared inconsistent with the Constitution 5 constitutional provisions, thereby engendering and fostering impunity, corruption and wastage of national resources. Hence one of the major challenges being faced by African countries, including Nigeria, is to produce a constitution that will enjoy both legitimacy and efficacy. Attempts have been made to address the above mentioned weaknesses of the Constitution through First and Second Constitutional Amendments effected in and These constitutional reforms were followed up with the passing of the Electoral Act that was employed in the conduct of the Elections that was won by President Goodluck Jonathan on the platform of the Peoples Democratic Party PDP , and were adjudged to be better conducted than previous elections in the country. A capable state, in this context, is one characterized by transparency, accountability, the ability to enforce law and order fairly throughout the country, respect for human rights, the effective sharing of resources between the rural and urban populations, a limited role in the market economy, the creation of a predictable, open and enlightened policy-making environment and the working in partnership with the private sector, the media and organs of civil society. In addition, the acceptance of competitive politics and the maintenance of a bureaucracy imbued with a professional ethos and committed to acting in furtherance of the

public good are required. These characteristics enable a state to effectively perform its role of developing the country and bringing about a better life for its people The Role of the Legislature in promoting constitutionalism The legislature epitomizes an aspect of the sovereign expression of the constituent representative authority of the people, whose interest it is the duty of the legislature to project and protect through the discharge of the legislative functions of: An Eastern and Southern African Perspective, supra, atp. Yet African legislatures are arguably more powerful and autonomous today than at any time since independence a half century ago. Unfortunately, the performance of the legislature has fallen woefully below expectation, as they have been sometimes involved in bribery and corruption themselves when they receive bribes or incentives from the executive to pass appropriation Bills or they corruptly enrich themselves when expending the budgetary allocations to the National Assembly! The question then is who will bell the cat? See also Ibrahim Imam and M. These arguments were rejected by the Appellate Courts, and the Vice President was able to continue in office till May 29 , and to stand for the election for the office of the President during the Elections. See Attorney General of the Federation V. The Code of Conduct prohibited, inter alia, the giving and receiving of bribes, abuse of office by Public Officers, the operation of private foreign accounts, as well as conflict of personal interest with official duties on the part of Public Officers. It is also vested with the duty of receiving and dealing with allegations that a Public Officer has committed a breach of or has not complied with the provisions of the Code. The Conduct Tribunal conducts administrative adjudication on all allegations of contraventions of the Code and imposes any of the punishments specified by the Constitution. However, the immunity clauses of section of the Constitution that restricts the institution of civil or criminal proceedings against the President, Vice-President, Governors, Deputy Governors, have been employed successfully against any successful prosecution for breaches of the Code by the Code of Conduct Tribunal. The list of Public Officers for the purpose of the Code of Conduct include the President, Vice President, all members and staff of legislative houses, Governors and Deputy Governors of States, all judicial officers and all staff of courts of law, etc. The list covers every Public Office in Government. In recent times the judgments of the appellate courts have been bereft of sound jurisprudential analysis, rather the decisions are invariably based on expediency. However, good governance is a more recent and novel idea of democratic governance that found expression in the detailed provisions of Chapter II of the Constitution on Fundamental Objectives and Directive Principles of State Policy. Good governance became the reducible criteria for assessment of government under the and Constitutions, in response to the negative effect of military rule 34, the political activism of the civil society, and the pressures of international financial institutions such as the World Bank, IMF and UNDP. It ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources. Vanguard Wednesday, Marcy 07, at http: Fawehinmi40 not to be of the same status as the Constitution ie. Inferior to the constitution and the provisions of the Act were subject to the provisions of the Constitution, which will including section 6 6 c. And granted that the provisions under the directive principles of state policy were justiciable, it would be the exclusive jurisdiction of the Fedral High Court, being a matter solely within the domestic jurisdiction of the Federal Republic of Nigeria. The right to education recognized under Article 17 of the African Charter on Human and Peoples Rights and not a breach of the right to education contained under Section II of the Federal Constitutionâ€¦â€¦. It is well established that the rights guaranteed by the African Charter are justiciable before this Court. The Supreme Court held that, the Fundamental Objectives and Directive Principles, will however be justiciable when read together with the justiciable provisions of the Constitution or enacted into law by the National Assembly. Where the Commission took cognizance of the fact that the Nigeria had incorporated the African Charter into its domestic law with the result that all rights contained therein can be invoked in Nigerian courts, before holding, inter alia, that the Nigerian government was in violation of the right to a general satisfactory environment. In the locus classicus case of Abraham Adesanya v. President of Nigeria45 where the Supreme Court stated that: However, the shift from a restrictive to a more flexible approach to standing in cases of human rights violation was accepted in the SERAP v FRN47 by the ECOWAS Community Court of Justice to have taken place in Nigerian constitutional jurisprudence, and therefore a plaintiff need not establish that he has suffered injury or

has a special right in order to have standing. Instead plaintiff has to show that the right alleged to have been breached is public in nature and that the matter is justiciable. Indeed, the revised Fundamental Rights Enforcement Procedure Rules appears to have adopted this new approach through its preamble. In my opinion these developments in our constitutional law augurs well for the enforcement of socio-economic rights through public interest litigations and the practice of good governance in Nigeria. Governmental Institutions It has been observed that the corruption of public office has existed in Nigeria since the establishment of modern structures of public administration in the country by the British Colonial Administration. However, its escalation has coincided with the expansion of administrative structures and the full development of the public sector. These cases support restrictive interpretation of the requirement of locus standi, that for a party to have standing he must have suffered some ham or prove to have some special interest which is worthy of protection. The Public Service has been regarded as: The resultant effect of this has been the phenomenon of inflated contracts, abandoned projects, lack of public infrastructures, poverty of the citizens and an abysmally poor standard of living. However, these have not been effective in checking corruption and corrupt practices, as the reforms have failed to address the fundamental causes of corruption in the public service, especially the conditions of service of the public servants and the establishment of effective transparency and accountability procedures for the public service. K, have been followed up with statutory reforms through the enactment of the Fiscal Responsibility Act and Public Procurement Act, both of Indeed the Freedom of Information Act of is intended to give access to the press and the public as to the operations of government institutions and make them less opaque. Ocheje supra at â€” The recent English Court decision on allegations of criminal and civil corruption in the prosecution of former Governor of Delta State, James Ibori and his co-conspirators, led to their sentences to jail terms coupled with the freezing of their accounts and the forfeiture of the proceeds of his corrupt practices. Together with the earlier case of former President Frederick Chiluba of Zambia 56 these laudable decisions give clear warnings to African leaders that they will not be able to hide away their proceeds of corruption in foreign countries. Umez 57 and Oliver de Sardan58 in relation to the value systems in African societies, such as Nigeria, that promote corruption, reveal dimensions to the corruption problem that goes beyond the frontiers of legal normative propositions to the need for socio-cultural normative standards that will correct the existing value systems. Understanding the existence, growth and impact of corruption within the Nigerian state, requires the definition or conceptualization of corruption within the context of first, the domestic legal system and administration of justice, and second, the international treaties, conventions, and instruments, to which Nigeria is a signatory or has ratified, since there is no universally acceptable definition of the term. This necessitates the call for the domestication of relevant international conventions and treaties59 within the Nigerian State in order to concretize the basis for a more effective criminalization policy, and anti-corruption techniques and mechanisms in combating and preventing corruption in Nigeria. It has also been observed that the statutory criminal laws, the Criminal and Penal Codes, do not define corruption. Attorney-General of the Federation supra. This wide range of enumeration of offences has been criticized, among other over- reaching provisions of the Act. The Act is presently before the National Assembly for review and amendment. In a recent study of the development 73 problems in Nigeria, Bedford N. Ocheje, supra â€” Validation Decree , all dealt with the investigation and forfeiture of Assets of Corrupt Officers. The Supreme Court in Lakanmi v. Attorney General, West 1 U. Ten out of the twelve Military Governors in that Regime were indicted for corruption. Theories and Solution His observations are true for the Nigerian society. Little wonder that the constitutional mechanism established by the Constitution to combat corruption failed woefully during the President Shehu Shagari Administration. On the other hand John R. Heilbrunn, writing for the World Bank Institute, 80 raised a query as to the effectiveness of the various anti-corruption commissions and institutions set up by policymakers to combat corruption, thus: Most observers note that corruption is a symptom of deeper problems in how a political leadership administers the key financial functions of state. Accordingly, a range of policies have been identified to improve public administration including reforms of public expenditure management, procurement procedures, auditing functions, and rules governing conflicts of interest. One striking development of anti-corruption commissions has been the adoption by numerous governments despite a mounting body of evidence they fail to reduce corruption. What drives policymakers to

invest a portion of scarce resources in a commission that has such a doubtful impact?

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Nyanchoga, A. S; Francis Muchoki, Pius Kakai and Susan Waiyego Democratization and Constitutionalism in Kenya Catholic University of Eastern Africa Press Kenya's Flawed Electoral Process, Ethnic Violence and Genocide (Submitted for publication to the Journal of Elections; Electoral Institute of Southern Africa).

Get Full Essay Get access to this section to get all help you need with your essay and educational issues. Get Access Constitutional Law and Constitutionalism Essay Sample Constitutional Law May be deemed elusive and immaterial when the constitutions in Consideration are either dead, hogwash and unrealistic. Critically analyze the above statement using relevant case law and statutory provisions. A constitution is a set of laws either written or unwritten that govern the relationship between the different organs of a government that is the Executive, Judiciary and the Legislature and the relationship between the government and the governed in a given state or country. This is the supreme law of any given state. Constitutional Law is that branch of law that governs and guides constitutional interpretation and implementation as well as sets down the relationship between different entities of a state namely the executive, the legislature and the judiciary. All States can be said to have some form of norm that governs the relationship between the arms of the government and a government and its people, however the problem comes in in implementation of the said norms i. A constitution is a document and basically it cannot be said to be dead or alive and what determines the same is the implementation of the said document. Constitutionalism is well achieved when the constitution is implemented to the later that is when the spirit and the letter of the constitution are upheld. It will take the good will of the government of the day to implement the constitution in order to breathe life into it. Therefore, a constitution as a document cannot be said to be dead but for the failed implementation or rather the deliberate encroachment by the ruling elites. Constitutionalism will require a conducive political environment and the entrenchment of the particular clauses in the constitution, for it to be achieved. This entrenchment has made sure that the fundamental rights of the accused are not compromised. This has been done for example by the famous Fifth Amendment of the U. In view of the above, the courts have had to make landmark rulings just to make sure that these rights are upheld e. Arizona ruling, the United States Supreme Court extended the Fifth Amendment protections to encompass any situation outside of the courtroom that involves the curtailment of personal freedom. This has been evidenced by the land mark rulings by the High to challenge unconstitutional appointments by the executive such as the appointment of Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission â€" Mumo Matemu v. The Court held that it had jurisdiction to review the process of appointments of persons to State or Public Offices where mandatory procedures as well as the law were not followed. The High Court further decided that the doctrine of separation of powers did not prevent it from entertaining the controversy surrounding the appointment of Mumo Matemu. The judiciary has tried to keep the constitution alive by such rulings. The other way in which constitutionalism has been up held especially in Kenya is by the legislations that by the 10th Parliament. The Parliament burned the midnight oils in a bit to beat the deadlines set up in the constitution such as the Public Finance Bill, Devolution among others. As earlier stated, constitutionalism largely depends on the political goodwill and the integrity of the ruling elite without which, this piece of document becomes hogwash. We have instances in Kenya where the ruling elite have tried to suppress the constitution. This is especially because of the influence of the executive in the decision making by the other wings of the government especially the legislature. We have and still witness the manipulation of the legislature by the executive. Members of Parliament and the senate interpret the constitution to suite their own interests and those of their affiliate political parties. We have heard of incidences where members of the legislature have attempted to mutilate the constitution for their own gain. The most evident scenario is the series of impeachment motions going on in the county assemblies, the parliament and the senate. The most recent one is how the government section of the Parliamentarians prevailed over Hon. Mithika Linduri to drop his impeachment motion against Hon. The whole debate was reduced to the question of loyalty. Therefore, without political good will, the constitution will remain a mere piece of document without life. Another incident where the constitutionalism has failed the test is on the

Sovereignty of the people. There is a constitutional Paradox since it is the ruling elite that exercise the sovereignty while the people themselves are mere subjects being manipulated by these leaders. In my opinion, can be eliminated, when the citizens effectively exercise their sovereignty e. This can best be achieved if a thorough voter education is carried out, and the population economically empowered. This will go a long way in liberating the citizens in order to make independent decisions while exercising their sovereign powers through voting and elect leaders of integrity. But I will be quick to state that any constitution of a given state in itself cannot die but may remain abstract if life is not breathed into through proper interpretation and implementation through upholding of the letter and spirit of the constitution. Constitutionalism can be achieved through, clear structures especially on the separation of powers whereby, no arm of the government seem to be more powerful than the other, proper interpretation by the judiciary and the willingness to implement it to the latter. The Kenyan Constitution. Judicial Activism in India: Meaning and Implications- a paper by Lipika Sharma 3. Business Dictionary- Definition of a Constitution More essays like this:

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Understood in this way, all states have constitutions and all states are constitutional states. Anything recognizable as a state must have some means of constituting and specifying the limits or lack thereof placed upon the three basic forms of government power: Suppose it is widely acknowledged that Rex has these powers, as well as the authority to exercise them at his pleasure. The constitution of this state might then be said to contain only one rule, which grants unlimited power to Rex. He is not legally answerable for the wisdom or morality of his decrees, nor is he bound by procedures, or any other kinds of limitations or requirements, in exercising his powers. Whatever Rex decrees is constitutionally valid. They mean not only that there are norms creating legislative, executive and judicial powers, but that these norms impose significant limits on those powers. But constitutional limits come in a variety of forms. They can concern such things as the scope of authority e. Compare a second state in which Regina has all the powers possessed by Rex except that she lacks authority to legislate on matters concerning religion. Suppose further that Regina also lacks the power to implement, or to adjudicate on the basis of, any law which exceeds the scope of her legislative competence. We have here the seeds of constitutionalism as that notion has come to be understood in Western legal thought. In discussing the history and nature of constitutionalism, a comparison is often drawn between Thomas Hobbes and John Locke who are thought to have defended, respectively, the notion of constitutionally unlimited sovereignty e. But no one can command himself, except in some figurative sense, so the notion of limited sovereignty is, for Austin and Hobbes , as incoherent as the idea of a square circle. Whether this appeal to popular sovereignty provides Austin with an adequate means of dealing with constitutional democracies is questionable. But if we identify the commanders with the people themselves, then we seem inexorably led to the paradoxical result identified by H. Hartâ€”the commanders are commanding the commanders. Roughly speaking, we might define sovereignty as the possession of supreme and possibly unlimited normative power and authority over some domain, and government as those persons or institutions through whom that sovereignty is exercised. Once some such distinction is drawn, we see immediately that sovereignty might lie somewhere other than with the government and those who exercise the powers of government. And once this implication is accepted, we can coherently go on to speak of limited government coupled with unlimited sovereignty. As Locke might have said, unlimited sovereignty remains with the people who have the normative power to void the authority of their government or some part thereof if it exceeds its constitutional limitations. Though sovereignty and government are different notions, and normally apply to different entities, it nevertheless seems conceptually possible for them to apply to one and the same individual or institution. Anything less than such an ultimate, unlimited sovereign would, given human nature and the world we inhabit, destroy the potential for stable government and all that it makes possible. Entrenchment According to most theorists, another important feature of constitutionalism is that the norms imposing limits upon government power must be in some way, and to some degree, be entrenched, either legally or by way of constitutional convention. Most written constitutions contain amending formulae which can be triggered by, and require the participation of, the government bodies whose powers they limit. But these formulae invariably require something more than a simple decision on the part of the present government, through e. Sometimes constitutional assemblies are required, or super-majority votes, referendums, or the agreement of not only the central government in a federal system but also some number or percentage of the governments or regional units within the federal system. Were a government institution entitled, at its pleasure, to change the very terms of its constitutional limitations, we might begin to question whether there would, in reality, be any such limitations. Consider Regina once again. Were she entitled, at her discretion, to remove and perhaps later reinstate the constitutional restriction preventing her from legislating on some religious matter on which she had strong views, then it is perhaps questionable whether Regina could sensibly be said to be bound by this requirement. Of course this constitutional meta-rule or convention is itself

subject to change or eliminationâ€”a fact that raises a host of further puzzles. For example, does such an act require application of the very rule in questionâ€”i. Entrenchment may be an essential element of constitutional regimes, but it would seem that constitutions neither can nor should be entrenched against the actions of a sovereign people. Writtenness Some scholars believe that constitutional norms do not exist unless they are in some way enshrined in a written document e. But most accept that constitutions or elements of them can be unwritten, and cite, as an obvious example of this possibility, the constitution of the United Kingdom. One must be careful here, however. Though the UK has nothing resembling the American Constitution and its Bill of Rights, it nevertheless contains a number of written instruments which have, for many centuries, formed central elements of its constitution. Magna Carta C. Furthermore, constitutional limits are also said to be found in certain principles of the common law, explicitly cited in landmark cases concerning the limits of government power. The fact remains, however, that historically the constitution of the UK has largely taken unwritten form, suggesting strongly that writtenness is not a defining feature of constitutionalism. Why, despite the existence of seemingly obvious counter-examples, might someone be led to think that constitutional norms must be written rules, as opposed to more informal conventions or social rules? One possible reason[10] is that unwritten rules and conventions are sometimes less precise and therefore more open to interpretation, gradual change, and ultimately avoidance, than written ones. If this were true, then one might question whether an unwritten rule could, at least as a practical matter, serve adequately to limit government power. But there is no reason to accept this line of argument. Long standing social rules and conventions are often clear and precise, as well as more rigid and entrenched than written ones, if only because their elimination, alteration or re-interpretation typically requires widespread changes in traditional attitudes, beliefs and behaviour. And these can be very difficult to bring about. Montesquieu and the Separation of Powers Does the idea of constitutionalism require, as a matter of conceptual or practical necessity, the division of government powers urged by Montesquieu and celebrated by Americans as a bulwark against abuse of state power? But how, it might be asked, can she be the one qua judge who determines whether her legislation satisfies the prescribed constitutional limitation? Perhaps Bishop Hoadly was right when he said in a sermon before the English King: Although some constitutional limits, e. Regina might argue that a decree requiring all shops to close on Sundays the common Sabbath does not concern a religious matter because its aim is a common day of rest, not religious observance. That constitutions often raise such interpretive questions gives rise to an important question: Does the possibility of constitutional limitation on legislative and executive power require, as a matter of practical politics, that the judicial power by which such limitations are interpreted and enforced reside in some individual or group of individuals distinct from that in which these legislative and executive powers are vested? In modern terms, must constitutional limits on a legislative body like Parliament, the Duma or Congress, or an executive body like the President or her Cabinet, be subject to interpretation and enforcement by an independent judiciary? Marbury v Madison settled this question in the affirmative as a matter of American law, and most nations follow Marbury and Montesquieu in accepting the practical necessity of some such arrangement. But it is not clear that the arrangement truly is practically necessary, let alone conceptually so. Bishop Hoadly notwithstanding, there is nothing nonsensical in the suggestion that X might be bound by an entrenched rule, R, whose interpretation and implementation is left to X. This is, arguably, the situation in New Zealand where the courts are forbidden from striking down legislation on the ground that it exceeds constitutional limits. Observance and enforcement of these limits are left to the legislative bodies whose powers are nonetheless recognized as constitutionally limited and subject to whatever pressures might be imposed politically when state actions are generally believed to violate the constitution. It is important to realize that what rule, R, actually requires is not necessarily identical with what X believes or says that it requires. Nor is it identical with whatever restrictions X actually observes in practice. That constitutional limits can sometimes be avoided or interpreted so as to avoid their effects, and no recourse be available to correct mistaken interpretations and abuses of power, does not, then, imply the absence of constitutional limitation. But does it imply the absence of effective limitation? Perhaps so, but even here there is reason to be cautious in drawing general conclusions. And whatever their faults, there is little doubt that many Parliaments modeled on the British system typically

act responsibly in observing their own constitutional limits. Constitutional Law versus Constitutional Convention The idea of constitutionalism requires limitation on government power and authority established by constitutional law. But according to most constitutional scholars, there is more to a constitution than constitutional law. But there is a long-standing tradition of conceiving of constitutions as containing much more than constitutional law. Dicey is famous for proposing that, in addition to constitutional law, the British constitutional system contains a number of constitutional conventions which effectively limit government in the absence of legal limitation. These are, in effect, social rules arising within the practices of the political community and which impose important, but non-legal, limits on government powers. An example of a British constitutional convention is the rule that the Queen may not refuse Royal Assent to any bill passed by both Houses of the UK Parliament. Perhaps another example lies in a convention that individuals chosen to represent the State of Florida in the American Electoral College the body which actually chooses the American President by majority vote must vote for the Presidential candidate for whom a plurality of Floridians voted on election night. Owing to the fact that they are political conventions, unenforceable in courts of law, constitutional conventions are said to be distinguishable from constitutional laws, which can indeed be legally enforced. It includes constitutional conventions as well. We must further recognize the possibility that a government, though legally within its power to embark upon a particular course of action, might nevertheless be constitutionally prohibited from doing so. Should she violate one of these conventions, she would be acting legally, but unconstitutionally, and her subjects might well feel warranted in condemning her actions, perhaps even removing her from officeâ€”a puzzling result only if one thinks that all there is to a constitution is constitutional law. Constitutional Interpretation As we have just seen, there is often more to a constitution than constitutional law. As we have also seen, constitutional norms need not always be written rules. Despite these important observations, two facts must be acknowledged: Differences of view on these matters come to light most forcefully when a case turns on the interpretation of a constitutional provision that deals with abstract civil rights e. As we shall see, stark differences of opinion on this issue are usually rooted in different views on the aspirations of constitutions or on the appropriate role of judges within constitutional democracies. Theories of constitutional interpretation come in a variety of forms, but they all seem, in one way or another, to ascribe importance to a number of key factors: The roles played by each of these factors in a theory of constitutional interpretation depend crucially on how the theorist conceives of a constitution and its role in limiting government power. Simplifying somewhat, there are two main rival views on this question. On the one side, we find theorists who view a constitution as foundational law whose principal point is to fix a long-standing framework within which legislative, executive and judicial powers are to be exercised by the various branches of government. Such theorists will tend towards interpretative theories which accord pride of place to factors like the intentions of those who created the constitution, or the original public understandings of the words chosen for inclusion in the constitution. On such a fixed view of constitutions, it is natural to think that factors like these should govern whenever they are clear and consistent. And the reason is quite straight forward. From this perspective, a constitution not only aspires to establish a framework within which government powers are to exercised, it aspires to establish one which is above, or removed from, the deep disagreements and partisan controversies encountered in ordinary, day to day law and politics. It aspires, in short, to be both stable and morally and politically neutral. To be clear, in saying that a constitution aspires, on a fixed view, to be morally and politically neutral, I in no way mean to deny that those who take this stance believe that it expresses a particular political vision or a set of fundamental commitments to certain values and principles of political morality. All constitutional theorists will agree that constitutions typically enshrine, indeed entrench, a range of moral and political commitments to values like democracy, equality, free expression, and the rule of law. But two points need to be stressed. First, fixed views attempt to transform questions about the moral and political soundness of these commitments into historical questions, principally concerning beliefs about their soundness. The task is not to ask: What do we now think about values like equality and freedom of expression? Rather, it is to ask: What did theyâ€”the authors of the constitution or those on whose authority they created the constitutionâ€”in fact think about those values? So stability and neutrality are, on fixed views, served to the extent that a constitution is capable of transforming questions of

political morality into historical ones.

CONSTITUTIONALISM AND DEMOCRATISATION IN KENYA, 1945-2007 pdf

5: Project MUSE - The New Constitutional Law of Kenya. Principles, Government and Human Rights

The Constitution of Kenya is the supreme law of the Republic of Kenya. There have been three significant versions of the constitution, with the most recent redraft being enabled in There have been three significant versions of the constitution, with the most recent redraft being enabled in

Alan E Masakhalia 3 November While Kenya cannot be classified among the dictatorships or undemocratic nations that dot the African continent, a lot has to be done to solidify and strengthen its emerging democratic culture. Simply put, democracy is rule by the people, of the people and for the people. Kenya is a democratic country that has embraced the system of representative democracy, where representatives - usually Members of Parliament - are tasked with representing the people as well as their opinions. As Kenyans struggle for their basic democratic rights it is worth noting that Kenyan public institutions such as Parliament and City Hall have suffered from a massive loss of credibility. Over three quarters of the parliamentarians have lost their seats during the last two general elections. This, however, has not translated into any meaningful change. New parliamentarians swiftly emulate the bad practises of their predecessors. He maintained that, "all citizens should meet together and decide what is best for the community and enact the appropriate laws. Any law which is not directly created by the citizens is not valid, and if those laws are imposed on people, that is equivalent to the people being enslaved. The citizens of a society must both develop and obey laws. The Kenyan constitution The outgoing Kenyan constitution did not allow citizens to trigger a referendum. Citizens could only participate in state-prepared referendums, and this was only when it centred on constitutional change. However the new constitution will cater for popular initiative. Kenyan citizens will have the right to launch an initiative backed by at least one million signatures , which is then handed over to the Independent Electoral and Boundaries Commission, which forwards it to the 47 county assemblies for discussion. If parliament fails to pass the bill then it shall be up to the citizens to decide in a national referendum. It is worth noting that all referendums in Kenya are national: However, there is still a long way to go on democratization as even the new constitution does not give the citizens a say in which international treaties the government might sign; there is still a clear lack of bottomâ€”up citizen participation; Kenyans still have no role to play in budget making, and other national matters. For example, a few months ago the Kenyan Parliament passed a resolution to compel the government to withdraw from the Rome statute that makes Kenya a member to the International Criminal Court. This was done by MPs in total disregard of the public mood. The people cannot prevent the implementation of such an unwanted law or resolution. Recall as an instrument of direct democracy is new fro Kenya, and very welcome. The recall clause shall enable citizens to force out of office non-responsive members of parliament and trigger a by-election. The recall is however limited to Members of Parliament â€” it does not apply to mayors, governors or the president. The only aspect of direct democracy that has always been in practice in Kenya is that of holding public consultations, first seen in when the then president, Daniel Toroitich, asked the vice president and others to go round the country and establish whether the citizens really favoured the introduction of a multiparty system. The practice of holding public consultations is not backed by law and it is usually carried out at the pleasure of the president. Yet these are leadership positions wield a lot of power and influence over the citizens. Most of these are just presidential appointments by decree. A future for Kenyan direct democracy Even though the availability of basic necessities such as affordable healthcare, security and food depend on political will, and therefore politicians, most Kenyans no longer trust them. They see them as dishonest, selfish, tribal and largely incompetent in leadership. This has seen the more educated and enlightened urban dwellers becoming more politically active. Citizens ought to be able to monitor and check the government throughout its term. They should be able to submit motions and agenda for public debate whether the government favours it or not. Most importantly they should be able to recall underperforming politicians. In when Kenya gained independence from the British most citizens had simple and common needs that could easily be addressed by parliament. Things have changed, however, and people now have varying beliefs and aspirations as well as varying social lifestyles. Hence, the current parliamentarians simply do not fully represent the wishes of the entire electorate. Most of

the voters before were illiterate and certainly unaware of government operations. But this has changed and the bulk of Kenyan citizens are now educated and quite capable of joining in the debate about their future. Our current parliament, for example, has not a single MP who is an expert in matters of Genetically Modified Organisms, cloning, stem cell research, or nuclear power. Yet there are hundreds of citizens with plenty of expertise in these fields. Direct Democracy should enable citizens to play a leading role in decision-making in areas of their expertise. ODM - favours it. As this happens, the people are often forgotten. The introduction of direct democracy in Kenya could go a long way towards strengthening the concept of dialogue and consensus-building in parliament and in national politics at large. Politicians will always opt to reach a compromise satisfying the greatest number of interests rather than take hard-line positions and be overruled by the people in a referendum. Major parties such as ODM, PNU and KANU would not be taking chances by ignoring the small parties as legislation passed by narrow margins stands little chance of surviving a referendum. Wider support and consensus will thus be sought in advance, and all this will lead to a better and more unified Kenya. Since corruption is rampant among the political class, and since it is also naturally possible to sway or influence the decisions of a few people, it would be safer to entrust decision making to the entire citizenry. It is not feasible to sway or bribe 10 million Kenyans â€" decisions made by the people will most likely be ones that are of societal benefit. Generally, representative democracy has failed Kenyans as the political class has consistently catered for their own interests which contradict the public will. Cases in point include: Implying that they would have sabotaged the new constitution had their financial demands not have been met. A recent case is the decision to spend millions of dollars on upgrading the Kenyan Embassy at the Hague, Netherlands! In fact in the recent case where billions disappeared from the Education Ministry , no single MP has castigated the minister concerned. It is the citizens via civil society organizations that are on the streets calling for accountability and an end to impunity. Conclusion Embracing direct democracy would shatter the imbalance of power that currently favours the political class while leaving the citizens alienated and powerless. The chance for citizens to play an active role in political decision-making will act towards raising the esteem of the general public. The populace would also mature politically due to frequent participation in decision making, thereby making them better voters and better citizens in general. For direct democracy to become a reality in Kenya, regional and local self-determination shall have to be promoted so that stronger, semi-autonomous federal structures can be established. Proper devolution either based on fewer and larger counties in a provincial model is what can take politics within the reach of the average citizen. The current centralized system denies citizens the right to make political decisions locally. They should be free to choose their institutions and have their own bylaws. They should also be free to organize their own unique judicial system, housing, and agricultural policies. While Kenya cannot be classified among the dictatorships or undemocratic nations that dot the African continent, a lot has to be done to solidify and strengthen its emerging democratic culture. Direct democracy in Kenya is surely the way to go as it will promote political awareness as well as stir public debate on national issues thereby giving broader legitimacy to political decisions. He is a seasoned political scientist currently serving as Country Representative of Democracy International Germany.

CONSTITUTIONALISM AND DEMOCRATISATION IN KENYA, 1945-2007 pdf

6: Constitutional Law and Constitutionalism | Essay Example

Arguing that the aspirations expressed during the review process have been achieved, largely with the adoption of the new constitution, this chapter documents the state of constitutionalism, democratic evolution and governance in Kenya for the year

Constitutional reforms in Kenya Kenya has had two major constitutional reforms involving wholly new texts since gaining independence: In , the independence constitution was replaced with a new text that entrenched amendments already made to the system of government that the independence constitution had contemplated. Further amendments to the constitution were later effected, including, in , the institution of a de jure single party government. The single party system was ended in , and the first presidential election took place in Calls for a comprehensive review of the Constitution intensified in the late s and early s, helped by the victory of the opposition National Rainbow Coalition NARC party in the general elections. Official and civil society consultation processes led to the adoption of what became known as the "Bomas draft" constitution after the location of the conference that adopted it. The review of the Constitution stalled and negotiations over the adoption of a new text seemed deadlocked. A deadlock only finally broken by the intervention of the African Union through a mediation team headed by Kofi Annan , following the outbreak of serious post-election violence in early Drafting process for the Constitution[edit] The Constitution of Kenya was the final document resulting from the revision of the Harmonized draft constitution of Kenya written by the Committee of Experts initially released to the public on 17 November so that the public could debate the document and then parliament could decide whether to subject it to a referendum in June The public was given 30 days to scrutinise the draft and forward proposals and amendments to their respective members of parliament, after which a revised draft was presented to the Parliamentary Committee on 8 January The Parliamentary Select Committee PSC revised the draft and returned the draft to the Committee of Experts [5] who published a Proposed Constitution on 23 February that was presented to Parliament for final amendments if necessary. After failing to incorporate over amendments to the proposed constitution, parliament unanimously approved the proposed constitution on 1 April The proposed constitution was presented to the Attorney General of Kenya on 7 April , officially published on 6 May , and was subjected to a referendum on 4 August Separation of Powers between the Three arms of government i. Executive, Legislature and Judiciary. The Executive â€" who holds executive authority and the qualifications. An introduction of an upper house â€" the Senate. The removal of age limit of 35 years to run for president. New draft allows people to run as long as they are of adult age. Article Representation in elective bodies has to effectively meet a gender equity constitutional requirement, namely that no more than two-thirds of members shall be from either gender in its make up. Chapter 7, Article 81 b Integrity Chapter, requires an Independent Ethics Commission to be set up that will monitor compliance with Integrity in all government institutions and make investigations,recommendations to the necessary authorities i. Attorney General and any other relevant authority. Chapter Six An advanced Human Rights and Equality Commission that will also have power to investigate and summon people involved in Human Rights abuses within the government and with the public. Article Equitable Sharing of resources between the National government and the County government through a resolution of Parliament. Chapter Part 4. An Equalization Fund to improve basic access to basic needs of the marginalized communities. Any member of the Public has a right to bring up a case against the government on the basis of infringement of Human Rights and the Bill of Rights â€" Article 23 1 2. The courts and government institutions are bound to the Bill of Rights as per the constitution Article 2 1 , Article 10 1. The Salaries and Remuneration Commission that is an Independent entity and has the power of regularly reviewing salaries of all State officers to ensure the Compensation bill is fiscally sustainable. Independence of the Judiciary is affirmed Article An Independent National Land Commission created to Maintain oversight and manage all Land Public belonging to National and County Government and recommend policy on addressing complaints from public,advise the National government on ways of improving National and County land management,planning,dispute resolution. Environmental Rights are recognized under Chapter 5 Part 2

Freedom of Media establishment from penalty on expression, by the State on any Opinion and dissemination of media. This is subject to the Article The Executive[edit] The executive at the top most levels will be constituted of a president , deputy president and the Cabinet. Shall not be a member of parliament Commander-in-Chief â€" and will declare war and state emergency upon approval by the National Assembly and Cabinet respectively. Head of Government â€" will wield executive authority and will co-ordinate and supervise all major sections of the executive branch. Shall nominate, appoint with prior approval of the national assembly, and dismiss Cabinet Secretaries. Preside over Cabinet meetings. Shall assent bills into law or refer them back to parliament for further review. Shall nominate, and after approval of Parliament, appoint a Chief Justice. Shall nominate, and after approval of Parliament, appoint an Attorney General Shall nominate, and after approval of Parliament, appoint a Director of Public prosecution. The Legislative branch is bicameral and will constitute of the following An upper house â€" the Senate Each of the 47 counties will have a Senator A senator will be elected by the voters. Tentative total number of Senators will be Presides over presidential impeachment hearings article A lower house â€" the National Assembly Each constituency the number gazetted by Independent Electoral and Boundaries Commission in October Tentative total number of MPs will be Votes to investigate and impeach the president article County Assemblies and Executive The country will be divided to approximately 47 counties â€" the counties are comparable to the current districts. Each county will have a County Executive headed by a county governor elected directly by the people and; A county assembly elected with representatives from wards within the county. Judiciary of Kenya There will be three superior courts: Supreme Court â€" highest judiciary organ consisting of the Chief Justice , the Deputy Chief Justice and five other judges. This court will handle appeals from the Appeals and Constitutional courts. It will also preside over presidential impeachment proceedings. Court of Appeal â€" will handle appeal cases from the High Court and as prescribed by Parliament. It will constitute not less than 12 judges and will be headed by a president appointed by the chief justice. An independent Judicial Service Commission has been set up to handle the appointment of judges. They will recommend a list of persons to be appointed as judges by the president this article will be enforced after the transitional period. The commission will consist of the following: Shall be appointed by the president â€" with approval from the National Assembly Hold office for only one term of not more than 6 years. Devolution[edit] Devolution to the county governments will only be autonomous in implementation of distinct functions as listed in the Fourth Schedule Part 2. This is in contrast with the Federal System in which Sovereignty is Constitutionally divided between the Federal government and the States. The Kenyan Devolution system still maintains a Unitary Political Concept as a result of distribution of functions between the two levels of government under the Fourth schedule and also as result of Article which gives the president the power to suspend a county government under certain conditions. A conflict of laws between the two levels of government is dealt with under Article where National legislation will in some cases override County legislation. The relationship between the National Government and the Counties can be seen as that of a Principal and a limited autonomy Agent as opposed to an Agent and Agent relation in the Federal System. More checks and balances have been introduced as requirements for accountability of both levels of government. The Parliament Senate and National Assembly has much discretion on the budgetary allocations to the County Governments. Every Five years the Senate receives recommendations from the Commission of Revenue Allocation Article and a resolution is passed on the criteria for Revenue allocation. The National Government is constitutionally barred from intruding wilfully with the county government role and function under the Fourth Schedule. Exceptions may require parliamentary approval Article and The National Government has a role to play in the County level by performing all the other functions that are not assigned to the County Government as listed on the Fourth Schedule Part 1. Citizenship[edit] The new constitution makes important reforms to the previous framework on citizenship, in particular by ending gender discrimination in relation to the right of a woman to pass citizenship to her children or spouse; by ending the prohibition on dual citizenship; and by restricting the grounds on which citizenship may be taken away. The text has been criticised, however, for not providing sufficient protections against statelessness for children or adults. A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen Art 15 1. A person who has been lawfully resident in Kenya for a continuous

period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen Art 15 2. A person who is a citizen does not lose citizenship by reason only of acquiring the citizenship of another country Art 16 and persons who are citizens of other countries may acquire Kenyan citizenship Art 15 4. A person who as a result of acquiring the citizenship of another country ceased to be a Kenyan citizen is entitled, on application, to regain Kenyan citizenship Art 14 5. Disagreements over reform[edit] After the draft of the constitution was released the type of government which would be implemented with the constitution was a debate amongst the various government coalitions. The remaining contentious issues primarily concern abortion, Kadhi courts and land reform. Mainstream Christian leaders in Kenya object to the constitution The Proposed Constitution of Kenya in Sec 26 4 reiterates and reaffirms the current Kenyan penal code by stating: Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law. However, the church insists that the weak drafting of the clause, especially the last two parts, could allow for the same clause to be used to enact laws or justify procurement of on-demand abortion. The church leaders also insist that for the clarity of the separation of religion and state doctrine and equality of religion, the Kadhi courts should not be in the constitution. A three Judge Bench of the High Court has since in a landmark ruling of a case filed six-year ago, declared the inclusion of the Kadhi court illegal and against the principles of non-discrimination, separation of religion and state and constitutionalism. International reaction[edit] Generally the whole world praised the approach that the Kenyans took to constitutional reform, seeing it as a viable way to keep corruption in check.

CONSTITUTIONALISM AND DEMOCRATISATION IN KENYA, 1945-2007 pdf

7: Direct democracy in Kenya: a case to be made | openDemocracy

'Constitutionalism and the Democratisation in the Two East African countries' A Paper presented to the Historical Association of Kenya held between July at Catholic University of Eastrn Africa.

Advanced Search Abstract The last decade has witnessed a constitutional revival in Africa, with several countries adopting new constitutions. Several of these constitutions have been adopted following serious ethnic tensions, especially in the Great Lakes region. Because of the nature of the ethnic conflicts which were rooted in the repression of minority communities, the new constitutional frameworks regarding ethnicity and minority rights are going to be extremely significant for the peace and stability of the region. By analyzing the recently adopted constitutions of Rwanda, Burundi, and the Democratic Republic of Congo, this article seeks to examine the extent to which some of the most recently adopted constitutions of the continent are addressing, or not, the rights of the most marginalized minority communities. By focusing on the Great Lakes region, this article explores why there is still a general reluctance towards the recognition of minority rights in most African constitutions. The Great Lakes region 4 has been particularly tormented by ethnic hatred, as Rwanda, Burundi, and the Democratic Republic of Congo DRC have witnessed genocide, civil wars, and inter-state conflicts. Such repression took the worst form in Rwanda where the Tutsi minority and moderate Hutus were physically exterminated. Moving away from this dreadful past, most countries of the region have embarked on a transition to more stable democratic endeavors. The adoption of new constitutions in Rwanda , Burundi , and the DRC have marked an end of the transitions in these three countries. Due to the recent history of ethnic conflicts, in all three states the relationship between the different ethnic groups formed a fundamental backdrop to the constitutional momentum. The aim in each case was to open a new era of power sharing amongst the different ethnic communities. Based on each case study, the main objective of the article is to examine the broader issue of minority rights protection in the constitutional design of sub-Saharan African states. The concept of minority rights remains largely underdeveloped on the continent. Traditionally, a large majority of African states have adopted an attitude marked by political skepticism and juridical ambiguity towards the rights of minorities. As noted by Heyns in a recent review of all the constitutions of Africa: Out of the 48 Sub-Saharan countries, this represents a very small minority of states having adopted a special legal framework of protection for minorities. While there is no generally accepted legal definition of minority, several elements for such a definition have been put forward. At the United Nations level, the proposed definition by Special Rapporteur Capotorti is often viewed as authoritative. It defines a minority as: There are several other working definitions of minorities, all of which present slight differences but by and large all the definitions put forward the same main characteristics. More subjectively, another important factor to take into consideration is the wish of the minorities to preserve their own specific identity. Minority rights aim at ensuring the right of the minorities to preserve and enjoy their own culture while also having the right to participate, on an equal footing, in the political, economic, and social life of the society at large. While the standards of non-discrimination and equality are crucial, they constitute only the first pillar of the protection of minorities. The second pillar goes a step further by providing minorities with the right to practice their own religion, develop their own culture, and use their own language. The aim is to ensure that minorities have the right to enjoy their own identity, in other words the right to be treated equally while remaining different. The right to remain different constitutes the quintessence of minority rights. While most, if not all, African countries do have specific protection to ensure equality and non-discrimination in their constitutions, very few have taken the next step which is to adopt a minority rights approach. The need to address the right of minorities to enjoy their own culture and have access to power has been crucially highlighted by recent events, which have put forward the question of ethnicity in the constitutional arrangement of several African states. This includes ethnical division in Sudan which resulted in the separation of South Sudan after decades of repression; the recent implosion of previously peaceful Ivory Coast; the post-electoral ethnic violence in Kenya; or the ongoing fratricidal violence against minorities in Nigeria. The list could be extended as, to some extent, all recent ethnic violence has been largely driven by either the repression of minorities or the rebellion

of minorities against oppression. From this perspective, the situation in the Great Lakes Region offers a tragic illustration of the intricate connection between ethnic violence and the lack of protection for minorities. This article focuses particularly on the Great Lakes Region to analyze how some of the most recent constitutions have dealt with the issue of ethnic minorities in countries which had witnessed the most horrific ethnic hatred. The recent decades of ethnically driven conflict instigated by the repression of minorities are therefore the primary reason for focusing on the Great Lakes Region. Secondly, in Rwanda, Burundi, and the DRC, the adoption of a new constitution marked the end of a transitional period from conflict to peace, and as such, the new constitutions were seen as crucial legal instruments to organize the new ethnical relations under the banner of consociationalism. The examination of these three different approaches will provide a good snapshot of the relationship between ethnicity and constitutional minority protection. Based on an analysis at the national level, this article will go on to examine the historical, theoretical, and objective contentions towards the affirmation of constitutionally embedded protection clauses for minorities. Ultimately, the overall aim of the article is to examine to what extent the concept of minority rights is relevant in the context of Africa. Banning ethnicity The constitutional history of Rwanda is marked by its association with ethnicity. The post-independence constitutions of , , and were all seen as legal instruments that imposed the domination of the Hutus over the political affairs of the country. As noted by Senator Wellars Gasamagera: The new Constitution, which is the result of a transition period lasting nine years, affirms in its preamble that the government is determined to eradicate all ethnic division. The constitution aims at promoting national unity by supporting the elision of concepts of ethnicity. Given the historical association between politics and ethnicity this article aims to ban any association of the two. In a similar perspective, article 33 which guarantees freedom of religion also prohibits any ethnic or racist propaganda. Likewise, article 35 which guarantees freedom of association affirms that any association may be banned if it has an ethnic basis. The secondary aim of promoting national unity is inscribed in several articles of the Constitution. Several articles of the Constitution contribute to the elaboration of a program promoting national unity. Article provides for an independent national institution in charge of promoting the unity of the country. The principle of non-discrimination is identified as a constitutional pillar in support of the aims of unity and the eradication of ethnic divisions. On a theoretical front, Rwanda places itself on the side of states that have adopted an approach based on non-discrimination and equality when it comes to ethnicity. If people and communities are not discriminated against based on their identity, then ethnic markers might just go away. The only noticeable special measure of minority protection concerns access to the Senate. Outside this minimal reference to historical marginalization, the governmental project of banning any reference to ethnicity is upheld by the Constitution. Overall, the Constitution supports the official policy of the total eradication of anything having to do with ethnic identification and the maturation of unity. Instead, the principal message of the new Constitution is not so much that Rwanda is pluri-ethnic, but rather that Rwanda is a non-ethnic state. The recent ethnic bloodshed certainly gives serious justification to this ban on ethnicity. The attitude of the present Constitution of banning ethnicity in politics, promoting unity, and ensuring equality can be viewed as a legally pragmatic approach to the question of ethnicity. On questions of ethnicity there are two distinct camps in post-genocidal Rwanda: The other holds that ethnic distinctions are real, and that avoiding their recognition might only lead to more bloodshed. In the words of Mgbako: Rwanda remains a society in which many if not most Rwandans still cling to the idea of ethnicity, despite the havoc and destruction that this concept has wreaked. Ethnicity is a powerful idea; it cannot simply be talked out of existence. As highlighted by Minority Rights Group: In fact, it allows a situation to develop in which a group can enjoy a de facto situation of privilege, but people are not allowed to challenge it. This provides fertile ground for frustrations which can be exploited by movements wishing to challenge the state through violence. The Batwa have been largely forgotten in the constitutional project despite having also suffered a great deal during the genocide. While much has been written on the relationship between Hutus and Tutsis in the region, the Batwa community remains excluded. It is estimated that in the community made up only approximately 0. Beyond the difficulty for the Batwa to get representation, the absolute ban on ethnicity has profound consequences on the advancement of their rights. The constitutional ban on ethnicity means that no specific program can be put in

place to address their marginalization. With no proper legal framework, there is little chance of the Batwa cause being promoted, and even less of being adequately addressed. This perpetuates the cycle of discrimination and marginalization. The situation of the Batwa shows how a total ban on ethnicity and an anti-minority rights approach can undermine the fundamental rights of some of the most marginalized communities. More generally, in terms of constitutional design, the situation of the Batwa in Rwanda illustrates how the constitutional protection of equality and non-discrimination might not provide enough legal protection for communities who are in a minority position. As a community, the Batwa are in danger of extinction through not having the right to practice their own culture. From this perspective, the premises of equality and non-discrimination remain extremely far-flung arguments for a community which is de facto banned from enjoying and perpetuating its own culture. While the promotion of unity between the two major communities is understandable, an outright constitutional rejection of minority rights protection can sweep aside a legitimate need for legal protection, with minorities suffering from an extreme ban. While Rwanda is not the only country to put forward the argument that minority rights oppose the goal of unity and equality, such arguments run contrary to the recent history of a country which had witnessed the most blatant abuse of minority rights by the majority. In Rwanda, the repression of the minority Tutsi reached its nadir with the genocide. Burundi also witnessed decades of extremely high levels of violence between the dominant minority Tutsi and the statistical Hutu majority. The most recent wave of ethnic fratricide started with the assassination of the president of the Republic belonging to the Hutu ethnic group in The Arusha Peace and Reconciliation Agreement, signed in , started a period of transition towards democracy which led to the adoption of a new constitution in The new constitution guarantees representation for both ethnic groups Hutus and Tutsis by establishing a quota of posts they will have in parliament, the government, and the army. As in Rwanda, the issue of ethnicity was at the heart of the Burundi Constitution. Despite the similarities, the two countries have adopted radically different approaches to the ethnic question in their constitutional design. Rwanda opted for the full rejection of ethnicity by banning mention of ethnicity in political and legal affairs. Burundi moved towards power sharing with the aim of establishing a political balance between the Hutus and the Tutsis. The preamble of the Constitution affirms the will to move away from ethnic tensions by declaring the unshakeable determination to put an end to the causes of ethnic violence, genocide, and exclusion. The preamble also affirms the need for re-structuring the national security and justice systems to guarantee the security of all, including ethnic minorities. Article 1 affirms that Burundi is an independent, sovereign, secular, democratic, unitary Republic which respects its ethnic and religious diversity. Article 14 states that all Burundians have the right to live in Burundi in peace and security, and that all Burundians should live together in harmony while respecting human dignity and tolerating their differences. This part includes standard human rights protection for specific groups such as women and children but falls short of providing specific rights for minorities. Part 2, dedicated to the duties and obligations of citizens, invites all citizens to respect each other without any discrimination. Article 67 affirms that all citizens have the duty to respect each other without discrimination and to promote tolerance among each other. However, this remains an obligation of citizens. The main focus of the Constitution is on organizing the power sharing arrangement. It guarantees proportional representation to all the ethnic groups: Ethnic quotas are also used for representation in the executive, the administration and the military. The constitution also guarantees proportional representation to all ethnic groups at local level.

CONSTITUTIONALISM AND DEMOCRATISATION IN KENYA, 1945-2007 pdf

8: Constitutionalism (Stanford Encyclopedia of Philosophy)

From the inclusive reform process that birthed a new Constitution in and credible and legitimate elections in until today, Kenya has achieved many democratic milestones.

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9: Research & Publications

The Constitution of Kenya upon promulgation and enactment changed the Governance structure from a centralized unit to devolved sub-units known as the County Governments. It was.

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