Furthering constitutions, birthing peace

liber amicorum

Yash Pal Ghai

Humphrey Sipalla
J Osogo Ambani (eds)

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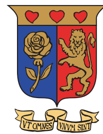

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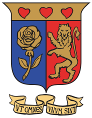

FURTHERING CONSTITUTIONS, BIRTHING PEACE:
LIBER AMICORUM YASH PAL GHAI

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Albert HY Chen is Cheng Chan Lan Yue Professor of Constitutional Law at the University of Hong Kong (HKU). He previously served as Head of the Department of Law (1993-1996) and Dean of the Faculty of Law (1996-2002) of HKU. His research has been in the fields of constitutional law and the legal systems of the Hong Kong Special Administrative Region (SAR) and the PRC. He has written over 200 articles and book chapters, and has written or edited over 30 books in English or Chinese. Professor Chen has served on the Law Reform Commission of Hong Kong (2002-2008), the Commission for Strategic Development of the Hong Kong Government (2005-2012), and is currently a member of the Committee for the Basic Law of the Hong Kong SAR under the Standing Committee of the National

People's Congress of the PRC (1997-). Professor Chen was Professor Yash Ghai's colleague when Yash taught at the HKU in 1989-2006. He had much scholarly interaction and collaboration with Yash, and was a contributor to several volumes on Hong Kong public law edited by Yash.

Philip Knight is a retired private legislative counsel from Vancouver, Canada, who participated in constitution-making projects in several countries over the past 20 years. For 7 years he served as an Adjunct Professor at the University of British Columbia, lecturing on aspects of legal drafting, and for 7 years was a regular contributor to an Annual Legal Drafting Programme offered by the Faculty of Law at the University of Cape Town. Since 1998, he has been a Lecturer in the Annual International Legislative Drafting Institute at Tulane University.

Peter Larmour [PhD from Macquarie; MPhil London; BA Sussex] was professor at the University of the South Pacific's School of Management and Public Administration. His work focussed on comparative research on Pacific Islands government and politics. He originally worked in the Lands Department in Solomon Islands and his PhD compared land polices in Melanesia. He edited a number of books by Pacific Islanders for the Institute of Pacific Studies at USP and taught at the University of PNG in the 1980s. He has been at the School of Asia Pacific Studies at the Australian National University since 1994 and became Professor of Public Administration and Policy at USP in 2011. His book *Foreign flowers* (University of Hawaii 2005) looked at the imposition and adoption of foreign institutions in the Pacific Islands and *Interpreting corruption* (University of Hawaii 2012) looks at how corruption is defined, discussed and dealt with in the region.

Willy Mutunga was Kenya's 14th Chief Justice since independence and first President of the Supreme Court under the 2010 Constitution (2011-2016). Recently he has served as consultant with the Constitution Review Commission of The Gambia; Secretary General of the Commonwealth Special Envoy to the Maldives; and a distinguished scholar-in-residence at Fordham Law's Leitner Center for International Law and Justice School.

Mutunga played a pivotal role in the constitution-making processes in Kenya from the 1970s and particularly, from the early 1990s. He worked on the implementation of the progressive 2010 Kenyan Constitution as Chief Justice. He advocated, in

his writings and judgments, for the development of indigenous, robust, patriotic, decolonised, de-imperialised, pro-people, progressive, and transformative jurisprudence that is not insular and does not pay unthinking deference to other jurisdictions. He has also advocated for a progressive jurisprudence for Africa and the Global South as part of the significant contribution in the struggle for a new just, peaceful, gender just, non-racist, non-ethnic, non-militaristic, ecologically safe, prosperous, egalitarian, and equitable socialist world.

During his tenure as Chief Justice, Mutunga sought to lay permanent and indestructible foundations for a transformed judiciary and achieved impressive progress in bringing the justice system closer to ordinary people. He is well known for his fight against corruption in the Judiciary and in Kenya as a whole. As one of Kenya's organic intellectuals, Mutunga has written and co-authored books and scholarly articles on his various areas of intellectual interest and pursuit. He continues to work with various social movements led by the grassroots youth and the middle classes that are committed to Kenya's fundamental transformation and a new world.

Abdul Paliwala is emeritus Professor of Law at the University of Warwick where he was involved in the founding and teaching of the Law in Development LLM (renamed International Development Law and Human Rights) since 1981. He is a longstanding friend and colleague of Yash Ghai. He previously taught at the Queen's University of Belfast, the University of Dar es Salaam and the University of Papua New Guinea, where he also worked as the Secretary of the Law Reform Commission. He was Director of the CTI Law Technology Centre for UK Law Schools, the Law Courseware Consortium, the UK Centre for Legal Education and the Electronic Law Journals Project that published the *Journal of Information Law and Technology* and *Law social justice and global development*. His work on law and development includes *Law and crisis in the Third World* (co-edited with Sam Adelman) (1993) and *Law's ethical global and theoretical concerns: Essays in honour of William Twining* (co-edited with Upendra Baxi and Christopher McCrudden) (2015) *The limits of law and development: Neoliberalism, governance and social justice* (co-edited with Sam Adelman) (2021) and *Beyond law and development: Resistance, empowerment and social injustice* (co-edited with Sam Adelman) (2021 in press).

Anthony Regan is a constitutional lawyer, working for the Department of Pacific Affairs at The Australian National University, Canberra, Australia. He previously lived and worked in Papua New Guinea for almost 20 years, part of that time teaching at the University of Papua New Guinea. He has done advising work in Fiji and Solomon Islands. He lived and worked in Uganda from 1991 to 1994, as a Commonwealth Secretariat adviser to the Uganda Constitutional Commission, and then to the Department of Constitutional Affairs, assisting with the establishing the Uganda Constituent Assembly. He has been involved in conflict resolution work in or in relation to Bougainville (Papua New Guinea), Sri Lanka, Solomon Islands, the Ogaden region of Ethiopia, and the Naga areas of northeast India. He has been involved in post-conflict constitution-making processes in Uganda, Bougainville, Fiji, Solomon Islands, and Timor Leste.

He has worked with Yash Ghai for 40 years, since first meeting him in Papua New Guinea in 1981. They have jointly authored two books, and several journal articles and book chapters. They worked together 1999-200 advising the Bougainville parties to the Bougainville Peace Agreement of August 2001.

Humphrey Sipalla teaches at Kabarak University School of Law and is Editor-in-Chief, Kabarak University Press. Since 2000, he has edited texts across various fields, especially in theology, philosophy and law and has worked in communication and advocacy, especially centred around the African human rights system. He previously taught at Strathmore University Law School and was Managing Editor of *Strathmore Law Journal*. He believes deeply in empowering intellectual production on the African continent.

Seema Kiran Shah is an elections expert with experience in North America, Asia and Africa. She holds a doctorate in political science, and her research focuses on electoral politics, with an emphasis on electoral integrity and electoral violence.

Issa G Shivji is Professor Emeritus at the University of Dar es Salaam where he taught Public Law for 36 years before retiring in 2006. Prof Shivji was the first and founding professor of Mwalimu Nyerere Professorial Chair in Pan-African Studies, 2008-2013 (Kigoda cha Mwalimu Nyerere). He was the founding Director of Nyerere Resource Centre, 2013-2019 (Kavazi la Mwalimu Nyerere) established at

the Tanzania Commission for Science and Technology (COSTECH). He has been a visiting professor to a number of universities in the Global South. Currently he is Honorary Visiting Professor to the National Law School University of New Delhi, India. Professor Shivji has published over a dozen books, some 100 journal articles and contributed numerous chapters to edited books on varied developmental and human rights topics. He is a recipient of two honorary doctorates and several national and international awards. Professor Shivji's latest publication, co-authored with two other colleagues, is a three-volume biography of Mwalimu Julius Nyerere titled *Development as rebellion: A biography of Julius Kambarage Nyerere*.

Mahendra Pal Singh (Professor Dr) is Research Professor, OP Global Jindal University, Sonipat, near Delhi. Professor Singh has taught at Meerut (Jan 1964-Jul 1970); Delhi University (Jul 1970-Jul 2005); Visiting Professor NUS (Aug-Dec 2005); JNU, Delhi Jan-Jul 2006). He was Vice Chancellor, National University of Juridical Sciences, Kolkata (Dec 2006-Dec 2011); Chairperson, Delhi Judicial Academy (Dec 2011-Dec 2013); Chancellor, Central University of Haryana (2010-2015); and Visiting Scholar, Max Planck Institute of Public Law, HD, Germany (Mar-Sep 2014). He was Visiting Professor & Chair, Centre for Comparative Law (National Law University Delhi Oct 2014-Jan 2021); Kansai University, Osaka, Japan for two months, Visiting Professor on occasional visits, Renmin University, Beijing (2007-2010); Hong Kong University and City University of Hong Kong, among others. Professor Singh met Yash Ghai initially through Jill when both of them were at Warwick University and later at Hong Kong several times for longer periods and intense discussions. His writings include over ten books, including *German administrative law in common law perspective*, as well as over 150 articles, book reviews etc. in different national and international journals.

William Twinning is Professor Emeritus of Jurisprudence at University College London. Between 1958 and 1965 he taught Law in Khartoum, becoming a founder member of the Law Faculty in Dar in 1961. He has kept in touch with Eastern Africa ever since. He claims to have helped to recruit Yash Ghai to Dar in 1963, but that was an easy task. They have been colleagues and close friends ever since. His recent publications include *Human rights: Southern voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi* (2009) and *Jurist in context: A memoir* (2019), both published by Cambridge University Press.

William Whitford is Emeritus Professor of Law, University of Wisconsin Law School. From 1967-69, I was a Senior Lecturer at the University of Dar es Salaam, Tanzania, where I met Yash Ghai and we became lifetime friends. I have written elsewhere about my personal reflections on my time at the University of Dar es Salaam: 'Teaching law at the University of Dar es Salaam in the Sixties', 4 *Zanzibar Yearbook of Law* 367-378 (2014).

Liz Alden Wily (PhD, Political Economy of Customary Land Tenure) is an activist scholar. Her academic work stems from her practitioner work at global and national levels in especially Africa. Over the last four decades her work has focused on practical mechanisms to admit customary tenure as a uniquely relevant property regime to social equity and environmental protection in modernising agrarian economies, deserving the same legal force and protective effect granted to individual rights secured under systems received from Europe. Liz is a Fellow of the Van Vollenhoven Institute for Law, Governance and Society at the Leiden School of Law, The Netherlands. She has worked with state and civil society actors in 20 countries in Asia and Africa and continues to be engaged in application of reformed land and resource laws in a number of these states. This includes Kenya where Liz resides. Her most recent publication addressed forest tenure in a changing world, available in *Human Ecology* at: https://doi.org/10.1007/s10745-021-00231-2. Liz is proud to contribute to this volume in honour of Professor Yash Pal Ghai, whom she holds in the greatest esteem as a unique constitutionalist and social change actor.

Edward P Wolfers is Professor Emeritus at the University of Wollongong. His research focusses on comparative politics, government and public policy, international relations, constitution making and constitutional development, national sovereignty and the role of women. Professor Wolfers joined the University of Wollongong in 1987 as the Foundation Professor of Politics, where he worked for 27 years. He authored the seminal book, *Race relations and colonial rule in Papua New Guinea* in 1975. He has contributed in various capacities to the constitution-making process and subsequent constitutional changes in Papua New Guinea from independence to the Bougainville Peace Process. He has served on the United Nations (UN) Panel on Opportunity and Participation, as an expert at Regional Seminars of the UN Special Committee on Decolonisation.

Sophie Woodman is Senior Lecturer at The University of Edinburgh's School of Social and Political Science. Her research focuses on citizenship, human rights and social movements in contemporary China; political sociology and social movements, particularly transnational movements; migration and translocality, including for mobility for education; local citizenship and the politics of sustainability; constitutionalism, law, politics and governance in modern China and beyond; gender and the state; asymmetry and formal autonomy in state systems. She co-edited *Practising self-government: A comparative study of autonomous regions* with Professor Ghai in 2013.

Note on Yash portrait

I wanted to avoid the kind of portrait you might see on the walls of a Senior Common Room, though I found some lovely examples such as Humphrey Ocean's portrait of Philip Larkin. A painted portrait would have been difficult without some face-to-face sittings (Yash is in Kenya and I'm in Sydney). In any case it might be beyond my technical abilities.

There was also a very good photo on his University of Hong Kong webpage, which seemed to do what portraits are meant to do – reveal character – with a background of books, indicating his profession.

I first thought of a painting with Yash out in the tropical sun speaking urgently into a microphone. There would be a problem deciding a background and clothing, as Yash had worked in so many places, and there were pitfalls in using symbols that might be read as partisan (whereas Yash's career had been about transcending obvious markers of identity).

Late 2015, I got interested in stencils and they played a role in graffiti, which had activist overtones which pointed to Yash's recent career with NGOs.

I worked on the project during a class at the National Art School in January 2016. There I did a cut-out picture of a constitutional committee at work, with Yash sitting back in the middle, characteristically clasping his hands – borrowed from the website photo – while somebody talks at him (see it in peterlarmour.com, under 'Yash portrait'). Yash's skills include his ability to listen carefully to people, and sit through days of jaw-boning negotiations. The committee members were all cut off at the waist by the table that separated them from the audience or witnesses. The tropical sun was reduced to a bright window up in the distance (a reference to Velasquez's Las Meninas painting). The atmosphere was claustrophobic, and like a court.

I did the picture in cardboard, as an unpretentious medium, like a draft, but it also allowed a pun on Max Weber's famous characterisation of politics as the 'slow grinding of hard boards'.

This led in two formal directions. The first was to a very graphic life-size outline of a head and shoulders, which might be spray painted on a wall (I've not yet tried this, for fear of getting caught). It could also frame real-life images of political drama outside windows, or on tv, in the various countries Yash had worked.

The more intriguing second image became the hands clasped in front of the torso. In some ways they represented the political cliché of cooperation, 'working together' in committees, and so on. But they also showed self-restraint – I'm holding my hands so I don't hit you back – and closed the gate to interlocutors. 'Hand wringing' implies sympathy but also non-intervention. So they were nicely ambiguous, and interesting to draw, paint and cut out.

Peter Larmour
Sydney, March 2016

Foreword

It is a singular pleasure for me to write this Foreword for this *liber amicorum,* this book of friends, in honour of Professor Yash Pal Ghai. I have known Professor Ghai for almost six decades. I joined Dar es salaam University College in 1963. I was part of the first intake of the University of East Africa which consisted of Makerere University College, Nairobi University and Dar es Salaam University College. Before that, the colleges were affiliates to University of London.

When I joined the university, the campus at Dar es Salaam consisted only one faculty, the Faculty of Law. Makerere and Nairobi accommodated medicine and engineering respectively. The college community was very small. The total number of students was less than one hundred and our class was about forty. The teaching staff consisted of basically five lecturers.

Professor Ghai was the youngest lecturer at around twenty-five years of age. I recall a number of students were older than Ghai at the time, and some were his age mates as we had started off our childhood with the customary duties of herding cattle before starting school. I was two years younger than Ghai and in our custom he was my age mate.

Professor Ghai, though our age mate, commanded the respect of a teacher, but was also welcoming and approachable as a friend. The mutual respect and comity that developed between the student body and Professor Ghai was in many ways the bedrock of his appeal as a teacher. The contributions to this volume about the time, including two chapters from two other former students, Professor Issa G Shivji, and former Kenyan Chief Justice Dr Willy Mutunga, attest to this.

The 1960s was a period of intense political activity in Africa and the world as a whole. We, the students at Dar es Salaam, were active in politics, both on campus and beyond. We seized every opportunity to organise boycotts and demonstrations. We even organised a boycott of the wearing of academic gowns in class as a colonial relic. I was one of the student leaders and spent a lot of time politicking at the expense of my studies. Professor Ghai was one of the lecturers who consistently cautioned me to devote time on my studies or else I would fail. I owe him a lot.

Since our class was small in number we had a lot of time to interact with lecturers in class and tutorials. Since Ghai was our age mate we often interacted with him in heated debates. When I was Prime Minister, Professor Ghai visited the University of Dar es Salaam. He was present on a day I had a session with university students. I faced a barrage of tough questions, particularly on governance and human rights. After the session I invited him to my office. He complimented me for the way I handled the session. He said he was amazed that I answered the question without showing anger though some of the questions were very provocative. I reminded him that we used to do the same to him when he was our lecturer but he did not lose his temper.

Professor Ghai should be proud of his product. A lot of people he taught went on to render good service in academia and public service, the likes of Professor Shivji and Chief Justice Mutunga. In my class alone we had people like Barnabas Samatta, former Chief Justice of Tanzania and Damian Lubuva who was Attorney General, Minister of Justice and later Judge of Appeal in Tanzania.

From 1966 to 1970, Professor Ghai was a member of the East Africa Council for Legal Education and thus was involved in laying the foundations of legal education in the region. I recall then the strong commitment to building a cadre of conscientious lawyers that infused Ghai's teaching back then. The expectations and promise of an independent Africa drove the vision of the law school at the time. Obviously the close involvement of the Chancellor, Mwalimu Julius Nyerere, in the intellectual life of the university had a deep impact in the ethos of teaching and learning then.

Professor Ghai's involvement in constitution-making is easily his greatest contribution to legal scholarship as well as social justice and rule of law. In fact, his first engagement in constitution-making was as a consultant to the Kawawa Commission on the One-Party State in Tanzania in 1965.

Almost five decades later, between April 2012 and April 2014, I served as Chair of the Constitution Review Commission of Tanzania, a role not dissimilar to Professor Ghai's own as Chair of the Constitution of Kenya Review Commission (2000-4). As a Commission, we invited Professor Ghai once again to advise on the process as we sought the views of the Tanzanian people on their constitutional future.

The advice he gave to the Commission was invaluable. More than anyone else he opened our eyes on the obstacles the Commission would face. Indeed, we did

face those obstacles, especially the political obstacles. His advice served us well. Apart from that we extensively consulted his writings. Members of the Commission who had known Professor Ghai, such as the late Chief Justice Ramadhani, the late Dr Sengondo Mvungi and Professor Palamagamba Kabudi (who later become Minister of Justice and Foreign Minister) consulted his writings extensively.

Professor Ghai is undoubtedly a man of great intellect, committed to his profession and has made great contribution to society. With his immense achievements, he has remained a simple human being. That is his greatest quality.

Joseph S Warioba
Former Vice President and Prime Minister of Tanzania,
Former Chairman, Tanzanian Constitutional Review Commission,
Former Judge, International Tribunal for the Law of the Sea
Dar es Salaam
June 2021

Second Foreword

In the early 60s, William Twining had been travelling around the world in search of lecturers to teach at the new Faculty of Law in Dar es Salaam, Tanzania. By the time he got to Yash Pal Ghai, he had already convinced a handful of other scholars to join the Faculty. At only 25, and having been uprooted from his post graduate doctoral studies at Oxford, Ghai accepted Twining's offer to join the Faculty and left for Tanzania. What ultimately led to his decision to move was his knowledge that this was the first time Africans would have had a chance to study law within East Africa, and his conviction that this was a good thing. By then, Ghai already had a deep understanding of the power of constitutions.[1]

Yash's passion for more than sixty years has been to fasten the state to the rule of law to protect its own citizens against its own excesses. The state has the sacred responsibility to create the necessary conditions to foster an environment that safeguards human dignity, equality and access to justice. This could only be attained by designing constitutional checks and balances founded on a comprehensive and complete bill of rights.

Yash subscribed to Mwalimu Nyerere's vision. Having grown up in Apartheid-organised colonial Kenya, Yash witnessed and suffered racial discrimination in his own flesh. This moulded his legal thinking towards equality and fairness, founded on dignity. Yash would constantly encourage his students to use the law for the good of all who were subject to it, in the hope that with independence, African societies would promote human dignity, equality, freedom and democracy.

Yash ensured that his students had mastered the common law and positivism but were also able to critique their traditions. He wrote:

> It was not long before I became acutely uncomfortable with endless explorations of the rules of privity and consideration, and became conscious of the unreality of the emphasis on the common law when it touched only a small segment of the population.

---

[1] William Twining provided me with these early details in a personal interview in October 2019, at his home in Oxford.

In the early sixties, Tanganyika had only two African lawyers, making it a challenge to recruit local lecturers for the Faculty. This meant that the Faculty had to be made up of individuals from outside East Africa who shared the ideals of freedom and equality and who were conversant with common law. The Faculty would be working against time, as local institutions would have already been established before the first batch of students graduated.

A few months into the Faculty's establishment, the first appointments made were for the positions of Dean of the Law Faculty and Principal. Professor AB Weston and Professor Cranford Pratt, both professors from the University of Toronto, took up these positions. Most of the early staff members came from England and other parts of the Commonwealth. However, over time, the Faculty became more (East) Africanised and more ethnically diverse. Some memorable members of the Faculty include: Yash Pal Ghai, William Twining (UK), Patrick McAuslan (UK), James Read (UK), Abraham Kipai (Tanzania), A Sawyerr (Ghana), S. Picciotto (UK), Firoz Kassam (Tanzania), UO Umozurike (Nigeria), Josephat Kanywanyi (Tanzania), Lal Patel (Kenya), Luto Kato (Tanzania), DMK Bishota (Tanzania), HR Nsekela (Tanzania), Ian Macneil (US), Robert Seidman (US), Gilbert Boehringer (US), Steven Mann (Canada) and Brian Slattery (Canada).[2]

Prof Ghai and his colleagues ascribed to a teaching philosophy that would be destined to become the hallmark of teaching in Africa. It was conceived on two pillars. First, in terms of the treatment of the law, it was essentially the task of the faculty to reverse engineer the thinking that the law was a tool of domination and oppression. Instead, the law was to be seen as a friend. And just like a friend, the law could be used to promote good values. The second provided the goal; the objective of the teaching. During his speech at the Faculty's inauguration, the first president of Tanzania, the late Mwalimu Nyerere, shared his vision for Tanganyika as well as for the University College, saying:

> We are in the process of building up a Tanganyika nation…If we are to build a sturdy sense of nationhood, we must nurture our own educated citizens who must have an *African oriented education*. That is, an education which is not only given in Africa, but also directed at *meeting the present needs of Africa*. For our present plans must be directed at reaching the villages…

The early members of the Dar faculty understood that it was their job, through legal education, to promote Nyerere's truly African vision. His vision also included the preservation of independence, the war against poverty and disease, and the

[2] As above.

maintenance of national security. With this, the Dar faculty was conscious of the import of their mission to teach the next generation of decision makers and leaders of East Africa.

For Prof Ghai and his colleagues, it became necessary to shed the old skin of strict positivist formalism, and instead adopt a newer, more contextual and pragmatic method. The method of teaching that does this is known as 'legal radicalism' as it came to be known. This method was unlike the ones adopted at other faculties around Africa at that time.

The promise of the 'Dar Generation' was to seek to understand and interpret the law within the social, political and economic contexts within which it functions. The aim of the teaching was to help build East African nations by producing graduates competent enough to understand the issues of the day, rather than abstract rules in common law developed and could only be fully applied in England.

Since then, and for almost sixty years, Prof Ghai has always been at the centre of a power struggle, a constant tension between ruling elites, ordinary people, inequality, oppression and the desperate desire to achieve freedom, justice and development within a true democratic state. Prof Ghai, the soft-spoken, reserved and determined professor set himself to construct a statehood devoid of the homogeneity of the past. How do we factor in plurality in this construct? How does the basic law evolve to protect multiple interests, including those of minorities and how do we breathe life into these states – enabling them while constraining them at the same time? These questions that he dedicated his life's work to and the answers that he propounded, are the lifeblood that sustains our constitutional scholarship today.

At this moment, as we stand at the cusp of change in a rapidly evolving world and are inundated by discourse on finding ways to enable state power while limiting it for the protection of individual rights, we do not approach this conversation empty-handed. With us is this vault of impeccable study and practice that Ghai has gifted us with, and for which we are terribly grateful for.

This book is therefore a celebration of this man and the gift of his mind to humanity. Every single student of law in Africa has been impacted, knowingly or unknowingly, by Yash Pal Ghai, a dedicated, focused, kind, yet resolute mind, gentle mentor and impeccable spirit; a wonderful man who has made an indelible mark in the world.

Ghai's legacy is accompanied by the not less impressive mind and talent of his loving wife and constant companion, Prof Jill Cottrell Ghai. Their legacy has already been felt across the world, and particularly in Africa, where Yash has always worked against the grain. While the world was, what Sigmar Gabriel calls, 'talking down the state,' Ghai was hell-bent on making sense of it – and making it work.

Years ago, we invited one couple to the graduation party of the pioneer class of Strathmore Law School. They were the only guests. They were Yash and Jill Ghai. Their presence, company and wise counsel would never go unnoticed. When Yash spoke, his eyes became watery. Everyone was moved and emotional. Yash said, 'what I see here today is the realisation of the dream we had when we started in Dar. A school that would produce a new type of lawyers. Brilliant young minds ready to change Africa and the world, ready to use the law as a tool for justice and development.'

When Max Jacob, a French poet, lay dying, he turned to his still unknown friend and roommate, Picasso and implored him, 'may you never be satisfied with anything less than the full expression of your talent.' This book, written by eminent friends, colleagues and students of Prof Yash Pal Ghai, can at best only hope to capture and freeze a snapshot of first, the inspiration that galvanised us to contribute to the work began decades ago of true study, and second, for those that come after us, as evidence of a generation's gratitude to a man that was never satisfied with anything less than the full expression of his talent and what that meant to us.

Prof Luis G Franceschi
Senior Director, Commonwealth of Nations
Founding Dean, Strathmore Law School

Preface

Professor Yash Pal Ghai is Kenya's most accomplished legal scholar. His work, spanning over five decades, in legal education, constitution-making, human rights, self-government systems and peace mediation, has left an indelible mark on legal thought, law making and governance systems across the world.

Most Kenyans would know Ghai as our 'constitutional architect' – as described in the Queen's University at Kingston citation on award of a honorary doctorate to Ghai. Many would remember him from the tense times at the turn of the century when he inspired the merger of the then parallel constitution review initiatives and led the Constitution of Kenya Review Commission (CKRC) to the 'Zero Draft' and the National Constitutional Conference in 2003-4. To Kenyan lawyers of several generations, he would be remembered for the seminal 1970 text *Public law and political change in Kenya,* co-authored with JPWB McAuslan, which remains the primary text on public law in Kenya four and a half decades later.

Ghai has also contributed, in various capacities, to the review processes of the constitutions of Tanzania (1965, 2013), Papua New Guinea (1972-5, 1978, 1995-6), Seychelles (1974), Solomon Islands (1977-78, 1978-79, 1997), the New Hebrides (Vanuatu) (1977-1980), W. Samoa (1982), the Tamil United Liberation Front (1982), Kiribati (1985), Fiji (1987, 1988-1997, 2012-3 as Commission chair), Zambia (1993), Cambodia (May-June 1996), Cook Islands (1998), East Timor (2000), Afghanistan (2002-3), Maldives (2004), Iraq (2005), Nepal (2006-8), Somalia (2009-2012), Ghana (2010), South Sudan (2010, 2011), Libya (2012), Tunisia (2011), and Philippines (2013).

In peace mediation, Ghai played an important role in reconciling warring parties sufficiently to stop fighting or to start negotiations mostly in the South Pacific (PNG and Bougainville, Solomon Islands, and New Hebrides/now Vanuatu). In Fiji, his efforts (on at least two occasions) included bringing antagonist groups to the negotiating table. He also facilitated the first meeting (in Harare in 1988) between lawyers from the African National Congress (ANC) and the Afrikaner National Party, as part of other meetings, to start dialogue between Nelson Mandela and President Frederik de Klerk. Ghai recalls some of his past mediation initiatives in his characteristically disarming humility:

> I would say [the South African mediation] was a most successful (and moving) meeting I can recall – not of course due to my efforts.
>
> As you know, I played, I think, a critical role in Kenya in order to get a comprehensive peace process in 2000 to start the constitution making process which had the support of all Kenyans and their organisations.
>
> I was less successful in similar efforts in Sri Lanka (where my efforts were intermittent – several other local and overseas experts/conciliators were also involved at various stages). I was also a mediator between the Indian Government and the Naga 'rebels' – again without achieving success.

It is instructive that Ghai sees his peace mediation work as auxiliary and corollary to his constitution-making contributions. Such reading recalls Professor Issa G Shivji's present reflections on the debate on the role of law in society, and its implication for legal education.

Ghai's teaching career has been long and expansive. He taught at University College, Dar es Salaam, University of East Africa (as it was then) from 1963 to 1971, where he rose to the positions of Dean and Professor. It is most fitting that among his students number scholars and eminent jurists of their own right. Shivji is hardly the least among these. Shivji reminds us here of his teacher's affirmation that this period in Dar was formative for him and shaped his teaching philosophy and research orientation – and we dare say, constitutional architecture – over the years to come. These years took Ghai to Yale, Uppsala, Warwick and Hong Kong, not to mention numerous instances as visiting scholar.

Ghai's published works are staggering. Including books, editorships, chapters in edited collections, journal articles, reports and occasional papers, co-authored or of sole authorship, these number at least 215. Among the most influential are his works on governance systems, and the transitional period in Hong Kong after its ceding by Britain to China.

In the last few years, Ghai has continued his work in Kenya, through litigation, judicial training and civil society advocacy, aimed at supporting the implementation of the 2010 Constitution.

It is worthy tradition that an accomplished scholar is honoured with a *liber amicorum,* a book of friends, in which former students and colleagues pay tribute to the scholar's body of work. Such publication is the academy's form of a lifetime achievement award.

The portrait of Ghai on the cover is Dr Peter Larmour's contribution to the Ghai festschrift. In this art piece, Larmour, a former colleague of Ghai's, portrays Ghai sitting back, characteristically clasping his hands. It pays tribute to Ghai's ability to listen carefully to people, and sit through days of jaw-boning negotiation. The hands clasped in front of the torso in some ways represent the political cliché of cooperation, 'working together' in committees, and so on. But they also show self-restraint – I'm holding my hands so I don't hit you back – and closed the gate to interlocutors. 'Hand wringing' implies sympathy but also non-intervention. In this sense, the portrait depicts that skill of Ghai's, without which his life's work, of mediating difficult transitional moments and midwifying transformative visions of societies, would not have been.

Humphrey Sipalla and J Osogo Ambani

Kabarak, August 2021

Africa kills her sun:
Defining heroics in dystopia
Some introductory thoughts

> When the madness of an entire nation disturbs a solitary mind, it is not enough to say the person is mad.
>
> — Francis Imbuga, *Betrayal in the city*

What is a hero? What are the makings of an (inter)national hero? Are there international heroes today? National ones? Do we need – nay can we realistically ignore – the construction of heroism in our societies?

Professor Yash Pal Ghai, I contend, unabashedly, is a hero. In the literary sense, in the story of nation and state building, he is a person admired for his achievements and qualities. And in *his*tory of this nation and State, he is also a major protagonist. But I think a hero is more than simply a person admired, a protagonist. A hero is such a one as, even when despised, cannot be discounted. The one against whom the reactionary must plan his regression. Especially in the *his*tory of this nation and State.

But surely, dystopia? Such a harsh term to describe our societies is uncalled for, one should think. The task of constitution-making is a peace-making, nation-building, state-defining, coexistence-forming, endeavour. Almost every constitution-making endeavour that Ghai has been involved in – for the last 6 decades – has been such an endeavour. It has, without fail, consisted of imagining a state that can harmonise its diverse nations, its peoples, ensure their individual freedoms and group interests, and provide promise of a better future. So maybe it is not too harsh to say that, at least every constitution-making endeavour Ghai has been involved in has sought to construct the promise of utopia, precisely because the contemporary circumstance was dystopic.

And yes, colonialism was dystopic. No doubt about it. But also, the horror that became the independent state that never advanced to post colony, was, and sadly, still is, dystopic. And misanthropic.

And it is, I dare say, to the heroism – understated, considered, self-effacing,

sublime – of Ghai, that my generation turns, us the late 70s, early 80s kids. Too often, we are taken in by charlatans. Beguiling forms proclaiming utopic futures, and we, to use a Kenyan phrase, lean on such, with our backs on unlocked doors. Maybe, just maybe, the heroism we should admire is such as is quietly lived by Ghai.

Among my earliest memories of Ghai – and this betrays my youth – was the scene on national television, of a Kenyan Asian man, holding up his dark blue Kenyan passport and insisting that President Daniel Moi had got it wrong, that he *was Kenyan*. I had first thought the background was those stripped fabric benches that was Chester House press briefings of the time, but in conversation, Jill Cottrell-Ghai laughily corrected me. It was probably at the then Holiday Inn, at a reception held by the Kennedy Human Rights Centre to award Dr Gibson Kamau Kuria, which Yash and Jill attended. Incidentally, he had just been, that day, to an embassy for the usual soul wringing visa application processes we have to go through, and so he had his passport with him. It was the height of constitutional review clamour at the start of this century, and I frankly do not recall but the political noisemaking of the time, and how taken in our youthful drive for change was by the grandstanders. In time, the grandstanders have shed their snakeskin and revealed themselves to us in full serpentine glory.

To be sure the passage of time does not soften our memories, these were times when grown men would greet the President bowing almost to their knees. It was unheard of for a Kenyan to accept a presidential appointment but refuse the ceremony until they got what they had asked for – in this case, a unifying of the State and *Ufungamano* constitution review processes. I recall wondering, who on earth publicly disabuses President Moi? First by refusing to be sworn in, and again in reminding Moi his Kenyan citizenship is not within the President's gift. Hero, if you ask me. Then, and now. Evergreen.

And curiously, Ghai did manage to at once keep his principled position and remain cordial with Moi, in ebbs and flows obviously. And just like with President Jomo Kenyatta before him, and probably also later, he declined the kinds of 'favours' from State largesse that have repeatedly destroyed the ethics of many a Kenyan public figure.

With the benefit of the last two decades, I cannot help but be mesmerised by the thought that almost every single constitution-making endeavour for Ghai demanded such heroism. Such going against the grain, persisting firmly yet gently

in both guiding a delicate process but being principled. And that he did it, again and again, not only across countries, but back again in the same countries, continually fighting the reactionaries who plan their anti-heroic regression.

And now, consider that every 'Ghaian' constitution-making process is at once a peace-building process as well as one of encouraging self-discovery and self-confidence of minority groups. So much is said of Ghai's constitution-making work, and not nearly enough on his peace mediation and affirming of minorities.

Ghai himself says this of his peace mediation as requisite for constitution-making:

> I played an important role in reconciling parties sufficiently to stop fighting or to start negotiations mostly in the South Pacific (PNG and Bougainville, Solomon Islands, and New Hebrides/now Vanuatu). My efforts in Fiji (on at least two occasions) were also to bring antagonist groups to the negotiating table.
>
> I also facilitated the first meeting (in Harare in 1988) between lawyers from the ANC and the Afrikaner party, as part of other meetings, to start dialogue between Mandela and De Klerk. I would say it was a most successful (and moving) meeting I can recall – not of course due to my efforts.
>
> As you know, I played, I think, a critical role in Kenya in order to get a comprehensive peace process in 2000 to start the constitution-making process which had the support of all Kenyans and their organisations.
>
> I was less successful in similar efforts in Sri Lanka (where my efforts were intermittent--several other local and overseas experts/conciliators were also involved at various stages). I was also a mediator between the Indian government and the Naga "rebels"--again without achieving success.

Ghai recalls that he was always more interested in political science than in law. He chuckles, remembering his old friend Professor Ali Mazrui, who, being of Arab Kenyan extraction, could not be allowed to study law – and they were together in Oxford at the dusk of the 50s – and so studied political science. Yet in their conversations, both were more interested in the other's discipline. I think this proactive disciplinary cross-pollination is what made them such incisive scholars.

Literature, that enjoyable study of human affairs, insists that each story has a hero. That character that defines the story. Sensationalised storytelling distorts the hero (Hollywood, Bollywood, tsk tsk, or as we say in Kenya, nkt!). Heroes don't always 'win'. Rather, they always win the moral story, not the material. Even in loss

and death, *especially so*, the hero, lays down the subliminal why, affording the 'victor' the aptly termed pyrrhic victory.

Yes, the hero is not always the victor. The hero may be difficult to spot in a story. In fact, I maintain, the mark of a great story is when the hero and their heroics are not apparent. They are protagonists, even in the background. In colloquial Kenyan, we say, *kuwa chini ya maji* (literally, operating underwater/below the water level). Understated. Sublime.

In the story of many countries – I have counted 26 separate countries, whose constitutions Ghai has helped craft – their officialised and well-known stories will tell of figures that built this or that. The phrase widely used, and whose use attracts my recoil, is 'father of the nation' or such like institution/academic discipline. Ghai is rather my hero. That Kaiser Soze figure (that's a Hollywood reference. Google it) that's there right in front of you all along, but you ignored. The heroic antihero.

Ghai cuts a figure farthest from officialised heroic. Short, small bodied, soft spoken. And by popular culture (I was struck when researching this piece, that the Kenyan national anthem has no reference to *shujaa.* It is an excellent exhortation. Frank prayer. Mass mobiliser. But no describer of whom or what to emulate), nothing to be admired.

I wonder why Ghai did not take the beaten path. He could have been mindlessly wealthy and politically influential had he chosen to look away. He chose to look, nay, stare. And mutter his displeasure loudly under his breadth in an incessant drone.

Even when he was forced into decades of exile, he never gave up Kenyan citizenship, as many in his position then would have, and did. And in those days, there was no dual citizenship. This point to me is immeasurably important. Because Kenya can at best of times be so testing of our love. I can only imagine the struggle to get passports renewed back then in the 70s and 80s and 90s, and this included having to travel back to Nairobi for this. Boy, it is a struggle today!

Ghai's tenacity, raw stubbornness to keep moving, even when surrounded by contemporary dystopia is deeply inspirational. Heroic. One can only imagine for instance the 70s, forced into exile, restarting work and life in almost every way, away from home, with widespread xenophobia disguised as patriotism… and a glance at his CV, one would not tell!

Kenya is one of those countries where it is so much easier to be an international hero than a national one, and curiously, more oft than not, preferably, assuming one cares for the integrity of being only titled as one deserves.

Kenya's history is replete with false heroes and genuine downtrodden ones, ignored, maybe feared, by officialdom. It is not unusual for the Kenyan hero to find *Betrayal in the city*. As Ken Saro-Wiwa so tragically prophesied, *Africa kills her sun*.

In so many ways, Kenya is like a blackhole, a collapsed megastar so dense, whose deep state gravity is so powerful, not even light can escape. And what are these forever imprisoned lights, held in a surreal dungeon so dense it bends space and time?

Ghai presents Kenya with an inconvenient truth, of the greyness, not the blackness, of our Republic and its patriots. Here we recall that the colour black on our flag symbolises black majority rule – that's what they told us in primary school!

Ghai himself seems conflicted about race in Kenya, and here I lay emphasis on 'seems'. He seems unsettled by erstwhile groupings of Kenya Asian pride, especially when they endear themselves to officialdom. This discomfort can sometimes make one seem like a self-group hater, willing to barter away one's cultural pride for a comfortable non-confrontational middle class cultureless existence – an accusation quite difficult to lay on Ghai. It is a major unspoken problem in Kenyan society. It seems that we are generally not allowed to be progressive yet culturally proud.

Is racial pride exclusionist, by necessity, by definition? Does it have a place in the construction of a pluralistic society? These are uncomfortable questions for our middle class? How do I draw the line?

Ghai's own practice reminds us that it is a constant struggle, a never-ending attempt at balance, complicated thousand-fold by the casual absolutist pigeon-holing of Kenyan life.

Writing a constitution is not simply legal drafting. Constitutions, well, Ghaian constitutions – for they are numerous, and distinct – are certainly not cold valueless statutory statements of basic law. They seek to encase a people's, nay, a collection of peoples' – for that is what the 'nations-state' *invariably* is – aspirations, make tangible the fleeting hopes of a battered people seeking a better future, if not for themselves, certainly for their progeny. Capturing such a delicate part of human nature and troubled culture, almost always and of necessity takes the drafter into the heart of such people.

Imagine then, what a journey it must have been for Ghai in the Kenyan constitutional review process. That journey, without affective distance so necessary for scholarly and professional objectivity, full of knowledge yet conscious of the prospect of Machiavellian manipulation. Now imagine that Ghai has done this, over and over, in a little over two dozen countries.

Ghai once shared, in conversation as we were preparing this volume, just how much reading into history and culture and anthropology one had to do to even attempt to advise a constitution-making process. He would recall instances where a people's culture forced one to accept the unique beliefs of such peoples while still trying to propose a pluralistic future. In a country where witchcraft has a strong influence on the organisation of society and therefore politics, how do you construct a unifying yet respectful state? How do you construct a secular state when nothing is profane in the peoples' belief?

The blessed curse – or cursed blessing? – of longevity. Blessed with a fruitfully long career, Ghai's intellectual evolution is itself heroic. Its sheer volume floors me every time I look at his bibliography. But even more, I can only but imagine the crazy twists and turns that a scholar of his station and longevity has witnessed. From the exhilarating anticipation of independence, the dizzying suggestion of revolutionary rebellion that was 60s and 70s Marxian thought, the swift and brutal disappointment of the reality of politics and xenophobia of the times, the critical promise of a unifying Third World approach, the Fukuyaman end of history and its restart barely a decade later, the incessant return of reactionaries after intense peace-building and constitution-making, from Papua New Guinea through South Asia to Africa from South to Kenya. And now, the disturbing prospect of reactionary illiberalism in a multipolar world. Ha! And in all these, to have kept a consistent line of thought, a consistent critical approach, evident from his works from the 1960s to date. That is nothing short of inspirational. Heroic. In a very 'Ghaian' sense.

My professor of peace-building at UPeace, Amr Abdalla, speaks of the numb emptiness of exile. Having left home, how one struggles with belonging in your new abode, and every return home only serves to remind one that life moved on in your absence. And it doesn't help that intellectual work is by nature quite 'alone' even if not lonely. It speaks volumes of Ghai's giving heart that he somehow lived and knew and loved so many places. A long living restless evergreen industrious hero is a rarity even in fictional literature.

And the best part of it all. Many have said it but it bears repeating. No matter your station, when you talk to him, he truly listens to you. He hears and ponders what you say. I suspect this comes from a fine balance of self-doubt born of exilic yearning and a history of exceptional achievement.

Libri amicorum, *mélanges*, festschriften, let's be plain, have recently developed a less than honorific reputation in certain Western scholarly circles. And why not? They are, by definition, one-party praise song books.[1] A bunch of friends, who already like the honouree, come together to quite literally preach to the choir.

> In 1985, Lord Denning admitted 'festschrift is not a word known to me'.[2] … Like the Ph.D. and the Christmas tree, as Tony Weir has pointed out, the festschrift is a German import.[3]

Many an invitation to contribute to a festschrift come at inconvenient timing – good scholars never have convenient time to start a new project, usually uncoordinated with the list of pressing research priorities, and presenting significant, maybe undue, social pressure to honour a friend, a longtime colleague, a deeply admired professor and mentor. It is not unusual for one to dust off the half complete, on-the-side piece of writing that had never quite passed the muster, for submission to a *liber* project. As a result, it is not uncommon for such works to be, what Mohammed Bedjaoui calls 'a juxtaposition of unrelated essays along the lines of "studies in honour" of a respected authority',[4] sometimes of less than exceptional scholarship.

Joseph Weiler is equally dismissive, harshly describing such works as poorly edited – if at all, expensive, largely not consulted by researchers and therefore hardly cited in other works, 'replete with recycled material', constructions of vanity.[5] The above is not entirely untrue.

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[1] Michael Taggart in providing a taxonomy, also describes 'hidden' and 'anti-festschriften', the latter being 'attacks on the work and philosophy of the "great man"', noting that philosophers and philosopher-kings are particularly susceptible to the latter, and names HLA Hart as such a one. Michael Taggart (ed.), *An index to common law festschriften: From the beginning of the genre up to 2005,* Hart Publishing, 2006, xix.

[2] 'Judges and the judicial power' in R Dhavan, R Sudarshan and S Kurshid (eds), *Judges and the judicial power: Essays in honour of Justice V.R. Krishna Iyer*, Sweet & Maxwell, London, 1985, 3, cited in Michael Taggart (ed.), *An index to common law festschriften: From the beginning of the genre up to 2005,* Hart Publishing, 2006, xi.

[3] Tony Weir, Book review' *Cambridge Law Journal* [1984] 176, cited in Taggart, *An index to common law festschriften*, xi.

[4] Mohammed Bedjaoui, 'Preface' in Mohammed Bedjaoui (ed) *International law: Achievements and prospects,* Martinus Nijhoff/UNESCO, 1992, lv.

[5] Joseph Weiler, 'Editorial - 'That which is hateful to you, do not do to your fellow! That is the whole Torah; The rest is interpretation' (from the Elder Hillel in Babylonian Talmud, Shabbat 31a)' 31 *European Journal of International Law,* 1, 9-10.

With this said, Ghai has a genuine distaste for praise-singing. He suspiciously – I think instinctively – views such as attempts at softening him up, of buttering his loaf, ready for the devouring. And for a scholar, none could have come more suspiciously than an offer to collect a book of friends in his honour.

Is this a mass choir at a stadium on a hot national day singing erstwhile dictator praise songs?

I tend to think of this, rather, as a book of friends engaged in deservedly celebration writing.[6] The value of honouring *the* figure that is Ghai, and of advancing the proposition that a carefully put together book of friends in *our* epistemic community where scholarly excellence is treated with disdain by officialdom – including university officialdom – was deemed to tip the scales. I pray that editorial judgement was accurate to some degree.

I have elsewhere in this volume suggested a variant, probably Africanist, view of the place of festschriften in our epistemic community. But yes, I think it is also fair to not take for granted the critique of the abuse the institution can be subjected. But is also noteworthy that not all scholarly production must cut new ground. In fact, it is *necessary,* that intellectual production stop to contemplate the history that provides contingency for the present and certainly the future. I think festschriften are precisely placed to perform such task.

What Weiler calls cemeteries, and Taggart graveyards, though for different reasons, I find to be fascinating Spanish sunken treasure troves, which while products of genocidal colonial greed, allow us when found, a glimpse into otherwise erased pre-Columbian life. Every so often, in every festschrift, one finds useful insights, hidden away in occasional dissonance of a mass choir singing praises to the proverbial strongman. And in a world where the researcher, like the great white shark, is constantly swimming forward, never 'allowed' to look back and contemplate the shoulders on which we stand, I pray that books of friends are not completely lost to disdain, the vanity of its participants notwithstanding.

It may be that the decline in respect for festschriften may also be linked to the decline of the print book form. With near total digitisation of scholarly research and publication, articles in journals are more usually consulted, I would wager, followed by the book length monograph. This leaves edited collections under particular strain, especially as, in content, each chapter is in reality a law journal article, but

[6] *Liber amicorum* – book of friends; festschrift – celebration writing.

encased in a dated form. It may be that festschriften that are presented as special issues of reputable journals will be more available and hence consulted.

Having Germanic roots, the civil law world of continental Europe has a longer tradition of festschriften, and by extension, international law, which is very much dominated by continental Europe. In an aptly titled introduction, 'Turning the graveyard of legal scholarship into a garden: Indexing common law festschriften', Michael Taggart offers a quick overview of the development of this institution and an excellent comprehensive bibliography. Taggart's treatment reflects a more positive view of the place of festschriften. As the tradition is only taking root here in our epistemic community, the suggestion of Africanist roots will be critical in promoting a distinguished tradition, rather than one approached with disdain, again, editorial vanity and missteps notwithstanding.

> 'In a universe in which heroes and heroines are in short supply, the festschrift … will continue to serve as a reward for the best and an inspiration for the brightest.'[7]

Weiler's critique must nonetheless stand as prophetic critique. I pray the institution of the book of friends does not become as bastardised here as it has in Europe.

And so it is not with lack of admiration that we are privileged to present this volume in honour of Yash Pal Ghai. The contributions to this volume span but a small but hopefully representative spectrum of Ghai's influence on the intellectual and political life of our societies. His earliest – many say brightest – students, his colleagues from Dar through Warwick to Hong Kong, his colleagues in peace-building and constitution-making in Africa and Asia/Pacific, and a couple of young star-struck admirers.

The volume is divided in three broad parts. Part One presents chapter contributions that speak to Ghai, his life and his theory. The following two parts, Two and Three cover Ghai and his work or his influence in Africa and Asia/Pacific respectively. One special contribution is the cover artwork by Peter Larmour, who, when invited to contribute to this festschrift, happily informed us of his retirement art work. Larmour prepared the portrait of Ghai precisely as his contribution to this book of friends.

[7] Irving L Horowitz, "The place of the festschrift" (1990) 21 *Scholarly Publishing* 77, 83, cited in Michael Taggart (ed.), *An index to common law festschriften: From the beginning of the genre up to 2005,* Hart Publishing, 2006, xxv.

The preparation of this volume has been a very happy but unfortunately long delayed labour of love. Our unreserved thanks first go to the chapter contributors, some of whom have been immeasurably patient with the 6-year delay since we proposed the project. I would also like to especially thank Professor Luis Franceschi, who, then Dean of law at Strathmore, wholeheartedly supported this book project, from inception.

Thanks too, to John Githongo, who heartily granted us permission to republish Seema Shah's biographic reflections which open our festschrift, having first published it in *The Elephant*.

Christine Nkonge of *Katiba Institute* was such a timely and generous supporter of this book project. Her support got us through the last hurdles and we are most thankful.

Certain special appreciation goes to Jill, midwife of this book of friends and loving wife of our honoree. She, with a joyful laughing voice – even when written on email – has advised, and facilitated communication and conversation, asked piercing editorial questions, clarified recollections, brought the contributors together, always being available, responding to both my 4am and 11pm emails – yes I can only pray for half such industry in my retirement. This book is truly the fruit of her intelligent design.

I also wish to sincerely thank my brother, my former Editor-in-chief and my co-editor of this volume, Professor J Osogo Ambani. When I first proposed the idea of this book to him – it was late in the evening in the little corner of the small red-walled office he shared with Dr Francis Kariuki and which became my unofficial office as well – he only paused for a few seconds in consideration, and ever since has been the jet engine behind this project. His second editorial eye always saw the errors I missed and suggested substance I was ignorant of. His political support and diplomatic mien carried us through every aspect of the project. And his personal support – that held me up during the upheavals that have paralleled this book project – has done more than language was designed to articulate.

And finally to Yash Pal Ghai himself. I pray that this volume becomes a worthy abstraction of the pedestalled bronze horse-laden figure urging us to some war or other campaign on the proverbial heroes promenade of the many countries whose destiny you have touched.

Thank you for being you. As our Kenyan young people say, *cheza kama wewe*.

Humphrey Sipalla
Nairobi, June 2021

Yash Pal Ghai

Citizenship Kenya
Date of Birth 20 October 1938

Degrees and Professional Qualifications

B.A., Oxford University, UK, 1961 (Distinction in Moderations, First Class in Finals)
LL.M., Harvard University, USA, 1963
Barrister-at-Law (Middle Temple), UK, 1962
Doctor of Civil Law (Oxford University) 1992

Honours

Independence Medal (Papua New Guinea) (1976)
Queen's Medal for Distinguished Service (New Hebrides) (1980)
Independence Medal (Vanuatu) (1980)
Commander of the British Empire (CBE) (UK) (1981)
Independence Medal (Afghanistan) 2002
Elder of the Order of the Burning Spear (EBS) (Kenya) 2012

—

Honorary Doctorate (University of the South Pacific) 1995
Honorary Doctorate (Queen's University, Canada) 2014
Honorary Doctorate, (University of Pretoria) 2021

—

Honorary Fellow, the Society for Advanced Legal Studies (1997)
Honorary Life Member, the Law Society of Kenya (1998)
Distinguished Research Achievement Award (University of Hong Kong) (2001)
Jurist of the Year, International Commission of Jurists, Kenya (2001)
Fellow of the British Academy (2005)
Emeritus Professor, University of Hong Kong (2006-)
Chair of the Advisory Board of the Commonwealth Human Rights Initiative (CHRI) (2013-)
Member, Amnesty International, Africa Panel (2014-2017)
CB Madan Award (2016), jointly with Jill Cottrell Ghai (awarded annually for 'legal excellence'; the citation says: for 'contribution to the development,

enactment and implementation of Kenya's transformative constitution as well as their steadfast commitment to securing a rule of law culture in Kenya through their scholarly and advocacy work')

Languages

Spoken and written: English, Urdu, Swedish

Spoken only: Hindi and Swahili

Employment

Retired (with occasional consultancy) 2008-

Director of Katiba Institute (Non-Executive) 2011-

Head, Constitution Advisory Support Unit, UNDP, Kathmandu, Nepal 2006-2008

Chairperson, Kenya Constitution Review Commission (November 2000-June 2004) (on leave from the University of Hong Kong)

Chairperson, Kenya National Constitutional Conference (April 2003-June 2004)

Sir Y.K. Pao Professor of Public Law, University of Hong Kong December 1989-2006

Professor of Law, University of Warwick, Coventry, UK, April 1978-December 1989 (Honorary Professor, 1992-7)

Research Fellow, Uppsala University, 1973-1978

Director of Research, International Legal Centre, New York 1972-1973

Senior Fellow and Lecturer, Yale Law School, USA, 1971-1973

Consultant to the East African Community, 1970-1971

University of East Africa at Dar-es-Salaam, 1963-1970, (Professor and Dean of the Law Faculty, 1968-1970)

Visiting Appointments

Visiting Professor, London University, UK, 1974 (Spring Term)

Visiting Fellow, University of the South Pacific, 1981

Visiting Fellow, Australian National University, March-August 1982

Visiting Professor, National University of Singapore, 1985-86

Distinguished Brittingham Professor, University of Wisconsin (Madison), Winter 1989

Distinguished Visiting Professor in Legal Theory, University of Toronto, Sep-Oct 1992

Hon. Professor, the Indian National Law School, Bangalore, 1993-97

Visiting Fellow, Legal Research Institute, University of Wisconsin, Madison, October 1993

Visiting Professor, University of Melbourne, July 1995

Visiting Professor, Harvard Law School, August-December 1996

Visiting Professor, University of Puerto Rico, Winter term 1998

Visiting Professor, European University Institute, June 1998

Visiting Professor, University of Wisconsin, Fall semester 2000

Distinguished Visiting Professor, University of Cape Town, 2002-2005

Named and Keynote Lectures

Waigani Lecture, University of Papua New Guinea, 1978, Law and Decentralisation

Taylor Lectures, University of Nigeria, 1980, Law and Social Change

Lansdowne Lecture, University of Victoria, 1993, Legal Responses to Ethnicity in South and Southeast Asia

Waigani Lecture, University of Papua New Guinea, "Establishing a Liberal Democracy Through a Constitution: Papua New Guinea Experience" (on the occasion of the 20th anniversary of independence)

Yencken Lecture, 1996, Australian National University, "Rights and Asian Values"

3rd Peter Allan Memorial Lecture, University of Hong Kong, May 1997 'The Constitutional Transition in Hong Kong'

1st Constitution Matters Lecture 1998 (Citizens' Constitutional Forum, Fiji)

University of Wisconsin USA: Mildred Fish-Harnack Human Rights and Democracy Lecture on "The Challenge of Ethnicity to Human Rights" (2000)

1st Ben Beinart Memorial Lecture, University of Cape Town, September 2003: "A Journey around Constitutions: Reflections on Contemporary Constitutions"

Sir Douglas Robb Lectures, University of Auckland, New Zealand, September 2007 "Ethnicity, Human Rights and Democracy"

Norwegian Academy (Annual Lecture 2009), "The Chimera of Constitutionalism"

Macabbean Lecture, British Academy 2015 "The State, Society and Economy: African Experience"

Keynote speaker at many conferences including:

"The Relationship between the State and Minorities", keynote lecture at the Conference on Diversity in Asia, International Centre for Ethnic Studies, Colombo, 2000

"Human Rights and the Eradication of Poverty", keynote speech at pre-Commonwealth Heads of Government NGO Conference, Kampala, Uganda, November 2007

"Autonomy and Federalism: Coping with Diversity", International Conference on Autonomy and Federalism, Manila October 2016

Publications

A. Books

(i) Authored

1. *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press, 1970) (with JPWB McAuslan) (reprinted with introduction by Y Ghai in 2001)
2. *Manual on Decentralisation* (with Conyers, Larmour and Wolfers) (London: Commonwealth Secretariat, 1982)
3. *Management Contracts and Public Enterprises in Developing Countries* (Ljubljana: International Centre for Public Enterprises, 1988) (with TC Choong)
4. *The Heads of States in the Pacific: A Constitutional and Legal Analysis* (Suva: University of the South Pacific, 1990) (with J Cottrell)
5. *Law, Politics and Administration of Decentralisation in Papua New Guinea* (PNG INR, Port Moresby, 1993) (with AJ Regan)
6. *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997) (second edition, 1999)
7. *The Millennium Declaration, Rights, and Constitutions* (Delhi: OUP, 2010) (with Jill Cottrell)
8. *The Processes of Constitution Making: A Handbook of Options* (published on the web by Interpeace (see http://www.interpeace.org/constitutionmaking/)) (with Michele Brandt, Jill Cottrell and Anthony Regan)
9. *Kenya's Constitution: An Instrument for Change* (Nairobi: Katiba Institute, 2011) (with Jill Cottrell Ghai) (2nd edition in press)

(ii) Books edited (in each case also a major contributor – see under book chapters)

1. *Portrait of a Minority: Asians in East Africa,* (Oxford, 1971) (with DP Ghai) (Swedish edition published by Prisma, Stockholm, 1971)
2. *Law in the Political Economy of Public Enterprises* (Uppsala, Scandinavian Institute of African Studies, 1977)
3. *The Political Economy of Law: A Third World Reader* (with R Luckham and Francis Snyder) (Delhi: Oxford University Press, 1987)
4. *Law, Government and Politics in Pacific Island States* (Suva: University of South Pacific, 1988)
5. *Public Administration and Management in Small States: Pacific Experiences* (Suva: University of the South Pacific Press, 1991)
6. *Put Our World to Rights: Towards a Human Rights Policy for the Commonwealth* (London: Commonwealth Human Rights Initiative, 1991)
7. *The Hong Kong Bill of Rights: A Comparative Perspective* (Singapore: Butterworths, 1993) (with Johannes Chan)
8. *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000)
9. *Hong Kong's Constitutional Debate: Conflict over Interpretation*_(Hong Kong: Hong Kong University Press, 2001) (with Fu Hualing and Johannes Chan)
10. *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2003) (with Jill Cottrell)
11. *Creating a New Constitution: A Guide for Nepal Citizens* (edited book of chapters by Nepali scholars, published by International IDEA, 2008) (with Jill Cottrell)
12. *Marginalized Communities and Access to Justice*, (London: Routledge, 2009) (with Jill Cottrell)
13. *The Millennium Declaration, Rights, and Constitution* (with Jill Cottrell) (Delhi: Oxford University Press, 2011)
14. *Practising Self-Government: Comparative Study of Autonomous Regions* (edited with Sophia Woodman) (Cambridge University Press, 2013), (4 chapters by me)
15. *Ethnicity, Pluralism and Nationhood: Kenyan Perspectives* (edited with Jill Cottrell, three chapters by me) (Nairobi: Katiba Institute; a joint publication of the Katiba Institute and the Global Centre for Pluralism, 2013)

16. *The Legal Profession and the New Constitutional Order in Kenya* (edited with Jill Cottrell Ghai) (Nairobi: Strathmore University Press, 2014)
17. *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (edited with Simon Young) Cambridge University Press, 2014) author/ co-author of 5 chapters)
18. *Kenya-South African Dialogue on Devolution* (edited with Nico Steytler, Juta: Claremount, 2015); authored three chapters

B Monographs, Reports and Occasional Papers

1. *Asians in East and Central Africa* (Minority Rights Groups, London, 1971) (with DP Ghai) (reprinted in B Whitaker, *The Fourth World* (1974))
2. *Law and Development: The Future of Law and Development Research* (1974) (co-author) (ICLD, New York)
3. *Legal Education in a Changing World* (1975) (co-author) (ICLD, New York)
4. *Reflections on Law and Economic Integration in East Africa* (Scandinavian Institute of African Studies, Uppsala, 1976)
5. *The Revision of the Paris Convention* (co-author) (UNCTAD, 1978)
6. *Parliament and Public Enterprise* (with VV Ramanadham, Ljubljana, 1981)
7. *Fiji* (Minority Rights Group, London 1987) (co-author)
8. *The Constitutional Arrangements for Decentralisation in Papua New Guinea: An Overview* (co-author) (IASER Discussion Paper No. 56, Papua New Guinea)
9. *Decentralisation and Intergovernmental Relations in Papua New Guinea* (co-author) (IASER Discussion Paper No. 57, Papua New Guinea)
10. *Whose Human Right to Development?* Human Rights Unit Occasional Paper, Commonwealth Secretariat, 1989
11. *The Rule of Law in Africa: Reflections on the Limits of Constitutionalism* Working Paper, Programme of Human Rights Study, Chr. Michelsen Institute, Department of Social Science and Development, Bergen, 1990
12. *The 1990 Fiji Constitution: A Fraud on the Nation* (Suva, 1991) (prepared for the National Federation Party and the Fiji Labour Party Coalition)

13. *Thoughts on the Cambodian Constitution* (Law Working Paper Series, No. 6, University of Hong Kong, 1993)
14. *Legal Responses to Ethnicity in South and Southeast Asia*, (Victoria: Centre for Asia-Pacific Initiatives, Victoria University, Occasional Papers 1, 1993)
15. *Act Right Now* (Commonwealth Human Rights Initiative, London 1993)
16. *Human Rights and Governance: The Asia Debate* (San Francisco: The Asia Foundation, 1994)
17. *Towards Racial Harmony and National Unity: Submission of the National Federation Party and the Fiji Labour Party to the Fiji Constitutional Review Commission* (Suva, 1995)
18. *The Right to a Culture of Tolerance* (Commonwealth Human Rights Initiative 1997) (principal author)
19. *Asian Human Rights Charter: A People's Charter* (Asian Human Rights Commission, 1998)
20. *The Implementation of Fiji Islands Constitution* (Suva: The University of the South Pacific and the Citizens'' Constitutional Forum 1998)
21. *Interights Bulletin* 1998/9 Vol. 12, No1 (Special Issue on the 50th Anniversary of the Universal Declaration of Human Rights) and two articles in it:
    a. 'UDHR: 50 Years On' pp. 1-2;
    b. 'The Critics of the UDHR' pp. 45-6
22. *Human Rights and Social Development: Towards Democratisation and Social Justice* (Geneva, UNRISD, 2001) 45pp.
23. *Public Participation and Minorities* (London: Minority Rights Group, 2001) 28pp.
24. *Human Rights and Poverty Eradication: A Talisman for the Commonwealth?* (Commonwealth Human Rights Initiative Millennium Report) (Delhi: Commonwealth Human Rights Initiative, 2001) 110 pp. (main editor and contributor)
25. *Reviewing the Constitution: A Guide to the Kenya Constitution* (Nairobi: Constitution of Kenyan Review Commission, 2002) 125 pp.
26. *The People's Choice: Report of the Constitution of Kenya Review Commission* (Nairobi: CKRC, 2002) 98 pp.

27. *The Constitution and the Economy*, Institute of Economic Affairs, Nairobi, Kenya, Annual Lecture (Nairobi: IEA, 2002) 32 pp.
28. *Democratisation and Constitution Building* (International Institute for Democracy and Electoral Assistance, Stockholm) (with Guido Galli)
29. *Constitution Making in Nepal* Report of Conference organised by Constitution Advisory Support Unit UNDP, Kathmandu, March 2007 (with Jill Cottrell) (Kathmandu: CASU 2007)
30. *Restructuring of the State: with Special Reference to Federalism* Report of Conference organised by Constitution Advisory Support Unit UNDP, Kathmandu, March 2007 (with Jill Cottrell) (Kathmandu: CASU 2008)
31. *Human Rights, Diversity and Social Justice* Report of Conference organised by Constitution Advisory Support Unit UNDP, Kathmandu, April 2007 (with Jill Cottrell) (Kathmandu: CASU 2008)
32. *The MDGs through Socio-Economic Rights: Constitution Making and Implementation Handbook* (Bangkok: UNDP, 2009) (with Jill Cottrell) (a longer version has been published – see under authored books)
33. *Rwanda's Application for Membership of The Commonwealth: Report and Recommendations of The Commonwealth Human Rights Initiative* (New Delhi: CHRI, 2009) (principal author) available at https://www.humanrightsinitiative.org/download/Rwanda%20application%20for%20membership.pdf
34. *Taking Diversity Seriously: Minorities and Political Participation in Kenya* (with Jill Cottrell Ghai, Korir Sing'oei and Waikwa Wanyoike) (Minority Rights Group, 2013)

C Chapters in Books

1. "Law and Courts" in D Butler and J Freeman (eds), *British Political Facts 1900-1960* (1963)
2. "Some Problems of the Constitution in East Africa" in *Proceedings of the Peking Symposium* (Peking, 1964)
3. "Constitutional and Legal Problems" in C Leys and P Robson, *Federation in East Africa: Problems and Prospects* (Oxford: OUP, 1965)
4. "Customary Contracts and Transactions in Kenya" in Blackman (ed), *Ideas and*

Procedures in African Customary Law, (1966), reprinted in I McNeil, *Contracts in East Africa* (1967)

5. "The Asian Minorities of East and Central Africa" (with Dharam Ghai) in Ben Whitaker (ed), *The Fourth World: Victims of group oppression* (London: Minority Rights Group and Sidgwick and Jackson, 1972), pp. 22-72
6. "Cooperative Legislation" in Withstand (ed), *Efficiency and Cooperatives in East Africa*, 1973
7. "Judicial Protection of the Individual against the Executive in Kenya", in *The Judicial Protection of the Individual against the State* (Heidelberg 1973)
8. "Population and International Migration: The Case of Migrant Workers" in *The Population Debate: Dimensions and Perspectives Vol. II* (UN, 1975)
9. "Control and Management of the Economy: Research Perspectives on Public Enterprise" in Ghai (ed.), *Law in the Political Economy of Public Enterprises* (1977) (see A (ii) 2), above)
10. "Law and Public Enterprise in Tanzania" in Ghai (ed.), see 9 above
11. "Constitutional Foundations of Public Administration" in Ghai (ed.), *Public Administration and Management in Small States: Pacific Experiences* (see A (ii) 5, above)
12. Chapter on "Tanzania" in Vol. 1 (National Reports) of the *International Encyclopaedia of Comparative Law* 1978)
13. "Legal Education for Socialism: Tanzania" in Pedamon (ed.) *Legal Education in Africa* (UNESCO, 1978)
14. "The Transfer of Technology" in Hussain (ed.), *Legal Aspects of the New International Economic Order* (London, 1980)
15. "Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations" in Dias, Luckham, Lynch and Paul (eds), *Legal Professions in the Third World: Comparative and Developmental Perspectives,* (Uppsala: Scandinavian Institute of African Studies, 1981)
16. "Law, State and Participatory Institutions: A Papua New Guinea Study", in Bhanduri and Rahman (eds), *Participatory Institutions and the Rural Poor* (1981; UNRISD)
17. "The Relationship between the Executive and the Legislature: Some Aspects of the Systems of Government in Melanesia", in Sack (ed.) *Pacific Constitutions* (Canberra, 1982) pp. 207-220

18. "Ministerial and Bureaucratic Power in Papua New Guinea: Aspects of the Dutton/Bouraga Dispute" (with Hegarty), in Sack, *ibid.*, pp. 247-255
19. "State, Law and Participatory Institutions: Papua New Guinea Experience" in Amit Bhaduri and Md. Anisur Rajman (eds), *Studies in Rural Participation* (New Delhi: Oxford and IBH Publishing Co., 1982) pp. 121-150
20. "Constitutional Issues in the Transition to Independence" in Ali and Crocombe (eds) *Foreign Forces in the Pacific* (Suva: University of the South Pacific Press, 1983) pp. 24-65
21. "The Making of the Independence Constitution" in Larmour (ed.), *Solomon Island Politics* (Suva: University of the South Pacific Press, 1984), pp. 9-52
22. "Law and Public Enterprise" in Ramanadhan (ed.) *Public Enterprise in Developing Countries* (London, 1984)
23. "Executive Control over Public Enterprise in Africa" in Reddy (ed.), *Government and Public Enterprise* (Bombay, 1984) pp. 181-219
24. "Land Law and the Paradigms of Development" in Sack (ed.) *Legal Pluralism* (Canberra, 1985)
25. "Vanuatu" in Larmour (ed.) *Decentralisation in the Pacific,* (Suva: University of the South Pacific Press, 1985)
26. "The State and the Market in the Management of Public Enterprise in Africa: Ideology and False Comparisons" in Ndegwa, Mureithi and Green (eds) *Management for Development* (Nairobi, OUP, 1987)
27. "The State and the Market in Public Enterprise" in KLK Rao (ed.) *The State, Public Enterprise and the Market Place in Developing Countries* (Ljubljana 1988)
28. "Legal Radicalism, Professionalism and Social Action: Reflections on Law Teaching in Dar es Salaam" in I Shivji (ed.) *Limits of Legal Radicalism: Reflections on Teaching Law at the University of Dar es Salaam* (Dar es Salaam, 1986)
29. "Supranational Regulation and the Development of Technology" in *Proceedings and Papers of 8th Commonwealth Law Conference* (Kingston, Jamaica, 1988)
30. "Constitution Making and Decolonisation" in Ghai (ed.), *Law, Government and Politics in the Pacific Island States* (see A (ii) 4, above) pp. 1-53
31. "Systems of Government I" (as in 29 above) pp. 54-75
32. "Systems of Government II" (as in 29 above) pp. 76-105

33. "Political Consequences of Constitutions" (as in 29 above) pp. 350-372
34. "The Politics of the Constitution: Another Look at the Ningkan Litigation", in Mahendra P. Singh, (ed.), *Comparative Constitutional Law*, Festschrift in Honour of Professor P.K. Tripathi (Lucknow: Eastern Book Co., 1989)
35. "Bills of Rights: Comparative Perspectives", Wacks (ed.), *Hong Kong's Bill of Rights* (Faculty of Law, University of Hong Kong, 1990) pp. 7-18
36. "A Comparative Perspective", Wesley-Smith (ed.), *Hong Kong's Basic Law* (Faculty of Law, University of Hong Kong, l990), pp. 1-21
37. "South-West Pacific" in Butler and Low (eds), *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (London: Macmillan 1991) pp. 233-273 (with Jill Cottrell)
38. "Freedom of Expression" in Wacks (ed.), *Human Rights in Hong Kong* (Hong Kong: OUP, 1992) pp. 369-409
39. "Constitutional Law" in Sihombing, ed., *Annual Survey of the Law 1990-1991* (Hong Kong Law Journal Ltd., 1992) pp. 181-196.
40. "Ethnicity, Democracy and Development" in *Peace and Conflict Issues after the Cold War* (UNESCO Studies on Peace and Conflict, 1992) pp. 79-103 (with Dharam Ghai)
41. "Constitutional and Legal System" (with Peter Wesley-Smith) in Halkyard and Smart (eds), *International Trade and Investment Law in Hong Kong* (Singapore, Butterworths 1993), pp. 3-24
42. "The Constitutional Framework for the Transition in Hong Kong" in Wesley-Smith (ed.), *The Transition in Hong Kong* (Hong Kong: HKU, 1993), pp. 11-50
43. "Constitutions and Governance: A Prolegomenon", in Adelman and Paliwala (eds), *Crisis in Law and Development* (Oxford: Hans Zell, 1993), pp. 51-74
44. "The Role of Law and Capitalism: Reflections on the Basic Law" in R Wacks (ed.), *Hong Kong, China and 1997* (Hong Kong: Faculty of Law, University of Hong Kong Press, l993) pp. 342-66
45. "Rule of Law and the Ideology and Practice of the Legal Profession" *Proceedings of the 10 Commonwealth Law Conference* (Nicosia: Cyprus Bar Association, 1993)
46. "Theory of the State in the Third World and the Problematics of Constitutionalism", in Douglas Greenberg et al. (eds), *Constitutionalism and*

Democracy: Transitions in the Contemporary World (New York: Oxford University Press, l993) pp. 186-196

47. "Ethnicity and Constitutionalism" in *Papers of the 1993 Fiji Law Society Conference* (Suva: Fiji Law Society, 1993)

19. "A Comparative Perspective on the Bill of Rights" (with Johannes Chan) in *The Hong Kong Bill of Rights: A Comparative Perspective* (Singapore: Butterworths, 1993) (with Johannes Chan) pp. 1-36

20. "Derogations and Limitations in the Hong Kong Bill of Rights" in *The Hong Kong Bill of Rights: A Comparative Perspective* (Singapore: Butterworths, 1993) (with Johannes Chan) pp. 161-198

48. "The Kenyan Bill of Rights: Theory and Practice" in Philip Alston (ed.) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999)

49. "Reflections on Self-Determination in the South Pacific" in Donald Clarke (ed.), *Self-Determination* (London: Macmillan Press, 1996) pp. 173-199

50. "Decentralisation and the Accommodation of Ethnicity" in Crawford Young (ed.), *Ethnic Conflict and Public Policies* (London: Macmillan Press, 1997) pp. 31-71

51. "Migrant Workers, Markets and the Law" in Wang Gungwu (ed.) *Migration and Global History* (Boulder: Westview Press, 1996) pp. 145-182

52. "The Politics of Rights in Asia" in G. Wilson (ed.), *Frontiers of Legal Research* (Chichester: Chancery Law Publishing, 1995) pp. 203-226

53. "The Interpretation of the Basic Law of the Hong Kong Special Administrative Region" in J. Burton (ed.), *1995 Law Lectures for Practitioners* (Hong Kong: Hong Kong Law Journal Ltd., 1995)

    [a revised version of this appeared in Orucu, Attwooll and Coyle (eds), *Studies in Legal Systems: Mixed and Mixing* (London: Kluwer, 1996) pp. 129-146

54. "Democracy and Representation in the Special Administrative Regions of Hong Kong and Macau" in G Hassell and C Saunders (eds), *The People's Representatives: Electoral Systems in the Asia-Pacific Region* (St. Leonards, NWS: Allen Unwin 1997) pp. 192-211

55. "Recommendations on the Electoral System: The Contribution of the Fiji Constitutional Review Commission" in P Larmour and B Lal (eds), *Electoral*

Systems in Divided Societies; the Fiji Constitutional Review (Canberra: The Australian National University, 1997) pp. 147-149

56. "Migrants Workers, Markets, and the Law' in Wang Gungwu (ed), *Global History and Migrations* (Boulder, Colorado: Westview Press, 1997) pp. 145-182
57. "The Economic Provisions of the Basic Law" in P Wesley-Smith (ed.), *Law Lectures for Practitioners 1997* (Hong Kong: Hong Kong Law Journal Ltd) pp. 287-298
58. "Rights, Duties and Responsibilities" in Josiane Cauguelin, Paul Lim and Birgit Mayer-Konig (eds), *Asian Values: Encounter with Diversity* (Richmond, Surrey: Curzon Press, 1988) pp. 20-42
59. "Human Rights, Social Justice and Globalisation" in D Bell and J Bauer (eds) *The East Asian Challenge to Human Rights* (Cambridge: Cambridge University Press, 1999)
60. "Analysing Deep-Rooted Conflict" (with David Bloomfield and Ben Reilly) pp. 31-48; "The Structure of the State: Federalism and Autonomy" pp. 155-167; and "Human Rights Instruments" pp. 234-242 in Peter Harris and Ben Reilly (eds) *Democracy and Deep-Rooted Conflict: Options for Negotiations* (Stockholm: Institute for Democracy and Electoral Assistance, 1998)
61. "Human Rights for a Better World" in Ministry of Foreign Affairs of Sweden: *A Human Rights Message* (1998), pp. 57-62 (a publication by the Swedish Government to mark the 50th anniversary of the Universal Declaration of Human Rights)
62. "National Security and Freedom of Expression" in Coliver, S, Fitzpatrick, J and Bowen, S (eds*) Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (Dordrecht: Martinus Nijhoff, 1999) (pp. 305-320) (with Van Dale, J)
63. "The Legal Profession and the Transfer of Sovereignty: Hong Kong" (with Jill Cottrell) in Rob McQueen and W Wesley Pue (eds), *Misplaced Traditions: British Lawyers, Colonial Peoples* (Law in Context Special Issue: Vol. 16, No. 1) pp. 123-150
64. "Ethnicity and Autonomy: A Framework for Analysis" Ghai (ed), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000) pp. 1-25

65. "Bougainville and the Dialectics of Ethnicity, Autonomy and Separation in Ghai, ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (with A Regan) pp. 242-65
66. "Autonomy Regimes in China: Coping with Ethnic and Economic Diversity" in Ghai, ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* pp. 77-98
67. "The Implementation of the Fiji Islands Constitution" in AH Akram-Lodhi (ed.) *Confronting Fiji Futures* (Canberra: Asia Pacific Press at Australian National University, 2000) pp. 21-49
68. "Autonomy as a Device for Diffusing Conflict" in P Stern and D Druckman (eds) *International Conflict Resolution after the Cold War* (Washington DC: National Academy Press, 2000) pp. 483-580
69. "Decentralisation: 1976-1995" in AJ Regan (ed) *Twenty Years of the Papua New Guinea Constitution* (Sydney: Law Book Co., 2001) pp. 161-80 (with AJ Regan)
70. "Establishing a Liberal Political Order Through a Constitution: The Papua New Guinea Experience" in AJ Regan (ed) *Twenty Years of the Papua New Guinea Constitution* pp. 35-57
71. "The Head of State" in AJ Regan (ed) *Twenty Years of the Papua New Guinea Constitution* pp. 77-97 (with J Cottrell)
72. "Litigating the Basic Law: Principles, Interpretation and Procedures" in Chan, Fu and Ghai (eds) *Conflict over Interpretation: The Constitutional Debate* (Hong Kong: HKU Press, 2001) pp. 3-52
73. "The NPC Interpretation and its Consequences" in Chan, Fu and Ghai (eds) *Conflict over Interpretation: The Constitutional Debate* (Hong Kong: HKU Press, 2001) pp. 199-218
74. "Rights, Duties and Responsibilities" in Cauguelin, C, Lim, P and Mayer-Koning, B (eds) *Asian Values: Encounters with Diversity* (Richmond, Surrey: Curzon Press) pp. 20-42
75. "The Structure of Human Rights in Federations" in K. Hossain et al (eds), *Human Rights Commissions and Ombudsman Offices* (The Hague: Kluwer Law International, 2001) pp. 41-53
76. "Between Two Systems of Law: The Judiciary in Hong Kong" in Russell, Peter and D O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical*

Perspectives from Around the World (Charlottesville: University of Virginia Press, 2001) pp. 207-32 (with Jill Cottrell)

77. "Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy" in Andrew Reynolds (ed.), *The Architecture of Democracy* (Oxford: OUP, 2002) pp. 141-70
78. "Global Prospects of Autonomies" in Harry Jansson and Johannes Salminen (eds), *The Second Åland Islands Question: Autonomy or Independence?* (Mariehamn: Julius Sundblom Memorial Foundation, 2002)
79. "Globalization, Multiculturalism and Law" in B Sousa (ed.) *Globalisation and Social Emancipation* (Spanish edition published November 2002, English edition 2004)
80. "Constitution Making in a New Iraq" in Ghai, Lattimer and Said (eds), *Building Democracy in Iraq* (Minority Rights Group International Report) (London: Minority Rights Group, 2003) pp. 27-38
81. "Territorial Options" in RMJ Darby (ed.) *Contemporary Peace-making: Conflict, Violence and Peace Processes* (London: Palgrave, 2003) pp. 184-93
82. "Introduction" (6 pp.) and "The Role of Courts in the Protection of Economic Social and Cultural Rights" (30 pp.) (with Jill Cottrell) in Ghai and Cottrell (eds) *The Role of the Courts in Implementing Economic Social and Cultural Rights* (London: Interights, 2003)
83. "Comparative Perspectives on the Prevention and Management of Conflict in Federal States" in *Proceedings of the National Conference on Managing Conflict within a Federal System* (Federal Democratic Republic of Ethiopia (House of Federation: Addis Ababa, 2006) pp. 21-43
84. "Between Coups: Constitution Making in Fiji" in Laurel E. Miller (ed.), (with Louis Aucoin), *Framing The State in Times of Transition: Case Studies in Constitution Making* (Washington, DC: US Institute of Peace, 2010) (with Jill Cottrell)
85. "Redesigning the State for 'Right Development'" in Bård A. Andreassen & Stephen P. Marks, (eds), *Development as a Human Right: Legal, Political, and Economic Dimensions* (A Nobel Book) (Cambridge, Mass: Harvard University Press, 2006)
86. "Constitutional Engineering and Impact: The Case of Fiji" in Saïd Amir Arjomand, (ed.), *Constitutionalism and Political Reconstruction* (Leiden: Brill, 2007) pp. 159-192 (with Jill Cottrell)

87. "A Tale of Three Constitutions: Ethnicity and Politics in Fiji" in Sujit Choudhury (ed.), *Ethnicity and Constitutional Ordering* (Oxford: Oxford University Press, 2008) (with Jill Cottrell) (same as item D58 below)
88. "Understanding Human Rights in Asia" in Catherine Krause and Martin Scheinin, (eds), *International Protection of Human Rights: A Textbook* Turku: Institute for Human Rights, Åbo Academy University, 2008) pp. 547-576
89. Introductory chapter and chapters on fundamental principles and on federalism in Ghai and Cottrell *Creating a New Constitution: A Guide for Nepal Citizens* (International IDEA, 2008) (translated into Nepali also)
90. "Understanding Human Rights in Asia" in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku: Abo Akademi University, 2009) pp. 547-576
91. "Independence of and Access to the Courts and a New Constitutional Vision for Kenya" in Ayesha Kadwani Dias and Gita Honwana Welch (eds), *Justice for the Poor* (Delhi: Oxford University Press, 2009) (with Jill Cottrell)
92. "The Rule of Law and Access to Justice" and "Conclusions and Reflections" (with Jill Cottrell) in Ghai and Cottrell, (eds), *Marginalized Communities and Access to Justice*, Routledge (2009) (a publication of the American Bar Association)
93. "Access to Land and Justice: Anatomy of a State without the Rule of Law" (on Cambodia) in Ghai and Cottrell, (eds), *Marginalized Communities* above
94. "Constitutionalism and the Challenge of Ethnic Diversity" in James J Heckman, Robert L Nelson, Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (London: Routledge-Cavendish, 2009) pp. 279-302
95. "The Intersection of Chinese Law and the Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics?" in Jorge Oliveira, Paulo Cardinal (eds), *One Country, Two Systems, Three Legal Orders - Perspectives of Evolution: Essays on Macau's Autonomy after the Resumption of Sovereignty by China* (Berlin; London: Springer, 2009) pp. 13-50
96. "Creating a New Constitutional Order: Kenya's Predicament" in Elizabeth Gachenga, Luis Franceschi, Migai Akech, David Lutz (eds), *Governance, Institutions and the Human Condition* (Nairobi: LawAfrica and Strathmore University Press, 2009) pp. 13-30

97. "The Chimera of Constitutionalism: State, Economy and Society in Africa" in Swati Deva, (ed.), *Law and (in)Equality: Contemporary Perspectives* (Lucknow, India: Eastern Book Co., 2010) pp. 313-331 (based on my lecture on this topic to the Norwegian Academy)
98. "Participation as Self-Governance" in Marc Weller and Katherine Nobbs, (eds), *Political Participation of Minorities* (Oxford: OUP, 2010) pp. 613-633
99. "Åland's Autonomy in Comparative Perspective" in Åkermark, Sia Spiliopoulou (ed.), *The Åland Example and its Components: Relevance for International Conflict Resolution* (Mariehamn: Åland fredsinstitut / Åland Islands Peace Institute, 2011)
100. "State, Ethnicity and Economy in Africa" in Hiroyuki Hino et. al (eds), *Ethnic Diversity and Economic Instability in Africa: Interdisciplinary Perspectives* (Cambridge University Press, Cambridge, 2012) pp. 129-169
101. "Ethnicity and Human Rights: Conflict or Accommodation" in Harvey and Schwartz (eds), *Human Rights in Divided Societies* (London: Hart Publishers, 2012) pp. 51-84
102. "Legal Profession: Themes and Issues" (32 pages); and "The Attorneys-General: Upholders or Destroyers of Constitutionalism" pp. 139-166 in *The Legal Profession and the New Constitutional Order in Kenya* (edited with Jill Cottrell Ghai) (Nairobi: Strathmore University Press, 2014)
103. "Themes and arguments" in Young and Ghai (eds) *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) pp. 1-30
104. "Autonomy and the Court of Final Appeal: The Constitutional Framework" in Young and Ghai *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* pp. 33-68
105. "Genesis of Hong Kong's Court of Final Appeal" (with Simon Young and Antonio da Roza) in Young and Ghai (eds) *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* pp. 11-144
106. "Role of the Chief Justice" (with Simon Young and Antonio da Roza) in Young and Ghai (eds) *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* pp. 225-252

107. "Concurring and Dissenting Judgments" (with Jill Cottrell Ghai) in Young and Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* pp. 283-324

108. *National Values and Principles of the Constitution* (with Jill Cottrell Ghai) (eds), (Katiba Institute: 2015). I have six short chapters in it, a) National Values and Principles: Roots of Constitutionalism; b) National Identity and Respect for Diversity: Foundations of the State; c) Separation of Powers, Checks and Balances, and the Rule of Law; d) Human Dignity: Underlying basis of human rights; e) Judicial Interpretations of the Right to Dignity; and f) Democracy: The Prime Constitutional Value

109. "Introduction: Nature and Origins of Autonomy" in Ghai and Woodman (eds), *Practising Self-Government: Comparative Study of Autonomous Regions* (Cambridge UP, 2013) pp. 1-31

110. "Zanzibar in Tanzania: From Sovereignty to Autonomy?" in Ghai and Woodman (eds), *Practising Self-Government: Comparative Study of Autonomous Regions* pp. 251-280

111. "Hong Kong's Autonomy: Dialectics of Powers and Institutions" in Ghai and Woodman (eds), *Practising Self-Government: Comparative Study of Autonomous Regions* pp. 315-348

112. "Comparative perspectives on institutional frameworks for autonomy" in Ghai and Woodman (eds), *Practising Self-Government: Comparative Study of Autonomous Regions* (with Sophia Woodman) pp. 449-486

113. *Understanding Devolution* (with Conrad Bosire and Jill Cottrell Ghai (eds)), (Katiba Institute, 2015). I have seven short chapters. a) Context; b) History, Objectives and Transition, c) Powers and Functions of County Governments, d) The Senate: The protector of county government autonomy; e) Intervention in the Affairs of Counties (co-author); f) Intergovernmental Relations: Implementing, building consensus and settling disputes; and g) Public Participation and Devolution

114. "The Old Order is Dying, The New Order Is Not Yet Born: Politics of Constitution Demolishing and Constitution Building in Nepal', in Albert HY Chen (ed.) *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge, Cambridge University Press, 2014)

115. "Constitutions and Constitutionalism: The Fate of the 2010 Constitution"

in Godwin Murunga, Duncan Okello, and Anders Sjogren (eds), *Kenya: The Struggle for a New Constitutional Order* (Zed Press and Nordiska Afrikainstitutet, 2014)

116. "South African and Kenya Systems of Devolution: A Comparison", pp. 1-30; "Devolution in Kenya: Background and Objectives", pp. 56-80; and "Devolution: What Can Kenya Learn from South Africa? (with Nico Steytler), pp. 442-482 in Nico Steytler and Yash Pal Ghai (eds), *Kenya-South African Dialogue on Devolution* (Claremont: Juta, 2015)

117. "Comparative Theory and Kenya's Devolution" pp. 13-37, in Conrad Bosire and Wanjiru Gikonyo (eds), *Kenya's Emerging Devolution Jurisprudence under the New Constitution* (Nairobi: IDLO, JTI and KI, 2015)

118. "Civil Society, Participation and the Making of Kenya's Constitution 2010", pp. 11-38, in Commission for the Implementation of the Constitution (ed.), *Effective Citizens' Participation: Broadening Citizens' Opportunities under the Constitution of Kenya 2010* (Nairobi: CiC, 2015)

119. "Constitutions and Constitutionalism in Post-Colonial Africa" in U Baxi, A Paliwala, and C McCrudden (eds) (festschrift for Professor William Twining) (Cambridge University Press, 2015 (with Jill Cottrell Ghai)

120. "Constitutionalism: African Perspectives" in festschrift in honour of the late Professor Okoth-Ogendo, Patricia Mbote and Collins Odote (eds) *The Gallant Academic: Essays in Honour of HWO Okoth-Ogendo* (Nairobi: University of Nairobi, 2017) pp. 149-170

121. "Ethnicity, Politics and Constitutions in Fiji" in Doug Munro and Robert Cribbed (eds), *Bearing Witness: Essays in Honour of Brij V. Lal* (Canberra: Australian National University Press, 2017), pp. 177-206

122. "Dilemmas of 'Genuine Autonomy' for Tibet" in Jens Woelk and Roberto Woelk (eds), *Regional Autonomy, Cultural Diversity and Differentiated Territorial Government: The Case of Tibet – Case of Chinese and Comparative Perspective* (London: Routledge, 2017)

123. The Role of Participation in the Two Kenyan Constitution Building Processes of 2000-5 and 2010: Lessons Learnt? (with Rose W Macharia) in Tania Abbiate, Markus Böckenförde and Veronica Federico (eds), *Public Participation in African Constitutionalism* (Routledge 2018)

124. "The Contribution of the South African Constitution to Kenya's Constitution" in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press, 2018) pp. 254-293 (with Jill Cottrell Ghai)

125. "Constitutional Transitions and Territorial Cleavages: The Kenya Case" (with Jill Cottrell Ghai) in George Anderson and Sujit Choudhry (eds), *Territory and Power in Constitutional Transitions* (Oxford: Oxford University Press, 2018)

126. "Civil Society, Participation and the Making of Kenya's Constitution" in David Landau and Hanna Lerner (eds), *Comparative Constitution Making* (Edward Elgar, 2019) pp. 212-233

127. "Security, Economy, Politics: The Chinese Agenda" in Cora Chan and Fiona de Londras, (eds), *China's National Security: Endangering Hong Kong's Rule of Law?* (Hart Publishing, 2020) pp. 307-332 (with Jill Cottrell Ghai)

D Articles

128. "The Kenya Council of State and Rhodesia Race Relations Board: A Device to Protect Minorities" 19 *International and Comparative Law Quarterly* (1963), pp. 403-433

129. "Constitutional Proposals for a One Party State in Tanzania" (with JPWB McAuslan) *East African Law Journal,* Vol I (1965) pp. 124-147

130. "Constitutional Innovation and Political Stability in Tanzania" (with McAuslan) *Journal of Modern African Studies* Vol 4 (1966) pp. 492-515 (has been translated into Danish and published in *Den Nya Norden* (Copenhagen and used in various anthologies)

131. "Independence and Safeguards in Kenya" (1967) *East African Law Journal* pp. 177-217

132. "Legal Aspects of the Treaty for East African Cooperation", *East African Economic Review* (1967) pp. 27-38

133. "The New Marriage Law in Tanzania", *Africa Quarterly* Vol XI (1971) pp. 101-109

134. "Constitutions and the Political Order in East Africa" *International and Comparative Law Quarterly* Vol 21, (1972) pp. 403-433

135. "Expulsion and Expatriation in International Law: The Right to Leave, to Stay and to Return", *Proceedings of the American Society of International Law* (1973) pp. 122-127
136. "East African Industrial Licensing System: A Device for the Regional Allocation of Industry?" *Journal of Common Market Studies* (1974) pp. 265-295
137. "*Oberoende i sikte*?" ["Independence in Sight?"] [in Swedish] (on Papua New Guinea) in *Rapport* (Stockholm), (No 6, 1975)
138. "*Ratt blev oratt*" (*rattsystemet på Papua New Guinea*) ["When Law Becomes Injustice: The Legal System of Papua New Guinea"] [in Swedish] in *Rapport* (No 2, 1976)
139. "National Goals and Law Reform: A Report on the Goroka Seminar", 1976 *Melanesian Law Journal* pp. 259-269 (with J Gawi and A Paliwala)
140. "Notes Towards a Theory of Law and Ideology: Tanzanian Perspectives", *African Law Studies* (1976) pp. 31-105
141. "Control and Management of the Economy: Research Perspectives on Public Enterprise", *Verfassung und Recht in Ubersee* (1976) pp. 157-185
142. "Law and Another Development", in *Development Dialogue* 1978 (No.2) (Uppsala)
143. "Decentralisation in the Pacific", in *Asia and Pacific Guide* (1982) pp. 62-67
144. "Plant Breeding and Plant Breeders" Rights in the Third World: Perspectives and Policy Options in the Third World" (with Dias) Report to the International Development and Research Centre (1983)
145. "Alternative Systems of Executive Control", *Public Enterprise*, Vol 4 (1984) pp. 69-75
146. "Management Contracts in Africa" *Africa Guide* (1984) pp. 38-42
147. "Plants and Seeds: A New Item on the North/South Agenda", in *Asia and Pacific Guide* (1985)
148. "Land Regimes and Paradigms of Development: Reflections on Melanesian Constitutions", *International Journal of the Sociology of Law* 1985, 13, pp. 393-405 (same as IV C 19)
149. "The Rule of Law, Legitimacy and Governance", *International Journal of the Sociology of Law* 1986, 14, pp. 179-208

150. "The Politics of the Constitution: Another Look at the Ningkan Litigation", in *Singapore Law Review* (1986)
151. "The Head of State in the Westminster Constitutions of the South Pacific: The Case of Western Samoa" in *Public Law* (1986)
152. "Law, Development and African Scholarship" 1987 *Modern Law Review* pp. 750-776
153. "Coups and Constitutional Doctrines: The Role of Courts" *The Political Quarterly* 58, 3 (1987) pp. 308-311
154. "Nature and Purposes of Legal Research" *Nairobi Law Monthly* (1989) No. 18, pp. 29-31
155. "A Coup by Another Name? The Politics of Legality" 1990 *The Contemporary Pacific* 2:1 pp. 11-35
156. "The Management of Public Enterprise through Holding Corporations" 1990 *Public Enterprise* 10:1 pp. 18-26
157. "Constitutional Reviews in Papua New Guinea and Solomon Islands" 1990 *The Contemporary Pacific* 2:2 pp. 313-333
158. "Official Information: Government Secrets or Public Assets?" 1991 *Hong Kong Law Journal* 21:1, pp. 78-86
159. "The Role of Law in the Transition of Societies" 1991 *Journal of African Law* 35:1 and 2, pp. 8-20
160. "The Theory of the State in the Third World and the Problem of Constitutionalism" 1991 *Connecticut Journal of International Law* 6:2, pp. 411-423
161. "The Past and the Future of Hong Kong's Constitution" 1991 *The China Quarterly* pp. 794-813
162. "Asian Perspectives on Human Rights" 23:3 *Hong Kong Law Journal* (1993) pp. 340-357
163. "Hong Kong and Macao in Transition (1) Debating Democracy" 2:3 *Democratization* (1995) pp. 270-290
164. "Hong Kong and Macao in Transition (II): Exploring the New Political Order" 2:3 *Democratization* (1993) pp. 291-312

165. “Ethnicity and Governance in Asia” 7:1 *The Thatched Patio* (1994) pp. 1-16
166. “The Hong Kong Bill of Rights Ordinance and the Basic Law: Complementarities and Conflicts” I *Journal of Chinese and Comparative Studies* (1995) pp. 30-71
167. “Human Rights and Governance: The Asia Debate” 1995 *Australian Yearbook of International Law* pp. 1-34 (essentially the same as B16)
168. “Back to Basics: The Provisional Legislature and the Basic Law” 1995 *Hong Kong Law Journal* pp. 2-11
169. “Democratisation, governance and conditionalities” 33 *Development Bulletin* (March 1995) pp. 12-14
170. “Securing a Liberal Democratic Order Through a Constitution: The Case of Papua New Guinea” 28 *Development and Change* (1997) pp. 303-330
171. “Sentinels of Liberty or Sheep in Woolf’s Clothing? Judicial Politics and the Hong Kong Bill of Rights” 60 (1997) *Modern Law Review* pp. 459-480
172. “Autonomy with Chinese Characteristics: The Case of Hong Kong” Vol. 10:1 *Pacifica Review* (1998) pp. 7-22
173. “Human Rights and Asian Values” 9:3 *Public Law Review* (1998) pp. 168-182
174. “A Play in Two Acts: Reflections on the Theatre of the Law” 29 *Hong Kong Law Journal* (1999) pp. 5-7
175. “The Legal Profession and the Transfer of Sovereignty: Hong Kong “(with Jill Cottrell) in McQueen, R and Wesley Pue, W, *Misplaced Traditions: British Lawyers, Colonial Peoples* (Annandale, NSW: Federation Press, 1999) (special issue of *Australian Journal of Law and Society* Vol 16 No. 1) pp. 123-150
176. “Citizenship and Politics in the HKSAR: The Constitutional Framework” (2001) 5(2) *Citizenship Studies* pp. 143-64
177. “The Nature of the Constitutional Transition in Hong Kong” (2000) 182 *Journal of Law and Politics* pp. 17-30
178. “The Basic Law of the Special Administrative Region of Macau: Some Reflections” (2000) 49(1) *International and Comparative Law Quarterly* pp. 183-98
179. “Universalism and Relativism: Human Rights as a Framework for Negotiating Inter-Ethnic Claims” (2000) 21(4) *Cardozo Law Review* pp. 1095-1140#

180. "Resolution of Disputes between the Central and Regional Governments: Models in Autonomous Regions" (2001) 5(1) *Journal of Chinese and Comparative Law* pp. 1-20
181. "A Journey around Constitutions: Reflections on Contemporary Constitutions" 2004 *South African Law Journal* 804 (published version of named lecture, see above)
182. "Unitary State, Devolution, Autonomy, Secession: State Building and Nation Building in Bougainville, Papua New Guinea" in *The Round Table* 95(386), September 2006 (with Anthony Regan)
183. "Constitution Making and Democratisation in Kenya (2000-2005)" 14 (1) *Democratisation* pp. 1-25 (2007) (with Jill Cottrell)
184. "Constitutionalising Affirmative Action in Fiji" in Special Issue (on Equality) of *International Journal of Human Rights* Vol. 11 pp. 227-257 (2007) (with Jill Cottrell)
185. "A Tale of Three Constitutions: Ethnicity and Politics in Fiji" 5 *International Journal of Constitutional Law* pp. 639-669 (2007) (with Jill Cottrell) [see above under book chapters]
186. "Devolution: Restructuring the Kenya State" in *Journal of Eastern African Studies* (2008) pp. 11-26
187. "Is there Scope for Genuine Autonomy for Tibetan Areas in the PRC System of Nationalities Regional Autonomy?" (with Sophie Woodman) 17 *International Journal of Minority and Group Right*s pp. 137-186 (2010)
188. "Unused Powers: Contestation over Autonomy Legislation in the PRC" (with Sophia Woodman) *Pacific Affairs* No. 82, No. 1, Spring 2009
189. Bruce J Berman, Jill Cottrell, and Yash Ghai, "Patrons, Clients, and Constitutions: Ethnic Politics and Political Reform in Kenya" in *Canadian Journal of African Studies* Jan 2009
190. "Dilemmas for the Judiciary" in *The Nairobi Law Monthly* Vol 6: 12 (December 2015) pp. 46-51

#Extracts from items marked # are included in a reader and commentary by Professor William Twining: *Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi* (Cambridge, UK: Cambridge University Press, 2009).

E Forewords

1. To Christine Loh (ed.), *Building Democracy: Creating Good Government for Hong Kong* (Hong Kong: Civic Exchange, 2003) pp. viii-xxii
2. To *Tanzania: The Legal Foundations of the Union* by Issa G Shivji (Dar es Salaam University Press, 2009)
3. To Willy Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Mwengo 1999) and 2nd edition Strathmore University Press 2020
4. To Teo Soh Lung, *Beyond the Blue Gate: Recollections of a Political Prisoner* Strategic Information and Research Development Centre, Petaling Jaya, 2010)
5. To Simon N. M. Young and Richard Cullen, *Electing Hong Kong's Chief Executive* (A Study Commissioned by Civic Exchange). (Hong Kong: Hong Kong University Press, 2010)
6. To Greg Constantine, *Kenya's Nubians: Then and Now* (2011)
7. To *Creating an Effective Coalition to Achieve Sdg 8.7: International Advisory Commission Report to Commonwealth Heads of Government* (Commonwealth Human Rights Initiative, 2018)
8. To Oagile Bethuel Key Dingake, *Towards a People's Constitution for Botswana* (Notion Press, 2020)
9. To Krishna Hachhetu, *Nation-Building and Federalism in Nepal: Contention on Framework* (Understood to be in press)
10. Afterword to JE Sibi-Okumu, *Collected Plays* 2004-2014 (Hapazi Press, 2021)

Other Academic and Related Activities

A Editorships etc of journals and other publishing activities

Editor of the *East African Law Journal*, 1965-1967
Founder and editor of the *Eastern African Law Review*, 1967-1970
Founder and editor of series, Studies of Law in Social Change and Development (under which six socio-legal books were published)
Member of editorial/advisory boards of following journals:

i) *Democratisation*
ii) *Development and Change*
iii) *Asian Journal of Human Rights*

iv) *Fijian Studies* (new journal, member since 2002)
v) *Netherlands Journal of Human Rights* (no longer member)
vi) *Buffalo Journal of Human Rights*
vii) Third World Legal Studies
viii) Law, Social Justice and Global Development

B Directing, participating in or evaluating research projects

As Director of Research, International Legal Centre, New York, Secretary of two international committees of jurists and social scientists, on Legal Education and Law and Development, 1972-1973

Director of multi-country Research Project on Public Enterprises in Africa based at the Scandinavian Institute of African Studies, Uppsala, and financed by SAREC, 1976-1980

Part of School of Law, University of Warwick, consultancy group for the United Kingdom Ministry of Energy on the legal aspects of combined heat and power generation (1987) (my role was to advise on how the necessary public controls on corporations in the energy sector could be exercised through statutory schemes or corporate structures)

Consultant to the Ford Foundation on Ethnicity and Governance, 1992

Consultant to the Sasakawa Peace Foundation on a project on Identity and Culture, 1993

Evaluator for SAREC (Swedish Agency for Research Cooperation with Developing Countries) of the International Centre for Public Enterprises, Ljubljana (1985)

Consultant to the Swedish Government on its policy towards Asia (with special reference to human rights) 1999

Consultant to the Tibet Government in Exile on its negotiations with China 2001-3

Member of the Universities Grants Council Research Assessment Panel (Hong Kong January 1994)

Member of the Humanities Panel of the Hong Kong Research Grants Committee (April 1995-6)

Co-Investigator – Canadian project on Ethnicity and Democratic Governance (funded by the Canadian Social Sciences Research Council (2006--) directed by Professor Bruce Berman

Co-investigator with Simon Young on project on Ten Years of the Court of Final Appeal of Hong Kong (CRCG grant)

Research Awards

Ford Foundation, Rockefeller Foundation, Nuffield Foundation, Tercentenary Fund of the Swedish Central Bank, SAREC, The Swedish Social Science Research Council, the British Social Science Research Council, The British Academy, The Hong Kong Research Grants Council, The British Council, etc

Distinguished Researcher Award University of Hong Kong 2001

C Membership of Advisory Bodies of Research Institutes, professional bodies etc

Member of Kenya, Uganda and Tanzania Councils of Legal Education, 1966-1970

Trustee, International Centre for Law in Development, New York 1973-1986

Trustee, Foundation for the Pacific Peoples, UK, 1982-1991

President 1991-4. Commonwealth Legal Education Association and member of Advisory Panel, 1983-94

Member of Advisory Council, Interights, London, 1987-2000

Member, Advisory Commission, Commonwealth Human Rights Initiative 1990-1995, 2007-2019

Member, Advisory Board, International Alert, 1993-4

Member, Law Reform Commission of Hong Kong, 1993-99

Member, Advisory Board, Asian Human Rights Commission, 1996-

One of founders of Citizens Constitutional Forum, Fiji (a leading NGO in Fiji) mid-1990s

Member, Programme Advisory Board, International Council on Human Rights Policy, 1996-99 (on Executive Board October 1998-99)

Member, Board, Minority Rights Group, 1999-2001

Member, Board of Institute of Transitional Justice, New York, 2002-2005

Global Centre for Pluralism (Ottawa) (member of Board of Directors for one term 2010-2013)

D *Consultancies and memberships of bodies concerned with constitutional development and review*

Consultant to the Constitution Commission (Kawawa Commission on the One-Party State, Tanzania) 1965

Consultant to the Government of Papua New Guinea:

On the Constitution for Independence (1972-5)

1978 (July-September) reviewed the process of decentralisation and the establishment of provincial government

Advisor to Seychelles Peoples United Party at the Seychelles Constitutional Conference, London, April 1974

Constitutional advisor to the Government of Solomon Islands 1977-78 on the constitutional arrangements for independence; chief negotiator at the independence conference, London, 1977. Drafted most of the Constitution

Constitutional advisor to the Government of Solomon Islands Select Committee on Provincial Government, 1978-79

Advisor to Government of and political parties in the New Hebrides (Vanuatu) on constitutional developments and the preparation of the independence constitution. Negotiated on their behalf with France and Britain on the grant of independence and the Constitution, 1977-1980

Constitutional Advisor to W. Samoa (1982) (various constitutional questions on the electoral system)

Consultant to the Tamil United Liberation Front (1982) (on constitutional aspects of devolution)

Member, Constitutional Commission to Inquire into Certain Provisions of the Kiribati Constitution (relating to the protection of the Banabans) and principal author of its report (1985)

Constitutional Advisor to the Coalition Party; Fiji, 1987 (August-Sept.), October 1988-June 1997

Consultant to the Government of Zambia on constitutional review and reform, October 1993

Consultant to the Papua New Guinea Constitution Commission 1995-6

Consultant on the democratic process in Cambodia (May-June 1996 as part of Danida-Cowiconsult team)

Consultant to the Government of Solomon Islands on legislation for provincial government 1997

UNDP Advisor to the Cook Islands Constitution Review Commission, October-November 1998

Chairperson of the Kenya Constitution Review Commission (November 2000-4) and chair of the National Constitutional Conference (equivalent to the Constituent Assembly)

> Note: in my private capacity I drafted a new suggested version of a constitution – based on the work of the National Constitutional Conference – in 2006

Asia Foundation Senior Advisor on Constitution for East Timor 2000

Advisor to Constitutional Commission for Afghanistan, 2002-3 and constitutional advisor to Ibrahim Brahimi, head of the UN Mission to Afghanistan

Advisor (UNDP) to Law Society of Maldives on review of Constitution 2004

UN/USIP Advisor to Constitution Making Committee of Iraq parliament, June 2005

UN/NDI Expert on Constitution Making Process Iraq July-August 2005

Visited Nepal under auspices of International Idea on various occasions 2004-6, and for 10 days in April-May 2009

Consultant to UNDP in connection with constitution making process in Nepal: advising political parties, civil society, government, organising and participating in many conferences; writing advisory memos, preparing conference reports etc. (2006-8)

Consultant, American Bar Association on World Justice Forum (2007-8)

Senior Advisor, UNDP Somalia Office (Nairobi) on constitution making in Somalia 2009-2012

PeaceNexus (Geneva) consultant to Ghana Constitution Commission November 2010

Advisor to the Committee on the amendments to the South Sudan Constitution following secession (2010)

Consultant to the South Sudan Constitution Commission 2011

Consultant on constitution making in Tunisia (IDEA) 2011

Consultant on constitution making in Libya (UNDP) 2012

Key note speaker on constitution making at the first national conference in Cairo (UNDP, Govt of Egypt and Social Contract Centre, Cairo) 2012

Chair, Fiji Constitution Commission (2012)

Advisor to the Constitution Commission of Tanzania, 2013

Advisor to the Transitional Commission in the negotiations between the Philippines Government and the Mindanao Islamic Liberation Front 2013-2014

Advisor to Government of Zimbabwe (2016) on implementation of constitutions

E Peace-keeping and negotiating; or advising

Papua New Guinea/Bougainville

1976 (July, October), chief negotiator for the Bougainville Provisional Government in the discussions with the Government of Papua New Guinea to end the secession of Bougainville and to establish the system of provincial government. Helped subsequently to draft the necessary legislation.

Advisor on the legal form and scope of amnesty in relation to the Bougainville crisis (May 1995)

Advisor to the Bougainville Liberation Army (1991)

Member of UN Centre of Human Rights mission to Papua New Guinea (May 1995)

Advisor to Governor of Bougainville on peace negotiations with the Papua New Guinea Government (1999-2002)

New Hebrides/Vanuatu

Mediation between two leading political parties on the independence constitution (1979-80)

Mediator between the New Hebrides Government and the secessionist "government" of Santo Island, 1980

Sri Lanka

Various visits over the years, including June 2006 under auspices of One-Text project (advisor to the Muslim community), and October 2017

Nepal

Paid two visits to Nepal in 2003 under auspices of IDEA

Member of Amnesty International Mission to Nepal, July 2003 to advise on introduction of human rights considerations in peace process

Head of the UNDP Unit on Constitution Making (2006-8)

F Consultancy for UN and other international/regional bodies

UNESCO Consultant on race relations in East Africa, 1970.

East Africa Community Legal consultant on:

i. The East Africa System of industrial licensing and mechanisms to allocate large scale industry among the Partner States (1970)

ii. Harmonisation of fiscal incentives to industry within the Partner States (Art. 19 of the Treaty) (1970)

iii. Compatibility of the Arusha Association Agreement between EEC-EAC, with the GATT (1970-71); and

iv. The revision of the Treaty for East African Co-operation, (1976)

UN Consultant on the preparation of a background paper for the Bucharest Conference on Population (1974)

UNCTAD 1976-1977 legal consultant on the transfer of technology. Helped to prepare the background materials for the inter-governmental meetings of experts on the code of the transfer of technology, assisted at the meetings, and prepared a paper on the revision of the Paris Convention on Patents

FAO

i. Consultant on parastatal institutions in fisheries development (1978-1979);

ii. Consultant on plant genetic resources (1988) (helped to draft a settlement between supporters of plant breeders' rights, mostly North countries, and supporters of farmers' rights, mostly South countries)

International Centre for Public Enterprises in Developing Countries, Ljubljana, (1980, 1987, 1988) (Consultant on systems of control and accountability of public enterprise; the use of the holding corporation in the public sector)

UN Centre on Transnational Corporations on Management Contracts Consultant (1980-1981)

UNDP Part of Mission to China to advise on the reform of administrative structures and administrative law (December 1990-January 1991). Subsequently advisor on and co-ordinator of activities relating to the reform of administrative law (1991-93)

Commonwealth Secretariat Consultant on various projects over a number of years from 1975 onwards on constitutional matters, decentralisation, small states, state-owned companies, and grass-roots organisations

G Advisor to national governments either of developing countries or countries of "the north" in connection with aid or development policy or specific projects

Consultant to the Government of Papua New Guinea:

On the role of customary law in the legal system (report being the basis of proposals of the PNG Law Reform Commission) 1976

1984, member of the Fiscal Review Committee (and a principal author of its report)

Consultant, International Development and Research Centre (Ottawa) on

i. patents in developing countries

ii. the relevance of plant breeders' rights to agriculture in developing countries (1982)

Consultant to the Ministry of Foreign Affairs, Swedish Government on its Asia Strategy Policy (January 1998)

Danida Consultant on the re-organisation of the Ministry of Justice in Mozambique (December 1998-January 1999)

Advisor to the Ministry of Foreign Affairs, Denmark on review of its development assistance for democracy and human rights (April-October 1999)

Advisor to Government of Fiji Islands on implementation of Social Justice Chapter of the Constitution (under contract with ILO) February 2000

Consultant on the democratisation process in Nepal February-April 1994 (as part of Danida-Cowiconsult team)

H Advisor to Foundations

Ford Foundation: on human rights and minorities – 1991

I Other legal practice and consultancy, particularly in relation to public law issues

Legal practice at the Tanzania Bar, 1970-71

Legal advisor to the Cuban Sugar Corporation in litigation in the US Supreme Court (*First National City Bank v Banco Para El Commercio de Cuba*, 1982)

Legal advisor to the Uganda Evacuees Association in litigation against the UK Secretary of State for Foreign and Commonwealth Office (*Amin v Secretary of State*) (1984-1985)

Advisor to the Governor-General in litigation involving the election of the Prime Minister, October 1993 (Solomon Islands)

Advisor to the Prime Minister of Solomon Islands (October 1994) on rules and conventions regarding the dismissal of the Prime Minister.

Advisor to the Governor, the Central Bank of Solomon Islands on the constitutional status and rights of the Bank and its Directors

Advisor to the Chinese Government on aspects of the implementation of the Sino-British Joint Declaration on the transfer of sovereignty of Hong Kong (1995-6)

Mediating between the Chinese and British Governments on certain aspects of the transfer of sovereignty over Hong Kong from Britain to China (1996)

I mediated between ANC and the Afrikaner political parties in establishing an understanding on a democratic and non-racial future of South Africa in Harare in 1988 at the request of ANC; and was later asked to advise the Advisors to the Constitutional Assembly

Facilitator (part of KREDDHA team) in connection with negotiations on constitutional development between Government of India and Nagas (NCSN-IM)

Occasional advisor to Tibet Government in exile on autonomy and negotiations with Government with the People's Republic of China.

Emissary of the UN Secretary General to Fiji to discuss Fiji's return to democratic rule and UN's participation as a facilitator (Nov-Dec 2008)

I have written several legal opinions (largely on a *pro bono* basis) for human rights organisations as well as for private clients (on commercial terms), mainly in the area of public law, in relation to several jurisdictions. Since the adoption of the new Kenya constitution (August 2010) I have taken cases to court to protect the rights of marginalised communities, and at the request of the judiciary, I have appeared as amicus curiae.

J Special Representative of Secretary General of UN

2005-2008 Special Representative of Secretary General of UN on Human Rights in Cambodia

K Establishing NGOs

I have been responsible for establishing two NGOs: one in Fiji, Citizens Constitutional Forum (as a way to bring different races together in the common cause of a democratic and non-racial constitution in 1997 – today it is the most active and effective NGO in Fiji

I have been responsible for establishing the Katiba Institute in Kenya to promote the implementation and defence of Kenya's 2010 Constitution. Since my return to Kenya in 2008, I have played an active role in civil society. Among other activities (such as public interest litigation and civic education) I am responsible for the weekly column on constitutional matters in *The Star*, which has enabled many Kenyans to understand the Constitution and its dynamics.

Part one
Yash Pal Ghai, the man, the theory

The indomitable Yash Pal Ghai

Seema Shah

Long awaited beginnings

On an otherwise ordinary Nairobi day in 2016, Yash Pal Ghai stood in a hallway of the Supreme Court of Kenya, waiting to have lunch with his former student and friend, Chief Justice Willy Mutunga. Ghai, carrying his usual striped cloth bag, its worn strap tied in a knot and its edges frayed, waited patiently, his unassuming nature belying his reputation as one of the world's foremost experts in constitutional law.

Ghai soon noticed activity around the Chief Justice's office. Mutunga had gone in, followed by several senior judges, many of whom had been Ghai's students in the early days of Kenya's independence. When he was finally called in, Ghai was taken aback by the arrangements in the room, which had been set up to swear him into the Roll of Advocates of Kenya. Mutunga had arranged it as a surprise. But Ghai knew what all the fuss was for. As Jill Cottrell recalls, 'he was wearing a suit!!'

Now, at 78 years of age, and after having waited nearly half a century for this day, the father of the Constitution of Kenya – his small, slender frame concealed beneath a billowing, black robe and a white barrister's wig hiding the silver wisps of his iconic, unruly hair – cut a distinctive figure in the room.

> As Chief Justice, it was my singular and great honour to admit Yash in the Roll of Advocates on 10 June 2016, six days before I retired. I fought tears as I conducted this ceremony. It seemed like a culmination of brother-comrade-friend-teacher-student-patriot.

It was a meaningful moment for Ghai as well, but – ever the professor – his memory of the day is dominated by pride in his student. 'To see Willy, my former student, as Chief Justice, was very meaningful. I had kind of given up on practicing law at that point, so being sworn in was quite moving.'

It had been a long and circuitous journey, but Ghai was finally home. For Mutunga and many others, the moment was highly symbolic, a mark of rightful return, a sign that Ghai – whose lifelong work in the service of people's rights had been done while in exile from his home – was finally back where he had always belonged.

Growing up in colonial Kenya

It may come as a surprise, given his long and illustrious career, but law was not Ghai's first career choice. In fact, when he left Kenya for the University of Oxford in 1956, the young Ghai had been intent on studying English Literature. 'I loved reading novels,' he remembers with a smile. 'My father used to give me fifty shillings a month, and I would hoard it and hoard it until I could buy a Jane Austen novel. I thought I might be an English teacher.' When he wasn't absorbed in an Austen novel – *Pride and Prejudice* being his favourite – young Ghai could be found with his best friend, Dushyant Singh, the son of esteemed High Court Judge Chanan Singh.

Born in October 1938, the youngest of six children, Ghai remembers a happy childhood. His family was close, and he was, in his own words, 'slightly pampered' by his older siblings. Ghai's home in Ruiru was behind his father's store, Mulkraj Ghai Shops, a popular stop for the area's coffee farmers.

> We sold everything, from kerosene, to food, to general supplies. The farmers would come in the morning to place their orders, and by the time they returned in the evening my father would have prepared and packed each order.

Kenya in the 1940s was heavily segregated, and – aside from one notable exception – Ghai says he rarely saw a non-white customer. That exception was none other than Jomo Kenyatta.

> At the time, Africans were not allowed to drink, but he used to drink a lot. He would come to the shop, and my father would take him up to our place, close the curtains and give him a drink. My mother would give them lunch. My father could have been jailed if anyone had ever known that.

Kenyatta, who developed a close friendship with Ghai's father, took a special interest in the youngest Ghai. He would often ask to see the youngster, bringing him fruit from his farm. Ghai remembers seeing Kenyatta after he was released from prison. 'When I had come home from Oxford, Kenyatta had just been released and he asked my father why he hadn't taken me to visit him and my father told him that the queues of people waiting to see him were so interminably long! So he arranged for us to see him specially. There is a picture of us all together about a week after he was released.'

The success of his father's shop blessed Ghai with a relatively easy childhood. He spent the week in Nairobi, where he went to school and was cared for by his grandmother, and returned to Ruiru on the weekends. His father emphasised the

importance of education, and Ghai worked hard, excelling in school. In fact, when Princess Margaret visited Kenya in 1956, Ghai, as the top student in his school, was chosen to present her with a bouquet of flowers. Unbeknownst to him, it would be his first claim to fame.

> In those days, the British had their own propaganda thing. There were huge, outdoor screens, and they would show these clips. It would start with news about the country, and then they would show a cowboy movie.

Mutunga laughingly remembers. 'I saw Yash in that clip. That was the first time I saw him.' When asked about the moment, Ghai laughs quietly. 'I fell in love with Princess Margaret.' Indeed, Mutunga says, 'You know, the way the British did those documentaries was very, very interesting. A lot of us became monarchists as young kids after seeing those beautiful women and queens.'

The reality of segregated living meant that young Ghai had virtually no substantive interaction with the white British population in Kenya, nor the black Kenyans. What little interaction he did have, though, showed the young Ghai how very different life was for some Kenyans. 'We wouldn't be allowed anywhere near any British home. We didn't know any British kids.' In fact, as he now looks out over his garden in Muthaiga, Ghai describes his initial reluctance to live in the neighbourhood. 'I remember dogs barking at me here. They would bark at any non-white person. I never wanted to be here.'

Most of the inter-racial interactions he did have in his youth occurred at school, especially during athletic competitions. Once a year, he remembers, the leading schools in Nairobi, each segregated by race, would have athletics competitions.

> I took part in athletics. We would always lose, because the Prince of Wales School (for white students) had coaches and equipment. You were on the field together, but then at intervals you went back to your own side. We didn't even get to know their names.

Segregation was just one manifestation, however, of the harsh reality of inequality all around him. Ghai remembers witnessing insults and beatings on the streets. 'As a kid, when I used to see people being beaten up, I couldn't do much. The injustice of it left a very deep impression on me, the unfairness of it.' By the time Ghai was ready for university, he had been personally bruised by the harsh mark of racism as well.

As he was preparing to apply for university admission, Ghai was advised to seek assistance from the Ministry of Education. He recounts,

> In the Ministry, I saw a lift and I had never been in one. So I got into the lift. I was about to go, and suddenly three white men came in and asked me what I was doing. They physically picked me up and threw me out, and I ended up on the floor. I was so shattered. I thought, "How can they just throw me like this?"

Taking the stairs instead, Ghai eventually reached the office of Mrs Brotherton, who, Ghai had been told, could help with the university admissions process.

> She asked me where I wanted to go. I said, "Oxford." She looked at me and smiled and said, "You? You want to go to Oxford?" She laughed at me and then mentioned two or three other universities. "You really think you could go to Oxford?" she taunted. I said that I wanted to try. She asked me if I had received a credit in my 'O-levels'. And I said, "No." She smiled and said, "See? You didn't even get a credit in your exams." That's when I said, "Madam, I did not get a credit. I got a distinction." She was so angry with me. She told me she didn't think Oxford was good for me.

It was a defining moment for Ghai, who had received the highest O-level results in Kenya. Instead of embittering him, however, the experience motivated him to forge ahead. In fact, when he spoke to his teachers at the newly opened Gandhi Academy, which would eventually become the University of Nairobi, they wrote to Queens College to recommend him. After passing the entrance exam, Ghai was accepted at Oxford, intent to pursue literature. Until 1960 – and Yash joined in 1958 – O level Latin was an entry requirement for Oxford, so he was compelled to study Latin.

> My teachers helped me get tutorials for Latin. They got this chap to come from the Prince of Wales School twice a week and tutor me. My school arranged it. I was quite pleased that this chap drove up and took the time. I thought, "He's English but he's quite nice."

The university student

Oxford (Queen's College) welcomed Ghai, but it was an adjustment.

> In the beginning, I was nervous in all kinds of ways – there were all these bright people, etc. I didn't even know how to eat food British style. The British Council had set up a course on how to eat, and I attended that to learn how to use utensils. I would look at other people, and I got a complex about knowing which spoon to use.

Ghai quickly made friends, pursuing his love of sports and the outdoors. He also enjoyed time with his brother, who was still at Oxford, and with Singh, who was studying in Bristol. The two kept in touch, hitchhiking around Europe during their holidays.

Soon, however, Ghai realised that studying English literature was not what he had expected.

> It was very difficult, because at Oxford they started four centuries before Austen. It was hard to read old English, and I just couldn't cope. So I went to my tutor. He was understanding, and he asked me what I wanted to do instead of English. Even though my second love was history, I chose law.

Ghai excelled at Oxford, so much so that, when he achieved the highest exam scores in the university, the College Provost told him that the College would henceforth take care of his fees. After graduating with his Bachelor's degree in 1961, Ghai applied to undertake graduate work at Oxford's Nuffield College. It was while at Nuffield, where he was studying comparative Commonwealth constitutions for his doctorate, that Ghai was approached by his former tutor.

> He raised the idea of Harvard. I hadn't really thought about it, but he said, 'Why not take a break from Oxford and go to Harvard?' He said I could come back later and finish my thesis. I wondered if the College would really allow something like that. He was such a nice person, and he wrote to his friends there. Harvard gave me a grant and a generous allowance.

At Harvard, Ghai completed a Masters in Law (1963) and also took courses related to his doctoral thesis.

And it was at Harvard that Ghai met William Twining, the son of the former Governor of Tanganyika, who would become a lifelong friend. Twining had just started a law school, along with AB Weston, in Dar es Salaam. The University of East Africa, as it was then known, was recruiting professors. 'People were telling me that Twining was around and was looking for me. It turned out that he was looking for staff. When we met, he said, "I've come to pick you up." "Pick me up?" I laughed it off.' Although he was tempted, Ghai was concerned about finishing his doctorate, especially because Nuffield had been so good to him. It turned out, however, that Twining had already spoken to Oxford and the university was very supportive, encouraging Ghai to take the position in Dar.

> After a lot of thinking and consideration of the fact that this was the first time Africans would have had a chance to study law [in East Africa], I thought it would be good to do this. Twining had already recruited four or five teachers. I ended up going at short notice.

Although Ghai would continue to work on his doctoral thesis once in Dar, even publishing several chapters, he never had the chance to finish it. In 1992, the University of Oxford honoured Ghai with a 'higher doctorate' in Civil Law. While ordinary doctorates are earned through a defined program of study, higher

doctorates are awarded only through a nomination process and a review of a scholar's research work over a period of time. Ghai is among only 96 recipients of this degree since 1923.

A young professor in Dar es Salaam

In 1963, Ghai, at only 25 years of age, accepted his first professional position as a lecturer of law at the University of East Africa at Dar es Salaam. It was a heady, idealistic time for the young graduate, as well as for the wider society. According to Professor Bill Whitford, Ghai's colleague and lifelong friend, Dar was one of the most desirable places in terms of legal education at the time.

> There was a wide range of people from all over the world, and the students were fantastic. [The first class of law students was only 14], and they were superb. The other thing was that this was [Tanzanian President Julius] Nyerere's most creative period, and thoughts about creating a new society were all over the place. Everything was up for debate. It was a very hopeful time.

Indeed, Ghai describes his time in Dar as 'most formative' in terms of his professional growth; he was acutely aware of the significance of his role. 'It was the first time black Africans were being allowed to study law [in Africa],' he remembers.

> People didn't know much about law other than that this is what the British used to beat you. We were aware that the students who left us could soon be judges or senior government officials, and we were conscious of inculcating in them the sense that law could be used for the promotion of good values.

This conviction of his responsibility to inspire students to use the law to work for the betterment of society, to seize and channel the fervour of newfound independence in the direction of an equal, democratic post-colonial Africa, is partly responsible for Ghai's break with the legal positivist tradition in which he had been trained, opting for what came to be known as 'legal radicalism'. This approach, which sought to understand and interpret the law within the social, political and economic contexts in which it functioned, was not the norm at the time. In the new era of independence, however, Ghai and others like him believed it was critical for lawyers to understand how the existing law had come to be and how it might need to change to suit the rapidly evolving needs of newly independent nations. Writing about his years in Dar, Ghai says, 'It was not long before I became acutely uncomfortable with endless explorations of the rules of privity and consideration,

and became conscious of the unreality of the emphasis on the common law when it touched only a small segment of the population.'

Indeed, Mutunga credits Ghai for this approach.

> We were taught law within its historical, socio-economic, cultural, and political contexts, thus departing from the conservative legal positivism with its clarion call that "law is the law is the law". We undertook to study, research, and practice law never in a vacuum. Above all, we anchored law in politics and shunned legal centralism. Our approaches were multi-disciplinary.

At the same time, however, Ghai ensured that his students were well grounded in traditional law. Mutunga describes the high standards Ghai held as a teacher, demanding that his students become masters of 'staunch positivism' while having the skills to interrogate that tradition. Mutunga describes Ghai's approach as a 'fantastic balance', recalling how his professor's exams required students to address three questions dealing with technical aspects of the law and two questions asking students to critique the legal rules. 'Dar law graduates could regard themselves as "learned", as we were distinguishable from other pretenders to the "learned" tag.' Mutunga considered Dar to be his 'liberation Mecca', the place where he developed his own intellectual, ideological, and political positions.

Not everyone was a fan of this approach. Mutunga describes how some students were not interested in studying context. Already assured of high level jobs, these students 'just wanted to know the rules so they could go out there and practice.' Some students wanted to 'finish things and get marks. They had gone to law school to be "big people".' Ghai himself has questioned legal radicalism, wondering if his students were at a disadvantage for not having trained as traditional lawyers. Mutunga, who adopted Ghai's approach when he became a professor, disagrees, explaining that his own students have expressed how the approach of law in context helped them cultivate a more holistic approach to the law, and to an understanding of the law.

Ghai's natural aptitude, not just for the law but also as an educator, quickly became clear. While teaching in Dar, he co-authored (with his colleague and friend, Patrick McAuslan) what would become one of his most well-known books, *Public law and political change in Kenya*. Although their primary motive in writing the book was to provide a textbook for their students, who did not have authoritative texts on the laws of newly independent East Africa, *Public law* became one of the most widely cited works related to Kenyan law. When it was published in 1970, Ghai was just 32 years old.

The authors wrote that they wished to provide an analysis and critique of Kenya's development since early colonial times as seen through the processes of law:

> We have never understood the function of the law teacher or writer to be the mere reciter of rules whose merit is to be gauged by the quantity of information he can relay. All African countries have great need for lawyers who can take their eyes off the books of rules, who can see more to law than a set of statutes and law reports ... The law student must constantly be brought up against questions such as ... what is this law designed to achieve, what set of beliefs lie at the back of this law... a text should aim to stimulate, even aggravate, not stupefy, and that is what we have tried to do here.[1]

Their analysis was incisive and sometimes harsh, blatantly questioning, for instance, increasing Executive power and the trampling of the Bill of Rights, which they said was so ineffective that they wondered why it remained a part of the Constitution at all.

George Kegoro, the former Executive Director of the Kenya Human Rights Commission, refers to *Public law* as 'the bible,' and 'easily the most widely cited book in Kenyan law'. Kegoro says,

> At independence, everybody was trying to establish a frame of analysing Kenya and Kenyan society. How do you analyse society? What are the constituent components? He provides that within the book. There was no clarity about where the tails were, where the heads were. And what he did was to show us where the tails and heads were. It has held sway up to now. It is still very much a valued way of analysing Kenyan society, which is why the book gets cited over and over and over again. It is one of the reasons why he is a legend.

Kegoro pauses, then adds – with incredulity – 'And he never talks about it himself! Ever, ever!'

In fact, despite his growing success, Ghai remained down-to-earth. He strove, in many ways, to be a peer of his students. According to Mutunga:

> Yash belonged to a group of law professors and lecturers who did not carry the tag of "academic terrorists". We reserved that tag for the faculty who clearly did not like to teach, did not like students, and suffered from egos and serious intellectual arrogance. Invariably, they treated us as intellectually inferior, adopted a pulpit lecture system where they ordered not to be interrupted while lecturing. Questions were to be asked during tutorials. Yash and others were different. They were approachable, treated us as equals in the word and spirit of the intellectual culture in Tanzania. 'All students were Yash's friends,

[1] Yash Pal Ghai, JPWB McAuslan, *Public law and political change in Kenya,* Oxford, 1970, Preface to first edition, vii-viii.

Indeed, Ghai's ease with people placed him in the middle of a wide social circle, made up of students and colleagues. Despite his work, which was significant, Ghai invested time in creating and maintaining deep and often lifelong relationships with people around him. Mutunga explains,

> He was always likable and great company in and out of class. Bear in mind Yash became a full professor at the tender age of 32. In all respects he wanted us to see him and treat him as a brother. Many of us were in our mid-20s. Today, whenever I communicate to Yash I sign off, *Nduguyo*/Your brother because of a relationship that spans almost over five decades.

Whitford describes Ghai's ability to balance a social life with his professional duties. 'He cooked, and he was an excellent cook! What male Asians cooked at that time?' Whitford asks in amazement.

> He didn't have servants, because he didn't want to have that kind of relationship with anyone. He was a democratic socialist from the word "go". He entertained but was also very intellectual. It was typical to see him walking around with his arms full of papers all the time.

Just as Dar es Salaam was a site where he flourished professionally, it was a place where home took on a new meaning. It was while in Dar that Ghai met and married his first wife, Karin Englund, who was from Sweden. Their daughter, Indira, was born in Dar in 1971. He remembers a pleasant life, with a house by the sea.

Ghai's tenure in Dar was one of the most dynamic periods of his life. He quickly climbed the ranks, becoming the first East African Dean of the University of East Africa's law school in 1970. He was also personally approached by Tanzanian President Nyerere, who asked him for assistance in the development of the Tanzanian Constitution. He admired Nyerere, who gave him complete freedom to say what he believed.

Interestingly, it was also while he was teaching in Dar that Ghai met his future wife, Jill Cottrell, for the first time.

> I first met him in 1969. I was doing my Masters at Yale, and my supervisor had taught for a year in Dar. He knew Yash, who was at Yale on a short visit. My supervisor invited a group of people who had some connection to East Africa over for dinner, and then he invited me, although I didn't know any of these people.

Cottrell Ghai laughs, remembering the evening. 'He said, "I am going to introduce you to a glamorous man, but I think he's going to get engaged." He did get married soon after that.'

Over time, however, the environment in Dar became increasingly stressful. In his reflections on this time, Ghai writes of more and more racism.

> For despite the scholarly analysis of some Marxists, what passed in general for radicalism in those days included a large amount of racism and xenophobia. I remember overhearing the wife of a Tanzanian colleague – a self-proclaimed Marxist – that she would not rest in peace unless she saw that *muhindi* (Indian) out of the country – that *muhindi* being me!

In fact, a growing drive to 'Africanise' things, along with the University of Nairobi's continued and persistent invitations to return to Kenya and assume the deanship at the law school, tempted Ghai to finally accept the offer.

Exile

Ghai had accepted the offer of a deanship at the University of Nairobi, packed up everything ready to leave Dar es Salaam, and was saying his goodbyes when he got a call from his former student, Willy Mutunga.

> So Willy said to me, "I hope you aren't coming to Nairobi." And I said, "I am taking up the deanship at the University of Nairobi." He said, "I can't say much now, but don't come. I can't talk now, but don't come until we tell you." He was ringing from the AG's office, where he worked. I didn't know why they were saying that. But then the University of Nairobi rang me two days later and said they were sorry but my appointment was canceled. I said, "You spent hours and hours persuading me, even when you knew how happy I was. I agreed because of your pressure. Why has it been cancelled?" They said that they couldn't tell me.

Ghai learned later that Attorney General Charles Njonjo did not want him in Kenya. He was warned by friends that he could face harassment and even torture if he returned. Ghai is emotional as he speaks of this time, expressing frustration and outrage at the way things unfolded. 'To this day, I do not know what bothered the AG. I never knew what I did. When I asked Njonjo about it, he never admitted it, even though he had signed all the orders himself.' Following the warning from Mutunga, Ghai went into exile.

Ghai's colleagues and friends attribute the orders to the work he had done until then, pointing especially to *Public law*. Says Mutunga:

> I believe legal radicalism, politics in Tanzania and the publication of the book he co-authored with Patrick MacAuslan in 1970 – which was very critical, in the academic and political sense, of developments in East Africa – definitely made the conservative Njonjo fearful of such a teacher in the Faculty of Law at the University of Nairobi. Of course, when I

> joined the Faculty of Law, University of Nairobi, I adopted the approach he would most likely have adopted had he joined the faculty. So, in a way, we had our last laugh.

Whitford agrees, saying that Ghai's attack on newly independent Kenya's public policies led to Njonjo's actions.

Although the news was devastating, Ghai's time in Dar had catapulted him into the international limelight. The impact of his work, not just as a teacher and administrator, but also as a trusted international adviser, was becoming increasingly clear. Unsurprisingly, senior ministers in Tanzania asked Ghai to stay on, offering him positions in the Attorney General's office. The University of East Africa at Dar es Salaam also invited him back when the news broke that he would not return to Kenya. Ghai declined these offers, choosing instead to take on some short-term work with the East African Community (EAC). While there, he advised the EAC on membership issues and on reforms aimed at addressing the vastly unequal economic conditions of member states. It was interesting work and Ghai enjoyed it. In fact, Ghai's performance prompted the Tanzanian Attorney General to nominate Ghai to be the Chief Legal Officer of the EAC, but Njonjo stepped in again, vetoing the nomination.

At this point, Ghai could have turned to Kenyatta to ask for assistance. Says Mutunga, 'Yash could have gone to Jomo, but he's not that kind of person and I'm glad he didn't. It would have destroyed him professionally. Everyone would have known that Kenyatta helped him return and then he would have been seen as "Kenyatta's boy". He would have been seen as a sycophant.' Mutunga doubts that Njonjo knew of Ghai's connection to Kenyatta, and he is confident that Kenyatta had no knowledge of Njonjo's actions. 'Even Njonjo wouldn't have dared to do what he did if he had known of the connection.'

Ghai's departure for the United States in 1971 was a loss for East Africa, but he left behind a model for teaching law. Indeed, Whitford calls Ghai's vision of – and standards for – a law school the 'Ghai ideal'. At the heart of this vision is the role of law faculty as 'independent critics of legal developments'. The Ghai ideal envisions law schools as havens of intellectual scholarship, marked by well-resourced and up-to-date libraries as well as by full-time law professors, who are well remunerated and who have reasonable teaching loads.

Ghai epitomised his own vision of a law professor. Ambreena Manji, who teaches law at the University of Cardiff and who is the former head of the British Institute of East Africa (BIEA), says she has been profoundly influenced by Ghai's

commitment to teaching. 'He will just quietly talk to you about your ideas.' Manji remembers hosting several constitutional conferences while at the BIEA, and she particularly recalls Ghai's attention to young scholars. 'I used to watch him quietly sit with young people and just quietly talk to them and question and probe. He is a very committed teacher. A lot of what I've tried to do as a teacher has been influenced by him. He is an exemplar of how you should live your life as an academic.'

Hope in times of grief

In 1971, Ghai settled his young family in New Haven while he lectured at Yale Law School and served as the Director of Research at the New York-headquartered International Legal Centre. The family soon welcomed a son, Tor.

At the same time, Ghai continued to receive invitations to assist with constitution-making processes around the world. While at Yale, Ghai remembers receiving a telegram from Papua New Guinea, where leaders were trying to negotiate an independence constitution. Says Ghai,

> I was quite surprised. I didn't know very much about Papua New Guinea. It turns out that the Australians offered them some consultants from Australia, and the local leaders felt that they may be biased and they may be influenced by – or even directed by – the Australian government. So they wanted input from a totally independent person. They had just established a law school and the first dean of the law school was, at one stage, my dean in Dar. So they asked him and he recommended me.

Ghai accepted the offer, travelling to Port Moresby from New Haven for short periods, somehow also managing his other professional responsibilities as well as the demands of his family.

Ghai's time at Yale (1971-1973) was positive, and having received several offers from around the country, Ghai considered settling in the United States. 'But my wife didn't like the US and so I gave up a number of offers, including the UN. Since she had come to the US because of me, I decided to go to Sweden [for her].'

From 1973 to 1978, Ghai worked as a researcher at Uppsala University in Sweden as well as at the renowned Nordic Africa Institute. He also continued to travel to Papua New Guinea, sometimes for longer periods, as the country considered how to manage the demands of multiple ethnic groups in a time of transition to independence. The assignment was particularly invigorating for Ghai, who had a special interest in minority rights. Ghai and his team travelled around the

country to canvass people's views and desires, a hallmark of his constitution-making methodology. In the end, he advised the Government to be open to devolution in areas where there was a demand for it – especially for the island of Bougainville. Without that option, he feared that groups would press for secession. When, at the end of the process, the Chief Minister lobbied successfully to eliminate the Draft Constitution's chapter on devolution, Bougainville did indeed declare its intention to secede.

Constitutional lawyer turns peace maker

In September 1975, Bougainville seceded and declared independence. But when violence broke out, Ghai, who had no training as a negotiator, was asked to return to Papua New Guinea to act as a mediator. He agreed and the 1976 negotiations, in which Ghai was instrumental, led to a settlement and saw Bougainville's return to Papua New Guinea. But Ghai also quickly realised that the balance of expertise was strikingly unequal. Ghai explained, 'Bougainville had no lawyer to speak of and the Government had quite senior lawyers.' It would be easy to conclude that Ghai's decision to work on behalf of Bougainville would place him in a contentious position. He had spent months working for the Government, only to finally end up working 'for the other side.' Amazingly, however, the integrity Ghai had exhibited throughout the constitution-making process mitigated any tension that could have existed.

> Fortunately, all the people we were negotiating with were sort of friends because of the time I had spent there working. I was seeing senior civil servants, economists, finance officers, people from the Ministry of Lands. So by the time the negotiations started, I knew most of them quite well and had become good friends with them.

Ghai's ability to connect with actors from across political divides is emblematic of his natural ease with people. Ghai's own anecdotes about people he has met – from local artists whose works bring life to his garden, to former Indian Prime Minister Manmohan Singh, whom he met as a student at Oxford – often end with the words, 'We became good friends.' Lulu Kavoi, who works as the Katiba Institute's (KI) Executive Assistant, describes what she was expecting when she first met Ghai. 'I had only read about him and seen him on TV. I was expecting a bossy person, someone too serious for life.' She was surprised at the reality.

> Working for him is fun, because he likes to understand people. He's a mentor and also a boss, but he's not a bossy person. He is interested in what you're doing for your education and in

> your life. He would come and ask me, "So Lulu, what are you doing and studying?" More like a friend I can talk to for advice.

Devolution was eventually reinstated in Papua New Guinea. When it was time to implement this aspect of the new Constitution, Ghai was asked to return, this time to chair a commission responsible for implementing devolution. Although Ghai wanted to help, he did not want such a role for himself.

> I wanted a local person to be chair. I asked [Papua New Guinea leaders], even in the very beginning, that I would like to work with one or two young lawyers so that they would acquire knowledge and experience of the constitution and the background to its various provisions, minimising reliance on foreign lawyers.

Ghai's response to this suggestion serves as an example of his commitment to sharing his knowledge and promoting local empowerment and ownership of democratic processes and institutions. Indeed, the person who was finally chosen for this role, Bernard Narakobi, eventually became Attorney General of Papua New Guinea, and later a diplomat.

Ghai's ability to take a backseat in order to promote local ownership and thereby plant the seeds for long-term, sustainable democratic rule has inspired many of those who have been lucky enough to meet and work with him. Manji says,

> The thing about Yash is that he doesn't give a monkey's about your status. He doesn't care. He's not going to be impressed whether you're the president or the professor. He doesn't care. If you have got something interesting to say, he will sit and listen. He wants to know about you.

Indeed, Papua New Guinea would later recommend Ghai to leaders in the Solomon Islands; he had local legitimacy. In 1976, Ghai was awarded Papua New Guinea's Independence Medal, created to honour those who had performed outstanding service to the country during the transition to full independence.

Ghai's success in the South Pacific brought him even more attention, and requests kept coming. Over the course of his career, Ghai would work on constitutions and constitutional development in many other countries, including Cambodia, the Cook Islands, East Timor, Fiji, Iraq, Kenya, Libya, Nepal, Somalia, South Sudan, Sri Lanka, Vanuatu, and Zambia.[2] Many of these assignments were borne of personal recommendations. Says Manji, 'He's utterly, utterly non-denominational and non-

[2] In Ghana, he made a very preliminary visit, and in the Phillipines, Ghai advised the Moro Islamic Liberation Movement in Mindanao, but not on the making of the Philippine Constitution.

racist. He's utterly scrupulous and fair-minded. That has been key to negotiating in complex terrain.'

Although Ghai's work in Papua New Guinea was a professional success, prompting the beginning of an extensive career as an adviser in the region and eventually the world, it was also an emotionally traumatic time. As it became clear that Ghai would have to commit more time to being on the ground in Papua New Guinea, his wife advised him to go in advance of the rest of the family so that he could set up their house and living arrangements.

> At one point, I realised I had been there for two months and she kept delaying her plans to travel. When I returned to Sweden, I realised that she had fallen in love with someone else and was living with him. She had moved to Stockholm [from Uppsala] with the children.

It was a great shock for Ghai, who struggled to balance work in Uppsala with time with his children, who were in Stockholm. 'I would go to Stockholm on the weekends and take them to a park and give them ice cream. They knew only Swedish. I found it so frustrating, and I would cry when I left them. It got to be too much for me.' Ghai told his ex-wife that he wanted custody. 'I told her that *she* should be one to visit them on the weekends.' He consulted a lawyer, but he was told that, as a non-Swedish man, he stood very little chance of winning custody against a Swedish mother. It was a significant emotional blow. Whitford recalls, 'He cooked, he did all that sort of stuff. He was the primary home person; he did more than she did in that regard.'

Ghai's relationship with his ex-wife was tense in the immediate aftermath of the divorce, and for some time afterward. It was somewhat unsurprising, then, that Ghai decided to leave Sweden when his contract expired. Wanting to remain close enough to see his children regularly and easily, however, he chose to stay in Europe. In 1978, he took up an appointment as a professor of law at the University of Warwick in the United Kingdom, where he had friends and some family.

Renewals at Warwick

In 1978, when Ghai's took up his new position at Warwick, it was like a professional homecoming. Whitford calls it 'the path of least resistance' for that time in Ghai's life. It was 'filled with academics from Dar,' recalled Whitford. Indeed, the law school at Warwick is known for its leading work in 'law in context,'' and it has been home to 'law in context' pioneers, including Twining, Ghai, McAuslan,

and others from Dar. Ghai thrived at Warwick, teaching constitutional law classes, publishing extensively and even taking up short appointments as a visiting professor in Australia, Singapore and the United States. He enjoyed these experiences and the exposure to different environments, never allowing his outsider status to stand in the way of the work in which he believed. In Singapore, Ghai took the Government to court in a case that sought to advocate for the rights of a group of domestic workers. After a string of legal victories, he was declared unwelcome and forced to quickly leave the country. His fellow lawyers were jailed, but Ghai continued to 'make noise', forging ahead until the lawyers were eventually released.

It was at Warwick that Ghai became reacquainted with Cottrell, whom he had originally met on a visit to Yale when he was still Dean in Dar. Cottrell and Ghai had met occasionally over the years, mostly at academic conferences, and they were now faculty colleagues. Their relationship quietly but steadily evolved at Warwick. Manji laughingly remembers seeing them together more and more. 'Every time someone would go around to Yash's place, Jill would be there. Nobody was told there was a relationship, but intellectually they are a perfect fit. Their relationship was a long time brewing, and it is such a great intellectual partnership.' Indeed, Zein Abubakar, Ghai's co-commissioner on the Constitution of Kenya Review Commission (CKRC), described the couple as an inspiration. 'Yash's love and affection for his wife – it's amazing to see them, how they complement each other. It's an inspiration for all of us. If *Mzee* is still able to do this, maybe we should learn something from him.'

The birth of that relationship quickly grew into a professional partnership as well. Although they were different in many ways, Manji describes the importance of their commonalities. Referring to Cottrell Ghai's early experiences as a law professor in Nigeria, Manji says, 'She had this totally global life. It took a lot of courage as a woman in that era to embark on that kind of life. When she ended up at Warwick as a young woman, she already had that outward push.' Like Ghai, Cottrell Ghai is also a quiet but determined force. Unlike her husband, however, she tends to stay out of the limelight. 'Jill is very quiet and very, very studious,' says Manji. 'She would almost prefer it if she never had to leave the house and if she could just get on with reading whatever textbook she was obsessing about at that particular time. She's an absolute powerhouse.'

At Warwick, balancing teaching and research responsibilities with missions around the globe, Ghai found himself in a unique position, often working for the British Foreign Office but acting as an adviser to local groups. In so many of these

cases, Ghai's British training and official connections to the British Government were considered background information. First and foremost, he was seen, and wanted to be seen – according to him – as 'a Third World person', as someone who could understand local views. Indeed, in the Solomon Islands (between 1977 and 1979), Ghai urged the Chief Minister and the Leader of the Opposition, who had a bitter relationship, to work together so that the British could not undercut their goals:

> You should negotiate as a united people. If you are fighting yourselves, Britain will play one against the other." And I worked on it, and worked on it. I would wear slippers and go to the Leader of the Opposition. I said, "I'm coming home to you. Do you have a free moment?" They liked that. For them, I was not a pompous civil servant coming from London. So I was able to establish a rapport.

At the end of the constitution drafting process, the Leader of the Opposition credited Ghai with uniting the country.

It was clear to Ghai that his work was about something bigger. Although he was in great demand, Ghai only accepted assignments that aligned with his political philosophy and that contributed to greater democratisation and respect for the rule of law. International missions were real-world applications of his academic work, a chance to have a hand in shaping progressive political frameworks that valued individual freedoms and protected minority rights. This is why, when he was first approached to help the Fijian Government with constitutional issues after the first 1987 coup, he refused. Ghai explains,

> I was afraid they wanted me there to "fix it". There had been some cases where the courts in other countries had accepted coups as lawful. [The coup leader's] expectation was that I would help the new regime to achieve a similar status. I had no intention to help them "fix it" – and expressed my willingness to go to help [only] with the return to constitutionality.'

When a delegation from the overthrown Fijian group arrived in London, Ghai reached out to them, eventually agreeing to be *their* adviser. Knowing that the coup leaders would be 'furious' if they found out that Ghai had turned them down but had volunteered to help 'the other side,' he went to Fiji but stayed out of sight. When they required assistance, the delegation would ask for a break from negotiations and visit Ghai in his room. Negotiations were successful, resulting in a power-sharing agreement, a review of the Constitution, and a long-term agreement to resolve inter-party differences. By the time Ghai returned to Warwick, in September 1987, however, a second coup had been staged.

Ghai continued to be involved in Fiji, acting as an adviser to the parties in the wake of the second coup, and again in 1995-7 in the preparation of their submission to the Commission drafting the 1997 Constitution. During that period, Ghai also established the Citizens Constitutional Forum, a non-governmental organisation meant to 'bring different races together in the common cause of a democratic and non-racial constitution.' The NGO reflected Ghai's deep-felt concern about the racial divisions and inequalities in the country, issues which he attempted to address in his recommendations regarding the new Constitution. He had strong faith in the power and importance of civil society, a belief that would continue to drive his work throughout his career. In 2012, when the country's military regime agreed to hand power back to civilians, Ghai was invited to head the Constitutional Commission.

The consummate innovative scholar

At the same time, Ghai continued to produce legal analysis, publishing books and articles on decentralisation, the political economy of law, human rights, and multiple works devoted to the politics, law and government of the specific countries in which he had worked. His list of publications, which does not include works completed in the last two years, runs 15 pages in length.

Ghai's 1989 article entitled, 'Whose human right to development?' was, according to Cottrell Ghai, a particularly important contribution and an example of his unique approach to the law. 'He doesn't always take the obvious approach. Very often, his analysis is out of the ordinary,' Cottrell Ghai explains. 'In [that piece], he questioned the right to development in the sense of saying that it was for elites rather than for ordinary people. He takes a slightly more sceptical approach, and that has been important intellectually.'

In fact, Ghai's unconventional approach to the law is what continues to impress and inspire lawyers to date. Waikwa Wanyoike, the first Executive Director of the KI, the NGO which he founded with the Ghais in Kenya, describes Ghai's ability to 'create possibilities where a lot of people think there are none.' According to him, Ghai can

> push new frontiers on nearly every subject. He's able to find ways to read the same text and expand it in a manner that is so rights-focused. He shows hyper-creative rights-oriented thinking, and that's probably his biggest contribution. His political savvy is also impressive – his ability to marry politics with the law and make the law work effectively on politics. He will contextualise issues, and he always starts from values and principles. That's ingenious. He

> breaks the barrier between the technical elements of the law and values; he infuses rights-based values into the law.

Despite his multiple responsibilities, Ghai also continued to act as a mentor. Mutunga says,

> He made it his business to mentor me by inviting me to conferences in various places, by getting me to Warwick Law School as a visiting fellow when he taught there, by being an external examiner in my courses when I taught law in the University of Nairobi, and by sending me his writings and seeking my comments. Yash is the epitome of collective intellect. Many of his books are co-authored and some of the co-authors were his students.

The Hong Kong experience

In 1989, after 11 years at the University of Warwick in the United Kingdom, Ghai applied to a new opening at the University of Hong Kong, which was interested in hiring a professor who could work on the island's impending change of sovereignty. Ghai was interested and felt it would give him a chance to broaden the scope of his work and expertise. When the Tiananmen Square massacre occurred on the eve of his interview, however, Ghai – appalled at the Chinese Government's violent attacks on pro-democracy protesters – considered backing out. He recalls, 'But then everyone said, "This is exactly why you *must* go." So I went.' Tiananmen Square reminded him, however, of what he would be faced with as he took on the challenge of analysing and assessing the nature of what would be a new relationship between China and Hong Kong.

As the first Sir YK Pao Chair of Public Law, Ghai became an expert in what is known as Hong Kong's "basic law," the law that rules Hong Kong as a special administrative region of China. His book, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, first published in 1997, became a primary reference text, including for Hong Kong's Court of Final Appeal justices, who carried the book to court. Ghai also published extensively on Hong Kong's Judiciary, relations with China, and the 'one country, two systems' structure.

Ghai considers his 17 years in Hong Kong to be defining. He believes his ability to bring a new perspective to the relationship with China was important. 'Ironically, they learned more about China from me! And I found Hong Kong and the people there very nice. The place was stimulating.'

Indeed, Ghai soon found that stimulation would come not just from the challenge of a new academic area of expertise but from a special role as negotiator between the Chinese and the British, on behalf of the United Nations, and between the Chinese and officials from Hong Kong. When he was first approached by the Chinese in the mid 1990s, he was surprised. When he asked why they had come to him, they told him that they had heard a lecture Ghai had given about colonial rule. 'I had been very critical, talking about how important it was for countries to find their own destinies and to be able to come up with their own methods and designs of rule. They liked that very much.' Ghai accepted the invitation to be a part of the legal team that helped negotiate what parts of British law would be retained, but he quickly found himself in an uncomfortable position. Ghai stood up to Chinese pressure, defending Hong Kong's stance that certain laws should not be retained. 'You can't have a bill of rights,' Ghai explains, 'but then say that the sovereign power can do what they want. I said, "I'm sorry, but I can't continue on this basis". It made no sense.' Ghai went on to write a report outlining his views on the transfer of power, eventually handing it to both sides. 'China didn't like it,' he recalls, 'but I was not doing it for them.' By this time, Ghai says, his relationship with the Chinese had become 'quite difficult.' Even then, however, the British pointed out that Ghai remained trusted by all sides. Indeed, when the British wanted to break their deadlock with China, and asked China whether Ghai could preside at their meeting, the Chinese had no objection.

Hong Kong was also home for another reason. Cottrell Ghai received a job offer, also becoming a law lecturer at the University of Hong Kong. The couple were married in 2003 and Cottrell Ghai remembers,

> It was the day I retired officially, the 30th of June in 2003. Yash's kids were visiting and my niece and her partner were visiting. We decided to get married when the kids were there, so there were six of us in the registry office. A very sweet young lady who had the job of marrying us had to give us a little pep talk on the responsibilities of marriage and looked suitably embarrassed about giving that talk to people in their 60s. My niece and Yash's son were our witnesses and then we had lunch in a nice Chinese restaurant... and then Yash and I went back to a Faculty meeting.

It was understated, to say the least, and yet completely characteristic of the couple.

Defender of justice

It was also while working in Hong Kong that Ghai had the opportunity to work with the Dalai Lama, an experience that Ghai remembers as one of the most meaningful of his life. When China showed openness to talks, Ghai served as an adviser to the Dalai Lama's team. The request was 'a great honour,' says Ghai. After months of preparations and rehearsals, Ghai prepared to fly to Beijing. At the last moment, he was informed that he would not be permitted to enter the country. 'I had written quite a bit about China's relationship with Hong Kong, and by that time I was out of favour.' He continued, however, to guide them via daily phone calls. 'The Chinese spent time showing them the Great Wall and wasting time. They made no progress. The Chinese [Government] are such bastards. They just played them.' Despite the disappointing nature of the talks, Ghai smiles as he remembers the experience, naming it as his 'favourite' mission. 'I admire him,' Ghai says of the Dalai Lama. 'He is gentle, he has a great sense of humour and a clear vision. I've never known him angry.'

Ghai officially retired from the University of Hong Kong in 2006, but his international work continued. His work since retirement has been based in a diverse array of countries, including Iraq, Nepal, Ghana, South Sudan, Libya, Tunisia, the Philippines, Zimbabwe, and continuing work in Fiji. In addition, in 2005, the former UN Secretary General Kofi Annan appointed Ghai to be his Special Representative on Human Rights in Cambodia. The assignment was the continuation of a longstanding interest in the country. In fact, while in Hong Kong, Ghai had accepted an assignment in Cambodia with the UN. One thing he did during that period was to encourage Cambodian civil society organisations, helping to reinvigorate them and promote their human rights promotion work. His UN mandate allowed Ghai to continue offering support to civil society groups, and he is especially proud of his ability to have revived the NGO sector. He was quietly encouraging, giving them the confidence they needed to pursue their goals. 'I always had to ensure them that nothing would happen to them for coming to see me. Eventually, there was a big sign in the UN office: "Civil society, come and see Yash Ghai."' Over time, however, Ghai became increasingly frustrated with the UN's lack of support. Ghai remembers pleading with the UN to march with him on Human Rights Day. 'No one came,' he remembers. It was a difficult time, especially as Ghai's criticisms of the Government's disrespect for human rights made him the personal target of the Cambodian Prime Minister, who referred to him as an 'African savage'. Ghai worried for those who associated themselves with him – especially in civil society –

as he felt they were in jeopardy. Eventually, in 2008, when the UN refused to stand up to the Prime Minister, Ghai stepped down from his position.

Ghai took a similarly strong stance when working for the UN in Nepal between 2006 and 2008, where he headed a team helping to establish a new constitution in the wake of a peace agreement between the Government and Maoist rebels. Ghai felt it was important to understand all sides, and he made it a priority to meet with all the communities and political parties, including the Maoists, so as to understand their positions and expectations of the future. When Ghai noticed a clear pattern of discrimination against the marginalised Dalit community, he made a special effort to work with them. He particularly recalls an occasion on which he had invited a number of guests from within the UN to lunch to explore various issues. When he noticed that hardly any Dalits had come, he asked his secretary to ask them to join. 'They did indeed come,' Ghai remembers, 'but they were carrying their own plates and spoons.' When he asked a friend why Dalits were the only people to bring their own cutlery, the explanation was that they were not allowed to eat from the 'normal' cutlery. 'I was aghast to hear that – in the UN! I urged the head of UN to stop that "rule" and give everyone equal rights. And I urged the Dalits to recognise that they had the same rights to the UN facilities as everyone else.'

Ghai's advocacy for Dalit rights caused some controversy, especially amongst a small group of senior Nepalese. As the negotiations to begin the formal constitution-making process made progress, one senior public servant attempted to prevent Ghai from having a role in the Constituent Assembly. Ghai, who was initially inclined to push back, eventually worried that this might cause tension, delays and even resentment towards the Dalit members of the Assembly. He withdrew from any formal role in the Assembly, opting instead to act as an informal adviser to various groups.

Kenya finally beckons?

Over the course of his career, Ghai has had the opportunity to act as a visiting professor in a number of countries, teaching law across Australia, Canada, Fiji, India, Italy, Singapore, South Africa, the United Kingdom, and the United States. It was during one such visiting appointment in 2000, at the University of Wisconsin, Madison, that Ghai received one of the most important calls of his career.

When the phone rang, Ghai was sitting with Whitford, his longtime friend, in Whitford's home in Madison. It was Amos Wako, Ghai's former student, then

the Attorney General of Kenya. 'Come home,' Wako said to a stunned Ghai. His initial reaction was disbelief. 'Are you really serious?' he asked Wako. 'Yes,' Wako explained, 'Everyone wants you to come home, and President Daniel Moi wants you to write the new constitution.'

Ghai's initial reaction was, unsurprisingly, one of hesitation. 'The Government had never shown any interest in me, and I still felt bitter about the way I had been treated.' His hesitation was compounded by a feeling of detachment. Although he had been home sporadically in the intervening years, it was never for more than a few days at a time; he did not have a strong sense of what was happening politically. 'I said no,' Ghai says. 'I didn't know what was happening, my experience had been bad and I didn't know how sincere they were.' Indeed, Ghai had missed the years of political turmoil that preceded this moment. He had been away while the Kenyan Executive gradually consolidated power and eroded democratic rights; he had missed the decades of struggle for constitutional reform.

Over the next few days, however, he consulted with old friends, including Pheroze Nowrojee and Mutunga, who advised him to visit and survey the landscape before making a final decision.

> Then one day my secretary rings from Hong Kong and says, "This man who rang has called again and wants to see you. Can I give him your details in America?" The next day, Wako arrived in Wisconsin. He spent time with me and said things had changed and that I should give it a chance.

Cottrell Ghai also recalls it clearly. 'Wako actually went to Madison. It was most extraordinary.'

As Ghai considered the offer, many of his contacts in Nairobi told him not to accept. The country was deeply divided, and the thinking around constitutional reform was concentrated in two opposing camps, one led by the Moi Government and the other led by a coalition of religious leaders and civil society organisations, known as Ufungamano. Many in civil society did not trust that any real change could come through Government-led efforts, and they believed that the focus should remain on deposing Moi from power. Mutunga was relatively alone among Ghai's closest friends in his support.

> He had written constitutions all over the place in the Commonwealth. He was honoured by the Queen for it. As a patriot, writing one for Kenya would be a great accolade. He had his doubts, but as a human rights activist we urged him to take up the task, notwithstanding the challenges.

After some initial thought, Ghai agreed to visit Kenya and survey the landscape without necessarily committing. First, however, he had to return to Hong Kong, which he did via Papua New Guinea, where he had some work. Ghai was relatively cut off for the duration of his short assignment, but by the time he returned to Hong Kong, Wako had (falsely) announced that he had accepted the position, a move that would eventually come back to haunt Wako.

When Ghai made his first visit to Kenya in December 2000, it was a momentous occasion. Wako and Raila Odinga, who was at the time representing Langata constituency in Parliament, personally met and welcomed Ghai home. He used this initial visit to meet with key players and get the lay of the land, eventually deciding to take the position but only on his own terms. When he returned to Hong Kong, though, the University was unwilling to allow Ghai to accept the assignment. A few days after the refusal, Ghai received a call from the Chancellor. 'He said he hadn't been able to sleep,' Ghai remembers. 'He had raised this with the Council and they said they felt a bit bad. After all, it was a chance for me to go back to my country. So they said, "Ok, but this is the last time you can go." We felt it wasn't right for Jill to also leave so she stayed back.'

Whitford remembers Ghai's hesitation.

> He didn't need that job. He just felt this tremendous loyalty to Kenya. He always travelled on a Kenyan passport even though he could've gotten a British passport. That was a real pain in the ass, but he did it. It was just important to him to play that role. It was about the chance to do something for his country.

Mutunga agrees, saying, 'Kenya remained his constant North.' It had been close to four decades since Ghai had been a young student, standing on the steps of Lancaster House, watching the Kenyan delegates arrive to negotiate an independence constitution. This was a chance for him to contribute to the next phase of that mission – to lend the wisdom he had gained through years of service to other countries to his own homeland.

When Ghai returned to Nairobi, now ready to begin work in earnest, he was under no illusions. Moi was under pressure. He wanted someone who would get it done and get it done quickly.

> I told Moi I wasn't ready to accept. I would only take it if all the key groups in the country were involved in this process. I didn't want to come and talk to a few politicians. I made it clear that it had to be a very participatory process. I said, "If you are willing on that basis, I will consider it."

Ghai told Moi he required two to three months to merge the Ufungamano and Government groups and create one united constitutional process. Ghai then embarked on what many consider to be one of his crowning achievements, the process of bringing the two sides together. So committed was he to achieving unity that he refused to take the oath as Chair of the CKRC unless there was one, unified process.

A bittersweet homecoming

In addition to the divisions between the Government and Ufungamano, Ghai quickly found that he would also have to address divisions within the Ufungamano group itself. According to Abubakar, who represented the Safina Party at Ufungamano and who also became a commissioner of the CKRC, a 'radical' wing of the Ufungamano process saw Ghai as someone who undermined the revolutionary path. Indeed, a radical minority group remained opposed throughout, branding those who participated as 'sell outs.' At the same time, Abubakar explains, it was understandable; the Government had never kept its word in the past and the fear of betrayal was very real.

Ghai was aware of the divisions. 'At that time,' he remembers, 'civil society were very divided about my coming. They had already formed their own commission. They had already started going from town to town to talk about the constitution. I didn't want to sabotage them.' Indeed, John Githongo, who was the head of Transparency International at the time, remembers being highly suspicious of Ghai.

> I'll be very honest. I was very concerned and completely opposed to him. I've never told him this, but we were very, very skeptical of a person brought by Amos Wako, even though the Ghai brothers had a sterling reputation as academics. Yash was bright and super-brained, but our attitude was that there's no way he's going to get our politics. He's been away too long.

Abubakar agrees, explaining that Ghai – despite his international reputation – had no legitimate standing with local civil society and religious leaders.

His commitment to achieving unity greatly impressed sceptics in the Ufungamano group. Abubakar says,

> One of the things we appreciated was his position that there can only be one process, which was principled. One of the things that bothered a number of leaders was that if you had two processes, apart from divisiveness, how would you implement the outcome of either one? The country was split 55-45 in our favour. It's very difficult to have a constitutional order that is not supported by half the country. There was also potential for violence and reversal

> of some of the democratic gains that people had paid for and won by then. At a strategic level, we said that it is better to negotiate a unified process.

Ghai's style, based on an objective and open attitude, impressed key players. Abubakar remembers,

> The first thing he did was to listen to various sections of society and the listening process allowed him to understand that this process was deeply dividing the nation. Based on those initial consultations and listening, he decided not to take the oath as Chair. That also helped build bridges with the religious sector and the other side, because he was seen as credible and as someone who was not showing any bias. He was willing to listen to everyone who had an opinion.

Githongo agrees, pointing to Ghai's refusal to take the oath as one of the key factors in shifting the tide in his favour.

> His credibility started very low with progressive forces. He was seen as Moi's man, Wako's man. I remember all of us sitting around, discussing. People said, "No, no. This is a hatchet man for Moi, a waste of time." But then he refused to take the oath. Yash's credibility was first built on that – his unwillingness to take the oath until the two sides came together. It was a very slick move, very well executed. In fact, he doesn't talk about it or show it but he is a very politically wily operator. After that, all of a sudden, people took him seriously.

Ghai also made it clear that he was willing to walk away from the process if it did not live up to his standards. Unlike many others who had been competing for the position of Chair of what would be the review commission, Ghai had no personal ambition to win the position. Abubakar says, 'He was willing to walk away and that was important in terms of people's willingness to sit and talk.'

Finally, Ghai's connections to all sides greatly facilitated communication and eventual cohesion. 'He opened back channels to Government and to opposition leaders,' Abubakar says.

> I think then, that both Ghai's insistence, and Raila's support for Ghai's position, is what reluctantly convinced Moi to agree to a common process. If it had been Ghai alone, it wouldn't have happened. It had to be Ghai and Raila. Ghai then said if there is no willingness to unite the country in a process and make sure the process is credible, he was willing to walk away.

After nearly five months of negotiations, Ghai achieved unity. The two sides came together, and now the real work began.

As Chair of the CKRC, Ghai created and implemented a citizen-centred methodology based on his decades of experience. The CKRC set up local offices around the country, canvassing public views and educating Kenyan citizens about

the process. The CKRC also travelled extensively, in multiple rounds in 2001, to hold public hearings so that they could listen to what people wanted with regard to the key issues. It was important to Ghai to create a publicly-owned constitution, one that addressed people's longstanding grievances and that offered equal empowerment and protection to all. He personally travelled to public hearings, further demonstrating his deep commitment to and investment in the work. Githongo says, 'I was very impressed, and I grew to have a great fondness for him. He was not only giving intellectually. He believed deeply in the work.'

Indeed, the Ufungamano groups had already begun the process of canvassing public opinion, and Ghai was able to carry that initial momentum forward. 'Many places were new to me,' Ghai remembers.

> I had never been to so many places. In the beginning, it was not easy. My Swahili had deteriorated a lot, but I still enjoyed it and found it very interesting. I had never seen so many different Kenyans, different styles of dress and ways of life. I enjoyed getting people's views, getting concrete feedback from the people.

Abubakar recalls Ghai's personal touch on these journeys.

> He has a willingness to learn from others, to talk to people, just ordinary people who flock around him. I had the occasion of him accompanying me to a number of public hearings. He has an ordinary touch with people. He has an ability to inspire people. He connects with young people, ordinary people, people from all different stations in life – from leaders all the way to people who don't know where the next meal will come from. One time, we were driving to a hearing and he saw people walking on the side of the road. He said, "Stop the car and ask these people where they are going." They said they were going to the hearing. And then he asked for arrangements for them to be dropped there. And he's in his element that way.

The CKRC was extremely successful, and by the end of the process in 2002, it had collected over 37,000 public submissions on a full range of issues. In its 2002 report to the country, the CKRC highlighted 13 main points from the people. Examples of these included a desire for a 'decent life', fair access to land, a request to have more control over decisions which affect daily life, leaders who meet a higher standard of intelligence and integrity, respectful police, gender equality, freedom of expression for minorities and accountable government. There was a clearly expressed demand to 'bring government closer to us'. The CKRC was deeply moved by the public participation. Ghai commented on how 'humbling' it had been to see 'people who, having so little, were most hospitable to the Commission teams, and [who were] prepared to raise their eyes from the daily struggle to participate

with enthusiasm in the process of review'. Githongo calls this public consultation process the second pillar of Ghai's credibility. 'The process he defined and described helped people see that he was serious.'

Ghai's commitment to his work generated massive amounts of attention. Abubakar says he respects Ghai for his ability to remain 'down to earth'. He says, 'Prof [Ghai] didn't take big security. The only time that he took it was when the Government insisted and that was periodic.' This was in sharp contrast to other commissioners, who insisted on 4-wheel drive cars and who even refused to share vehicles with secretariat staff. Mutunga agrees, recalling, 'they wanted him to drive a big car; he refused. Moi even announced that Yash was being too lax about security, and we all thought it meant he would be bumped off! One of the reasons why he became so popular was because of his humility.'

At the end of public review, the CKRC moved on to drafting, producing a draft constitution in September 2002. Ghai then broke his team into thematic groups, each responsible for refining and improving specific portions of the draft. He called in experts from around the world to assist and offer comparative knowledge. He also courted diplomats, many of whom were so impressed that they offered to help fund the process. 'But I said, "no,"' remembers Ghai. 'I wanted it to be a *Kenyan* process.'

Three days before the debate on the draft was to begin, however, President Moi dissolved Parliament. Since all MPs were part of the National Constitutional Conference, the body legally mandated to adopt the new Constitution, things could not proceed. In December 2002, Kenya held landmark elections. Moi, who had been in power for nearly a quarter of a century (24 years), finally stepped down, ceding power to the National Rainbow Coalition (NARC), headed by President Mwai Kibaki. One of NARC's key campaign promises was the promulgation of a new constitution within the first 100 days in office. Once in office, Kibaki stalled.

> When people talked about presidential and parliamentary systems, Kibaki used to say that we are opposed to an imperial presidency; we want a parliamentary system. Once he realised that he could be president, that all changed. There was a lot of this opportunism. Even Raila to a certain extent – once Raila realised he wouldn't be president, he split away.

Indeed, speculation was rife that the aging Kibaki's reluctance to move ahead with the Constitution was due, at least in part, to a provision that would prevent him from running for a second term.

Fighting shadows continues

In April 2003, four months after the elections, the process again got underway, this time at the Bomas of Kenya. Ghai remembers,

> [W]hen we moved to Bomas, I told the people there that we are going to take over and we need six, seven months. This is going to be hundreds of people. I felt that people should have time to think about their own positions. The mood got better and better. People got to know each other. By the end, people who didn't know each other had become good friends.

At the same time, however, there was increasing factionalisation amongst the delegates, each making decisions purely based on political self-interest. At one point, during a break in drafting, the Government attempted to stop the process from continuing. 'I don't think I have ever seen him so apoplectic,' Githongo recalls with a smile. 'Prof started leading demos of delegates in the streets to demand entry into the Bomas, and that was against guys with guns and dogs,' recalls Abubakar.

Soon thereafter, Ghai was alerted that Kibaki was planning to take the CKRC to court and allege that the entire process was illegal. Upon hearing of the impending court case, Ghai moved quickly to finalise a draft. At this point, however, Ghai remembers that 'the only people left in the constitution-making body were from Raila's side. Others were told to boycott. Kibaki and the [Democratic Party (DP)] walked out ostentatiously at one point when they saw they wouldn't get the vote they wanted.' Particularly contentious to the Government were provisions for a parliamentary system and some aspects of devolution. He resolved to work hard to finish. 'I had only ten or eleven days to finish and get an endorsement. We had to do so much so quickly, and that's why some parts are not so good.' Kibaki succeeded in court, and the CKRC was prevented from passing its draft to the Government. 'That he was able to get the Bomas draft approved by the delegates before the reactionary forces disbanded the conference was a miracle,' says Mutunga.

Ghai returned to Hong Kong in 2004 soon after finalising the Draft Constitution of Kenya (Bomas Draft).

> I read in the papers that the High Court had declared the whole process and the constitution unconstitutional. I felt terrible. I think I issued a couple of strong articles saying that, based on the documents that started the process, we were legal. By that time, Kibaki had gotten enough support and bribed enough people. They dissolved parliament altogether, and then there was nothing more for me to do.

Cottrell Ghai remembers the final push as particularly difficult. 'They put huge pressure on the closing stages of the process. There was a sense of great satisfaction for having produced a document but he was disappointed.'

The Government's hijacking of the process became most clear at the end of the Bomas period, but Ghai faced enormous amounts of stress throughout the process. Cottrell Ghai remembers calling him every morning from Hong Kong, after reading the Kenyan papers online, to warn him about what he could expect that day.

Ghai had little say, for instance, regarding the team of commissioners he would lead, and it was clear that there were divisions. Some commissioners were little more than spies for the Government side, sometimes purposely delaying progress, while others were more interested in using the opportunity for personal profit than for sincere constitutional reform. 'After Yash had managed to unite the two sides, he found himself with a very difficult CKRC, riven with self-interest, corruption, people meeting with the President behind his back, people being paid off ... which he had to mitigate on an ongoing basis,' says Githongo. Mistrust was so deeply embedded that Abubakar insisted on the verbatim recording of all meeting minutes.

> It was the only protection against people who would change their views. Almost all our meetings were recorded verbatim with the exception of two to three of them, where it was so bad that people said to switch it off. Of course, that in itself was against what we had agreed.

An early battle erupted over the Secretary of the CKRC, who – according to both Abubakar and Ghai – was a severe alcoholic, incapable of discharging even the most basic of his duties. 'The person was not fit for public office,' Abubakar remembers. When dismissal procedures started, however, Moi was against it, and he threatened to disband the entire CKRC. Ghai and others stood firm, making it clear that they were willing to walk away from the CKRC if the Secretary was not dismissed. It worked. 'It became so bad that when the other members realised that we were willing to disband, they backtracked and went to see Moi. They convinced him to give the Secretary a soft landing by appointing him to the Law Reform Commission,' Abubakar recalls.

Corruption and betrayal were significant issues, dogging Ghai throughout his time as head of the CKRC. Cottrell Ghai recalls this as a particular strain on Ghai.

> Some of the commissioners were very nice, but others were lazy or corrupt. That was all a big strain, constantly watching whether they were stealing. Yash would say, "I think I'm going

to resign" and then the next day, he would say, "It's ok. I'll carry on." The up and down was quite a strain.

Ghai agrees, attributing the onset of his diabetes to this period in his life.

Githongo also recalls Ghai's stress and frustration.

> Sometimes, he would rant and we would all sit and listen. And he would go on and on sometimes, talking about receipts and accounts, and then we would gently have to say, "Ok, let's get back to the agenda." But he needed that outlet, that safe space to express himself.

Githongo explains that the kinds of problems he faced were new to him.

> He is politically very savvy, but he had never functioned in a context where such avarice, corruption and greed were so blatant. It was even amongst people who were very respected legal scholars etc., and that seemed to really throw him. He was used to different types of problems.

Abubakar remembers meetings in which members would try and build consensus around a certain issue.

> Then you see a commissioner signal and leave the room. Then two or three people follow him. Then they would come back in and do a 180-degree turn on a position, or propose something that is inherently illegal. You could see from his facial expressions that he was angry, but there were few times when he would lose his temper. On a few occasions, he would just walk out of meetings.

By the end, the process had taken a clear toll on Ghai. Recalls Githongo,

> He has done some really difficult things. He has been in situations where guys would show up armed and he would have to negotiate with them to leave their AK-47s outside of the negotiation room. So he's used to that, but this one is much more soul destroying. It's avaricious, corrupt, deceitful and very money-oriented. That really threw him. He found himself interacting with some of the most respected law scholars, and he found himself completely stuck on issues like travel expenses. That took a toll. What was very clear to me is that Yash has not only put his whole mind and all his experience – which are both considerable – into this but he has put his whole heart into it. He would get very hurt by the betrayals, by the lies and by the realisation that he had been strung along.

Ghai resigned in 2004, soon after returning to Hong Kong. Cottrell Ghai remembers being in Italy on vacation. 'The internet was not that good. We had to use a dial-up connection, and after a lot of hassle he emailed his letter of resignation to the President from there.'

Despite all the challenges, Ghai does not regret accepting the job. 'It meant a lot to me, especially because I had devoted a lot of my career to human rights.' He says that the chance to return home after having been 'thrown out' was also significant.

> In the long run, I feel it gave Kenya a new start. I don't regret doing what I did. I met a lot of people, and I know so many more Kenyans than I would have otherwise known. It was really, really challenging, but I felt quite pleased in the end that I was able to bring some peace.

There are still, however, elements that haunt him.

> Our document was strongly parliamentary, and I think people liked it. We were trying very hard to build a non-ethnic political system and many of those provisions are still in. I think a parliamentary system is better and more participatory; you have to be more careful as prime minister. Also, we hadn't quite finished what we had wanted to do with devolution. I regret these two things very much indeed. The people who are now saying to change these elements are the ones who had not wanted it back then.

In spite of the significant problems faced by Ghai and the CKRC, the Constitution of Kenya – finally promulgated in 2010 – is based largely on Ghai's Bomas Draft. For this reason, Ghai continues to be known as the 'guru' and the 'father' of the Constitution. One of his proudest achievements, and indeed one reason why the Constitution receives such widespread, international praise, is the Bill of Rights. 'I am very proud of it,' Ghai says.

> I think it's a good document. It's very people-oriented. There are a lot of methods through which they can take action, which they must be allowed to do. And I am particularly pleased about the Bill of Rights. If we are failing, it's our fault. Our politicians have absolutely failed us, and now it's up to us to solve it.

Wanyoike agrees, describing the Bill of Rights as a personal reflection of Ghai's thinking on human rights. Says Wanyoike, 'He has a very strong connection to it. Even in terms of newer constitutions, I don't think that we have any constitution that surpasses the Kenyan Constitution, especially in terms of rights.' Wanyoike also credits Ghai for what he calls the uniquely 'transformative' aspects of the Constitution.

> What you get is an overthrow of the political order and the installation of a completely new political order which clearly spells out values and principles. That element of transformation is even more defining than any single chapter of the Constitution, and that was because of the design that he and the CKRC put in place, which was very, very participatory. It's now very hard for the political class to try and trash what has been done.

Mutunga agrees, especially with regard to the Bill of Rights.

> Our Bill of Rights is the most modern in the world. It has borrowed from the progressive development of human rights from the world over... I am proud of it, too. In my writings I have called the jurisprudence envisioned by the Constitution "indigenous, rich, robust, progressive, decolonised, and de-imperialised". I see the Constitution as rejecting and mediating the status quo that is unacceptable and unsustainable in its various provisions. If implemented, I have always argued, it could put the country in a social-democratic trajectory and act as a basis of further progressive social reform... if we have the political leadership committed to its implementation. It seems, however, that Kenyans as parents have given this "baby" to a political leadership that cannot be trusted to grow and breathe life into it.

Githongo also laments the nature of Kenya's leaders, who he believes are incapable of implementing the 2010 Constitution with any sincerity.

> On paper, our Bill of Rights is extremely progressive, but life is breathed into the Bill of Rights by leaders agreeing to be accountable and surprising their people by saying, "I can't do this because it is wrong." Our guys make every effort to show that the Bill of Rights doesn't apply to them. If you are poor, then you can die anytime; the Bill of Rights doesn't apply to them. It hasn't come to life for the majority of Kenyans.

On the other hand, Githongo believes that Ghai's work on the Constitution ensured that – despite everything – it continues to offer hope. He says, 'We still have a hugely corrupt and dangerous elite that will do anything to continue looting and raping this country, but Yash wrote this Constitution so they can't mess with certain things.'

Being Kenyan in Kenya

Ghai returned to Kenya in 2008, 'with no expectations' of getting involved in constitutional work again. 'We wanted to rest,' he says, remembering the decision that he and Cottrell Ghai took to settle in Nairobi. 'We felt we were getting old.' Despite what he may have envisioned as a quiet life, however, the Ghais are never far from the limelight. Manji describes the Ghais' life: 'For all their living in Muthaiga in a nice house, all they do is work – and work and work and work.'

Ghai's experience in and service to various nations have afforded him multiple opportunities to make a home outside of Kenya. 'With his outstanding legal training, he could easily have developed "big man" syndrome and sat in London and held court. He could've made himself an extremely nice life,' says Manji. Cottrell Ghai explains the decision to return to Kenya. 'There was a conviction that he wanted to be Kenyan in Kenya; he still does feel pretty strongly Kenyan.'

Importantly, Ghai's conception and quiet demonstration of his Kenyan identity has allowed him to carve out a special niche for himself in his home country. Indeed, Githongo credits Ghai's ability to rise 'above tribe' as one reason why Moi agreed to appoint him as Chair of the CKRC.

> Yash made sense for Moi, who was in a political corner. He had no tribe but he was Kenyan. He was very sharp and very respected, but he wasn't affiliated with any big ethnic groups. Moi, in his pure political, ruthless analysis, thought, "This is the right guy."

Over the years, Ghai's work with various communities around Kenya has cemented his reputation. 'Yash transcends. People see him, ordinary people see him as just Yash,' Githongo says.

Ghai's model of Kenyan-ness has inspired others. Says Manji,

> We grew up in the Moi era, and we were told not to engage in politics. Keep your head down, say nothing. I tried once or twice and was told very clearly not to talk politics at the table. There was this Asian tendency to quietly get on with your life and don't let anyone know you are thinking. Growing up under Moi, you weren't entirely sure there was any kind of contribution you could make. What I loved about Yash was that I was suddenly free to think and talk about Kenyan politics and be political. Through his authority, he gave *me* authority to be political. There was something there that liberated me. I saw a model of how to be Kenyan and Asian. He really showed me how to make a contribution, and one way in which he did that is by demonstrating how to feel Kenyan by transcending tribe.

It is unsurprising that – since returning to Kenya – both Ghais have continued to dedicate much of their time and energy to constitutional work. Indeed, they continue to invest time and energy in the Kenyan Constitution, ever-dedicated to its power to effect change. Manji refers to Ghai as 'a constitutional optimist and something of an idealist.' Since resigning from the CKRC, Ghai has continued to publicly write and speak about the Constitution. On many occasions, he has also advised the Government on constitution-related issues and developments. His 'Katiba Corner' in *The Star*, which he and Cottrell Ghai began in late 2013, continues to offer the latest analysis and commentary – from themselves and other experts – on constitution-related matters in Kenya.

Perhaps the Ghais' most important contribution and one that will house the professor's legacy in Kenya for a long time to come, is the KI, an NGO dedicated to 'achieving social transformation through the Constitution'. Wanyoike, recalls his enthusiasm for the position.

> Yash is larger than life in academia and constitutional law. I knew his history quite well, and I knew he was very principled. He had gone into exile just because he didn't want to compromise on his principles, and he had been extremely successful. There is no question that being able to work in an institution where Yash was the main person – for me – was icing on the cake. Who else would you want to work for with regard to constitutions in Kenya and globally? It was a moment of pride that I could associate myself with him and with an institute that he founded. Being able to take advantage of Jill as well, of her interest in and knowledge of law generally – again, that was a huge, huge bonus for me.

KI is also a reflection of Ghai's commitment to Kenya. There is a commitment to harnessing local expertise and building a strong base of highly skilled lawyers. Says Wanyoike,

> [H]ow do you justify calling yourself an institute when you use consultants, when you aren't a repository of expertise? We knew that, if we have the right people, even if we weren't able to mobilise financial resources, we would still manage. We also wanted to build a new group of technical experts for the future. We saw ourselves as an extension of teaching institutions, a place where people could come and learn about real life problems.

This extends to more than the training of lawyers. KI's Executive Assistant says,

> [B]efore KI, I didn't understand the constitution, but now – working with him – I have learned a lot. I can say I am more knowledgeable about my rights and I can interpret some of the articles, despite not being a lawyer. He has impacted a lot of people in terms of trying to offer trainings to different communities and the world. A lot of people are more knowledgeable and they appreciate and have pride in Prof for what he has done for this country.

The focus on technical expertise goes hand in hand with broad inclusion. Wanyoike describes KI's desire to focus on groups that ordinarily would not get attention. More than half of KI's lawyers are women, and they appear before the Supreme Court more than other female litigators.

True to Ghai's spirit, KI fights hard to stay true to its own mission and priorities, relying as little on donors as possible.

> The programming of KI is not driven by donors or grants. 60-75 percent of litigation is not reflected in activity reports for donors. It's being creative, based on the needs and demands of the country at the moment.

And it has worked. Says Manji,

> [W]hat you see in Katiba is the most robust lawyers you can imagine. Yash has got an incredible eye for good lawyers. Waikwa is a really good example – he is Kenya's most brilliant

> lawyer. Everyone at Katiba is the same – the starting point is great lawyers and great legal minds and everything else follows.

Both Ghais continue to be a mentor to many, including Manji, who describes how the couple took her under their collective wing when she became the head of the BIEA. 'They were absolutely exemplary in looking after me. Any time I wanted advice or anything I ever asked, they did for me. They were just outstanding.' Speaking of Ghai specifically, she says, 'He's my teacher, as well as a mentor and an advisor. He's the grandfather of everything we are trying to do. There are many of us who feel that.' Mutunga concurs.

> When I became CJ, he was a great mentor and advisor. He was one of the scholars and judges who inducted the Supreme Court in Mount Kenya Safari Club (Yash used his contacts to get us prominent jurists). His contribution to the development of progressive jurisprudence based on the 2010 Constitution is exemplary. His and Jill's work at the Judiciary Training Institute has been legendary.

The Ghais also continue to support KI. Says Wanyoike,

> [A]t an intellectual level, they have always been very present, but at an administrative level they have not. They have always given us a lot of autonomy to operate, while also creating as much time for us as we have needed. People told me that Prof is difficult to work with, because he is headstrong, but that was never borne out in my experience. He insists on integrity and honesty, and as long as he has confidence that is what is driving you, he is not in your space. People don't know this. He has so much deference and respect for people who work for him. If there is ever a difference of opinion between him and the staff, he will almost always defer to what staff have decided. He is extremely loyal to people who work with him. This is at all levels.

Today, Ghai can often be found seated at the desk in the home office he shares with his wife, a large room whose walls, shelves and surfaces seem to spawn books. 'It's like a bomb of papers,' Githongo says with a laugh. 'He is the uber big brain. Yash can stay up half the night and in the morning you have a written constitution… and it's flawless. It's astonishing stuff.' And when he is seated in front of his computer, referring from time to time to one or the other miniature pyramids of books surrounding him, he appears the quintessential professor. At certain moments, when he pulls out his old, dog-eared copy of the Kenyan Constitution – peppered with his hand-written notes in the margins – to point to key sections and emphasise his arguments, he *remains* the quintessential professor.

Most days, Cottrell Ghai is seated across from him. 'We never realised the sheer power and importance of the role of Jill in the beginning,' Githongo recalls.

> Jill came in a bit later, and when she became visible, people did not know how to place her. Then they realized that she's as formidable a mind as Yash. She's ferocious, totally big brained and knows her stuff. It's a team, a very formidable team. I don't think Yash would have made it this far, with the years of disappointments and betrayals, without her.

Ghai agrees, crediting his wife as his partner in thinking, writing and editing. Even if it is not a jointly authored work, Ghai says, it is the product of 'hours of discussion' with Cottrell Ghai. He is lucky, he says, to have such a valued professional partner in his wife. When asked about her career, Cottrell Ghai is dismissive. 'I wasn't *that* distinguished and I've never been *that* ambitious. I've always told Yash that the most interesting things I've done in my life have been because of him.'

Ghai also sees his children and grandchildren at least once a year, and he considers himself lucky to have made lasting peace with his ex-wife, who is now a friend. Vacations are sometimes extended family affairs. It is lucky, Ghai thinks, that it is possible to be one family in this way. Cottrell Ghai agrees, saying that seeing the children remains an important priority for her husband. She worries that he does not get more time with them. Ghai also maintains old relationships, taking the time to visit and vacation with his close friends, whenever possible. Whitford says,

> [I] admire him to no end. I feel very lucky that he would regard me as a close friend. I certainly regard him as a close friend. We came from totally different upbringings, but we just hit it off. If he thinks well of me, I feel immensely grateful for that and flattered.

One of his most recent projects has been support of social justice centres in Kenya. Wanyoike describes his commitment to these centres, which are based mainly in Kenya's poor, informal settlements. 'He has actually contributed a significant amount of money to establishing social justice centres, but he won't take credit for it.' Kavoi describes the impact of this work on Kenya today. Ghai's support has allowed the centres to maintain offices and it has also sent students to university. He uses his networks to link the centres to other like-minded organisations, helping promote their impact. Githongo describes such work as exemplary of Ghai's independent spirit and deep-felt conviction for promoting rights, especially amongst those who are most disempowered. 'Yash is a very frustrating figure for the elites. He is retired and is hanging out with Mathare Social Justice guys. He should be at the country club; that's the model.'

Increasingly these days, Ghai expresses a desire to withdraw from public life. He is working on a biography of his personal hero, Chanan Singh. It is a project that means a great deal to him, both because of the great admiration he had for Singh and because he promised his best friend – Singh's son – that he would do it. 'In the last year, I feel age with a vengeance. Things I write take three or four times longer than they used to.' And yet he seems rejuvenated by a walk through his neighborhood, where he is a well-known and beloved figure, inevitably greeted and often thanked by strangers. 'It is a bit like being married to a rockstar,' Cottrell Ghai says, describing the public attention. Wanyoike remembers being star-struck long ago, before he had officially met Ghai.

> In 2010, I was visiting Kenya, and I went to Uchumi in Sarit. I saw him there, shopping with Jill, and I had this huge urge to introduce myself and say hi. But then I thought, "When you are that well-known, you don't want people to come up to you in the store." So I disciplined myself.

Cottrell Ghai says, however, that her husband enjoys the attention. 'It gives him a warm feeling; he feels appreciated by people in Kenya.'

It may seem strange that, after all the betrayals Ghai endured in his home country, he carries on with the same work, fighting for the same course. According to Githongo, this is because Ghai's work was always aimed at the common man. 'When a watchman recognises him, *that's* what is more important for him, and *that's* who he wrote the Constitution for.' He goes on,

> [O]nce Kenyans respect you for something, no one can take it away. The watchman on the road, the packers in the shops will give him that respect – not because he's powerful or rich but because he has stood up for the people. Kenyans realise that the same people that have cheated them have cheated him. Ghai has been called "the man who solved the world," a title at which he shakes his head.'

In Kenya, though, Githongo says Ghai is known as '*mtu wa roho safi* (a pure-hearted man). That's the way ordinary people know him, describe him and appreciate him.'

Reflecting back on his career, Ghai says, 'I always wanted to serve the people if I could. I have always been conscious that, if I have been doing something good, it's because I probably had better opportunities than others.'

Githongo believes that Ghai's work will continue to impact Kenya for generations to come. 'His contribution to human rights is without equal. He is in the very fortunate position that people will appreciate him more and more as time

passes. It's a slow burn. Kenyans realise.' Manji agrees, remarking, 'It's not just in the books, or in the law courts. He protests in the streets! He's got a real connection to ordinary people, and that to me is his contribution to human rights.'

Ghai's work has not always made him popular, especially in Kenya. In fact, Ghai recently lamented certain politicians' rhetoric, which blames the 2010 Constitution for problems that clearly are the result of elites' unwillingness to respect the rule of law. Mutunga is not surprised. In fact, the former Chief Justice points out that Ghai was honored by the Queen of England for his work while his home country failed him. Mutunga refers to Matthew 13:57, a Bible verse that reads, 'And they took offense at him. But Jesus said to them, "A prophet is not without honour except in his own town and in his own home."'

'He continues to work against the grain,' Githongo says, 'so his phone won't ring. The moment the crisis comes, the phone will ring off the hook. All the hoodlums will call him then. He's our fireman.'

The theory and practice of Yash Pal Ghai with respect to legal education*

William C Whitford

Yash Pal Ghai has had a long, still continuing, career in law. During this time he has served many legal roles, as an educator, researcher, counsel to private parties, conciliator/mediator for disputing groups or interests, and, most famously of all, as a drafter and interpreter of constitutions throughout the world. In this paper I will focus on legal education. I will attempt to state Ghai's views, espoused early in his career and maintained throughout, about what legal education should be or aspire for. I will conclude by raising a few questions about the practice of legal education in East Africa in the many years since Ghai concluded his period as a legal educator here.

Ghai was born and raised in Kenya. He received his basic legal education at Oxford, took a year at Middle Temple to earn a barrister's license. He also began his research at Oxford on ethnic divisions within the state and how to accommodate them, a topic that was to occupy him for the rest of his life. He then did a year of graduate study at Harvard, which greatly influenced both his approach to teaching and understandings of the law. Thereafter, in 1963, he became the first East African member of faculty at the new law school at the University of Dar es Salaam (Dar). This law school was established in 1961 as the first law school in East Africa. It was the only East African law school until the late 1960s, drawing students from each East African country (and a few from Zambia and Malawi). Much has and should be written about this Faculty and the programme it developed over this period. It is widely accepted that the programme that was developed was novel for legal education in Africa at the time. And Ghai fully participated in that development, even serving as Professor, and from 1968-70 as the first East African Dean of the Dar faculty. I will describe the view of legal education that was developed by a

* I am grateful for comments on an earlier draft of this chapter by Willy Mutunga and Bart Rwezaura. Responsibility for all errors is mine.

majority of the Dar law faculty at the time as Ghai's view, as I believe it was and is, but its generators or authors were many.[1]

There are two key perspectives about the nature of law and law's role in society that inform Ghai's perspectives on legal education. I will use the present tense in describing the perspectives, because I believe Ghai currently adheres to them, but they are also fundamental to the vision of legal education developed during his Dar period.

First, Ghai is not one who doubts that legal rules exist, and that they are determinant, in the sense that they account in important part for judicial decisions reached by applying them. To him, legal rules are more than the language used in legal opinions to rationalise results; they are also one of the determinants of those results.[2] To this extent he reflects the teaching of Herbert Hart's positivism and rejects some versions of legal realism.[3] But Ghai also believes that legal rules often contain ambiguities that foreclose a kind of robotic or deterministic application to accepted facts. And for that reason Ghai believes it is important to study the social policies that the legal rule is designed to serve. By appealing to the underlying policies it is possible to make rational, even convincing, arguments about how the ambiguities should be resolved. It is also possible to make more accurate predictions about the future resolution of ambiguities if one makes the often reasonable assumption that courts and other legal decision-makers will seek to further the policies sought to be furthered by the ambiguous legal rule. The implications for legal education from this view of the nature of law is that students need to learn, and scholars need to study, not just the formal statement of the rules but also the social policies that knowledgeable people (or lawyers) generally agree the rules are designed to advance. The study of law should not just be the rote study of legal rules, even as the study of rules remains important.

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[1] Ghai has himself written about his experiences on the Dar faculty during his time there and reflected on how it influenced his views about legal education and other matters. Yash Pal Ghai, 'Legal radicalism, professionalism and social action: Reflections on teaching law in Dar es Salaam,' in I Shivji (ed.) *Limits of legal radicalism: Reflections on teaching law at the University of Dar es Salaam*, 1986, 26-35. I believe the views I express in this essay are consistent with what Ghai himself wrote in that essay, though the emphases are different in some respects.

[2] Ghai's strong commitment to constitutionalism in later years in his career are dependent on this conviction that legal rules make a difference.

[3] For an excellent review of the conflicts between Hart's positivism and various schools of realist thought, see the excellent book by another founder of the Dar faculty, William Twining, *Karl Llewellyn and the Realist Movement,* 2nd edition, Cambridge University Press, 2012.

The perspective on the nature of law that I have just described is sometimes called the 'internal' view. It attempts to predict the future, and argue for particular resolution of ambiguities, from the perspective of maintaining the internal logic of law.

The second fundamental perspective that guides Ghai's views about legal education embraces an 'external' (in addition to an 'internal') view of the law. By an external view I mean an assessment of whether law, as applied, serves the policy objectives set by government or that are favoured by the analyst, other persons, or interest groups.[4] An external perspective on law requires not only assessment of a law's impact on law appliers (judges, administrators, others), which can be part of an internal study of law. An external view also requires assessment of a law's impact on private individuals or entities, such as businesses or potential criminals, whose behaviour may be incentivised by desired legal benefits or feared legal sanctions. Those determinations inevitably mean turning to the behaviourial sciences and their methodologies for measuring behaviour and its causes. It is not enough to study the published opinions of judges or administrators. Inevitably, while some of the behaviours observed will be caused by incentives created by the law, there will be causes for the observed behaviour that will have little to do with the law. There is rarely perfect correlation between the behaviour sought or intended by a law and the behaviour in fact. Or, as it is sometimes put, there is inevitably a 'gap' between the behaviour that a law sought to cause or achieve and the behaviour-in-fact after enforcement (if any) of an enacted law.

Because an external assessment of law inevitably involves resort to the methods of the behavourial sciences (like economics, sociology, psychology, political science) to describe behaviour and determine its causes, legal studies from an external perspective are sometimes described as 'law and society'. In Dar, the study of law from an external perspective came to be called 'law in context'. Ghai's commitment to the study of law from an external perspective as part of legal education stems from at least two ideas about the role of law schools in society. Law is one tool rule makers (largely government) can use to change or develop society, other tools including persuasion and force (through use of police, etc.). Often law is the favoured tool. Ghai believes that lawyers play a powerful role in making these laws and so law students should learn in law school about strategies for using law effectively

[4] One of the clearest descriptions of the difference between an internal and external view or study of law can be found in Richard Abel, 'Law books and books about law,' 26 *Stanford Law Review*, (1973), 175.

to accomplish various policy objectives.[5] Inevitably this requires instruction in the classroom about various external perspectives about law, as there are clearly things to be learned about the effective uses of law to achieve policy goals and also about the limitations of law as a vehicle for change. Belief in this kind of instruction was particularly apt in the context of the 1960s at Dar. As the first law school in East Africa, with very able students who were among the first East Africans of African descent to study law, it was obvious many graduates would ascend to positions of influence and authority in their countries where they could influence what laws were adopted and how law was used to pursue various goals. The case for teaching students about law-making as well as law-application was especially strong in those years at Dar. And development, especially economic development, was the commanding political programme in all the East African countries served by the law school. An external perspective allowed the law school to try to be relevant to that political imperative.

In the 1960s the emphasis was on law as a tool for development, and studies and teaching from the external perspective was oriented towards how law might better help government fulfill its goals. Not long thereafter, however, there emerged concerns about government as a reliable agent for goals and objectives that enjoyed wide approval[6], such as either development or respect for individual rights. In that context, there emerged greater concern about how law could be designed to fulfill one of its historic roles – as a check on excesses by various government actors. This shift towards a concern about what is sometimes now called 'good governance', not at the expense of development as an objective but in addition to it, also suggests the need for legal studies from the external view. In studying government malfeasance and nonfeasance, it is not enough just to look at published legal decisions, assessing them for consistency with governing legal rules (the internal view). It is necessary to look at actions by government actors that never are subject to legal assessment by a court or administrative tribunal, and at social problems (e.g., pollution, or hunger) that should be addressed by government agencies but are not. So once again the methods of the social sciences are needed to ascertain behaviour and its causes.

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[5] Ghai also believes that it is appropriate to study within legal education what policy objectives are appropriate and why.

[6] Ghai was an early proponent of concern for the role of law in good governance, as evidenced by his pathbreaking and influential book, *Public law and political change in Kenya* (1970) (with JPWB McAuslan). Another influential early work in the good governance tradition is Issa Shivji, *Tanzania: The class struggle continues* (1973).

The second basic idea about a law school's role that led Ghai to embrace an external perspective on law stemmed from his belief that legal education belonged in a University setting. Historically legal education has not always been so located. It often has been taught as essentially a craft, where the primary obligation is to learn the rules. But Ghai embraced the then modern trend to place legal training in a University setting. And within a University setting the idea that a law school, and especially its faculty, should play a societal role as an independent, critical observer is natural, and Ghai embraced it with gusto. It is impossible to fully perform the role of an independent critic of the legal system without embracing an external perspective to the study of law. To Ghai, one's critical responsibilities went beyond identifying inconsistencies in recent legal decisions with guiding precedents, which is something that can be done from an internal perspective. It included critiquing whether it was appropriate, given various policy objectives, for East Africa to continue with a legal system and rules that, aside from customary law and institutions, were largely copied from the English legal tradition.[7] And in the circumstances in East Africa in the 1960s, it included critiquing whatever changes were or were not proposed in the inherited legal system by sitting governments. East Africa lacked many of the institutions other than the University who might play the outsider, critical role. There was some independence of the press, but not a lot, and the kinds of civil society organisations that now exist had not yet been formed or were in their infancy.

Ghai's commitment to legal training in a University setting, and to the obligation of all University departments to engage in independent critique, leads naturally to another key part of Ghai's vision for legal education. Ghai believes that the law schools should be constituted substantially by full time faculty with a significant research responsibilities and with protection against dismissal or other sanction because of views expressed in scholarship or in the classroom. Full time faculty, who do not hold outrageously heavy teaching responsibilities, are necessary so that they have time to fulfill their obligations as independent critical commentators. Another reason to have full time faculty is to insure the faculty's independence when doing scholarship. A faculty member who supplements their income with other commitments, including law practice, can be compromised in the expression of views – for example, by a fear of alienating a potential client. And to insure

[7] In a 1987 article reviewing legal scholarship on Africa over the previous 25 years, Ghai noted that the scholarship produced by anglophonic law schools in West Africa was dominated by critique from what I have called the internal perspective, whereas East African law schools, led by Dar, had mostly produced scholarship from the external perspective. YP Ghai, 'Law, development and African scholarship, Modern Law Review' (1987) 750-776.

independence in the expression of views, faculty need job security to the extent of barring dismissal because of the content of views expressed.

Ghai's strong preference for full time law faculty brings to mind a personality characteristic of his that features prominently, I am confident, in the minds of almost everyone who knows or has known Ghai and reflects on his nature.[8] That characteristic is his commitment to absolute integrity, in all aspects of his life including his scholarship. An excellent example of that integrity, which also illustrates his commitment to the external perspective on law and to being an independent, critical, commentator on legal developments, is his first book published as a law professor, *Public law and political change in Kenya*.[9] In this book Ghai critiqued the pre- and post-independence developments respecting public and land law in Kenya, and in a very negative way. It was a bold move for a still young Kenyan and reflected his commitment to absolute integrity in his account of the subject he was analysing, whatever the personal consequences to him.

I have emphasised Ghai's commitment to an external perspective, and to a faculty member's obligation to contribute independent, critical commentary on legal affairs, but I would be remiss if I did not also emphasise his commitment to the professional training of students. Ghai believes that it is the responsibility of law faculties to provide that professional training, or at least to see to it that it is provided to students.[10] Ghai himself trained as a barrister and he represented clients while at Dar. He actively participated, as the faculty's only member of the Bar, in

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[8] Professor Issa Shivji, once Ghai's student, has given me permission to quote the following passage from an email he sent to me on 2 December 2015:

> "As a student, I was extremely impressed by Yash's integrity as a scholar and his commitment and devotion as a teacher. I often used to narrate to my colleagues of how I would see Yash with books in his both armpits and hands, climbing the stairs of the library around l:00 pm when most students and staff would have gone for lunch. (I used to go to the library at that time because that was the only time you could find law reports!).... Yash wanted to get the best out of his students and I think he managed it. We, I mean radical students, respected him even if we did not always agree with him."

[9] The book, published in 1970, was co-authored with JPWB McAuslan, one of the founding members of the faculty at Dar. McAuslan was driven by similar commitment to the truth and justice. This shared outlook yielded an academic partnership between Ghai and McAuslan that went well beyond this book. They also wrote about Tanzania's constitutional development, particularly its one party constitution, in addition to joint advice to the constitutional commission on how to maximise human rights within the framework of a one party state. Years later, when they met as faculty members at Warwick they developed and taught together a course in law and development, which flourishes to this day, many years later.

[10] In the early years of legal education planning in East Africa, there was debate, especially in Kenya, about how much law schools should be responsible for practical training and how much should be assigned to a post-graduate training program that law graduates would be required to undertake before being licensed to practice. This debate is well described in William Twining, 'Legal education within East Africa,' in *East African Law Today,* British Institute of International and Comparative Law, 1966, 115 *et seq*.

the legal aid clinic established early on at the law school. Throughout his career he has supported clinical legal education as part of legal education. He wants students to be trained as effective professionals, for which they need to study law from the internal perspective. He has expressed concern that at the end of his time at Dar, and in subsequent years, external perspectives about law were emphasised in the classroom at the expense of adequate training in professional knowledge and skills.[11]

Ghai left Dar in 1970. By that time the idea of a single law school within East Africa, with students coming from all three countries, had been abandoned, and national law schools had been established in Uganda and Kenya. Ghai resigned from Dar and a Tanzanian became Dean. Ghai's appointment to the new law faculty at the University of Nairobi was blocked by the then Kenyan Government, most likely a reaction to the criticism he directed at it in his book. He became a Senior Fellow and Lecturer at Yale Law School for two years (1971-73) and during this period he became the Director of Research for the International Legal Centre. The Centre was particularly concerned about legal education and research in the developing world. The Centre prepared two important reports in the early 1970s, one entitled *Legal education in a changing world* and the other *Law and development: The future of law and development research*. Ghai was a key member of the drafting committee for each report and wrote much of the text. Both reports, especially the former (on legal education) reflected views that Ghai had developed while at Dar (and described above). This includes a commitment to what I have called the external perspective as an important part of legal education and research, and the importance of placing legal education in a University setting with full time faculty. A couple of quotes, which follow, will provide the overall thrust of the report:

> (1) 'We have seen that in many law schools of Africa, Asia, and Latin America, the predominant concept identifies the law as simply a system of prevailing legal norms.... Consequently ... the law school curriculum reflects this image by teaching the content of legal doctrine while ignoring the social context in which it operates or its impact on behavior.
>
> More recently, there has developed a different view which conceives of law and the legal system and legal education as instruments to achieve various social objectives. Law and society, therefore, are intimately interrelated, not only because law is a social product, but because law has as a goal the making of a more developed and just society. This concept of law emphasizes not only knowledge of the law as a set of normative rules and the capacity to interpret it, but the acquisition of other skills and insights, e.g., ability to analyse and evaluate the policy assumptions behind the law; awareness that there are problems of social

[11] Ghai, 'Legal radicalism, professionalism and social action: Reflections on teaching law in Dar es Salaam,' 26-35.

> development which may be affected by the law; appreciation of relationships between the legal system and political and economic system and of the social sciences as tools to enable informed development of law as an instrument of social change....'[12]
>
> (2) 'At the heart of legal education and research is the law teacher.... Many of the recommendations in our report depend on the ability and effectiveness of the law teacher.... Isolated individuals as full-time law teachers have existed for some time. But the effort to recruit cadres of full-time teachers to develop institutions is something new (in lesser developed countries) .... We believe that no real or lasting improvements in legal education can come about unless there is a 'critical mass' – a core group – engaged full time over significant periods of time in that occupation.'[13]

Ghai left the International Legal Centre to become a Research Fellow at the University of Uppsala (Sweden), where he did little teaching. He became a regular law faculty member once again when he joined the faculty at the University of Warwick in 1978. By this time, however, his career as a consultant, constitution drafter, and the like had begun, and it frequently took him to the South Pacific. Ghai decided to remain a full time academic, as he was later at the University of Hong Kong, though in both institutions he wrote expert legal opinions in areas closely tied to his academic research. Ghai's prodigious work ethic (and long hours) made it possible for him to undertake consultant obligations without shorting his contributions as a full time faculty member. Ghai wrote little about legal education outside Africa during this period, but he did contribute two important articles assessing the condition of legal education in Anglophone subSaharan Africa.[14]

Ghai was the Senior Public Law Professor at the University of Hong Kong from 1989-2002. As the senior professor he mentored and advised graduate students and young faculty, in addition to teaching courses. He wrote little about legal education during this period. But he demonstrated his continued commitment, as a legal academic, to providing independent critical commentary on legal developments within the areas of his expertise. Ghai's period in Hong Kong included the handing over of Hong Kong from Britain to China. Ghai wrote the authoritative treatise on Hong Kong's Basic Law[15] – a document that defines the limited autonomy of Hong Kong from the Chinese Government. He also frequently wrote commentary for

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[12] International Legal Center, *Legal education in a changing world,* 1975, 60.

[13] International Legal Center, *Legal education in a changing world,* 76-7.

[14] Ghai, 'Legal radicalism, professionalism and social action: Reflections on teaching law in Dares Salaam'; Ghai, 'Law, development and African scholarship'.

[15] Yash Pal Ghai, *Hong Kong's new constitutional order: The resumption of Chinese sovereignty and the Basic Law*, Hong Kong University Press, 1997.

Hong Kong's press on that topic and about the state of both democracy and civil liberties in Hong Kong. In all this activity Ghai once again demonstrated his absolute integrity and his commitment to providing an independent voice, frequently taking positions critical of the Chinese Government. For example, Ghai served on a small task force to review Hong Kong laws for compatibility with the Basic Law. In that capacity he resisted Chinese Government suggestions to declare incompatible laws that Ghai believed were in fact very compatible, and significant tensions between Ghai and the Chinese Government resulted, leading ultimately to Ghai's resignation from the task force.

The University of Hong Kong was the last institution with which Ghai was affiliated as a full time faculty member. From there he returned to Kenya to help draft and later to help implement Kenya's new Constitution. In that role, he was usually an insider, as a principal drafter and proponent, and not usually an outside critic.[16] But after adoption of the Constitution he reaffirmed his commitment to the idea of being an outside critic by establishing, with Jill Cottrell Ghai and a fellow Kenyan, Waikwa Wanyoike, the Katiba Institute to monitor developments in the implementation of the Constitution.[17]

There remains for me to discuss to what extent Ghai's vision of what an ideal law school should be (what I will call the Ghai ideal) has been fulfilled in East Africa, the land of his origin and current residence. Ghai himself published a discouraging assessment in 1987.[18]

> Law faculties in Africa were established at a time of high optimism.... [T]here were expectations of rapid and equitable economic growth. Law was expected to play a crucial role in the transformation of these societies.... The promise of democracy and economic growth has not, however, been fulfilled.... Law has played little role in political or economic devel-

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[16] There was a period during the preparation of the Constitution when Ghai clearly acted as an outside external critic. After the election of President Mwai Kibaki in 2002, the draft Constitution approved at the Bomas' Constitutional Conference (acting as a constituent assembly), which was chaired by Ghai, was substantially amended by the Government and put up for referendum in 2005. By that time Ghai had resigned as chair of the Constitution of Kenya Review Commission (CKRC). As a private citizen Ghai wrote a series of columns for *The Standard*, a Kenyan daily, discussing the pros and cons of various provisions of the proposed Constitution. These articles are a classic example of an academic acting as a legal analyst taking what I have called the external view, and illustrate what Ghai long advocated was a prime responsibility of legal academics. Since the enactment of the Constitution in 2010, Ghai has continued to write in the press, chiefly in *The Star's* 'Katiba Corner', on various aspects relating to the implementation of the Constitution.

[17] See, www.katibainstitute.org. Ghai fully participates in the Institute's many activities, including strategic public interest litigation, writing publications and newspaper articles, lobbying Parliament, civil education, and participating in civil society public demonstrations.

[18] Yash Pal Ghai, 'Law, development and African scholarship' 774-75.

> opment. Nor have lawyers been the central actors in promoting and mediating change; they are peripheral to the system of political and economic power. The influence of universities, especially that of legal academics, on policy has been small.
>
> Twenty-five years ago a university lectureship was both well remunerated and prestigious. Library facilities were adequate, teaching loads were reasonable.... Today a university post is not particularly highly regarded. A career in politics, civil service or the private sector is much better rewarded, and offers greater possibilities to influence policy.... [A] university salary is no longer sufficient for a decent living. Most law teachers are consequently forced into consultancies or commissioned research, especially where the payment is in foreign exchange....
>
> The shrinking of resources and shortages of foreign exchange have taken a terrible toll on libraries.... [U]niversity libraries are unable to keep up subscriptions to the leading law reports and journals of common law countries, including England.... [E]ven local materials cannot be (copied) for distribution to students.... Students rely heavily on notes taken during lectures....

I am not qualified to assess whether this 20-year-old critique, which Ghai made of Anglophone legal education throughout sub-Saharan Africa (excluding South Africa), still applies to the overall state of legal education in contemporary East Africa.[19] Some things have clearly changed for the better. For example, the availability of many legal materials online at low or no cost, and widespread access to computers, lessens the impact of the deficiencies in libraries. Further the increased interest in constitutionalism, especially in Kenya, has made law more important in the formulation and implementation of public policy than was probably the case when Ghai wrote in 1987. So the potential for a legal academic to interest students in important contemporary public policy issues, and to have an impact through research and publication, may be greater.

On the other hand, some trends seem discouraging. There has been a big growth in the number of law schools in all three countries,[20] and some of them may have very limited research ambitions for their faculty. Most of the long established law schools have greatly expanded their enrollments, responding to a demand for law degrees. The result has been very large classes in the established, university-

[19] For a somewhat similar but more recent critique, again focusing on legal education in Anglophone, sub-Saharan Africa (and not just East Africa), see Muna Ndulo, 'Legal education in Africa in the era of globlization and structural adjustment,' 20 *Penn State International Law Review* 487 (2002).

[20] Abdul Paliwala, 'Context, political economy and good governance: Avatars of Dar legal education' in Thanos Zaratoudis and Valerie Kelley (eds), *Land law and urban policy in context: Essays on the contributions of Patrick McAuslan,* Routledge, 2016, 16-17 n. 11 ('[C]urrently there are 11 accredited law schools in Kenya; 11 accredited law schools in Tanzania; 9 accredited and 4 unaccredited ones in Uganda.')(2015).

based law schools, which makes it difficult for the teacher to engage students in opportunities to express themselves in a critical manner about how law impacts society. I believe that the practice of offering tutorials, and even seminars, has largely disappeared. What opportunities do students have these days to engage in critical dialogue with faculty? And the burden of marking whatever exams and essays are required leaves faculty with little time to engage in their own research. Further, most faculty continue to supplement their University pay with consultancies, a private practice, and what have you.[21] The result is that, with some laudable and notable exceptions[22], many law faculty in East Africa may not be fulfilling the role of being the independent critic of legal developments that Ghai pioneered as an essential role for legal academics many decades ago.

At the same time there has been substantial growth of civil society institutions in East African countries since the 1960s, when Ghai was formulating his ideas about legal education. Fundamental to Ghai's vision is the idea of a University as a protected space where faculty and students can provide independent, disinterested and critical commentary of public affairs. In today's East Africa, civil society institutions can fulfill some of that role. Indeed, Ghai himself is now engaged in nurturing the Katiba Institute, which he helped found and which is committed to providing critical commentary about the implementation of Kenya's new Constitution. Civil society can fill some of the gaps left by a failure of East African legal education to live up to the Ghai ideal. But only some of the gap. Certainly they cannot correct the inadequacies in the education of law students that Ghai so poignantly identified in 1987, and to the best of my knowledge largely remain.

Conclusion

Ghai has performed many roles and fulfilled many social functions during his long and illustrious career. Being a legal academic is just one of those roles, but it is

[21] These conclusions are verified by a recently published assessment of legal education in Kenya. Patricia Kameri-Mbote, 'Legal education and lawyers', in Yash Pal Ghai & Jill Cottrell Ghai (eds), *The legal profession and the new constitutional order in Kenya*, Strathmore University Press, Nairobi, 2015, 121-138. Some sample conclusions by Professor Kameri-Mbote are: 'Unfortunately, most of those who teach law have other engagements elsewhere and thus most of their time is not spent in teaching law.' (*Id.*, 134); 'Research is not entrenched as part of the law school agenda.' (*Id.*, 135).

[22] Listing names risks omitting scholars who should be mentioned as still living up to the Ghai ideal. As examples of what I have in mind, I mention Joe Oloka-Onyango and Sylvia Tamale of Uganda, Issa Shivji and Chris Maina Peter of Tanzania, and Patricia Kameri-Mbote and Sylvia Wairimu Kang'ara in Nairobi.

the focus of this contribution. An examination of Ghai's practice during his early years as a legal academic at Dar in the 1960s reveals a clear conception of what Ghai believed a legal academic should be or strive for. It emphasised two characteristics that Ghai has emphasised in all his social roles: excellence and absolute integrity. It also embraced both what I have called an internal and an external critique of law, both in teaching and in scholarship. I have emphasised in my account Ghai's embrace of the external perspective, which requires the legal academic to assess what is happening on the ground and compare it to what law aspires for as justice. It is the external view that is illustrated by Ghai's many challenges over the years of the 'powers that be', in the name of principles that underlie and/or should underlie a just legal system.

Yash Pal Ghai: A realist and materialist interpretation of human rights discourse

William Twining

I first met Yash Pal Ghai[1] on the campus of Harvard University in the spring of 1963. He was reading for the LLM. I was based at University College Dar-es-Salaam, but on a short visit to the United States. That day my task was to try to persuade Ghai to join the Law Faculty in Dar. This proved to be easy and soon afterwards he became a colleague and a life-long friend. Ghai and I have worked together in Dar, New York, Uppsala and Warwick, and for several years with the Commonwealth Legal Education Association and the Commonwealth Human Rights Initiative to which he has made a substantial contribution. We have, of course, coincided at conferences and other events in many other places. I have also followed admiringly from afar his adventures in designing constitutions, negotiating settlements, and courageously expressing his views, while wondering how he has had the time and energy to publish important contributions to scholarship, not least in Hong Kong where his writings about 'one country, two systems' have been particularly influential. Furthermore, I first met Jill Cottrell Ghai, as she now is, in Nigeria in the 1960s and she was also a colleague at Warwick. Thus the connection is a close one and I can claim to know Ghai well personally as well as professionally.

Accordingly, when I embarked on a modest project aimed at drawing the attention of Western legal scholars to the writings of jurists from the 'Global South' Ghai was an obvious choice. I am not a specialist in Human Rights Law but I had also worked closely with him and with three other individuals who had also written about human rights among many other things. I had the advantage of being familiar with their writings, knowing about their background and where their concerns came from, and what made each of them have a distinctive 'voice' as both activists and scholars in this important area.

Since I have already written in praise of Ghai more than once, I decided to republish the most substantial piece and later, with our mutual friend and former colleague Abdul Paliwala, set this in the context of the wider project of helping to

[1] See the bibliography for references to Yash Ghai's very extensive writings on human rights.

make other 'Southern voices' to be broadcast more widely to relevant circles.[2] In the book *Human rights, southern voices* I included only a brief introduction to Ghai's career and contributions so as to make more room for him to speak for himself, but in a lecture in Alberta I gave a longer account, which is reproduced here with only minor changes.[3]

Ghai on human rights

Ghai has unrivalled experience of constitution-making in postcolonial states. Besides his unquestioned academic and practical expertise, he has succeeded in winning the trust of many rival political leaders of different persuasions, often in tense situations, not least because of the obvious sincerity of his commitment to opposing all forms of colonialism and racism. He has shown great courage in standing up to his critics and autocratic rulers. His courage and negotiating skills are legendary.

Almost all of the constitutions that Ghai has helped to design and introduce have included a bill of rights. They have generally fitted broadly liberal ideals of parliamentary democracy, judicial independence, and the rule of law. He has been an outspoken critic of governmental repression, especially detention without trial and torture, but there is a discernible ambivalence in his attitude to human rights. For example, he was editor and principal draftsman of an important report by the Commonwealth Human Rights Initiative, entitled *Put our world to rights: Towards a Commonwealth human rights policy*, published in 1991.[4] Yet in 1987 he was co-editor (with Robin Luckham and Francis Snyder) of *The political economy of law: A Third World reader*, which presented a distinctly Marxian perspective and which contains no mention in the index of rights, human rights, or constitutional rights, except a few references to habeas corpus.[5]

After the 'collapse of communism', symbolised by the fall of the Berlin Wall, some former Marxist intellectuals adopted the discourse of human rights.[6] However,

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[2] William Twining and Abdul Paliwala, *Southern voices: Extending the project*.

[3] This was part of the MacDonald Lecture at the University of Alberta in 2005 originally published in the 11 *Review of Constitutional Studies* 203-79 (2007) and adapted here with permission of that journal. Since then Yash and Jill Ghai have continued to work indefatigably in many places, especially in Hong Kong and Kenya, and have become increasingly influential in and beyond the places they have worked in.

[4] Commonwealth Human Rights Initiative, London.

[5] Yash Ghai, Robin Luckham and Francis Snyder, *The political economy of law: A Third World reader*, Oxford University Press, Delhi, 1987.

[6] For example, Issa G Shivji, *The concept of human rights in Africa*, CODESRIA, London, 1989.

Ghai's ambivalence has deeper roots. Perhaps the key is to be found in his own account of his intellectual development.[7] In a refreshingly frank memoir, he tells how he moved from orthodox legal positivism (Oxford and the English Bar), through a phase of liberal reformism (Harvard and the early years in Dar) to accepting the basics of Marxist critiques of neo-colonialism and of Julius Nyerere's African Socialism from about 1967. He acknowledges that his acceptance of Marxism was not wholehearted. He recognised the value of Marxian structural analysis of political economy, but this was tempered by three concerns: First, as an East African Asian he was especially sensitive to racist attitudes that he discerned among locals as well as expatriates: 'What passed in general for radicalism in those days included a large amount of racism and xenophobia.'[8] Second, he had a 'predilection for free debate,'[9] which was beginning to be stifled by a local form of political correctness. And third, while his university colleagues were academically stimulating, most lacked any sense of the importance of legal technicality and practical sense. They taught their students to despise the law, but not how to use it:

> My experience seemed to point to the problems when fidelity to the law weakens – the arrogance of power, the corruption of public life, the insecurity of the disadvantaged. I was not unaware, of course, of other purposes of the law which served the interests of the rich and the powerful. But the fact was that it did increasingly less and less so; a whole body of statutory law since TANU [the ruling party] came to power had begun to tip the scales the other way. I retained my ambivalence about the legal system, and was not attracted to the attitudes of many private practitioners I met (or the interests they served). At the same time I knew the evasion of the law or the dilution of its safeguards harmed many of the people the radical lawyers were championing.[10]

Ghai's experiences in Dar were formative in important respects. In nearly all of his work since then, three tensions are apparent: a strong commitment to certain basic values, tempered by a pragmatic willingness to settle for what is politically feasible in the circumstances; a genuine interest in theory, especially political economy, and a determination to be effective in the role of a good hard-nosed practical lawyer; [11]

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[7] This essay, revealingly entitled 'Legal radicalism, professionalism and social action,' appears in a volume (Issa G Shivji (ed.), *The limits of legal radicalism* University of Dar-es-Salaam, Dar-es-Salaam,1986) commemorating the twenty-fifth anniversary of the Faculty of Law, University of Dar-es-Salaam.

[8] Ghai, 'Legal radicalism,' 29-30.

[9] Ghai, 'Legal radicalism,' 29-30.

[10] Ghai, 'Legal radicalism,' 27.

[11] Ghai, 'Legal radicalism,' 31.

and a materialist, Marxian perspective on political economy sometimes in tension with a sincere belief in liberal values embodied in the rule of law, an independent judiciary, and human rights. Until his retirement from Hong Kong he also had to balance the demands of teaching, research, and writing with practical involvement in high-level decision making in a continually expanding range of countries. As a consultant he has also had to reconcile his belief in the importance of local context – historical, political, and economic – with a general approach to constitutionalism and constitution making. He is a rare example of a foreign consultant who genuinely rejects the idea that 'one size fits all'.

In the early years of his career, Ghai wrote about many topics mainly from a public law perspective. He joined in East African debates about the arguments for and against bills of rights and he addressed particular topics, such as habeas corpus, racial discrimination, and the position of ethnic minorities.[12] While still in Dar, with Patrick McAuslan, he wrote *Public law and political change in Kenya*[13] which is now widely rated as a classic. However, it was not until about 1990 that he focused his attention regularly on human rights as such. This is perhaps due to 'the increased salience' that human rights discourse achieved during this period. Even then, he has consistently viewed bills of rights and the international human rights regime as one means among many that may serve to protect the interests of the poor and the vulnerable as well as satisfy majority and minority interests. As we shall see, his approach has generally been more pragmatic than idealistic and it is only quite late that he devoted much space to writing about human rights theory. Rather than try to attempt to trace his intellectual development or summarise his general constitutional theory, I shall here focus on three papers that illustrate more general aspects of his approach to human rights: the role of human rights discourse in reaching constitutional settlements in multi-ethnic societies, his critique of the 'Asian values' debate of the early 1990s, and his exchange with Abdullahi An-Na'im about the justiciability of economic and social rights. In considering these particular pieces, it is important to bear in mind that Ghai is primarily a public lawyer for whom bills of rights are only one aspect of constitutionalism and human rights discourse is but one aspect of constitutional and political theory. He has continued

[12] See especially Ghai, 'Independence and safeguards in Kenya' 3 *East African Law Journal,* 1967, 177-217; Dharam P Ghai and Yash Ghai (eds) *Asians in East and Central Africa,* Minority Rights Group, London, 1971; also, DP Ghai & YP Ghai, eds. & intro., *Portrait of a minority: Asians in East Africa* Oxford University Press, Oxford, 1971; YP Ghai & JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, Nairobi, 1970.

[13] Ghai and MacAuslan, *Public law and political change in Kenya.*

to write in this area during the past decade, but these three papers still stand out as illustrating aspects of his general approach.

Negotiating competing claims in multi-ethnic societies

Ghai, as a Kenyan Asian, comes from an embattled minority. One of his first monographs, written with his brother, DP Ghai, a distinguished economist, was entitled *Asians in East and Central Africa*. In nearly all of the countries where he has served as a constitutional adviser, protecting the interests of significant ethnic or religious minorities has presented a major problem. And of course, multiculturalism is a pervasive phenomenon in most societies today. So it is hardly surprising that this theme has been in the foreground of his more general writings on human rights.

In a symposium published in the *Cardozo Law Review* (February 2000),[14] he drew on his experiences of constitution-making to make what is perhaps his fullest statement of a general position on human rights. His central thesis is that both of these debates often obscure the political realities and the potential practical uses of human rights discourse as a flexible framework for negotiating acceptable compromises between conflicting interests and groups.

Ghai warns against interpreting human rights discourse too literally or solely in ideological terms. Rather, he adopts 'a more pragmatic and historical, and less ideological, approach.'[15] In his experience, concerns about 'culture' have in practice been less important than the balance of power and competition for resources. Human rights rhetoric may be used – sometimes cynically manipulated – to further particular interests or, as in the Asian values debate, to give legitimacy to repressive regimes by emphasising the right to self-determination of sovereign states (but not necessarily of peoples or minorities within those states).

Nevertheless, in his view, human rights discourse has provided a useful framework for mediating between competing ethnic and cultural claims, and in combating repressive regimes, just because it is flexible and vague and not rigidly monolithic.[16] In domestic constitutive processes and constitutional law,

[14] Yash Ghai, 'Universalism and relativism: Human rights as a framework for negotiating interethnic claims' 21 *Cardozo Law Review* 4, (February 2000) 1095

[15] Ghai, 'Universalism and relativism', 1099.

[16] He proceeds to clarify:
By the 'framework of rights' I mean the standards and norms of human rights reflected in international instruments and the institutions for the interpretation and enforcement of rights. This means that no permissible

the international human rights regime has provided a crucial reference point for local debates. In a study of constitution making in four quite different countries – Canada, Fiji, India, and South Africa – he found that the relevance of rights was widely acknowledged, much of the content and orientation of competing viewpoints was drawn from foreign precedents and international discourse, and groups presented their claims in terms of different paradigms of rights, drawn largely from transnational sources. In short, international norms and debates were used as resources for local arguments and negotiations in the process of achieving a constitutional settlement:

> For multicultural states, human rights as a negotiated understanding of the acceptable framework for coexistence and the respect for each culture are more important than for monocultural or mono-ethnic societies, where other forms of solidarity and identity can be invoked to minimize or cope with conflicts. In other words, it is precisely where the concept or conceptions of rights are most difficult that they are most needed. The task is difficult, but possible, even if it may not always be completely successful. And most states today in fact are multicultural, whether as a result of immigration or because their peoples are finding new identities.[17]

> Ghai uses his four case studies to explode a number of myths: First, he challenges the assumption that culture is the salient element in determining attitudes to rights, a matter of significance when 'cultural relativism' is invoked to undermine the case for human rights.[18] 'Culture' is not irrelevant, but it operates in complex ways. Culture is not monolithic, but protean; no community has a static culture;[19] cultures change and intermix; homogeneity of culture within a nation state is nowadays exceptional, and indeed much state effort is

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> policies are arbitrary. Instead, they must be justified by reference to a recognized right, the qualifications that may be lawfully imposed on the right, or a balance between rights. The procedures and guidelines for the balance and tradeoffs must be included within the regime of rights. The notion of framework also refers to the process of negotiations or adjudication which must be conducted fairly within certain core values of rights. There must also be the acceptance of the ultimate authority of the judiciary to settle competing claims by reference to human rights norms.

Ghai, 'Universalism and relativism', 1103-104.

[17] Ghai, 'Universalism and relativism', 1102.

[18] In respect of the four case studies he concluded:

> 'Culture' has nowhere been a salient element determining attitudes to rights. It has been important in Fiji, Canada, and South Africa, but it has been important in different ways... . With the exception of the Canadian first nations ['the Aborigines'], the proponents of the cultural approach to rights were not necessarily concerned about the general welfare of their community's cultural traditions. They were more concerned with the power they obtain from espousing those traditions... . The manipulation of "tradition" by Inkatha is well documented. Fijian military personnel and politicians who justified the coup were accused of similar manipulation by a variety of respectable commentators.

Ghai, 'Universalism and relativism', 1135-36.

[19] See Lisa Fishbayn's insightful paper on judicial interpretations of 'culture' in family cases in South Africa, Lisa Fishbayn, 'Litigating the right to culture: Family law in the New South Africa' 13 *International Journal of Law Policy and the Family*, 1999, 147.

devoted to artificially creating a common culture as a prop for national unity. Questions of the relation of rights to culture arise *within* communities, as when women or minorities have invoked rights to challenge or interrogate 'tradition'. As Boaventura de Sousa Santos and others have suggested, cross-cultural discourse can generate new forms and enrich the culture of rights.[20] Perhaps, most important, Ghai emphasises that 'the material bases of "rights" are stronger than cultural'.[21]

Second, Ghai attacks as a myth the idea that the origins and current support for universal rights are solely Western. Historically, the sources of the international regime are quite diverse, with different 'generations' having different supporters.[22] During the colonial period, for example, the British were among the strongest opponents of rights talk, especially in relation to self-determination or local bills of rights. At that time, nationalist leaders were strong supporters of human rights, especially the right to self-determination, but that enthusiasm did not always survive beyond independence. Bentham, Burke, and Marx were among the critics of rights within the Western tradition. During the Cold War, the Eastern bloc generally championed social and economic rights, the Western powers individual civil and political rights. In South Africa it was the whites who historically opposed universal human rights, and, after the end of apartheid, it was the black majority who were the most committed to them.[23] In modern times, political leaders have invoked 'the right to self-determination' as a defence against external criticism of internally repressive regimes and at the same time dismiss 'rights discourse' as a form of Western neo-colonialism – as in the Asian values debate.

It is no doubt true that the current international regime of rights derives largely from western intellectual traditions, but Ghai points out that today 'there is very considerable support for rights in Asia, among parliamentarians, judges, academics, trade unionists, women's groups, and other non-governmental organisations.'[24] When Western-dominated organisations, such as the World Bank, the International Monetary Fund, and state foreign aid agencies promote 'human rights and good

[20] Ghai, 'Universalism and relativism', 1098, citing Boaventura de Sousa Santos, *Toward a new legal common sense* Routledge, London, 1995. See Jeremy Webber's thesis that Aboriginal rights in Canada are best understood to be the product of cross-cultural interaction rather than as the result of some antecedent body of law; Jeremy Webber, 'Relations of force and relations of justice: The emergence of normative community between colonists and Aboriginal peoples' 33 *Osgoode Hall Law Journal*, 4, 1995, 623.

[21] Ghai, 'Universalism and relativism', 1100, 1136.

[22] Compare Upendra Baxi's account of alternative human rights histories, in Upendra Baxi, *The future of human rights* Oxford University Press, New Delhi, 2002, 67-72.

[23] Ghai, 'Universalism and relativism', 1137-38.

[24] YP Ghai, 'Human rights and Asian values' *Public Law Review,* 9, 1998, 169.

governance and democracy,' they tend to emphasise a narrow band of individual and property rights rather than the whole spectrum that were included in the original *Universal Declaration of Human Rights*.[25] Such selectivity illustrates the flexibility, and possibly the incoherence, of the general framework of rights discourse. Whatever the origin, the general framework and current support are not specifically Northern or Western.

Third, Ghai strongly challenges the use of sharp dichotomies in this context. For example, he identifies at least five types of relativist positions that need to be distinguished:[26] (i) strong cultural relativism – i.e., that rights depend upon culture rather than upon universal norms; (ii) that cultural differences do indeed exist, but only the Western concept of human rights is acceptable as a basis for universal norms (conversely, some Asian politicians argue that their societies are superior to the West because their cultures emphasise duty and harmony rather than individual rights and conflict); (iii) moderate cultural relativism – i.e., that a common core of human rights can be extracted from overlapping values of different cultures;[27] (iv) that cultural pluralism can be harmonised with international standards by largely internal re-interpretation of cultural tradition – the basic approach of Abdullahi An-Na'im; and (v) that an enriched version of rights can be developed by intercultural discourse, which can lead towards a new form of universalism. Ghai concludes:

> On the more general question of universalism and relativism, it is not easy to generalise. It cannot be said that bills of rights have a universalising or homogenising tendency, because by recognizing languages and religions, and by affirmative policies a bill of rights may in fact solidify separate identities. Nevertheless, a measure of universalism of rights may be necessary to transcend sectional claims for national cohesion. Simple polarities, universalism/particularism, secular/religious, tradition/modernity do not explain the complexity; a large measure of flexibility is necessary to accommodate competing interests. Consequently most bills of rights are Janus-faced (looking towards both liberalism and collective identities). What is involved in these arrangements is not an outright rejection of either universalism or relativism; but rather an acknowledgement of the importance of each, and a search for a suitable balance, by employing, for the most part, the language and parameters of rights.[28]

[25] The Universal Declaration of Human Rights included social, economic and cultural rights as well as civil and political rights, and recognised the importance of duties. See Ghai, 'Human rights and Asian values', 170.

[26] Ghai, 'Universalism and relativism', 1095-99. The formulation in the text is mine. Ghai's categories are recognisable, but some writers distinguish between many more positions. On the ambiguities of 'relativism,' see Susan Haack, 'Reflections on relativism: From momentous tautology to seductive contradiction,' in *Manifesto of a passionate moderate: Unfashionable essays* University of Chicago Press, Chicago, 1998, 149.

[27] A prominent modern example Alison Dundas Renteln, *Relativism and the search for human rights* Sage, London, 1990; See also Renteln, 'Relativism and the search for human rights' 90 *American Anthropologist*, 1, 1988, 64.

[28] Ghai, 'Universalism and relativism', 1139-40.

On the basis of these four case studies, backed by his wide practical experience, Ghai suggests some further general conclusions: First, rights provide a framework not only for cross-cultural discourse and negotiation, but also 'to interrogate culture' within a given community, as when women have used them to challenge traditionalists in Canada, India, and South Africa.[29] Second,

> in no case are rights seen merely as protections against the state. They are instruments for the distribution of resources, a basis for identity, and a tool of hegemony, and they offer a social vision of society. Rights are not necessarily deeply held values, but rather a mode of discourse for advancing and justifying claims.[30]

Third, in multi-cultural societies, balancing of interests requires recognition of collective as well as individual rights, including rights connected with being a member of a group, as with affirmative action in India.[31] Fourth, where rights are used for balancing interests, there is no room for absolutism of rights. They have to be qualified, balanced against each other, or reconceptualised.[32] Fifth, a stable settlement in a multi-ethnic society often involves recognition and appropriate formulation of social, economic, and cultural rights. This in turn requires an activist state.[33] Sixth,

> since interethnic relations are so crucial to an enduring settlement, and past history may have been marked by discrimination or exploitation, a substantial part of the regime of rights has to be made binding on private parties.[34]

Finally, the requirements of balancing conflicting interests within a framework of rights give a major role to the judiciary in interpreting, applying, and reinterpreting the constitutional settlement in a reasoned and principled way.[35]

> Ghai's approach is illustrated by his treatment of the so-called 'Asian values' debate. This is widely perceived as a concerted attack on human rights by spokespersons for what is wrongly regarded as representing some kind of Asian consensus. Ghai argues that the debate has obscured both the complexity and the richness of debates about rights within Asia.

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[29] Ghai, 'Universalism and relativism', 1137.

[30] Ghai, 'Universalism and relativism', 1137.

[31] Ghai, 'Universalism and relativism', 1138.

[32] Ghai, 'Universalism and relativism', 1138.

[33] Ghai, 'Universalism and relativism', 1138.

[34] Ghai, 'Universalism and relativism', 1138.

[35] Ghai, 'Universalism and relativism', 1138-39. See also, however, his caveats about the role of the judiciary in relation to economic and social rights, discussed below.

The 'Asian values' debate

> The authoritarian readings of Asian values that are increasingly championed in some quarters do not survive scrutiny. And the grand dichotomy between Asian values and European values adds little to our understanding, and much to the confounding of the normative basis of freedom and democracy. (Amartya Sen)[36]

'The Asian values debate' refers to a controversy that flared up in the run-up to the Vienna World Conference on Human Rights in 1993 (Vienna Conference). After the collapse of communism, increased attention to human rights issues had led to growing criticism of human rights violations in China and also in countries that had been allies in the Cold War. This was also the period of increased conditionalities being imposed by international financial institutions and Western aid agencies in the name of 'human rights, good governance and democracy'. In a regional meeting preparatory to the Vienna Conference, many Asian governments signed *The Bangkok Declaration*,[37] which was widely interpreted as an attempt to present a united front against growing Western hegemony. Lee Kuan Yew (and the Government of Singapore) and Muhathir Mohamed (and the Government of Malaysia), who could hardly be considered representative of the whole of Asia, framed this North-South confrontation in terms of a fundamental conflict between 'human rights and Asian values'.

The Asian values debate rumbled on for over a decade and surfaced in a number of different contexts, of which one of the most interesting and important was the positions taken by China both internally and externally in response to Western criticism.[38] Ghai was one of a number of 'Southern' intellectuals who jumped to the defence of ideas about human rights and democracy as not being peculiarly Western. In a series of papers published between 1993 and 1999, he sharply criticised the

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[36] Amartya Sen, 'Human rights and Asian values: What Lee Kuan Yew and I Peng don't understand about Asia' 217 *The New Republic*, 2-3, 14 July 1997, 40.

[37] *Final declaration of the regional meeting for Asia of the World Conference on Human Rights*, A/CONF.157/ASRM/8, A/CONF.157/PC/59, 7 April 1993. Other accessible documents include Government of Singapore, *Shared values*, Government of Singapore Printers, Singapore, 1991; and a useful symposium in 1994 in *Foreign Affairs*, including Fareed Zakaria, 'A conversation with Lee Kuan Yew' 73 *Foreign Affairs,* 2, 1994, 109 and the response by Kim Dae Jung, 'Is culture destiny?: The myth of Asia's anti-democratic values' (1994) 73 *Foreign Affairs,* 6, 89. See also Ghai 'Rights, social justice and globalization in East Asia' in Joanne R. Bauer & Daniel A. Bell, (eds), *The East Asian challenge for human rights* Cambridge University Press, Cambridge, 1999, 241.

[38] See Ann Kent, *China, the United Nations and human rights: The limits of compliance* University of Pennsylvania Press, Philadelphia, 1999; and Rosemary Foot, *Rights beyond borders: The global community and the struggle over human rights* Oxford University Press, Oxford, 2000.

arguments and positions adopted by the leaders of Singapore and Malaysia and in the process developed his own general position on human rights.[39]

We need not enter into the details of Ghai's criticisms of the Singapore and Malaysian versions of the Asian values position, which he treats as both insincere and confused.[40] He suggests that the true motive for their campaign was to justify authoritarian regimes at a time when they were being subjected to criticism both internally and internationally for repression of dissent and civil liberties. However, participating in the debate sharpened Ghai's focus on the connections between culture, the market, and human rights. Here it is sufficient to quote his own summary of his treatment of one phase of the debate as it surfaced before and during the Bangkok meeting in March and April 1993, preceding the Vienna Conference:

> Asian perceptions of human rights have been much discussed, particularly outside Asia, stimulated by the challenge to the international regime of rights by a few Asian governments in the name of Asian values. Placing the debate in the context of international developments since the Universal Declaration of Human Rights 50 years ago, [the author] argues that international discussions on human rights in Asia are sterile and misleading, obsessed as they are with Asian values. On the other hand, the debate within Asia is much richer, reflecting a variety of views, depending to a significant extent on the class, economic or political location of the proponents. Most governments have a statist view of rights, concerned to prevent the use of rights discourse to mobilize disadvantaged or marginal groups, such as workers, peasants, or ethnic groups, or stifle criticisms and interventions from the international community.[41] However, few of them [i.e. governments] subscribe to the crude versions of Asian

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[39] In the version of 'the Asian values position' advanced by Lee Kuan Yew and the Government of Singapore, Ghai summarises the core of the argument as follows: (i) The West is decadent – lawless, amoral, and in economic decline. This decadence is due to its emphasis on democracy and human rights based on extreme individualism. 'Rights consciousness has made people selfish and irresponsible and promoted confrontation and litigiousness.' (ii) Asian societies have maintained social stability, economic progress, and a sense of moral purpose on the basis of a culture and ethos that emphasises duties and subordinates individual interests to the welfare of the community. (iii) There is a Western conspiracy to subvert Asian political independence and economic success by imposing decadent alien values on Asian culture. Ghai challenged all of these positions in Ghai, 'Human rights and Asian values', 176-77; cf. the more detailed critique in Yash Ghai, 'The politics of human rights in Asia' in G. Wilson (ed.), *Frontiers of legal research,* Chancery Law Publishing, Chichester, 1995.

[40] Ghai tended to dismiss the Bangkok Declaration as an incoherent and self-contradictory document, a political compromise that was hardly worth deconstruction (e.g., Ghai, 'The politics of human rights in Asia', 209; Ghai, 'Human rights and Asian values', 174) and to concentrate on the arguments of Lee and Muhathir, about whom he was equally scathing (Ghai, 'Human rights and Asian values', 174): 'To draw from their pretentious and mostly inconsistent statements a general philosophy of Asian values is like trying to understand Western philosophy of rights and justice from statements of Reagan and Thatcher'.

[41] Ghai points to the highly selective presentation of Asian values by some protagonists, glossing over the hierarchical structures of relationships, subordination of women, the exploitation of children and workers, nepotism and corruption based on family ties, and the oppression of minorities. Ghai, 'Human rights and Asian values', 177.

values, which are often taken abroad as representing some kind of Asian consensus. [The author] contrasts the views of governments with those of the non-governmental organizations (NGOs) who have provided a more coherent framework for the analysis of rights in the Asian context. They see rights as promoting international solidarity rather than divisions. Domestically, they see rights as means of empowerment and central to the establishment of fair and just political, economic and social orders.[42]

To start with, Ghai was quite dismissive of arguments that human rights represent a form of cultural imperialism – the imposition of values that are atomistic, confrontational, and self-seeking on a culture that emphasises harmony, consensus, hard work, and solidarity. This argument, in his view, exaggerated the homogeneity of 'Asian' cultures, distorted the nature of human rights, and overemphasised the place of culture in economic success. However, in a later paper on 'Rights, duties and responsibilities' he decided to take more seriously the argument that some Asian traditions, notably Hinduism and Confucianism, emphasise duties rather than rights, and that this is a superior way to organise society.[43] 'Duty' in this context is more abstract than the Hohfeldian idea of duty: it refers to obligations or responsibilities attached to office or status or class, rather than merely being the correlative of claim rights. Such responsibilities prescribe right and proper conduct in respect of a given role or relationship, like father-son, husband-wife, friend-friend, and, most important, ruler-subjects. In one interpretation of Confucianism, such duties could be said to be less self-regarding than rights, more communitarian, oriented to harmony rather than conflict, and more informal, emphasising honour, peace, and stability. 'The key duties are loyalty, obedience, filial piety, respect, and protection.'[44] Ghai acknowledges that in some societies this version of Confucianism can be attractive:

I do not wish to oppose a broader notion of duty in the sense of responsibilities or civic virtue. There is clearly much that is attractive in persons who are mindful of the concerns of others, who wish to contribute to the welfare of the community, who place society above their own personal interests. No civilized society is possible without such persons. There is also much that is attractive in societies that seek a balance between rights and responsibilities and emphasize harmony. Nor do I wish to underestimate the potential of duty as a safeguard against abuse of power and office. I am much attracted to the notion of the withdrawal of the Mandate of Heaven from rulers who transgress upon duties of rulers (although I am

[42] This is based on the Abstract to Ghai, 'Human rights and Asian values'.

[43] Yash Ghai, 'Rights, duties and responsibilities' in Josiane Cauquelin, Paul Lim, Birgit Mayer-König (eds) *Asian values: Encounter with diversity*, Curzon Press, Richmond, Surrey, 1998, 20-42 (volume republished as Routledge, 2014).

[44] Ghai, 'Rights, duties and responsibilities', 29.

aware that this was largely impotent as a device of responsiveness or accountability or discipline of rulers).[45]

However, these virtues mainly concern social relations of human beings within civil society rather than relations between citizens and the state, which is the primary sphere of human rights. Moreover, as modern Confucian scholarship suggests, there is a downside to such a philosophy:[46] a duty-based society tends to be status oriented and hierarchical, and in some societies, Confucian duties rarely extended beyond family and clan, promoting corruption rather than a genuine civic sense. Confucius himself emphasised the moral responsibilities of the ruler, was contemptuous of merchants and profits, and was against strong laws and tough punishments – for authoritarian, market-oriented, and often corrupt governments to invoke Confucius is hypocritical. By conflating the ideas of state and community, the official protagonists of Asian values obscure the role of the regime of rights to mediate between state and community:

> That the contemporary celebration of duty has little to do with culture and much to do with politics is evident from the various contradictions of policies and practices of governments heavily engaged in its exhortation.[47]

In the present context, perhaps the important point is a warning against taking any debates and discourse about human rights too literally. The context is typically political, and the same discourse can be used or abused for a wide range of different political ends. Above all, such discourse is historically contingent:

> I believe that rights are historically determined and are generally the result of social struggles. They are significantly influenced by material and economic conditions of human existence. It is for that reason unjustified to talk of uniform attitudes and practices in such a diverse region as Asia. Rights become important, both as political principles and instruments, with the emergence of capitalist markets and the strong states associated with the development of national markets. Markets and states subordinated communities and families under which duties and responsibilities were deemed more important than entitlements. Rights regulate the relationship of individuals and corporations to the state. Despite the lip service paid to

[45] Ghai, 'Rights, duties and responsibilities' 37-38.

[46] Ghai, 'Rights, duties and responsibilities', 38, citing William Theodore de Bary, *The trouble with Confucianism* Harvard University Press, Cambridge, MA, 1991. He also points out that traditional Confucianism placed more emphasis on the individual than has generally been recognised, citing Yu-Wei Hsieh, 'The status of the individual in Chinese ethics' in Charles Moore, (ed), *The Chinese Mind: Essentials of Chinese philosophy and culture* University of Hawaii Press, Honolulu 1968; and Tu Wei-Ming, *Confucian thought: Self-hood as creative transformation* State University of New York Press, Albany, 1985.

[47] Ghai, 'Rights, duties and responsibilities', 34.

> the community and the family by certain Asian governments, the reality is that the State has effectively displaced the community, and increasingly the family, as the framework within which an individual or group's life chances and expectations are decided. The survival of community itself now depends on rights of association and assembly.[48]

The role of judges in implementing economic, social, and cultural rights

The Universal Declaration of Human Rights covered both civil and political rights (CPR) and economic, social, and cultural rights (ESCR). It made no formal distinction between the two classes. However, during the Cold War, the distinction became significant and was sharpened in the ideological battles between the Western powers and the Eastern bloc, the former prioritising CPR, the latter ESCR. This distinction became further entrenched both in international covenants and through the influence of the colonial powers and the Soviet Union on subordinated countries. Thus the European Convention on Human Rights[49] is restricted to civil and political rights, and this limitation has spread to many Commonwealth countries. The distinction still lives on, for example in the domestic and foreign policies of the United States and of the People's Republic of China. However, the constitutions of India (1949) and South Africa (1994) are significant exceptions to this privileging of one set of rights to the exclusion of the other.

The validity of the distinction has long been a matter of contention, and the claim that 'human rights are interdependent and indivisible'[50] is widely supported by the human rights community. At the start of the Millennium the debate became sharply focused within Interights, an influential London-based NGO, by the responses to a memorandum prepared by Ghai that was intended to focus the program of Interights on ESCR:

> It was not my intention to expound a theory of ESCR, but to suggest a focus for work. I acknowledged the importance of ESCR as rights, but cautioned against an over-concentration on litigation strategies and pointed to limitations of the judicial process in view of the nature of ESCR. The memo implied the need to avoid polarities or dichotomies (such as justiciability and non-justiciability and civil and political/economic and social rights). In this as other instances of enforcement of the law, there was a division of labour between court-oriented

[48] Ghai, 'Rights, duties and responsibilities', 169. On the complex relationship between economic globalisation and human rights in Asia, see Yash Ghai, 'Human rights, social justice and globalisation' in D. Bell and J Bauer (eds) *The East Asian challenge to human rights,* Cambridge University Press, Cambridge, 1999.

[49] *Convention for the protection of human rights and fundamental freedoms,* 4 November 1950, CETS No. 005.

[50] On Baxi's criticism of this and other 'mantras', see Baxi, *The future of human rights* n.190 and accompanying text.

> strategies and other modes of enforcement. It was important, in discussions of the enforceability of ESCR, to pay attention to the relationship between judicial enforcement and the supporting framework that other institutions could provide, as well as to the effects of litigation on wider participation in the movements, and lobbying, for human rights.[51]

The memorandum provoked mixed reactions. The ensuing debate culminated in a valuable collection of essays edited by Ghai and Jill.[52] This volume throws light not only on issues such as justiciability but also on the specific nature of ESCR, different methods of implementation, and the experience of the courts in several countries in dealing with them. The final chapter by the editors represents a significant development of Ghai's views.[53]

In this volume, the debate was initially framed by contrasting positions asserted by An-Na'im and Lord (Anthony) Lester.[54] An-Na'im objected in principle to the classification of human rights into two broad classes. He argued that this distinction leads to the perception that ESCR are inferior,[55] it denies the claim that human rights are indivisible and interdependent,[56] it is not based on any consistent or coherent criteria of classification, and it undermines 'the universality and practical implementation *of all human rights*.'[57] In particular, An-Na'im attacked the idea that no ESCR should be enforced by the judiciary. All human rights need to be supported by a variety of mechanisms, and the role of each mechanism should be assessed and developed in relation to each right. But it is not appropriate to leave promotion and enforcement to national governments, for the fundamental aim of protecting human rights 'is to *safeguard them from the contingencies of the national political and administrative processes*.'[58] The judiciary has a vital role to play in this. An-Na'im

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[51] Yash Ghai and Jill Cottrell (eds) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights*, Interights, London, 2004, vi.

[52] Ghai & Cottrell *Economic, social and cultural rights in practice*, vi.

[53] Ghai & Cottrell *Economic, social and cultural rights in practice*, 58.

[54] Abdullahi An-Na'im, 'To affirm the full human rights standing of economic, social and cultural rights' in Ghai & Cottrell *Economic, social and cultural rights in practice*, 7; Lester and O'Cinneide, "The effective protection of socio-economic rights" in Ghai & Cottrell, *Economic, social and cultural rights in practice*, 16.

[55] For example, "[W]ithin the European system, ESCR has been relegated to non-binding charters and optional protocols." An-Nai'im, 'To affirm the full human rights standing of economic, social and cultural rights' 11.

[56] For example, a right to freedom of expression is not much use to the vulnerable without a right to education; conversely, implementation of a right to education is dependent on freedom to research and communicate freely. An-Nai'im, 'To affirm the full human rights standing of economic, social and cultural rights' 11.

[57] An-Nai'im, 'To affirm the full human rights standing of economic, social and cultural rights' 11. [emphasis added].

[58] An-Nai'im, 'To affirm the full human rights standing of economic, social and cultural rights' 8.

placed great emphasis on the importance of human rights as universal standards incorporated in the international regime and backed by international co-operation in their implementation. The framework of international standards is crucial for the recognition of ESCR as *human rights*.

> Lord Lester and Colm O'Cinneide developed a familiar response: while acknowledging that ESCR are indeed human rights and the poor and the vulnerable need protection from violations of both classes of rights, they argued that ESCR are best protected by non-judicial mechanisms. For reasons of democratic legitimacy and practical expertise, the judiciary should have a very limited role in those aspects of governance that involve allocation of resources, setting priorities, and developing policies.[59]

In the ensuing debate it became clear that the range of disagreement was quite narrow. This is hardly surprising within a group of human rights experts (mainly lawyers) arguing in the context of an NGO that is committed to promoting ESCR. There appears to have been a consensus on a number of points: that ESCR should be treated as *rights*, that their effective enforcement and development was a matter of concern, that this requires a variety of mechanisms, that the idea of the interdependence of rights is of genuine practical importance, and that the concept of 'justiciability' is too abstract and too fluid to provide much help in delineating an appropriate role for the judiciary in respect of ESCR.

Ghai took issue with An-Na'im on two main grounds: An-Na'im placed too much emphasis on the international regime as the foundation for national policies on rights,[60] and he was wrong in suggesting that those who want a restricted role for the judiciary are necessarily opposed to ESCR as rights. Nevertheless, Ghai suggested that the differences between An-Na'im and the proponents of judicial restraint can easily be exaggerated – they are mainly differences of emphasis about a role that is contingent on local historical and material conditions. Several of the commentators made the point that courts have taken ESCR into account when interpreting CPR provisions.

One senses that Ghai may have been somewhat impatient with a debate which seems to have been based largely on mutual misunderstandings of the seemingly conflicting viewpoints. No one denied that courts had some role to play in this

[59] Ghai & Cottrell (eds), *Economic, social and cultural rights in practice*, vi.

[60] 'Reliance on international norms brings in all of the difficulties of hegemony and alleged imposition; and it ignores the national character of the constitution as a charter of the people themselves to bind their rulers . . . and it ignores the critical importance of local action, democracy etc.' Ghai, 'Introduction' in Ghai & Cottrell (eds), *Economic, social and cultural rights in practice*, 2.

area, while An-Na'im was not asking that they should be seen as the only relevant mechanism. However, the debate stimulated Ghai to develop his own ideas about the nature of ESCR and the role of human rights discourse in framing state policies. Without claiming to do justice to a rich and detailed analysis, one can perhaps pinpoint three key ideas underlying his position:

First, he was stimulated to articulate his view of the role of courts in relation to ESCR. This should not be static but generally speaking should be less prominent than their role in relation to CPR. After a survey of the case law developed so far, especially in India and South Africa, including cases in which courts had been felt by critics to have become too involved, concluded:

> Courts can play an important role in 'mainstreaming' ESCR by (a) elaborating the contents of rights; (b) indicating the responsibilities of the state; (c) identifying ways in which the rights have been violated by the state; (d) suggesting the frameworks within which policy has to be made, highlighting the priority of human rights (to some extent the South African courts have done this, by pointing to the need to make policies about the enforcement of rights, and Indian courts by highlighting the failure of government to fulfil [Directive Principles of State Policy] so many years after independence). There is a fine balance here, for there is always a risk that courts may cross the line between indicating failures of policy and priorities and indicating so clearly what these priorities ought to be that they are actually making policy.[61]

'The primary decision-making framework must be the political process.'[62] The main contribution of courts in Ghai's view should be 'in developing core or minimum entitlements.'[63] However, once policies have been formulated by government or other agencies, backed by standards and benchmarks, courts may also have a role in implementing such standards.

Second, Jill and Ghai point out that issues about justiciability cannot turn on the difference between CPR and ESCR, or on some untenable distinction between negative and positive rights.[64] They distinguish between two aspects of justiciability that are often confused:[65] (i) *explicit non-justiciability*, when a constitution or law explicitly excludes the jurisdiction of the courts, for example the Directive Principles of State Policy in the Indian Constitution; and (ii) *non-justiciability as a*

[61] Jill Cottrell and Yash Ghai, 'The role of the courts in the protection of economic, social and cultural rights' in Ghai and Cottrell, *Economic, social and cultural rights in practice,* 86.

[62] Cottrell and Ghai, 'The role of the courts in the protection of economic, social and cultural rights', 89.

[63] Cottrell and Ghai, 'The role of the courts in the protection of economic, social and cultural rights', 87.

[64] Cottrell and Ghai, 'The role of the courts in the protection of economic, social and cultural rights', 70-71.

[65] Cottrell and Ghai, 'The role of the courts in the protection of economic, social and cultural rights', 66-70.

matter of appropriateness, a more delicate and complex matter. This may be based on arguments about separation of powers, or legitimacy, or the competence of courts, or some concept of what is a 'political' question or a combination of these. These are contested matters in which no clear consensus has emerged in the case law, except a tendency to reject sharp distinctions.[66]

Third, the discussion of the role of the courts throws light on the nature of ESCR. Ghai rejects any sharp distinction between ESCR and CPR, but nevertheless argues that there are certain tendencies that characterise ESCR and suggest a more limited role for the courts in relation to many, but not all of them.[67] For example, in many domestic and international instruments, there is a tendency for ESCR provisions to be drafted in terms that allow considerable discretion in respect of standards, timing, and methods of enforcement.[68] Such notions as 'progressive realisation,' 'margin of appreciation,' and 'to the extent of its available resources' further limit the role of courts. No human rights are costless, but all implementation of all human rights depends on 'a complex interaction of policies in numerous sectors, institutions, and entitlements.'[69] However, as the Indian and South African cases have shown, there is scope for courts to define what is the minimum core of any given right (a notoriously difficult and contentious matter), to sanction state violation of established rights, and to point out that 'progressive realisation' implies that the state has a constitutional duty to start implementation and a further duty to ensure that there is no deterioration of standards. Ghai's essentially evolutionary and pragmatic argument is consistent with An-Na'im's insistence that what are appropriate mechanisms of implementation should be decided on the merits in respect of each right in particular contexts rather than by reference to abstract categories. But in light of the experience of the case law, there may be a considerably more significant role for courts in the long run than An-Na'im suggests.

[66] 'Courts are considered an unsuitable forum where there may be no clear standards or rules by which to resolve a dispute or where the court may not be able to supervise the enforcement of its decision or the highly technical nature of the questions, or the large questions of policy involved may be thought to present insuperable obstacles to the useful involvement of courts.' Cottrell and Ghai, 'The role of the courts in the protection of economic, social and cultural rights', 69. The Supreme Court of India case of *Upendra Baxi v State of Uttar Pradesh & Ors* (1986) 4 SCC 106 is cited as an example of the courts getting involved in an unsuitable activity. (Here the court supervised a home for women for five years.)

[67] See the excellent discussion by Cottrell and Ghai, 'The role of the courts in the protection of economic, social and cultural rights', 76-82, of the way these considerations affect rights to education, medical treatment, housing, environment, and social security.

[68] But there are exceptions: for example, the right to free and compulsory primary education. Cottrell and Ghai, 'The role of the courts in the protection of economic, social and cultural rights', 61.

[69] Cottrell and Ghai, 'The role of the courts in the protection of economic, social and cultural rights', 62.

Fourth, and more important, Ghai's main concern was to focus attention on other means of implementing and developing ESCR and to make a general case for the idea that human rights discourse can provide a broad overarching framework for constructing state policies and priorities.[70] One trouble with the debates about 'justiciability' has been that 'human rights' has tended to be treated as doctrine (often legal doctrine) rather than as discourse and that it focuses attention on litigation (usually a last resort) and away from the range of other possible mechanisms and resources that need to be employed in the realisation of all human rights, including ESCR.

Conclusion

One senses that Ghai is sometimes impatient with theoretical debates about rights and prefers to work at less general levels. Like many others, he rejects strong versions of both universalism and relativism; he criticises a tendency to over-emphasise 'culture' rather than material interests; he argues that the debate on Asian values greatly exaggerated the uniformities of 'East Asian culture' and was used to divert attention away from the failings of repressive regimes and human rights violations – the result being to obfuscate genuine issues about human rights in different contexts in East Asia. Similarly, the debate about the justiciability of ESCR amounted to little more than differences of emphasis among lawyers about the proper role of courts – a role that should depend on timing and context in any given country. Most of the protagonists have been lawyers who have tended to argue on the basis of human rights as legal doctrine rather than as a discourse that provides a workable framework for mediating conflicting interests and providing a basis for settlements that are accepted by local people as legitimate.

Many of these themes are illustrated in specific ways in Ghai's writings about Hong Kong, in which the same dichotomies between theory and practice, socialism and liberalism, and idealism and pragmatism are discernible in creative tension. After a generally pessimistic diagnosis of the situation, he ends on a pragmatic note of hope about the future by appealing to enlightened self-interest:

> It is easy for the Central Authorities, if they were so minded, to bypass or undermine the Basic Law, and they would presumably always find people who are willing to collaborate with them in this enterprise. However, China stands to gain more from a faithful adherence to the Basic Law, to keep promises of autonomy, to permit people of all persuasions to participate

[70] Cottrell and Ghai, 'The role of the courts in the protection of economic, social and cultural rights', 61.

> in public affairs, to respect rights and freedoms, and to let an independent judiciary enforce the Basic Laws and other laws. This is a more effective way to win the loyalty of Hong Kong people. An adherence to legal norms and consultative and democratic procedures would ultimately benefit the Central Authorities as they grapple with the difficult task of managing affairs on the mainland as economic reforms and the movement for democracy generate new tensions.[71]

Ghai advances a pragmatic materialist interpretation that is broadly supportive of the current international human rights regime. He emphasises the uses and limitations of bills of rights as devices for limiting governmental power and increasing accountability. He focuses on the use and abuse of human rights discourse in real-life political contexts, especially by governments that invoke the right to self-determination against external critics of their treatment of their own citizens. His views are not surprisingly controversial.[72] But he provides a uniquely realistic perspective on the practical operation of human rights discourse, especially in the context of constitutional negotiation and settlement.

[71] Yash Ghai, *Hong Kong's new constitutional order: The resumption of Chinese sovereignty and the Basic Law*, 2d ed. Hong Kong University Press, Hong Kong, 1999, 500.

[72] For example, 'naturalists' believe that human rights embody universal values. Cultural relativists might argue that he is too dismissive of the core of truth in the idea that there are strong communitarian traditions in Asia that are far less individualistic than Western ideologies of individual rights; and his views are likely to be anathema to free-market 'liberals'. He has also been attacked from the left by Upendra Baxi for too readily taking the international regime of human rights as the starting-point for constitutionalism and for failing to emphasise how human rights discourse can obfuscate 'the real historical struggles' of 'subaltern' peoples.

The rule of law as resistance

*Abdul Paliwala**

My experience seemed to point to the problems when fidelity to the law weakens – the arrogance of power, the corruption of public life, the insecurity of the disadvantaged. I was not unaware, of course, of other purposes of the law which served the interests of the rich and the powerful. But the fact was that it did increasingly less and less so; a whole body of statutory law since TANU [the ruling party] came to power had begun to tip the scales the other way. I retained my ambivalence about the legal system, and was not attracted to the attitudes of many private practitioners I met (or the interests they served). At the same time I knew the evasion of the law or the dilution of its safeguards harmed many of the people the radical lawyers were championing.[1]

It would be a great tragedy if the powers were given to the candidate who has little respect for the values and procedures of the Constitution. Then all the struggles and sacrifices of Kenyans to secure this Constitution would have been wasted – and in this way we will also have betrayed those who sacrificed most.

By now, most Kenyans understand these values – after all these are the values they demanded. We must vote for that candidate who shows the greatest respect for these values, for, once elected, it is not easy to remove the President, and the harm that the president can do the people and the state is enormous.

Briefly, constitutional values and goals include national unity, respect for diversity, human rights, respect for all citizens, equality, social and economic rights, democracy and devolution, people's participation in affairs of the state, and respect for the Constitution and the law.[2]

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[1] Yash Ghai, 'Legal radicalism, professionalism and social action: Reflections on teaching law in Dar es Salaam' in Issa Shivji (ed) *The limits of legal radicalism: Reflections on teaching law at the University of Dar es Salaam*, 1986, 27

[2] Yash Ghai, "Before you vote for President, consider the following issues" *The Star* (Kenya) 5 August 2017 https://www.the-star.co.ke/news/2017/08/05/before-you-vote-for-president-consider-the-following-issues_c1610029.

* This paper is offered as a tribute to Yash's commitment to constitutionalism and the rule of law.

Introduction

The statements above indicate Yash Pal Ghai's complex attitudes to constitutionalism and the rule of law. In the first statement Ghai was speaking of his experiences at the University of Dar es Salaam where he became Dean of the Faculty of Law in the 1960s. In the second, Ghai was speaking to the Kenyan electorate, firstly as a Kenyan, secondly as the chair of the Constitution of Kenya Review Commission, which developed the new constitution and thirdly as a deep believer in constitutionalism with its intrinsic value of the rule of law.

The rule of law is promoted from the perspective of widely differing ideologies. The American Bar Association Project on Rule of Law promotes a social liberal perspective linked to the World Bank definition of good governance.[3] Friedrich Hayek promotes it from a right economic liberal perspective with the principle that constitutions, governments and legislatures 'must never coerce an individual'.[4] On the other hand, Edward P Thompson's Marxist perspective proclaims that while the law has often been a weapon of the ruling classes, nevertheless, in its restraint on state power 'the rule of law is itself an unqualified good'.[5]

This paper started life as an attempt to resolve my own perplexity, a perplexity about Thompson's famous statement. How can an author whose life's work involved a devastating historical critique of oppressive laws end up with the phrase 'unqualified good?' Had he actually changed his mind? Was it his wife Dorothy who convinced him to see the rule of law as a bulwark against totalitarianism?[6] Was he urging us to obey even unjust laws? I believe that this perplexity also fits Ghai's perspective as outlined in the first prefatory statement.[7] Ghai co-authored the *Political economy of law* with Robin Luckham and Francis Snyder, which outlines a Marxist approach to the role of law in underdeveloped countries.[8] Nevertheless for him the rule of law remains a bulwark against the abuse of state and corporate power. However, this paper gazes not towards an analysis or justification of the rule

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[3] American Bar Association Website Rule of Law Initiative https://www.americanbar.org/advocacy/rule_of_law.html.

[4] F Hayek, *The constitution of liberty*, University of Chicago Press 1978, 205.

[5] Edward P Thompson, *Whigs and hunters: The origin of the Black Acts* Penguin Books 1977, 269.

[6] Daniel H Cole, '"An unqualified human good": EP Thompson and the rule of law' (2001). Faculty Publications. Paper 403.

[7] Ghai, 'Legal radicalism, professionalism and social action', 26.

[8] Yash Ghai, Robin Luckham & Francis Snyder, (eds) *The political economy of law: A Third World reader*, OUP, Bombay 1987.

of law. It gazes upon the extent to which different conceptions of the rule of law provide a scope for resistance to the very law it purports to protect. What is the scope for resistance within and without the law to national and global injustice, for example to neo-liberal globalisation?

I would like to suggest that far from a necessary contradiction between the rule of law and resistance, resistance is intrinsic to the rule of law. This interconnection is part of historical, philosophical, religious and national liberation discourses for example of Mahatma Gandhi[9] and Lala Ambedkar.[10] Equally significantly, the right to resist unjust laws and even constitutions is acknowledged in a significant number of world constitutions including a right to revolution. I suggest that this intrinsic nature is best signified in Michel Foucault's notion of resistance being inscribed within the rule of law as power's irreducible opposite with the potential of either being subordinated or resurrected through 'an insurrection of subjugated knowledges' and or anti-authority struggles.[11]

Some Thompson disciples urged us all to go to law school – perhaps some of us did follow this urge![12] Yet, Thompson's claim caused much controversy among the Marxist Left to which he belonged. One is reminded of the difficulty the Left has with the rule of law when we read such provocative titles as Ugo Mattei and Laura Nader's *Plunder: When the rule of law is illegal*.[13] Yet, Mattei and Nader themselves suggest:

> The ideology of the rule of law displays a double edged contradictory nature: it can favor oppression but it can also produce empowerment of the oppressed that leads to counter-hegemony. This is why powerful actors often attempt to tackle counter-hegemony by incorporating harmonious soft aspects aimed at disempowering potential resistance from the oppressed.[14]

For a more Southern reminder that perplexity about the rule of law is not mere musings but of relevance in contemporary discourses written in blood, especially in the global South, let me reproduce two brief extracts from a quite

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[9] Mahatma Gandhi, *Non-violent resistance (satyagraha)*, Dover, Mineola, NY, 2001.

[10] Lala Ambedkar, *Indian labour and war,* 13 November 1942 http://www.esamskriti.com/essay-chapters/Life-and-Mission-of-Dr-Ambedkar-19.aspx).

[11] Michel Foucault, *Power/knowledge: Selected interviews and other writings, 1972–1977*. Pantheon Books, 1980, 81-2. See generally Ben Golder and Peter Fitzpatrick, *Foucault's law*, Routledge-Cavendish, 2009, 75-6.

[12] Daniel H Cole, '"An unqualified human good": EP Thompson and the rule of law'. Faculty Publications, Paper 403, 2001.

[13] H Mattei and L Nader, *Plunder: When the rule of law is illegal*, John Wiley, 2008.

[14] Mattei and Nader, *Plunder: When the rule of law is illegal*, 18.

moving monologue by Upendra Baxi directed to his late assassinated friend Neelam Teeruchelvan:

> In a remarkable text entitled *Constitutionalism and diversity*, you wisely and well insisted that constitutionalism remains a dialogical, not any monological endeavor. Constitutionalisms remain ethical only in so far as these construct *pluriverses* (or many universes) not the prowess of any historically singular voice or what (adapting here Vandana Shiva's gifted phrase) are the 'monocultures of the mind.' It is for this reason that you so often reiterated providing scope for the profiles of constitutional 'management' of 'ethnic' conflict.
>
> …..
>
> The trouble with mere *instrumentalist* forms of constitutionalisms is that these translated the very idea of constitution in terms that 'effectively correspond[s] to the political style of the regime in power.' In contrast, forms of *consensual* constitutionalism envisage the 'fundamental law enshrining for all times the basic aspirations and ideals of the different components of the body politic.' If the instrumentalist form 'recognizes a somewhat authoritarian process of constitution-making' which disregards the 'aspirations of groups in opposition to the regime in power,' the consensual form 'views the Constitution as a legal and political compact capturing the compromises that have been worked out between different communities and political groups… (and) defines the framework within which the different groups may compete for power and gain access to the resources of a society.' The instrumental form remains, at the end of the day, just the plaything of power.[15]

This chapter begins with an examination of the scope for resistance within Thompson's 'unqualified good'. This is followed by an examination of the history of resistance to unjust laws and regimes in philosophy, religion and contemporary struggles and the tensions between the different conceptions of resistance. It ends by exploring Ghai's attitude to resistance.

On unqualified good

There have been many critiques of Thompson from the Left, and the purpose of this paper is not to go into arguments about structuralism, it is to locate the idea of resistance. The conundrum of Thompson's adherence to the rule of law can be resolved by asserting that both as a life long historian of the study of peasant and working class protests both legal and extra-legal and as himself a participant in protests, he saw the rule of law as part of the historical process of struggles both within and without the law. He clearly differentiated between legality and the rule of

[15] Upendra Baxi, *Human rights in a posthuman world*, Oxford University Press, 2009.

law. He did not intend to contradict the very assertions about the oppressive nature of the law which he spent a lifetime describing and protesting against. Even in the sentence preceding 'unqualified good' he writes 'We ought to expose the shams and inequities which may be concealed beneath this law'. He suggests that 'Transplanted as it was to even more inequitable contexts, this law could become an instrument of imperialism'. But then he goes on to say 'But even here the rules have imposed *some* inhibitions on imperial power. *If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow at the head of a million masked supporters*'.[16] This has a positive significance in Thompson's engagement with South Asian struggles, but it also has a negative significance – Thompson does not have a full appreciation of Indian constitutionalism and, in particular, the role of Ambedkar.

Nevertheless, Thompson was too involved in support for struggles for example the South Asian liberation struggles to see obeisance to legality as a substitute for the rule of law. His notion (grounded and limited by his social historical understanding) of the 'free-born Englishman' and their sense of justice meant that while the rule of law was seen as a bulwark against state oppression, this rule of law did not belong just to the powerful. It was 'imbricated' in social and economic life and was part of a struggle and any achievements were those of the continuous struggle. Only in this way can we explain the chronicling in his *Making of the English working class* of the various struggles 'in' and 'against' state and law[17]. This passage illustrates the micro-dynamics of these seemingly insignificant struggles:

> In a Somerset Village in 1724 an obscure confrontation (one of a number of such affairs) took place over the erection of a maypole. A local landowner and magistrate seems to have taken down "the Old Maypole" newly dressed with flowers and garlands, and then to have sent two men to the bridewell for felling an elm for another pole. In response his apple and cherry orchard was cut down, an ox was killed and dogs poisoned. When the prisoners were released the pole was re-erected and 'May Day' was celebrated with seditious ballads and derisory libels against the magistrate. [18]

Thompson was the primary drafter of the European Nuclear Disarmamemnt (END) Appeal in 1980

> The remedy lies in our own hands . . . We must commence to act as if a united, neutral and pacific Europe already exists. We must learn to be loyal, not to 'East' or 'West', but to each other, and we must disregard the prohibitions and limitations imposed by any national state

[16] Thompson, *Whigs and hunters,* 266. (emphasis mine)

[17] Edward P Thompson, *The making of the English working class*, Penguin, 2002.

[18] Edward P Thompson, *Customs in common: Studies in traditional popular culture*, The New Press, 1993, 75.

> . . . We must resist any attempt by the statesmen of East and West to manipulate this movement to their own advantage...(emphasis mine).[19]

On resistance to unjust laws

In this respect, Thompson must take his place within a long historical tradition of support for struggles against unjust laws and unjust states.[20] A contemporary statement of such a resistance is this statement by Martin Luther King Jr:

> A just law is a man-made code that squares with the moral law of the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St Thomas Aquinas: an unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.[21]

And of course there are great connectivities between King's non-violent resistance and Gandhian Satyagraha.[22] The principle of resistance is multicultural. The differences which arise are in the interpretation of the principle. Can resistance only be peaceful? Can it transcend to violent overthrow of unjust regimes? Yet, even if laws and regimes are unjust and therefore illegal, does the citizen who disobeys the unjust law have a duty to accept punishment for breach of law as a witness to the truth of the injustice (Gandhi and King) or does the citizen obey the law, because the right to punish belongs to God while at the same time the just will be rewarded in heaven?

These problems of interpretation clearly affected the Chinese philosophers. The legalists were the standard bearers of authoritarian positivism in asserting the rule of absolute obedience to the law as the state was above the law.[23] On the other hand, *Confucianism* promoted the principle of *Li* which in our context may be translated as rules of proper behaviour and whose closest approximation in

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[19] European Nuclear Disarmament, *An Appeal for Action,* Bertrand Russell Foundation, 1980, 2. Available at *Security Dialogue* http://journals.sagepub.com/doi/abs/10.1177/096701068001100202.

[20] Tom Ginsburg, Daniel Lansberg-Rodriguez, Mila Versteeg, 'When to overthrow your government: The right to resist in the world's constitutions' 60 *UCLA Law Review*, (2012) 1184.

[21] Martin Luther King Junior (1963), *Letter from Birmingham Jail* 1963 http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (Accessed 2 July 2020).

[22] Gandhi, *Non-violent resistance (Satyagraha).*

[23] Sungmoon Kim, 'The origin of political liberty in Confucianism: A Nietzschean interpretation', 3 *History of Political Thought* 29, (2008) 393-415.

Western thought is Aristotle's *virtue*.[24] The significance of Li was that it bound even rulers and was distinct from the law. Therefore if the ruler lost Li then they were not any longer entitled to rule. Confucius' followers Mencius and Xunzi extended the principle of Li to the right to resist and rebel. However, Sungmoon Kim suggests that this was not seen as a right but an existential sociological explanation – the Emperor lost power because he lost the mandate of heaven.[25] During the Han dynasty, while Confucianism formally triumphed as the official state ideology, an authoritarian twist was given to Confucian principles through the absorption of legalist notions of obedience.[26]

Plato also had a similar view of the rule of law for 'where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off'.[27] Christian texts develop a strong tradition of obedience to the authority of rulers[28] but also an equally strong tradition of rebellion against unjust rule. Thus Thomas Aquinas says:

> The government of tyrants, on the other hand, cannot last long because it is hateful to the multitude, and what is against the wishes of the multitude cannot be long preserved. For a man can hardly pass through this present life without suffering some adversities, and in the time of his adversity occasion cannot be lacking to rise against the tyrant; and when there is an opportunity there will not be lacking at least one of the multitude to use it. Then the people will fervently favour the insurgent, and what is attempted with the sympathy of the multitude will not easily fail of its effects. It can thus scarcely come to pass that the government of a tyrant will endure for a long time.[29]

In Islam there are contradictory opinions about the right to rebel. As with Christianity they seem to be located in positions between obedience to authority and objection to tyranny, and the differences have been utilised to their advantage by all sides in the Arab Spring.[30] On the one hand, scholars such as Hasan al Basri and Ibn Qayyim al Jawziyya suggested that rebellion is forbidden even where the rulers are transgressors and wrongdoers. On the other hand, there are equally strong

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[24] Kim, 'The origin of political liberty in Confucianism', 393-415.

[25] Kim, 'The origin of political liberty in Confucianism', 393-415; Luke Glanville, 'Retaining the mandate of Heaven: Sovereign accountability in Ancient China' 39 *Millennium: Journal of International Studies* 2, 2010 http://journals.sagepub.com/doi/abs/10.1177/0305829810383608.

[26] Kim, 'The origin of political liberty in Confucianism: A Nietzschean interpretation', 393-415.

[27] (The Laws IV 2006, 715d).

[28] Romans 13:1-7 [The Bible].

[29] Thomas Aquinas, *De regno (On kingship)*, 2012, Create Space, I, 11, 76).

[30] M Hoffman and A Jamal, 'Religion in the Arab Spring: Between two competing narratives,' 76 *The Journal of Politics* (July 2014), 593-606.

opinions expressed by scholars such as Ibn Hazm that the oppressive rulers can be overthrown through rebellion.[31] Those who argue for the potential of rebellion rely on the hadith '[n]o obedience is due to a created one if it leads to disobedience of the Creator'.[32]

It is not surprising that those involved with establishment religions associated with state structures would place primary emphasis on obedience and legality, but those concerned with enforcing ethical behaviour would either promote disobedience, such as John Knox, or accept that disobedience is the inevitable consequence of tyranny. The general emphasis on obedience seems to be mediated by an exceptional principle of disobedience and rebellion: exceptional because rebellion may threaten established structures.[33]

These hermeneutic parameters affect more contemporary frames of analysis emerging from religious belief. Thus Gandhi derived his principle of non-violent Satyagraha from the Hindu, Buddhist and Jain *Ahimsa* as the fundamental basis for struggle against the injustice of colonialism.[34] The underlying principle was that of love for your opponent, an absence of ill will. The deliberate breaking of laws was to bear witness in order to convince your opponent. But this also involved suffering whatever punishment was meted out. Disobedience of the law, resistance, was within the law.

This principle of witness is illustrated by the self-immolation by Buddhist monks protesting against injustice in Vietnam, a practice followed by Mohamed Bouazizi in Tunisia.[35] The monk and Buddhist liberationist author Thich Nhat Hanh wrote :

> The monks said in the letters left before burning themselves that they aimed only at alarming, at moving the hearts of the oppressors, and calling the attention of the world to the suffering endured by the Vietnamese.[36]

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[31] Michael Cook, *Forbidding wrong in Islam,* Cambridge University Press, 2003, 82-3; C Imber, *Ebu'S-Suud: The Islamic legal tradition,* Edinburgh University Press, 1997.

[32] Ahmed Ibn Hanbal, (nd) *Musnad* https://archive.org/details/EnglishTranslationOfMusnadImamAhmedBinHanbalVolume1, 4/432.

[33] J Burns and M Goldie (eds) *The Cambridge history of political thought 1450-1700*, Cambridge University Press, 1994. esp. 200.

[34] Gandhi, *Non-violent resistance (Satyagraha)*; John Leubsdorf 'Gandhi's legal ethics,' 51 *Rutgers Law Review* 923 (1999).

[35] 'Tunisian protester dies of burns' *Al Jazeera English,* 5 January 2011.

[36] 'Self immolation of a Buddhist Monk' http://buddhistinformation.com/self_immolation.htm (Accessed 2 July 2020).

These principles were subsequently applied by King Jr in ways which baffled his supporters as much as Gandhi baffled his own. Thus in relation to a case in a Southern segregationist court:

> [King] agreed in the planning session that the courts would be against us, as they always had been in the South. But he would say, 'Not every judge will issue an injunction; we can't assume that.' And Fred Shuttlesworth answered him, 'Where are those converted judges? Where did niggers ever move and law was not used to beat our heads, with judges helping?' 'Well,' King would repeat, 'we can't take that for granted.' He really believed sacrifice and cheerful acceptance might lead some judges to be moral.[37]

On the other hand, Ambedkar radically interpreted the principles of Buddhism to develop a liberation theology which insisted on the need for struggle against injustice. For Ambedkar the first noble truth for the present age was widespread suffering of injustice and poverty; the second truth was social, political and cultural institutions of oppression – the collective expressions of greed, hatred and delusion; the third truth was expressed by the ideals of liberty equality and fraternity; and the fourth truth was the threefold path of Ambedkar's famous slogan – 'Educate, Agitate, Organise!'[38]

> I am myself a believer in non-violence (*Ahimsa*). But I make a distinction between non-violence (*Ahimsa*) and meekness. Meekness is weakness and weakness which is voluntarily imposed upon itself is not a virtue…. Peace obtained by surrender to forces of violence was no peace. It was an act of suicide and a sacrifice of all that was noble and necessary for maintaining a worthy human life to the forces of savagery and barbarism. 'War cannot be abolished,' 'by merely refusing to fight when attacked. To abolish war, you must win war and establish a just peace.'[39]

Ambedkar also asserted that the battle is in the fullest sense spiritiual, there is nothing material or social in it![40]

Nelson Mandela rejected oppressive laws in the name of a superior law and supported violent struggle against oppression and yet submitted himself to the very law as a witness to its injustice as a duty to his people, to the legal profession and to

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[37] Alexandra Lahav, 'Portraits of resistance: Lawyer responses to unjust proceedings' 57 *UCLA Law Review* 725 (2010), 733; Andrew Manis, *A fire you can't put out: The civil rights life of Birmingham's Fred Shuttleworth,* University of Alabama Press, 2010.

[38] Ambedkar *Indian labour and war*.

[39] Ambedkar *Indian labour and war*, 19.

[40] Dhananjay Keer, *Dr Ambedkar* Popular Prakashan, 3rd ed. 1971, 351.

justice for humankind.[41] For Jacques Derrida this involved a deep affirmation of the rule of law which required contempt for the unjust law.[42]

The contradictory assertions in religious groups are also reflected in the founders of modern international law. One part of the doctrine of sovereignty was that of obedience to the sovereign will and Hugo Grotius and other founders of international law were concerned to promote the principle of obedience to authority, but had varying attitudes to resistance to unjust rule.[43] Emmerich de Vattel would go furthest in accepting an exceptional right to resist.[44] However, it is with the Enlightenment that ideas of social contract ambivalently create the principle of obedience to authority. And it is the very ambivalence in this relationship between contract and authority which leads to the different perspectives between Thomas Hobbes, Jean-Jacques Rousseau and John Locke on the limits of authority, with Locke being the clearest in suggesting that in extreme situations there is a right of rebellion against an unjust ruler[45] – a right which rationalises the French and US revolutions. Honoré subsequently extended this principle to a right of resistance in relation to self-determination.[46]

It is therefore no surprise that in the era of constitutions attempts would be made to revise this right of rebellion against the sovereign. This statement by Christian Fritz provides the most significant indication in relation to the US:

> The constitutional logic of recognizing the people, not a king, as the sovereign implied the irrelevance of a right of revolution in America. This did not develop instantly or uniformly after the establishment of American governments. Some of the first state constitutions included 'alter or abolish' provisions that mirrored the traditional right of revolution.... Other state constitutions adopted different versions of this right to 'alter or abolish' government that did not sound like the traditional right of revolution. In these provisions, the ability of the people to revise constitutions existed regardless of the traditional preconditions for the right of revolution.... Increasingly, as Americans included it in their constitutions, the right of revolution came to be seen as a constitutional principle permitting the people as the sovereign to control government and revise their constitutions without limit. In this way, the right broke loose from its traditional moorings of resistance to oppression. The alter or

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[41] Nelson Mandela, 'Statement from the dock at the opening of the defence case in the Rivonia Trial.' Pretoria Supreme Court, 20 April 1964. ANC http://www.anc.org.za/show.php?id=3430.

[42] J Derrida, 'Admiration for Nelson Mandela' in J Derrida and M Tlili (eds) *For Nelson Mandela*, Seaver Books, 1987.

[43] Ginsburg, Lansberg-Rodriguez, Versteeg, 'When to overthrow your government', 1184.

[44] Vattel, E de *The Law of Nations or the Principles of Natural Law,* 1758 Bk 1. Ch 4 para 51.

[45] Ginsburg, Lansberg-Rodriguez, Versteeg, 'When to overthrow your government', 1184.

[46] A Honoré, 'The right to rebel,' 8 *Oxford Journal of Legal Studies* (1988) 34, 38.

> abolish provisions could now be interpreted consistent with the constitutional principle that in America, the sovereign was the people.[47]

The right to rebellion was infectious and in an interesting historical and contemporary study of the right to resist, including a specific study of 918 constitutions, Tom Ginsburg, Daniel Lansberg-Rodriguez and Milla Versteeg suggest that until the 18th Century nearly 25% of world constitutions contained 'a right to overthrow the government'.[48] After a decline since the 18th Century, today roughly 20% of the constitutions include 'a right to resist'.[49] A more controversial claim in the article is a distinction between constitutions which adopt the right to resist as a part of 'democratic' revolutions and ones which do so after a 'coup'.[50] The former are classified as forward looking and the latter as ex post facto rationalisations. This distinction is very difficult to justify as it lumps Venzuela and Cuba into the backward looking category and the US into the democratic forward looking one. Setting aside some Latin American military coups, is it possible to differentiate between the Cuban and US revolutions?

On forms of resistance

Our story so far suggests that resistance is intimately linked to the rule of law. This is precisely because the right of resistance to unjust law going as far as rebellion is frequently though not universally acknowledged in philosophical, religious and legal documents such as constitutions. Yet, there is dispute as to how far such a right may extend. Even more significant is the fact that while the illegitimacy of unjust laws might be acknowledged, at times this acknowledgement does not justify any further action. A most interesting form of such approach is the idea that the right to punishment is 'the mandate of heaven' or in God's hands.[51] One interpretation is the affirmation of the power of the sovereign or the state to oppress. Alternatively it might provide a warning to miscreant rulers and makers of unjust laws that such behaviour might unleash 'heavenly' forces (such as peasant revolts) which they might not be able to control.

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[47] Christian G Fritz, *American sovereigns: The people and America's constitutional tradition before the Civil War,* Cambridge University Press, 2008, 24-5.

[48] Ginsburg, Lansberg-Rodriguez, Versteeg, 'When to overthrow your government', 1217.

[49] Ginsburg, Lansberg-Rodriguez, Versteeg, 'When to overthrow your government', 1218.

[50] Ginsburg, Lansberg-Rodriguez, Versteeg, 'When to overthrow your government', 1184.

[51] Glanville, 'Retaining the mandate of Heaven: Sovereign accountability in Ancient China'.

Whichever interpretation one accepts, the very idea of resistance under the rule of law is clothed in a language of exceptionalism which affirms the power of the sovereign and the state. Thus what do lawyers do when confronted with unjust processes such as the cases involving King Jr in Birmingham, where it was clear that the judges would act with palpable injustice, or involving Guantanamo Bay detainees? Alexandra Lahav[52] suggests that the alternatives include proclaiming the injustice of the law through being deliberate witnesses to the law or using an exit strategy of disassociation with the court and its processes and taking the struggle to politics. Either way the strategy is a reformist strategy shifting from one form of state-based action to another. Examples of the bearing witness strategy include Gandhi deliberately making salt illegally in the British Raj but then offering himself for punishment or Rosa Parks riding on the white sections of segregated buses and getting arrested. The bearing witness strategy acknowledges the injustice of law and through mass witness calls for the development of a just law.[53]

History is replete with examples in which people claim their rights with or without the use of force. A notable 20th Century example was the way the women of Greenham Common contested the establishment of US nuclear weapons on British soil through witness as well as forms of trespass and 'criminal damage' while challenging the very processes of the courts and positive law which tried them.[54] The Russell Peoples' Tribunals established the role of alternative tribunals.[55] A tribunal decided that Tony Blair committed an offence in international law in invading Iraq.[56] Santos has been a key scholar of the need for the recognition of counter-hegemonic struggles both within and without the law in the interests of social justice – these can involve assertion of popular democracy such as the Cochabamba democratisation of utilities movement,[57] physical action such as the *Movimento dos trabalhadores sem terra* (MST) land occupation movement in Brazil,[58] and

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[52] Alexandra Lahav, 'Portraits of resistance: Lawyer responses to unjust proceedings' 57 *UCLA Law Review* (2010) 725.

[53] John Leubsdorf, 'Gandhi's legal ethics', 51 *Rutgers Law Review* (1999) 923.

[54] Rebecca Johnson, 'Alice through the fence: Greenham women and the law' in John Dewar, Abdul Paliwala, Sol Picciotto and Mathias Ruete (eds) *Nuclear weapons, the peace movement and the law*, Palgrave Macmillan, 1986, 158-177.

[55] Christine Chinkin, 'People's tribunals: Legitimate or rough justice' 24 *Windsor Yearbook Access Justice*, (2006) 201; Jayan Nayar, 'A people's tribunal against the crime of silence? - The politics of judgement and an agenda for people's law', *Law, Social Justice & Global Development (LGD)*, 2001 (2)<http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_2/nayar/>.

[56] Iraq Tribunal, *The peoples' tribunal on the Iraq War* (2016) https://www.iraqtribunal.org/.

[57] M Baer, *Stemming the tide: Human rights and water policy in a neoliberal world,* Oxford UP, 2017.

[58] George Meszaros, *Social movements, law and the politics of land reform: Lessons from Brazil* Routledge, 2015.

Zapatistas struggles in Chiapas,[59] alternative constitutionalism such as constitutional declarations of indigenous peoples such as Kari-Oca 2 as well as other forms of resistance by indigenous peoples,[60] the Occupy movement against the depradations of global finance capital[61] and the Spanish indignados.[62] In the example given by Thompson above of the Somerset village Maypole, not only was there the use of force but the use of other devices such as ridicule.[63]

The telling of histories of struggles is often corrupted by the tendency to replace popular resistance memories with those of the old or new establishments. Thus, at the end of a struggle for social justice, the law will claim responsibility for the change which occurred thus wiping out the real history of the struggle.[64] More subtly, there is a tendency to transform the memory of struggles in order to make it fit with new orthodox ideologies. It is in this respect that the subaltern history of Chauri Chaura provides us with an example of the way in which memories of popular struggles get submerged by nationalist ideologies.[65]

On 4 February 1922, peasant villagers burned down a police station at Chauri Chaura in North India resulting in the death of 23 policemen. In Indian nationalist historical discourse, this was an ugly episode which led Gandhi to suspend non-cooperation with the British. Amin, on the other hand, through anthropological and oral history research has excavated alternative and forgotten memories of the event for the people who were actually involved.[66] The issue is not the taking of sides but to point out the way in which peoples' histories get submerged in the interest of a nationalist narrative. Thus Chauri Chaura is an example of a plurality of forms of resistance and the tendency towards subordination by power of otherwise uncomfortable popular forms with more comfortable nationalist discourses.

The above discourses on resistance tend to incorporate resistance within the power of the rule of law. At one level, we can see the intimate relationship between law and resistance as an affirmation of Foucault's notion of resistance being either

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[59] Mihalis Mentinis, *Zapatistas: The Chiapas Revolt and what it means for radical politics*, Pluto, 2006.

[60] M Bargh, Resistance: An indigenous response to neo-liberalism. Huia Press 2007.

[61] S Halvorsen, 'Beyond the network? Occupy London and the global movement' *Social Movement Studies* 2012, 11: 427-433.

[62] Ernesto Castaneda, 'The Indignados of Spain: A precedent to Occupy Wall Street' *Social Movement Studies 11 (3-4)*, 2012.

[63] Edward P Thompson, *Customs in common: Studies in traditional popular culture*, The New Press, 1993, 75.

[64] C Smart, *Feminism and the power of law*, Oxford Univeristy Press, 1989; Peter Fitzpatrick, *Modernism and the grounds of law* Cambridge University Press, 2014.

[65] S Amin, *Event, metaphor, memory: Chauri Chaura, 1922-1992*. University of California Press, 1995.

[66] Amin, *Event, metaphor, memory*.

subordinated or 'inscribed' as power's 'irreducible opposite'.[67] The 'exceptional circumstances' restraint on the right of rebellion means that even when outright rebellion succeeds, it can claim itself to be in compliance with justice and the rule of law. Or alternatively, the rule of law can reclaim itself as *ex post facto* victor on the side of the rebellion. In the interesting analysis of Foucault's complex approaches to resistance, Golder and Fitzpatrick suggest:

> Power is not, as Foucault emphasized in a late discussion, 'an inescapable fatality at the heart of societies, such that it cannot be undermined'. Instead, formations of power are constitutively lacking, always in the process of ruination and being undermined and reformed by resistance.[68]

Chauri Chaura also reminds us that forms of resistance compete for authenticity and involve hierarchies of power which may undermine subaltern voices.[69] Thus the ideology of peaceful resistance may be used to submerge more violent forms. As Amin suggests:

> The critical task of the scholar and the activist is to resurrect subjugated knowledges – that is, to revive hidden or forgotten bodies of experiences and memories – and to help produce *insurrections of subjugated knowledges*. In order to be critical and to have transformative effects, genealogical investigations should aim at these *insurrections*, which are critical interventions that disrupt and interrogate epistemic hegemonies and mainstream perspectives (e.g. official histories, standard interpretations, ossified exclusionary meanings, etc). Such insurrections involve the difficult labor of mobilizing scattered, marginalized publics and of tapping into the critical potential of their dejected experiences and memories.[70]

On the other hand, as Neelan Tiruchelvam's tragic example reminds us, violence may be meted out to those who choose peaceful forms of resistance.[71] Thus if the rule of law includes resistance, then it does resolve part of my own perplexity with Thompson. But it does not and need not tell me where Thompson stood on the form of resistance. For him it must have been a matter for history!

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[67] Michel Foucault, *The history of sexuality. Vol. I. An introduction.* 1976. (Robert Hurley, trans) Vintage Books, New York, 1990, 94; J Medina, 'Toward a Foucaultian epistemology of resistance: Counter-memory, epistemic friction, and guerrilla luralism' 12 *Foucault Studies* (2011) 9-35; Golder and Fitzpatrick, *Foucault's law*.

[68] Golder and Fitzpatrick, *Foucault's law*, 76.

[69] Gayatri Chakravorty Spivak, 'Can the subaltern speak' in Cary Nelson, Lawrence Grossberg (eds) *Marxism and the interpretation of culture*, Macmillan Educational, Basingstoke, 271-313; Rosalind Morris, *Can the subaltern speak?: Reflections on the history of an idea,* Columbia University Press, 2010.

[70] Amin, *Event, metaphor, memory*.

[71] Upendra Baxi, 'Constitutional utopias II: A conversation with Neelan Tiruchelvam' *The Island Online* (2009) http://www.island.lk/2009/07/30/features4.html.

Ghai's resistance

And finally in the context of this festschrift it raises a question: Where would Ghai stand on this issue? In many respects this is a presumptuous question for me to answer. However I can offer a number of clues based on a reading of Ghai's life work. As his urging to Kenyan voters emphasises, he is a strong believer in constitutionalism,[72] vouched by his involvement in the development, reform and troubleshooting of many constitutions and crises, with the Kenyan constitution being the most emblematic of his work. But for him constitutions have not just been a matter of drafting but of *building* democracy.[73] The building of constitutionalist constitutions requires going beyond the wording to ensure that the process of creation, including enactment, is of such a nature and the post constitution actions are such that the constitution becomes embedded or imbricated in popular consciousness.

It is necessary to make a distinction between the written text that is the constitution and the practices that grow out of and sustain the constitution. Constitution-building stretches over time and involves state as well as non-state organisations. Constitution-building in this sense is almost an evolutionary process of nurturing the text and facilitating the unfolding of its logic and dynamics.[74]

There are numerous provisions in the Kenyan Constitution which attempt to ensure that Kenyans embrace the Constitution at all levels whether it is the executive, the legislature, the judiciary, political parties, media, civil society or the people. Thus constitutionalism becomes a duty for each Kenyan to respect constitutional values. It was this duty that led him as a Kenyan citizen to suggest to fellow citizens to consider constitutional values in deciding who was the best candidate for president. For Ghai

> Briefly, constitutional values and goals include national unity, respect for diversity, human rights, respect for all citizens, equality, social and economic rights, democracy and devolution, people's participation in affairs of the state, and respect for the Constitution and the law.[75]

This suggests an approach under which the rule of law is an intrinsic part of constitutional values. As a corollary, the respect for the law has to be upheld to the extent that the law reflects these values and thus to be limited by these very

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[72] Ghai, 'Before you vote for president, consider the following issues'.

[73] Yash Ghai and Guido Galli, *Constitution building processes and democratization*, IDEA, 2006, 9 https://www.idea.int/publications/catalogue/constitution-building-processes-and-democratization.

[74] Ghai and Galli, *Constitution building processes and democratization*.

[75] Ghai, 'Before you vote for president, consider the following issues'.

values. What does this imply in relation to the issue of resistance where the law does not coincide with the constitutional values? An easy answer would be based on the consideration that Ghai has a history of resistance, but this has always been pragmatic and never gone beyond what is permitted by the law.

Train in the distance: A constitution for the rest of us

Philip Knight

I learned an important lesson about patience that evening in 2001 when Yash Ghai took me out for dinner in Nairobi. As the chair of Constitution of Kenya Review Commission (CKRC) at the time, he was both widely recognised and well loved: Kenyans of every social background and distinction delighted in his presence, and he in theirs. Dinner would be a long time coming!

Ghai has an infinite interest in people, matched by deep empathy for their conditions, experience, hopes and aspirations.

Consulting the people has been foundational to every constitutional review, or constitution-building process of his history. And, he has been fearless in representing his understanding of people's values: willing, as and when necessary, to confront presidents, prime ministers, attorneys general, secretaries general and even armed generals, speaking the peoples' truths to the politicians' power.

Much of the work of constitution-making is concerned with distilling, from the diversity of the nation, the shared values whose expression will legitimise the exercise of power by the state structures established by the constitution. It is a process that seeks to build unity by aggregating the concept of the people.

Ghai sees in the diversity of a society more than simply a distillation challenge, and rejects outright the idea of unity achieved by aggregation:

> I have talked throughout about 'the people'. But we have to disaggregate the concept of the people. There is no such thing as 'the people'. There are doctors and lawyers, engineers, dentists, Christians, Muslims, Hindus, people from the northern part, people from the south, women, youth, disabled, dalits, ethnic groups, farmers, workers, and so on. Each group has its own interest, its own moral perspective and views.[1]

Recognising that the unifying function, while essential to constitution-making, would always prove insufficient in constitutional practice, Ghai views diversity as a

[1] Yash Ghai, 'People take lead: Participatory process of constitution making in Kenya' in Hari Bhattarai & Jhalak Subedi (eds), *Democratic constitution making: Experiences from Nepal, Kenya, South Africa, Sri Lanka,* 2007, 127.

mosaic to be identified, described, affirmed, celebrated, protected, preserved and empowered.

James Madison described the core challenge of constitution-making in a simple aphorism: 'You must first enable the government to control the governed, and in the next place, oblige it to control itself'.[2] Recognising that majorities would always have the power to oppress minorities, he argued for a system of limited and distributed power, kept in check by a dispersed, decentralised and disaggregated society.

Ghai's call to disaggregate 'We the people' reflects a constitutional vision that appreciated Madison's skepticism of majoritarian democracy, but sought to reinforce his doctrine of institutional and social checks and balances with constitutional provisions that would empower every constituent group, enabling each to actively pursue 'its own interest, its own moral perspective, and views'[3], a dynamic model bearing features similar to those proposed by Cass Sunstein in his idea of 'deliberative democracy'.[4]

Providing such mechanisms for the people to inform and influence constitutional application and meaning, to secure continual constitutional justice within their society, has been a strategic goal in Ghai's several constitutional proposals. In this paper, I comment briefly on two mechanisms intended to empower diverse interest groups: first, provisions designed to constrain power and enhance official accountability to the people; second, rights provisions designed to stimulate social transformation.

The challenge of limiting power and enhancing accountability

In 1775 a Massachusetts patriot, Josiah Quincy, wrote 'It is much easier to restrain liberty from running into licentiousness than power from swelling into tyranny and oppression'[5], a neat formulation that informed Madison's vision, and still summarises the framing of a great deal of political and constitutional litigation – not only in the USA. In a general sense, Quincy's note describes two continuums: one personal, concerned with liberty; the other public, concerned with power.

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[2] James Madison, *Federalist No. 51,* 1788.

[3] Ghai, 'People take lead'*,* 127.

[4] Cass R Sunstein, *Designing democracy: What constitutions do,* 2001.

[5] Quoted in Gordon Wood, *The creation of the American republic 1776 -1787,* 1998, 23.

The extremities of each are recognised as dangerous to civil harmony: the challenge is to locate the intersectional equilibrium, where the state has just sufficient power to restrain liberty's tendency toward anarchy, while simultaneously empowering the people with the means to restrain the state's tendency to oppression.

In attempting to define that constitutional 'sweet spot', particularly with respect to restraining the use of state power, recent texts have employed three types of provisions. First are principal statements, often embedded in the supremacy clause, subjecting all state actors to the constitution, imposing on them a duty to uphold the constitution, act in accordance with it, and declaring invalid any official action that is inconsistent with it.[6] Second are institutional provisions establishing independent constitutional entities, with mandates to oversee the exercise of power by political actors.[7] Third are juridical provisions empowering individuals and civil society to challenge political action, enforce rights and seek appropriate and meaningful legal remedies through the courts.[8]

The fabric woven from those provisions does much to enhance public scrutiny, and thus contribute to a continuing culture of constitutionalism. But there is a political economy at work in constitutional arrangements: these positive innovations come at some cost in efficacy and efficiency, including enabling political actors to evade decision-making by pleading deference to other entities.

In all eleven constitution-building processes in which I have been involved, incumbent office-holders, or their advocates or partisan supporters, have uniformly greeted publication of each draft with expressions of dismay or even discomfort. Some years ago, Jill Cottrell and Ghai related the details of negative executive reaction to the constitutional proposals emerging from the National Constitutional Conference in Kenya,[9] and Alicia Bannon has summarised the arguments for an executive 'veil of ignorance' with respect to certain aspects of constitutional negotiation.[10]

[6] See, for example, *The Constitution of Kenya 2010*, Articles 1 (3), 2 (2) and (4), 3 (1), 10 and Chapter Six.

[7] See, for example, *The Constitution of Kenya 2010*, Chapter Fifteen.

[8] See, for example, *The Constitution of Kenya 2010*, Articles 59(3) and 165 (3)(d).

[9] Jill Cottrell and Yash Ghai, 'Constitution making and democratization in Kenya (2000-2005)' 14 *Democratization,* (2007) 1-25.

[10] Alicia Bannon, 'Designing a constitution-drafting process: Lessons from Kenya' (2007) 116 *Yale Law Journal,* 1851.

Two things in particular seem always to awaken that executive discomfort, and there is a common thread linking those things. First, they frequently express concern over the scope of the constitution – they would like it to be shorter, more general, articulating broad principles rather than specific rules. They quickly recognise that every constitutional rule is implicitly a limit on the flexibility of the incumbent and future administrations, which will restrict the scope of office-holders to act in what they perceive to be the best interest of the nation. They would prefer to see the nation simply create strong constitutional offices, assign them mandates, and then elect good leaders to occupy those offices and exercise their powers.

Second, incumbent officer holders chafe against any suggestion that constitutional checks, balances and restraints may be necessary to limit the risk of good leaders turning into bad rulers. So they argue against placing any specific limitations on the power of the state, and in particular, the offices they hold, against burdensome requirements of transparency and accountability, and against multiple avenues for review of state action.

In some cases there has even been a tendency to personalise this issue from either of two perspectives. First, with expressions of frustration at the apparent lack of trust being shown by 'our people' in the incumbent office-holders as individuals; and second, there was an implied, sometimes explicit, criticism of the persons responsible for having given expression to the public determination to hold officials accountable and restrain their power.

I suppose it is only human nature for incumbent officers of the state to defend their personal integrity. But that seems to miss the point, which is that constitution-making is never personal: it is intended to govern the state long after the incumbents have retired from the public stage. A more nuanced calculation, even based on their own self-interest, might counsel support for the institutions and principles that advance the well-being of the society, as assessed from the perspective of an ordinary citizen, rather than from the incumbent's temporary status of high office.

Executive resistance to limitations on power, and scrutiny over its exercise are, in some measure, quite reasonable if it is rooted in appreciation of the certainty to be found in political space defined in broad, general statements of principle. But that ought not to be the exclusive value served by the constitution.

Constitutions are crafted within, and contribute to a sense of, a unique historical moment, which creates opportunities for political and social restructuring.

Inevitably, the crucible of constitution-making is shaped by competing visions, which, however firmly they stand in mutual opposition, may still all be inherently reasonable. The art of constitution-making requires striking a balance between the competing values of the nation, on one hand, and the state, on the other.

Overreach in either direction may upset the spirit of nation building. Too strong an advocacy for either value will almost certainly aggravate disharmony within the political culture, and undermine support for both the proposals and the process. Too little restraint on power invites future abuse in governance; too much restraint engenders gridlock.

Provisions designed to impose checks and balances, or to hold officials accountable, are inserted not because the public assumes that every office-holder is engaged in mischief every day, but because they know that some office-holder will engage in mischief someday.

As Sunstein suggests, prudence dictates that it is better to provide a well-designed rule to deal with that mischief before it arises, rather than design one amid the passion and confusion of a crisis:

> Democratic constitutions are … designed to solve concrete problems and to make political life work better. Such constitutions are badly misconceived if they are understood as a place to state all general truths, or to provide a full account of human rights.
>
> … democratic constitutions operate as "pre-commitment strategies," in which nations, aware of problems that are likely to arise, take steps to ensure that those problems will not arise or that they will produce minimal damage if they do.[11]

Success in advancing the interests of a diverse people through the mechanisms of restrained power and enhanced accountability and oversight requires sensitivity to the different histories that have brought the nation to the moment, the present competing values informing their respective interests, and an appreciation of the essential future interpretative uncertainty.

Constitutions project their words into an uncertain future, of uncertain duration, to be interpreted and applied within a specific factual context whose presently unforeseeable circumstances will frame our future perception of the text, focusing a particular aspect, perspective and nuance, and thus informing our conclusions about its meaning at that time. Words that seemed certain when the drafter penned them tend to acquire unclear connotations when viewed later in an

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[11] Sunstein, *Designing democracy,* 240.

unforeseen setting.

The colloquial meaning of words is constantly evolving and shifting, giving entirely new connotations to things written decades ago. Circumstances arise that were unimaginable when the constitution was adopted, requiring provisions to be applied beyond their original intent, thus extending the meaning of the original words. Social structures, values and opinions shift over time, bringing what once may have been the uncontested 'clear, plain' meaning of a provision into focus as the "ambiguous" object of emerging political contests.

William Popkin, writing about ordinary statutes, suggests:

> All rules are the result of an equilibrium of policies and imparting both thrust and limit to the rule. Uncertainty arises when the interaction of text and facts appears to unsettle the original equilibrium, suggesting that the apparent application of the text to the facts is wrong or that the failure to apply the text makes little sense. Because all rules are what their applications signify, any doubt about whether they apply to new facts is potentially unsettling and requires some rethinking of the rule's meaning in a contemporary setting.[12]

Successful protection and promotion of the diverse interests of the people, through the mechanism of limited power and enhanced scrutiny is best achieved through the use of language that reflects compromise, sufficient to secure the support of all competing interests; general principles that provide for real remedies, but leave specifics to be addressed as circumstances evolve.

The urgency of promoting transformation

Paul Simon, the American singer and poet, wrote 'everybody loves the sound of a train in the distance, everybody thinks it's true'.[13] Because of in the distance, its strong low tones washing across the landscape, a train often evokes the romance of escape from the moment, change, promise, hope and all the possibilities capable of imagination. For all the same reasons, many people love the idea of a new constitution, ripe with the implication that the past has passed, that a new order awaits on history's threshold. But up close where the constitution-making 'train', is all noise, bother, heat, chaos, tremendous force and barely controlled energy, prudence recognises the wisdom in stepping back and re-assessing the implications of the moment.

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12 William D Popkin, *Materials on legislation: Political language and the political process* (2nd ed), 1997, 361.

13 Paul Simon, *Train in the distance,* Universal Music Publishing, 1983.

Do Ghai's ordinary people, in all their diversity, those whose lives have to give meaning to the words, see themselves reflected in the text? Are they willing citizens of the state whose social compact is described in those 'universal' and 'fundamental' expressions? Or, like the widow who, on hearing her husband favourably eulogised, whispered to her son to 'go check whether it is really your Daddy up there', do the grieving wretched of the earth – or for that matter the comfortable or even the elite – find themselves hearing the words, reading the grand pronouncements, understanding the values, but still come away searching for something recognisable to themselves, and reflective of their experience and their lives?

It is one thing to craft provisions that limit and disperse state power, that provide for scrutiny and oversight, that affirm the existence of rights and empower the people to seek redress through the courts. But will any of that transform their lives? Does constitutional reform, particularly the articulation of fundamental rights, advance social transformation?

The question seems to discount any nuance in what might be either 'fundamental rights' or 'social transformation'. The answer would seem to lie in considering what exactly, we mean by the words, or as Robert Frost famously wrote, 'Before I built a wall, I'd ask to know what I was walling in and walling out, and to whom I was like to give offense.'[14]

What rights?

Which rights are we thinking of, to what degree, and for whom? Even if we narrow the meaning to those rights articulated in various agreed conventions and declarations, we have to acknowledge that the concept is a slippery one, and that words conceal as much as they reveal and deceive as easily as conceive. More likely than not, the Universal Declaration of Human Rights is a very different thing than might be found in an imagined Declaration of Universal Human Rights.

Constitutional discussion loses some of its coherence, a good deal of its cohesion, and all its potential for certainty, when it engages in ritual adoption of externally generated statements of right, surrendering the national will and sentiment in favour of a globalisation of fundamental values relating to the state, individual and group, and papering over deep social differences with rhetoric and appeal to 'universal' norms.

[14] Robert Frost, 'Mending wall' in *The Poetry of Robert Frost,* 1969.

Is the classic liberal *Bill of Rights* really apposite in every sovereign nation? Perhaps, in that each of us is human and we all share certain inherent aspirations: it is difficult to imagine a culture whose members did not each aspire to enjoy the right to life. On the other hand, perhaps not, in that we exist in profoundly different historical, economic, social and ideological cultures: we differ markedly, for example, on how far we wish to extend the right to life, or how readily, and in what circumstances, we are prepared to abridge or deny it to others.

Indeed, if Alan Dershowitz[15] is correct in asserting that all rights emerge from wrongs, then any conception of universal rights must necessarily be limited to common points of experienced injustice, relegating to local concerns and parochial politics much of the multi-hued mosaic of misery that has been drawn across the broad canvas of human history.

What social transformation?

The implicit assumption that social transformation is an absolute good does not accord with the clinical reality in the drafting of any constitution I know. Rather, the crucible of constitution-making is shaped by competing visions ranging from reactionary through conservative to reformist, radical, revolutionary, and anarchist, whose transformative goals are directed around the full 360 degrees of the possible historical, political, social and economic compasses. Their aspirations to transform the society would more often than not be found to be in mutual opposition.

To be fair, social transformation is very often discussed in the context of advocacy for improving the lot of the vulnerable and impoverished, and empowering the relatively powerless within a society – the disaggregated people Ghai identified and affirmed as the ultimate source of sovereignty. Even accepting that limitation, it is important to recognise that while change can be objectively measured, improvement is a subjective evaluation. Transformation (a long word for change) is an improvement only if the people affected by it feel that their lives are better. Their judgment in this regard might surprise their advocates, who too often use the terminology as if it had absolute significance.

So, what concerns us? Is it any social transformation; a change in the power relationships at work in the society and the objective conditions of the vulnerable; or is it an improvement in their lives – as assessed by them?

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[15] Alan Dershowitz, *Rights from wrongs: A secular theory of the origins of rights,* Basic Books, 2004, 8-9.

Will constitutional rights yield social transformation?

First we must dispense with two equally false assumptions: that change in a society is necessarily bound up with law, and that the causal relationship between legal change and social transformation works in only one direction.

Across the world, the past half-century has seen some of the fastest, most profound transformations of social structures and widespread behaviour in human history. Some of those changes have been driven by technological change, some by education, some by attitudinal shifts, some by fashion, some by culture, a very few by law and its enforcement, and more by political activism – undertaken precisely because the desired results lay outside the ambit of recognised fundamental rights or existing law. Frankly, very few of the most significant transformations of our time were driven by the *a priori* articulation of some fundamental right or enactment of law.

Even when there is a relationship between law and transformation, the legal statement of fundamental rights is seldom, if ever, the seminal point of social transformation. Francis Fukayama asserts – 'Institutions reflect the cultural values of the societies in which they are established'[16].

This is a principle Thomas Macaulay had recognised 200 years earlier –

> The main principles of our government were excellent. They were not, indeed, formally and exactly set forth in a single written instrument; but they were to be found scattered over our ancient and noble statutes; and, *what was of far greater moment, they had been engraven on the hearts of Englishmen during four hundred years.*[17]

Ideals must always exist in a mind before they are inscribed on a page. Which means they had to be imagined, even if they had never been comprehended, much less realised. For imagination is always the beginning of social transformation.

It might have been in the eyes of the mourners at Sharpeville, in the bearing of a schoolboy at Soweto, in the silent defiant stare of a farm worker, in the blossoming intellect of an exiled student. But this much is certain – the social transformation of South Africa had its beginnings long before the 1996 Constitution proclaimed the Bill of Rights to be the cornerstone of democracy.

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[16] Francis Fukuyama, *The origins of political order,* Farrar, Straus and Giroux, 2011, 14.

[17] Thomas Macaulay, *The history of England,* Penguin Classics, 1986, 290. [emphasis added]

The challenge for constitution-makers is to find words that express those existing social values and, at the same time, challenge the society to reach beyond itself, to imagine a better future. And then, will that improve lives? We can make some predictions about the way that fabric will emerge over time.

An inscribed right will prove to be meaningless, its aspirations stillborn, if it is contrary to the broadly accepted core values of the society. Law – even constitutional law – cannot transform the values of an unwilling community. On the other hand, if the inscribed rights are perfectly congruent with prevailing values they will prove redundant, having very little transformative function. You do not need a law to tell you to save your own life, and you do not need a Bill of Rights to tell you to preserve anything else you already value. At that point, most of the society will already be behaving in accord with the prevailing values and rights: the law will serve not to transform society, but to constrain social deviance.

Of course, that assumes that life is simpler than it is – that our motives are always pure and constant, shared and common. Again, that is not part of any world I inhabit. Rather, we live in a world in which our values are often in conflict with each other, and almost constantly conflict with another's.

Faced with a challenge to their security and well-being, people often show a high propensity to set aside rights and similar legal statements of 'values'. The abstracted protection of rights of a binding social contract loses some considerable transformative potency in the face of an intruder in the night. Whether or not rights arise from wrongs, as Dershowitz asserts,[18] unconditional respect for those rights can certainly disappear in the face of a putative or incipient wrong.

For most people, life is experienced somewhere inside the space framed by the poles of happy and unchallenged value resonance, where rights statements are protective and otherwise irrelevant, on one extreme, and unhappy failure to preserve well-being in the face of crisis, where right statements are hopelessly inadequate on the other. Fortunately, many of us manage that balancing act, making the adjustments to permit us to keep or transform our behaviour broadly in accord with the values and therefore with our inscribed rights. But pushed by circumstances to the margins, this luxury quickly crumbles.

When it crumbles – as is so often the case for Ghai's disaggregated vulnerable and powerless, how then do constitutional rights statements have any potential to transform social attitudes and improve lives? By establishing what Sunstein called

[18] Dershowitz, *Rights from wrongs,* 8-9.

a 'pre-commitment strategy' for resolving those conflicts as they arise, a process in which the relationship between inscribed rights and social transformation will be determined within the context of other sorts of competition including – but probably not limited to –

(a) competition between rights inter se;

(b) competition, in the face of scarcity, between multiple claimants to rights;

(c) competition between values reflected in rights, and values not so reflected; and

(d) conflict between right statements and other real or imagined legal norms.

The result of the exercise may involve compromise and creative ambiguity, but even that tentative process can empower the powerless. Whether the result improves the lives of the vulnerable is for them alone to determine. But it is always worth the struggle for, as Simon concluded – and Ghai continually demonstrates – 'the thought that life can be better is woven indelibly into our hearts and our brains'.[19]

[19] Paul Simon, *Train in the distance.*

The Ghai in our Constitution

J Osogo Ambani∞

Introduction

Professor Yash Pal Ghai did not just lead the process of writing the Constitution of Kenya; he is actually embedded in it. Our Constitution benefited not just from Ghai's long experience in negotiating peace but also his philosophy and approach to constitution-making. As a person who has taught and studied the new Constitution since its inauguration on 27 August 2010, I have often been astonished by its uniqueness. Many times I have pondered on the ingenuity of its authorship and I have become more and more convinced that most of this has its origins in Ghai; born of his own personal experiences, professional engagements and the resultant intellectual ideas.

Ghai was born and brought up in colonial Kenya. Growing up as an Asian exposed him to discrimination on the basis of race, and as part of a numerically disadvantaged population. Even upon independence in 1963, Kenyan Asians remained a racial other and minority. Pretending to act on behalf of the majority, the emergent black African elite simply took the place of the minority white race that ruled during the colonial epoch. The Asians remained subordinate.[1] Even in the greater East African region, then encompassing Kenya, Uganda and Tanzania, the experience of Asians was not just, a situation Ghai and his brother reflected on.[2] In August 1972, the world watched in awe when Uganda's President Idi Amin ordered all 'Indians' out of the country within 90 days. At a personal level, Ghai

[1] 'The problems of nation building – Race' in CJ Gertzel, Maure Goldschmidt, Don Rothchild (eds) *Government and politics in Kenya: A nation building text,* East African Publishing House, Nairobi, 1969, 21-32. These texts include Hansard debates on Asian dominance of small trading, population statistics, and reproduced news reports from the major dailies at the time of Nairobi City Council removal of 'non-African traders' from markets. Interestingly, Professor Ghai is thanked in the Preface for his comments on earlier drafts of the book.

[2] YP Ghai, DP Ghai, *Portrait of a minority: Asians in East Africa*, Oxford, Nairobi, 1971 (Swedish edition published by Prisma, Stockholm, 1971).

∞ I am thankful to my brilliant daughter (Lizzie Muthoni) for her invaluable assistance during the writing of this chapter and to my compatriot Humphrey Sipalla and mentor Jill Cottrell Ghai for making valuable comments on the original drafts of this contribution.

has narrated to me experiences of discrimination both at the University of East Africa Dar es Salaam (Dar) – where he taught and served as Dean of Law – and at the East African Community (EAC) where his nomination as Chief Legal Officer was resisted by Kenya, which preferred a black African instead. Inevitably, this background must have informed Ghai's expansive scholarship on management of diversity and inclusivity.

But it is not in Ghai to be a silent minority. He speaks truth to power, which in the 1970s caused a lot of tension between him and the emerging black African elite in the region. His book, *Public law and political change in Kenya,*[3] co-authored with the late Prof Patrick McAuslan, confirmed the suspicion that he would not be a 'partner in crime'. The book, which is the first account of the social, political and legal developments in East Africa since the colonial epoch, offered a critical approach to the subject and was not taken kindly by those then in authority. And for this Ghai suffered. His appointment as the first African Dean of the University of Nairobi's Faculty of Law was opposed by the top echelons of the Kenya African National Union (KANU) leadership. Unbeknownst to him, he had been declared persona non grata in his own country. Unwanted at home and welcomed a bit more in the neighbourhood, Ghai did not report to his post at the University of Nairobi, did not stay at Dar for longer than a year, but instead headed overseas.

Ghai eventually held positions at various universities in the US, Sweden, UK and Hong Kong and simultaneously helped many countries in transition to negotiate peace and rediscover their paths toward constitutional governance. While postings in the established universities were conducive for Ghai's already flourishing scholarship, the constitution-making engagements brought him close to societies in turmoil. Thus, Ghai's scholarship evolved practical and cogent ideas for the emancipation of societies in transition some of which are traceable in our Constitution.

This chapter is about the Ghai in our Constitution. It explores Ghai's contribution to all the stages of our constitution-making process. As I do this, I am conscious that many people were involved in Kenya's constitution-making process and in the development of the various draft constitutions. Nonetheless, I argue that Ghai's touch – his constitutional philosophy and approach, which I explain in detail below – remains the most influential.

[3] Yash Pal Ghai, JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, 1970, 2nd Edition, 2001.

The Ghai in the collection and collation process

Ghai's commitment to an all-inclusive, consultative and 'educated' views collection and collation process, as well as the protection of minority interests from the inherently majoritarian tendencies of democracy, enriched our constitution-making process greatly.

When Ghai was appointed chair of the Constitution of Kenya Review Commission (CKRC), the country was divided badly, even madly. On the one hand, under the able hand of the late Dr Oki Ooko-Ombaka, was the civil society-led review process. On the other was the State-funded and supported CKRC, which Ghai was invited to chair. To the surprise of many Kenyans, Ghai deferred his appointment, opting to reconcile the warring factions first. He only took the oath of office once there was agreement to reconstitute the CKRC to include civil society representatives. This action alone showed Ghai's commitment to an all-inclusive review process, a principle that he continued to champion throughout. It also introduced trust and confidence in the constitution-making process, which would prove worthwhile subsequently.

Although the Constitution of Kenya Review Act[4] had already been enacted by the time of Ghai's appointment, and a consultative process first broadly mandated and later elaborated in it;[5] as chair, he gave the consultative and participatory requirements a life never before witnessed. The CKRC went throughout the country collecting the views of the ordinary Kenyan, then popularly known as 'Wanjiku'.[6] For the first time, Kenyans saw for themselves a State commission not only keen on listening to their views, but also one that did not distinguish on the basis of class, gender, age, tribe, locality or political affiliation. Ghai himself took the exercise very seriously. He was seen in various parts of the country engaging with different sectors of society including marginalised groups such as women, persons with disabilities and indigenous peoples among others. Furthermore, his humility, exemplified in his preference for a simpler car, endeared him to the masses who appreciated him as one their own.

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[4] Act No 13 of 1997. The Act was later amended in 2001 to facilitate the merger of the parallel processes that was negotiated by Ghai as prerequisite to his leadership of the review process.

[5] Sections 10(b), 11(a), 12A, 13A, CKRC Act (1997). The Act, as reviewed in 2000, replaced the rigid District Consultative Forums provided for in 12A and 13A of the 1997 Act with the more open Constituency Consultative Forums, which became the locus of both civic education and collation of view from the public directly, without necessary mediation of local leaders as was the case earlier.

[6] The term itself arose out of a derisive comment made by then President DT Moi, wondering what ordinary folk like 'Wanjiku' would know about constitution-making, thus suggesting that the people's views needed not be collated. All that was necessary, in the then President's view, was a drafting by experts.

As a student of law at the University of Nairobi, I was privileged to go round the country with the CKRC as a rapporteur. I witnessed first-hand the seriousness with which the CKRC – under Ghai's leadership – took consultation, participation and civic education. We had strict instructions to ensure all views were heard; to record with sufficient detail such views; to afford translators to those who needed them and to create an enabling environment for free expression while at the same time being sensitive to the various communities/groups and their values. The voices of the marginalised were especially to be afforded due attention and taken note of. The record of these public engagements were archived and are preserved to date.[7]

Ghai wanted Kenyans to take part in the constitution-making process, but from a point of education. So he put tremendous effort in civic education programmes and at every point ensured that Wanjiku had sufficient information to understand and engage in the process meaningfully. As a Kenyan who followed the constitution-writing process keenly, I lost count of the number of updates the CKRC issued as part of its public awareness efforts. Nearly every report or draft constitution was circulated in the full and simplified versions, and there were Swahili translations for most documents. The CKRC also held many civic education forums.[8]

Although Ghai promoted an all-inclusive constitution-writing process, including public consultation, participation and civic education, he was also conscious of the potential adverse effects of these processes on minority interests. He was aware that subjecting certain minority issues (such as gender equality and Kadhi courts) to uncontrolled public debate would likely lead to them being drowned out by the majority opinion. His position on this showed practically when Ghai vigorously pursued consensus at the Bomas Constitutional Conference, without which the Draft Constitution of Kenya 2004 (Bomas Draft) would have had to go to referendum.[9] Regrettably, even after achieving consensus at Bomas, the detractors of Ghai and the Bomas Draft succeeded in thwarting the entire review process through the *Reverend Njoya case*[10] under the pretence of an attractive theory, which held that changes to

[7] *Report of the Constitution of Kenya Review Commission, Volume IV: Constituency Constitutional Forums*, consists of reports from all then existing constituencies. Each of these contains detailed information on dates or hearings, a listing of all views expressed and a list of all citizens who spoke. As noted above, the CCFs became the locus of both collation of views and civic education.

[8] As above.

[9] Jill Cottrell, Yash Pal Ghai, 'Constitution making and democratization in Kenya (2000–2005)' 14 *Democratization,* 1, 7.

[10] *Rev Dr Timothy M Njoya, Kepta Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie O Ochieng, Muchemi Gitahi, Ndung'u Wainaina v The Hon Attorney General, the Constitution of Kenya Review Commission, Kiriro Wa Ngugi, Koitamet Ole Kina*, High Court of Kenya at Nairobi, 25 March 2004.

the basic structure of the Repealed Constitution could only be effected through a referendum. Ghai's fears would soon be justified as most minority rights issues (including gender equality, women's reproductive health rights, sexual minority rights and Kadhi courts) became the bone of contention, contributing to the failure of the *Proposed Draft Constitution of Kenya* at the November 2005 referendum. These issues remained contentious during the deliberations leading to the August 2010 referendum, with the result that serious restrictions were placed on the enjoyment of certain minority rights. The strange wording of Article 26(2) and (4) of the 2010 Constitution implying that life begins at conception and that abortion can only be permitted where a trained health professional certifies that the health of the mother is in danger; and the definition of a marriage as an institution of persons of opposite sex (under Article 45) will remain constitutional testimonies to the truth of Ghai's philosophy that minority rights suffer at the hands of the majorities.

The Ghai in the drafting and approach

Ghai did not stop at the views collection stage. His touch reflects in the drafting and approach of the 2010 Constitution brightly. We can credit the friendly and accessible drafting style, the extensive detail and 'intelligence' of the 2010 Constitution to Ghai's unique philosophy and technique.

On friendly and accessible drafting style

A continuous thread runs through all the various constitutional documents from the Draft Bill of the Constitution of Kenya Review Commission of 2002 (Ghai Draft) to the 2010 Constitution – an insistence on the accessibility of the language to Wanjiku. Through Ghai's advice, the CKRC contracted renowned plain English drafts-person, Prof Phil Knight, with instructions to help draft a simple and understandable constitution for everyone, not just for those in the legal profession. Even after the collapse of the Bomas constitutional deliberations, the new drivers, the Committee of Experts (CoE), still retained Knight's services, hence the stark similarity in the drafting of the constitutional documents since the arrival of Ghai.

To rate the accessibility of the 2010 Constitution, which retains Ghai's drafting philosophy, in comparison to the Repealed Constitution, I picked three words, which in plain English drafting parlance are referred to as archaic ('therein', 'hereinafter' and 'whereas') and then proceeded to count the number of times the words appear

in each document. The result was astounding. 'Therein' appears five times in the Repealed Constitution, 'hereinafter' appears four times and 'whereas' appears once. None of them is used in the Ghai-inspired 2010 Constitution at all – a sign that special care was taken to rid the new constitution of legalese.

Ghai's preferred drafting style is also sensitive to gender biases. Unlike the Repealed Constitution, which referred to natural persons through male-centric language such as 'him' and 'his'; the 2010 Constitution adopts gender neutrality. While the word 'him' appeared 76 times in the Repealed Constitution; it is completely absent from the 2010 Constitution. Similarly, while 'his' was used 227 times in the Repealed Constitution, it appears just once in the 2010 Constitution; and only when citing a provision of the Repealed Constitution. A summary of my findings are shown in the following table.

Table 1: Use of archaic and gender-biased words in constitutional texts

Archaic and gender-biased words	Number of uses in Repealed Constitution	Number of uses in the 2010 Constitution
Therein	5	0
Hereinafter	4	0
Whereas	1	0
Him	76	0
His	227	1

The Ghai in the details

Constitutional 'typologists' usually make a distinction between written and unwritten constitutions.[11] Under written constitutions, they further speak of brief and detailed constitutions. A detailed written constitution was Ghai's 'original' prescription for Kenya. As illustrated in Table 2, the very initial proposal made by the CKRC, the Ghai Draft, contained 20 chapters, seven schedules and 299 articles. After the constitutional conference, the Bomas Draft carried 20 chapters, seven schedules and a total of 307 articles. This approach was maintained, largely, despite the rigorous debates leading to the 2010 Constitution. Thus, the final text of the 2010 Constitution lost two chapters, through mergers, ending up with 18 – it shed one schedule, ending up with six; and severed several articles settling on the final

[11] M Kiwinda Mbondenyi, J Osogo Ambani, *The new constitutional law of Kenya: Principles, government and human rights,*LawAfrica, Claripress, 2012, 11-19.

264. The Bomas Draft chapters on land and property, and on environment and natural resources were merged. Additionally, the CoE, the ultimate 'mid-wife' of the 2010 Constitution, rescinded Ghai's idea of culture as a stand-alone chapter[12] and similarly thought superfluous the inclusion of a special chapter dedicated to national values, principles and goals. Hence the 18-chapter 2010 Constitution that resulted. This is still much more detailed compared to the Repealed Constitution, which at the time of its demise, had 11 chapters, a single schedule composed mainly of forms, and 127 articles.

Table 2: Detail of constitutional documents

	Repealed Constitution	Ghai Draft 2002	Bomas Draft 2004	Constitution 2010
No of chapters	11	20	20	18
No schedules	1	7	7	6
No of articles	127	299	307	264

Ghai's insistence on detail is not out of sheer verbosity. The Ghai in the details is born out of the belief in the emancipatory power of constitutional law. Upon reflection, I have come to the conclusion that Ghai's faith in this emancipatory power of the supreme law could have arisen while at Dar. During his time there, Ujamaa was the official State and university policy. Though distinguishable from socialism and even communism, Ujamaa was often related to these ideologies during the Cold War. I see the possibility that Ghai studied Marxist thought keenly, particularly the insight that law is a tool usually at the disposal of the bourgeoisie for the exploitation of the masses and stuck with the 'lesson' that law could be used as a powerful tool; this time to turn the tide in favour of the masses. This explains the detail in the Ghai constitution – which seizes every opportunity to bring every power, delegation and question under the ambit of the law, thereby denying the representatives of the people the much coveted and abused discretion. Thus, although Ghai believes in representative democracy, he ensures that the people give their representatives sufficient constitutional instruction, leaving very little to chance. For Ghai, just as the capitalist uses law to exploit the masses, Wanjiku can wield the same law to tame those same ardent abusers of power.

[12] Jill Cottrell-Ghai guided me that Ghai himself felt that the provisions of culture in the Bomas Draft were exaggerated. This might explain why the first CoE Harmonised Draft was brief on the subject and second draft (Revised Harmonised Draft) shortened provision on culture to roughly what it is now. The Parliamentary Select Committee in Naivasha deleted the whole chapter, and the CoE reinserted it but as part of Chapter 2.

The constitutional intelligence of Ghai

The genius of Ghai is also seen in his idea of transposing a certain ICT-like 'artificial intelligence' to constitutional law. Two examples are sufficient to illustrate this statement in some depth. First, and related to the preceding discussion, is the rigour and detail with which the 2010 Constitution takes charge of the regulation of the State. Second, is the fact that Ghai's constitution learns its surroundings and adapts appropriate solutions.

When the 2010 Constitution came into force on 27 August 2010, it took complete charge. It established sufficient regulatory cover over the subject of its focus in principle and spirit and in substance and procedure. Knowing that constitutions are not operated by angels, Ghai introduced the idea of prescribing detailed provisions to put the meaning of the Constitution beyond doubt. The Ghai Constitution enunciates national values to infuse constitutional spirituality in the human agents and a code of ethics to define their character and to guide their manners. Besides articulating an overarching Article 10 on national values and principles (which Ghai would rather have had as a stand-alone chapter), all chapters regulating State administration - the chapters on Land and Environment (Chapter Five), Representation of the People (Chapter Seven), the Executive (Chapter Nine), Devolved Government (Chapter Eleven), Public Finance (Chapter Twelve), Public Service (Chapter Thirteen), and National Security (Chapter Fourteen) – start by establishing the applicable values or principles. These values and principles are augmented by the articulation of a 'code of ethics', which remains one of the most striking aspects of the 2010 Constitution. Indeed, principles of leadership and integrity in the manner of Chapter Six of the 2010 Constitution are not regular features of constitutions. The Repealed Constitution did not articulate them. Comparatively, although Chapter 14 of the Constitution of the Republic of Uganda carries the title 'Leadership Code of Conduct', it serves little purpose beyond merely requiring Parliament to enact a code of conduct, and giving certain limited directions on the content of such enactment. Similarly, the constitutions of other countries in East Africa do not contain principles of leadership and integrity. Therefore, Chapter Six of the 2010 Constitution should be appreciated as revolutionary, at least regionally.[13] Underpinning Chapter Six is the principle that State power comes in the form of a trust, which trust is to be operated as a service. This principle is built upon the foundation of the foremost concept of sovereignty of the people.

[13] It is instructive that the Constitution of Papua New Guinea, where Ghai was involved, also provides for a

The net import of the concept of peoples' sovereignty is that although only a few persons can run day-to-day State affairs, such officials must have the people in contemplation constantly. State officials attain this ideal by consulting the people frequently, functioning in an open and transparent manner, and acting in the public interest always. Clearly, the intelligence of the 2010 Constitution has reorganised power in a manner that empowers the people and makes the State subservient to them.

The 2010 Constitution's intelligence has meddled even in areas where constitutions would normally be scanty, leaving discretion to the legislators. The typical example of this is seen in Article 261(1) of the 2010 Constitution as read together with the Fifth Schedule, which identifies 49 areas requiring parliamentary legislation complete with timelines for when Parliament should act. Having further provided for a handmaiden – the Commission for the Implementation of the Constitution (CIC) – the 2010 Constitution provides as follows:[14]

261. Consequential legislation

…

(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

(6) The High Court in determining a petition under clause (5) may—

(a) make a declaratory order on the matter; and

(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.

(7) If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

(8) If Parliament has been dissolved under clause (7), the new Parliament shall enact the required legislation within the periods specified in the Fifth Schedule beginning with the date of commencement of the term of the new Parliament.

Code of Conduct (Article 302).

[14] The CIC was provided for in the Bomas Draft, 2004, under Article 299. Provisions on consequential legislation in the Bomas Draft, Article 308, are carried verbatim to the 2010 enacted version cited here.

(9) If the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh.

By enabling Kenyans to enforce the constitutional implementation programme over ten years since the 2010 Constitution was promulgated, these fairly 'innocent' provisions have proven to be intelligent. The impasse in the quest for gender parity is illustrative of this genius of Ghai and the 'artificial intelligence' of the 2010 Constitution. Article 100 of the 2010 Constitution requires Parliament to enact legislation promoting the representation of marginalised groups in Parliament including women. Due to various factors, including a culture of disregard for the rule of law and patriarchy, Parliament dilly-dallied in enacting the relevant legislation precipitating a situation whereby the stipulated five-year period lapsed before the relevant legislation was enacted. Citizens petitioned the then Chief Justice, Hon David Maraga, who in 2020 advised the President to dissolve Parliament, under the terms of Article 261 (6,b) cited above. As I write, a constitutional crisis persists in what could be interpreted as a partial triumph for the constitutionalists. It is a story of a new and intelligent Constitution in total charge, on one hand; and an old and unintelligent political culture on the other. Regardless of who wins this particular battle, Ghai's constitutional intelligence has changed the terms of the war. For good.

Regarding adaptability, Ghai's constitutional intelligence, like artificial intelligence, learns from its environment and adjusts matters for the future good. In this sense, the 2010 Constitution ought to be seen as a transitional document. It is a manifesto meant to re-engineer a society with a troubled past. Written into the constitutional document is a re-ordering of power that centres the people. The 2010 Constitution envisions a State that for the first time must serve its people. It has turned tables. It has recognised people's sovereignty. It has established a framework for equal citizenship. It has affirmed human rights and introduced mechanisms for holding leaders accountable. Its very design and architecture confirms this position. The 2010 Constitution begins with the concept of sovereignty of the people. It articulates provisions on citizenship early at Chapter Three. And the Bill of Rights follows at Chapter Four. The 2010 Constitution places principles of leadership and integrity at Chapter Six, way ahead of the Legislature and Executive chapters which appear at chapters Eight and Nine respectively. This Ghai Draft-like set up, alone, represents a major revolution aimed at elevating the status of the sovereign people. Even literally.

Additionally, the 2010 Constitution is full of remedial provisions that have obviously taken lessons from past misdeeds. For example, the robust and flexible

provisions on standing,[15] which were inspired by the Constitution of South Africa and public interest litigation jurisprudence in India, which permit a person to lodge litigation on behalf of others or even the public interest are a reaction to the situation under the Repealed Constitution where the courts would deny public-spirited persons like the late Nobel Peace laureate Prof Wangari Maathai access to defend such critical matters as the environment.[16] Courts would also delay in determining election petitions unduly and there is a history of some petitions being determined close to the succeeding general elections – at the near close of the contested candidate's term in office. Ghai's remedy in the Bomas Draft was an ambitious provision requiring the Supreme Court to determine presidential election petitions within seven days of filling[17] and, with regard to parliamentary elections and nominations, the High Court would have had to determine such matters 'within six months of the date of lodging the petition'.[18] The 2010 Constitution maintains this position with minimum changes such as to increases the time for determining presidential petitions to 14 days.

Similarly, at the height of the 2007/8 post-election violence, then President-elect, Mwai Kibaki, was sworn in at dusk at State House Nairobi, out of sight of Wanjiku. The concept of constitutional intelligence suggested itself to the CoE; hence, Article 141(1) of the 2010 Constitution is explicit that the President shall be sworn in at a public place. Again, for a long time, the Bill of Rights could not be enforced because the then Chief Justice(s) had not made rules as the Repealed Constitution required. In fact, the Chief Justice Cecil Miller himself once ruled that the litigant before him could not enjoy his rights because *he* (the Chief Justice) had not made the rules operationalising the Bill of Rights.[19] In the spirit of constitutional intelligence, the 2010 Constitution provides that the absence of such rules does not limit the right of any person to commence court proceedings to enforce their rights.[20] Evidently, Ghai's constitution learns from the users, identifies bugs and updates its software accordingly.

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[15] Article 31(2), Bomas Draft; Article 22(1), 2010 Constitution.

[16] *Maathai v Kenya Times Media Trust Ltd* [1989] eKLR.

[17] Article 159(3), Bomas Draft.

[18] Article 127(2), Bomas Draft.

[19] See, *Kamau Kuria v Attorney General* (1989) 15 Nairobi Law Monthly 33. Also, *Maina Mbacha v Attorney General* (1989) 17 Nairobi Law Monthly 38. Former Chief Justice, Dr Willy Mutunga observed as follows about this practice: "This practice was endemic under the reign of CJ Cecil Miller (1986-1989) and championed vigorously by Justice Norbury Dugdale." See, Willy Mutunga The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decision, *SPECJU 6*, Vol 1, 2015, 3.

[20] Article 22(4), 2010 Constitution.

The Ghai in the content

So far, we have established that Ghai's conception of the constitution is an intelligent document that learns its social, political and legal surroundings and responds with significant detail for the good of the masses and to the chagrin of the powerful. Any substantive chapter of the 2010 Constitution could illustrate this point satisfactorily. But, for now, let me focus only on the Bill of Rights as the case study to save on space and time. How I wish we had room to also explore Ghai's aspirational ideas on national values or his radical prognosis of the land question or even the innovatory scheme of devolution.

The Ghai in the Bill of Rights

Consistent with other parts of the 2010 Constitution, constitutional intelligence in the Bill of Rights manifests in the comprehensive coverage of rights, accurate learning of the social, cultural and political environment, which in our case includes the history of marginalisation and human rights violations of profound proportions, and remedial measures meant to check excesses of power.

Very much a replica of the Ghai Draft,[21] our Bill of Rights provides a comprehensive catalogue of human rights that includes the right(s) to: life, equality and freedom from discrimination, human dignity, freedom and security of the person, freedom from slavery, servitude and forced labour, privacy, freedom of conscience, religion, belief and opinion, freedom of expression, freedom of the media, access to information, freedom of association, assembly, demonstration, picketing and petition, political rights, freedom of movement and residence, protection of the right to property, labour relations, environment, economic and social rights, language and culture, family, consumer rights, fair administrative action, and access to justice. In addition, the Bill of Rights has elaborate protection of arrested persons, the right to a fair hearing and the rights of persons detained, held in custody or imprisoned. It also has express and specific protection of children, persons with disabilities, youth, minorities and marginalised groups and older members of society.

Ghai's approach of detail particularly manifests in the broad list of grounds upon which discrimination is prohibited. The grounds include – but are not limited to – race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Except

[21] See Chapter Five of the Ghai Draft.

for the inclusion of the ground of 'dress', which arose in the course of negotiating the Bomas Draft, the rest are as the Ghai Draft had proposed. The new menu is broad when compared to the Repealed Constitution, which only listed race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex as the protected grounds.

True to constitutional intelligence, the Bill of Rights responds to our history of marginalisation not just by recognising the rights of minorities and other vulnerable groups but also by going beyond procedural equality to re-engineer a more inclusive society. As an overarching principle, the Bill of Rights obliges the State to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Similarly, it requires the State to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Substantive equality is a salient feature of the 2010 Constitution especially through the provision for: -

a) Affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life.

b) An electoral system that complies with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender as well as fair representation of persons with disabilities.

c) Party lists comprising an appropriate number of qualified candidates and which alternates between male and female candidates in the priority in which they are listed; and except in the case of county assembly seats, each party list ought to reflect the regional and ethnic diversity of the people of Kenya.

d) Respect, by every political party, of the right of all persons to participate in the political process, including minorities and marginalised groups.

e) Respect and promotion of human rights and fundamental freedoms and gender equality and equity by every political party.

f) The membership of forty-seven women and twelve members representatives of special interests (including the youth, persons with disabilities and workers) in the National Assembly.

g) The nomination of 16 women members to Senate and two further members, being one man and one woman, representing the youth, in

addition to the nomination of two members, being one man and one woman, representing persons with disabilities.

h) The enactment of legislation to promote the representation in Parliament of women; persons with disabilities; youth; ethnic and other minorities; and marginalised communities.

i) The appointment of at least four women to the Parliamentary Service Commission.

j) The representation of both genders in the Judicial Service Commission.

k) The promotion of gender equality in judicial service.

l) A devolved system of government aimed at protecting and promoting the interests and rights of minorities and marginalised communities.

m) County governments reflecting the principle that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

n) Special seats necessary to ensure that no more than two-thirds of the membership of the respective county assembly is of the same gender.

o) The inclusion in county assemblies of a number of members of marginalised groups, persons with disabilities and the youth as prescribed by an Act of Parliament.

p) No inclusion of more than two-thirds of the members of any county assembly or county executive committee from the same gender.

q) The requirement for the enactment of legislation to prescribe mechanisms to protect minorities within counties.

r) The principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.

These and similar provisions have put Kenya in line with international human rights standards such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which, for instance, implores states to take temporary special measures (affirmative action) to accelerate the achievement of equality in practice between men and women, and actions to modify social and cultural patterns that perpetuate discrimination with the view to achieving the elimination of prejudices and customary and all other practices which are based on

the idea of the inferiority or superiority of either of the sexes or the stereotyped roles for men and women.

There is more to the details. The Bill of Rights defies the divisive tendencies of the concept of generations of human rights. In addition to the usual civil and political rights, it also carries social and economic rights like the right to the highest attainable standard of health; the right to accessible and adequate housing, and to reasonable standards of sanitation; the right to be free from hunger, and to have adequate food of acceptable quality; the right to clean and safe water in adequate quantities; the right to benefit from social security; and the right to education. The Bill of Rights also protects environmental rights in addition to other special and specific rights of children, youth, women, and the elderly, amongst others. Provision is also made for consumer rights setting the Bill of Rights apart from many others. All the generations grace the Bill of Rights collectively upholding the wisdom that human rights are interrelated, interdependent, interconnected and equal in status. This is a rare feat in municipal law, and Kenya has joined South Africa and very few others in the region in securing overall human rights cover for its people.

To restrain the State and empower Wanjiku, the Bill of Rights retains strict and pro-people provisions on emergencies and limitation of human rights just like the Ghai Draft had proposed.[22] Careful regulation of emergencies is important because such occasions can provide opportunity for wanton violations of human rights. If the Ghai and Bomas Drafts are anything to go by, the Ghai philosophy is to define and delineate instances when emergencies can be declared clearly, to make the declaration of such measures exceptional, to be invoked only where regular operations of authority are impossible, to require emergencies to last for only the duration of the national threat, to provide institutional checks to the power to declare emergencies, and to secure important rights from derogation.

Following this script, the Bill of Rights establishes sufficient safeguards for the regulation of emergencies.[23] A state of emergency may be declared only when the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration is necessary to meet the circumstances for which the emergency is declared. Such declaration only applies prospectively for no longer than 14 days. The National Assembly may extend this period but only on attaining special majorities. As an additional measure, the Supreme Court

[22] See Articles 31 and 71 of the Ghai Draft.

[23] See Article 58 of the 2010 Constitution.

has jurisdiction to decide on the validity of a declaration of a state of emergency, any extension of a declaration of a state of emergency and any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency. A further safeguard is that a declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration may not permit or authorise the indemnification of the State, or of any person, in respect of any unlawful act or omission. Although the declaration of a state of emergency may justify the limitation of human rights, this is only to the extent that the limitation is strictly required by the emergency and the legislation under which the limitation is hinged is consistent with the Republic's obligations under international law. Even then, limitation of rights can only take effect after publication in the Gazette.

The rights enshrined in the 2010 Constitution may be derogated from with the exception of the right to freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*.[24] This exclusion of certain rights from derogation, aside from being a unique landmark in Kenya's constitutional history, is also controversial. Generally speaking, the idea of derogation from human rights during emergencies is not inconsistent with international human rights law. Under the framework of the International Covenant on Civil and Political Rights (ICCPR),[25] derogations are allowed but States are also required to inform the UN Secretary-General of the provisions from which they have derogated and the reasons for their derogation immediately. A similar communication must be made when the derogation ends.[26] By the ICCPR standards, the rights saved from exclusion under our Bill of Rights are few and in-exhaustive. The right to life;[27] the right not to be subjected to retroactive penal laws and the right to freedom of conscience and religion are not exempted from derogation as required by the ICCPR.[28] Further, the derogation provisions of the Bill of Rights are inconsistent with the African Charter, which does not allow state parties to derogate from their treaty obligations

[24] Article 25, Constitution of Kenya 2010.

[25] Kenya acceded to the ICCPRon 1 May 1972.

[26] F Viljoen *International human rights law in Africa* (2007) 251. Article 4(3), Constitution of Kenya 2010.

[27] Judge Emukule in *Republic v John Kimita Mwaniki* [2011] eKLR, was stunned that: 'Strangely also, life is not one of those fundamental rights which may not be limited under section 25 of the Constitution'.

[28] Under Article 4(2) of the ICCPR the right to life; the prohibition on torture, slavery, forced labour, application of retroactive penal laws and the right to freedom of conscience and religion may under no circumstances be derogated from.

during emergency situations.[29] These shortfalls aside, the reservation of certain rights from derogation, however few, should be lauded first and then built on.

Also praiseworthy is the pro-rights system of limitation of rights established under Article 24 of the 2010 Constitution. I say this because the Repealed Constitution was often criticised for overemphasising the limitations of human rights more than the entitlements themselves. Human rights would be limited in two major ways: by way of internal limitations assigned to particular rights; and through a general limitation clause which stated that human rights could be limited for the sake of greater interests of public health, security and morality. These provisions were often deployed to defeat the realisation of human rights. Faithful to constitutional intelligence, Article 24 learns and corrects that anomaly. With the exception of three human rights – the right to property, the right to freedom of the media and the right to freedom of expression – the new Bill of Rights does not use internal limitations or 'claw back clauses'.

This leaves the limitation of all human rights to be operated by one general clause akin to Article 36 of the Constitution of South Africa – Article 24 – of which six important things can be said.[30] First, it acknowledges limitation of rights only by way of law.[31] This is positive because it illegalises limitations by executive or military decrees or other extra-juridical devices. Second, and relatedly, Article 24 outlaws limitations by inference or implication. Legislation limiting the Bill of Rights must expressly state the intention to limit a particular right or fundamental freedom as well as the nature and extent of the limitation in question. Third, a limitation has to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account: the nature of the right or fundamental freedom; the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.[32] Fourth, at the very least, no limitation should go so far as to derogate from the core or essential content of the right in question.[33] Fifth, the burden of demonstrating, before courts, tribunals

[29] Communication 74/92, *Commission nationale des droits de l'Homme et des Libertés v Chad,* para 21.

[30] Article 24, Constitution of Kenya 2010.

[31] Article 24(1), Constitution of Kenya 2010.

[32] Article 24(1), Constitution of Kenya 2010.

[33] Article 24(2)(c), Constitution of Kenya 2010.

and other authorities, that a limitation meets the above requirements is vested with the State or person(s) justifying the limitation[34] and not the individual(s) or group(s) entitled to a particular right. Finally, perhaps in appreciation of the fact that certain globally acclaimed human rights may not always be palatable to all sections of society, Article 24 concedes that the provisions on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.[35] This qualification may be justified because, as cultural relativists argue, global human rights standards which greatly influenced the new Bill of Rights often fail to take into consideration that each region has its own unique realities or priorities. Consequently, 'regional specificities often are the casualties in processes of universal consensus-seeking'.[36] Such concessions should be understood as an effort toward practical cultural equilibrium.

Conclusion

As our foremost constitutional law scholar, Ghai has played his part fully. He brought his immense experience to bear during our constitutional moment. Ghai lent his intellect and credibility to the creation of a good and legitimate Constitution. He ensured we had an all-inclusive, consultative and educated constitution-making process protective of the minorities. He inspired the drafting of a friendly and accessible document and gave it sufficient detail and intelligence not merely for the ordinary regulation of the State, but most importantly for the ample cover of Wanjiku and to tame the leviathan for her. For these we shall forever be grateful. But the powerful are fighting back. Hard. Yet we shall not fear because the intelligent Constitution knew about them and gave us enough avenues to resist them this time. All we will need is eternal vigilance!

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[34] Article 24(3), Constitution of Kenya 2010.

[35] Article 24(5), Constitution of Kenya 2010.

[36] Viljoen, *International human rights law in Africa,* 2nd Edition, 2012, 392.

Part Two
Ghai and/in Africa

An intellectual journey with my teachers*

Issa G Shivji

I

Professor Yash Pal Ghai was my teacher. He took some classes, I believe in Constitutional Law and Legal Systems of East Africa, in my first year at the University College, Dar es Salaam, which was then one of the three constituent colleges of the University of East Africa. Writing an essay in honour of your teacher is humbling. I come from a tradition in which teachers command great respect. In the hierarchy of status and obeisance, teachers are next to parents who are next to God. I thus take this opportunity to honour all my teachers, some of whose memory I recall in this essay.

I did not want this essay to be autobiographical (unavoidably it has turned out to be semi-autobiographical) for the same reason that a 19-year old young man gave when asked to write an essay on 'My personal background and aims'.

> I always wondered, while reading autobiographies, how could people write about themselves without embarrassment and as if to give me a practical experience, Fate has put me, too, in the same awkward position of writing about my personal background and still worse to write about my aims. All the same, I hope I shall be able to stick to the facts without falling victim to that frailty of human-race, egotism.[1]

That young man was yours truly writing his first essay in General Paper in Form V, Science, on 19 January 1965. Now, as then, I entertain the same hope.

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[1] Issa G Shivji, 'Essays: Form V-Sc.' (1965) Notebook in author's possession.

* I am grateful to Parin, Natasha and Amil, all of Shivji clan, for their insightful observations and useful comments.

II

I was born in a colonial, racially segregated, sectarian society. The Aga Khan Primary School in Kilosa was my first school in the fifties. Primary school then was for eight years. Now it is seven. The school was almost exclusively for Ismailis, a Muslim sect who consider the Aga Khan as their spiritual leader. Teachers were a mixed lot of Ismailis and a few non-Ismailis, all Asian Muslims. One of my teachers, who left a lasting impression on me, was Mr UA Bhorania, my class teacher in grade eight and also the headmaster. A short man with a baldhead, he was wholly dedicated to his pupils. He organised extra-curricular activities such as debates and drama. I specifically remember one activity. In my last year, 1960 (a year before independence), Bhorania organised a 'parliament'. At its first meeting the motion was 'Kilosa needs good roads'. Bhorania trained us. I was elected the Speaker. After the speeches, the Speaker declared that the House seemed to be divided so he put the motion to vote. The motion won, Kilosa indeed needed good roads. (It still does!) Reading the Speaker's winding up speech fifty-five years later, I was struck by the following paragraph – so refreshing, yet so distressing.

> Last but not the least in importance is the [sic!] education. People can give education to their children only up to Standard VIII. As a result most parents cannot afford to continue the study of their children further. Some who send their children to other places, have to be at the mercy of other schools because they find it difficult to get admission. Even if they get admission they have to arrange for their boarding and lodging. That means a great expense for them. Thus a good school is an urgent necessity for the Kilosians which is your duty to arrange at the earliest.[2]

I find this refreshing obviously because of its accent on education, which to this day we have not been able to provide to all our children. Distressing because it made me wonder what the 14-year old meant by 'people'. Which people was he referring to? It could only be *his* people, Ismailis. Non-Ismaili Asians would be people, but their concern was the business of their own communities. Beyond Asians there were no people – there were only 'natives'. Even 'natives' were not homogenous. They were divided into 'tribes'. 'Divide and rule' was colonialism's notorious stratagem. When asked what influenced him in his choice of career, Nyerere, our great nationalist leader, replied:

> I had intended to be a doctor but then in one of my sudden decisions I said to myself: 'No, I am not going to be a doctor, I am going to be a teacher.' Had I become a doctor it would

[2] Issa G Shivji, 'Typescript of speaker's speech' (1960), in author's possession.

> have been for the same reason: to help our people. At that time, quite frankly, I think in my mind the idea of 'my people' was very limited. To be honest, I was talking about my little tribe. The vision became wider and, after Europe, one's attitudes began to change.[3]

We were all trapped in the colonial container, where the imperialist rulers divided us into races, communities, tribes, religions, and sects and their intellectual handmaidens defined our identities.[4] Only Europeans had universal national identities; the rest had only parochial 'cultural' existence. And all of us were inferior beings, inferior to whites, albeit even in our inferiority we were graded and hierarchically organised. Bear with me for one more illustration.

The person to judge the best 'parliamentarian' was one 'Mr Dundee'; no, not a European. He was an Ismaili. We all called him 'Dundee' because the petrol station he owned was called Dundee. Apparently, before coming to Kilosa he lived in Dundee, Scotland. What is it that qualified him to be our judge? First, because he spoke good English. Second, because he was married to a woman from a rich family owning a sisal estate nearby and who also happened to be the top leader of the Ismaili community. Third, because 'the Dundees' were the only couple that socialised with whites – Greek plantation owners and colonial administrators. It was the only Asian couple whom you would see wining and dining with whites in the only big hotel in Kilosa, the Parthenon. It was also the only Asian couple that played tennis with whites; tennis courts were located on a hill where whites lived and where the colonial administrative apparatus (*boma* as it was known) was situated. 'Natives', except domestic servants and the accused attending courts, were barred from the European area. This was colonial society *tout court*. Lest I am carried away, let me return to my teacher Bhorania.

One fine hot noon, the school was attacked by a swarm of bees. We were on the playing grounds. Bhorania supervised immediate evacuation. He would not leave his 'ship' until the last kid had safely reached home. In the process, his baldhead was bitten severely by the bees. He was bed ridden for a whole week. Bhorania's exemplar remains etched in my memory to this day.

Bhorania taught us typically flowery English, preferred by Indians. In our last year, he tutored us in writing essays on topics which we could possibly be asked to

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[3] Julius K Nyerere, 'The private and public Nyerere: Special interview with Peter Enahoro' *Africa Now* (1983), 97-125.

[4] See generally Mahmood Mamdani, *Define and rule: Native as political identity*, Harvard University Press, Cambridge, 2012.

write on as part of our entrance test to a secondary school, which, for me, would of course be the Aga Khan Boys School in Dar es Salaam. Today I am amused and slightly embarrassed at the style of the language in those essays, but also pleased with how young minds grappled with 'big' ideas. One of the topics typically was 'Why I want to join the New School'. After singing the praises of the school and the city, Dar es Salaam, in which it was situated, all in hyperbole, the 300-word essay written on double-spaced foolscap paper in graphic italicised font ends thus: 'Dull would he be of soul, who would not like to live in such an enchanting city and gather up the invaluable pearls of knowledge from such a sea of knowledge and adorn his career.'[5]

III

For a small town boy the school in Dar es Salaam was another planet. Seniors, who had preceded us to the Dar es Salaam school, boastfully painted it in extravagant terms. 'You know what, Issamamad' as I was called then, 'people like you who rank first in Kilosa, don't stand a chance in Dar es Salaam. Teachers are *dhorias* [whites].' *Dhorias* were colonial gods. Every year on Queen's coronation, we were marched to the football pitch where we sang: 'God Save the Queen'. It still hums in my ears.

I had the taste of a *dhorio* on the very first day of my entry to the secondary school in Dar es Salaam. Mr Maundrill administered the English test. I cannot remember the exact topic but I think it was the one expected. I recall I did not write in the flowery language that Bhorania had so painstakingly taught me. I wrote my essay in plain English. After an hour of anxious wait, Maundrill appeared at the door with a bundle of papers clenched mercilessly in his tobacco-stained hand. He leaned on the door, as was his wont, with his pipe hanging out of the torn pocket of his khaki shorts. Frequently the pipe would fall down and as frequently he would return it to the same torn pocket. 'Issamohamed Gulamhussein Esmail Shivji', he muttered under his teeth. I stood up with my little legs wobbling - would they be able to carry me? He looked at me and without a glimmer of smile said: 'You go to Standard[6] IXA; rest to IXC'. Streams were graded in terms of merit. Streams A and B had clever boys with a science bias. The value system then was that only dull students went into Arts taking such subjects as 'drawing', history and Kiswahili, yes,

[5] Handwritten in author's possession (1960).

[6] The nomenclature at the time was 'standard'. It was later changed to 'form'.

Kiswahili. There was one exception. English literature was taught in upper streams; I am not sure if it was also taught in lower streams.

I spent the next six years at the Aga Khan Boys Secondary School, four of secondary and two of high school. This was from 1961 to 1966. The student population was still predominantly Asian, majority being Ismailis. The school had opened its doors to non-Ismailis and it began to get a steady stream of Africans just as the country was approaching independence. In my stream, we had only one African student in a class of 46 though there were many more Africans in other classes. Among the staff, many were Indian expatriates; there was a significant number of Tanzanian Asians and a small number of whites, among whom was the erstwhile Maundrill. I particularly remember Mrs AM Silverstand, who was my class teacher in Form II. I remember her more particularly for introducing us to Charles Dickens. She would read out aloud from abbreviated versions of Dicken's novels, like a mother who reads aloud bedtime stories to her child, minus the mother's love and warmth, of course. Not many of my classmates enjoyed it. I did. It led me to read the full version of *The Pickwick papers*,[7] a tome of over 500 pages.[8]

When I entered the Aga Khan Boys School, the headmaster was one Mr RH Swift. We did not know much about him except that in one of his previous incarnations he was a sailor. He did look like one: unsmiling, fierce looking, with a short hefty body and sun-tanned coarse face. We only saw him at the morning assembly. He would walk to the centre of the platform as soon as the prayers were over to perform his two 'statutory' functions. One of which was to make stern, cryptic announcements to do with this or that administrative or disciplinary matter. The second was to administer lashing to miscreants who had been reported to him by class teachers the previous day. There is one incident involving Swift which has sharply, albeit unpleasantly, remained in my memory. Kabani was my fellow pupil in Form II. He was short, quiet, neatly dressed, least talkative but most thoughtful. He never participated in mischief and fun that the rest of us indulged in. One day Maundrill called him out of class. After an hour or so he returned, with a very sombre face but as dignified as ever. Even when prompted he would not tell us what had gone on except that he had been called by Swift. That smelled fishy. Eventually, the story came to light. Kabani had written an essay for Maundrill in which he had severely bashed colonial white soldiers in Zanzibar who went round the streets

[7] Charles Dickens, *The Pickwick papers,* Oxford University Press, London, 1969.

[8] Dickensian writing has its paradox. Just as it exposed social evils of his age, so it partook of its racial prejudices.

harassing and beating up 'natives', not even sparing women and children. Maundrill gave him a 'zero' and reported him to the headmaster. In the headmaster's office, Swift administered three lashes on his bums. Since then Kabani never wrote again an essay for Maundrill.

Kabani was an exceptional student. His classmates never understood him and often made fun of him, which he contemptuously ignored. I was a bit friendly towards him. He introduced me to Thomas Paine's *Rights of man*,[9] which I ploughed through and abandoned half way because I could not understand the book. The story making rounds in the class was that Kabani read widely but was eccentric. He would carry armful of reference books as he engaged in arguments on religion with priests, quoting from his authorities, we were told; right or wrong I cannot tell. The Kabani-Maundrill incident happened only two years after independence. Colonial mentality and white supremacy were still rife. Nyerere had to deport several whites who either barred blacks from their hotels and restaurants or openly insulted the new black Government. Many colonial officials believed that the only way to teach the 'native' and keep him in his place was by use of the lash.[10] And so was Kabani reminded of his status. Like Pip was told by her disciplinarian sister Mrs Gargery in Dickens' *Great expectations*:[11] 'Ask no questions, and you'll be told no lies',[12] the colonial headmaster was telling Kabani: Do not question our lies, for you will be told no truth!

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As the nationalist period grew, we had more enlightened white teachers. We also had Indian expatriates, who did not indulge in any 'politics' but were very dedicated to their job and taught us well, maybe a bit too rigorously for our young minds. Mr MA Khan, teaching Physics, Mr Kabir and Mr Patwekar teaching Maths, Mr 'Baby' John and Mr S Fernandes teaching Chemistry and several others; all have left fond memories. In Form IV, Mr Benerjee, most probably from Bengal, the land of Rabindranath Tagore, taught us literature. We read Dickens' ever-fascinating novel

[9] Thomas Paine, *Rights of man*, Penguin Books, New York, 1984.

[10] One senior official complained about 'Europeans who have no knowledge or experience of natives and cannot keep their temper under control; their one idea of administration being in showing their importance, in frequent use of the lash, and teaching the native that he is an inferior being.' Quoted by Julian Marcus paying tribute to Trevor Jaggar at 90. Jaggar was a former colonial official. *BTS (Britain-Tanzania Society) Newsletter,* January 2016, 8.

[11] Charles Dickens, *Great expectations*, Estes and Lauriat, Boston, 1881.

[12] Dickens, *Great expectations*, 32.

through ages, and Gerald Durrell's *My family and other animals*,[13] the title of which has never ceased to amuse me. Being science students, not many of my colleagues were interested in literature but I loved it. I would find myself dreamily floating in Dickens' beautiful prose as Mr Benerjee passionately read out passages from *Great expectations*. I remember one incident, in particular. Once he asked the class to name their favourite character. They all had their favourites, from Pip and Esta to Lady Havisham, but none, of course, the convict Abel Magwitch. When my turn came I had no hesitation: my favourite character was Joe Gargery. Mr Benerjee's eyes glistened. Joe's child-like innocence, his altruistic kindness and fathomless sincerity, his noble ideals expressed in hugely human and humane language – I loved it. If only the world had more Joe Gargerys, I said. Mr Benerjee could not stop nodding. We struck a deep chord. I did not realise it then. Two years later, Mr Benerjee, who was then acting as headmaster wanted to see me. He came to the class himself instead of sending a messenger. You could smell the sweet scent of his snuff from metres away. 'Shuuu', the sound went down the gangway: the headmaster was coming. From the doorway, in his soft polished tone, he asked. 'May I please see that distinguished gentleman, Mr Shivji?' How flattered was the young lad!

I never understood then, nor now, why Mr Benerjee was not confirmed in the post of headmaster. Instead we were brought another white man, one Mr JE Greenshaw. An English gentleman, no doubt enlightened by the standards of colonial whites, but still, in the management's wisdom, they needed an Englishman to lead the school.

Mr Greenshaw taught me General Paper in Form V (1965) when we still did Cambridge High School Certificate or HSC. He was a liberal of sorts. We were required to write essays on set topics within the 45-minute session. As I read these essays today, four decades later, with Mr Greenshaw's comments and grading, I marvel at how things have changed and yet remained the same. My first essay on 'My personal background and aims' is full of idealism privileging Gandhinian values of honesty, truth, selflessness and self-abnegation. Most probably I was under Gandhinian influence then having just finished reading his *The story of my experiments with Truth*.[14] Somewhat naïve idealism of the untutored conscience mixed with untainted honesty of a young person comes out in the following two (unedited) passages, one on 'personal background', and another on 'aims'.

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[13] G Durrell, *My family and other animals*, Penguin Books, New York, 1956.

[14] Mohandas K Gandhi, *Autobiography: The story of my experiments with Truth*, Beacon Press, Boston, 1957.

> I am happy to say that I was not born with a golden spoon in my mouth. My parents have always had to face and overcome grim difficulties to make both ends meet. Luxury has been a distant thing to my family. How would have my life changed if luxury would have been within my reach, is left to speculation. One thing, however, I can say for certain: by rolling in the lap of luxury I should have 'rolled out' the years of my life without learning what life has to teach.

And on aims:

> As regards my aims, they are neither very impressive nor convincing. With the world torn up with dissensions and petty quarrels and with the black cloud of World War III looming over mankind, every one, sincerely or insincerely, wrestles with one's mind to find the cause of these problems. I sincerely believe that the faults lie with man himself. So long as he is enslaved by the trio of vices i.e. dishonesty, selfishness and untruthfulness, he will continue groping in darkness. In view of this and having had opportunities to appreciate the evils of the world, by being born in a poor family, it is my sincere aim to breed within myself and in others these lofty qualities of honesty, truthfulness and self-abnegation. By this aim, I am neither trying nor do I wish to convince a practicalist, [sic!] but I am trying to appeal to that mind, which would stand by its ideals even if it means personal sacrifice.[15]

Today, perhaps, I would still stand by the sentiments expressed in the first passage though I am not sure if I subscribe to the preaching in the second which comes close to 'moral rearmament' under whose spell I was soon to fall. Fortunately, I fell out of it very early at the University once we, the students of the left, learnt of the politically reactionary aims and role of moral rearmament. More interesting, though, were Mr Greenshaw's comments.

> I accept your aims and ideals as genuine. I hope you continue to keep them – the world is in sad need of men and women who are prepared to work *realistically* to bring about a better state of affairs. Have you thought of teaching as a career?

'Realistically' was underlined in the original and that is where the jab really lay. I did become a teacher, not in a school but at the University. I did not know then what Mr Greenshaw meant by 'realistically', but since then in my life, again and again, I have come across arguments that simply brush aside ideals as 'unrealistic'. Whatever Greenshaw meant, but he did subsequently welcome our, perhaps, more 'realistic' proposition to form a representative body in school called the Pupils Own Council (POC). I drafted the constitution taking the United Nations Charter as my model. As Mr Greenshaw finished reading it, while we stood around his table

[15] Issa G Shivji, 'Essays', in author's possession.

waiting anxiously, he raised his eyes and rhetorically asked: 'Is your father a lawyer?' I kept quiet. My father was nowhere close to it. He was a small *dukawalla*, barely literate in Gujarati, but with bountiful of wit and humour. Material success evaded him; pride and dignity never abandoned him.

POC *was* established. This was the period of nation building. POC, like many other youth organisations, participated in nation-building projects such as building schools. Once, as the President of POC, I wrote to *The Standard*,[16] thanking the youth (Ismaili youth 'naturally'!), for participating in the Tanzania Parents Association (TAPA) School Building Project in Buguruni. The letter also thanks the headmaster Mr Greenshaw 'without whose whole-hearted co-operation and inspiring enthusiasm we could have done very little.'[17] To be sure, this was no exaggeration. Yet not all teachers were as enthusiastic because they believed, rightly, that my POC activities affected my performance in class. My grades fell. My teachers, in science and maths said it that much, albeit politely. Commenting on my 2nd term results, Mr Patwekar, who was teaching Applied Mathematics in which I had scored a 'D' remarked: 'Found the habit of independent thinking in him which will pay a good dividend in future. However he should not neglect his studies. Only student who could maintain his progress in studies in spite of his multifarious activities.' On my Annual Report, the comment read: 'A bright student tending to be a mediocre if he continues to overtax himself with extra-c activities.' Mr Greenshaw's enthusiasm and support and Mr Patwekar's concern were all expressions of their dedication to their students, which left in me a lasting impression and great respect for teachers. To this day, whenever Mr Fernandes, my former teacher, who lives in the neighbourhood, pays me a visit, I instinctively stand up to greet him with a 'sir' though I never liked when my university students addressed me as 'sir'. I respectfully, perhaps not as attentively, listen to Mr Fernandes although I disagree with him vehemently. If he had found me inattentive years ago when he was administering a 'Quick Test' in Maths, he would have most probably flicked a piece of chalk in my direction.

In the subsequent year, when the presidency had been taken over by another student, the Government banned POC. In October 1966, university students led by the National Union of Tanzania Students (NAUTS) demonstrated in protest against national service. National service required all graduates of higher education to spend five months in camps undergoing military training and 18 months in service during which they would be paid only 40% of their salary. Students' main concern

[16] *The Standard* was an English daily then owned by 'Tiny' Rowland's LONRHO.

[17] Issa G Shivji, 'Tapa school', letter to *The Standard*, date misplaced but in 1965.

was that they were being made sacrificial lamb while politicians were enjoying the fruits of independence. Nyerere was furious. He dismissed the whole lot, almost 400 of them, and banned their organisations including those that were affiliated to NAUTS. POC was one of the affiliates. In an extemporaneous speech that has gone down in history as one of his finest, Nyerere thundered:

> You're right when you talk about salaries. Our salaries are too high. You want me to cut them? (some applause) … Do you want me to start with my salary? Yes, I'll slash mine (cries of 'No'.) I'll slash the damned salaries in this country. Mine I slash by 20% as from this hour …
>
> The damned salaries! These are the salaries which build this kind of attitude in the educated people, all of them. Me and you. We belong to a class of exploiters. I belong to your class. Where I think three hundred and eighty pounds a year [the minimum wage that would be paid in the national service] is a prison camp, is forced labour. We belong to this damned exploiting class on top. Is this what the country fought for? Is this what we worked for? In order to maintain a class of exploiters on top? …
>
> You are right, salaries are too high. Everybody in this country is demanding a pound of flesh. Everybody except the poor peasant. How can he demand it? He doesn't know the language. … What kind of country are we building?[18]

The student demonstration was a turning point. The stage was set. Only four months later the ruling party, Tanganyika African National Union (TANU) adopted and announced the Arusha Declaration, Nyerere's blueprint to build socialism or Ujamaa. I joined the University in the Faculty of Law, perhaps the first science student to do law, in July 1967 and never left it until I finally retired 46 years later.

IV

We were the first post-Arusha generation at the University. The University College was established in July 1961, only five months before Independence, with a batch of 13 law students. The first teacher to walk into the lecture room to deliver a lecture was William Twining, son of Tanganyika's last but one Governor. He never taught me nor was he there when I joined the University but he is fondly remembered and therefore I came across his name long before I met him. He was my teacher only to the extent that he externally examined me in one subject.

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[18] Quoted in A Coulson, *Tanzania: A political economy*, 2 ed, Oxford University Press, Cambridge, 2013, 221.

The pre-Arusha University and the Faculty were run more or less on Oxbridge lines. Nonetheless, a University in a country with a fervently nationalist leader with intellectual credentials attracted many young expatriates, mainly British but also Americans, fresh from graduate schools. Among them were my teachers, some of whom I will have occasion to mention in the course of this essay. Ghai, a Kenyan, spent some eight years (1963-1971) at the University rising very fast from the position of a lecturer to Professor and Dean. He was the first East African Dean of the Faculty. The first Dean was Mr AB Weston, an Australian liberal of an unconventional kind. He was sympathetic to Nyerere's national project as was the Principal of the College then Cranford Pratt. Weston never taught me. The only time I remember him taking our class was when one of the lecturers was absent. He did not lecture; instead we were entertained to a series of anecdotes, legal and non-legal.

We also had some young East Africans on the Faculty. Besides Ghai from Kenya, there was Lal Patel who taught me Labour Law. It is not so much his teaching as the material he gave the class that developed my interest in Labour Law. Abraham Kiapi, a Ugandan, taught me Administrative Law. His teaching was rather turgid concentrating on civil service regulations. I cannot remember if he taught us one of the most fascinating topics in Administrative Law, Judicial Review. I developed interest in judicial review much later, in legal-aid practice, when we innovatively used the process of judicial review to get remedies in labour cases. Many years later when I taught Administrative Law, I approached Judicial Review, together with, of course, Constitutional Law, with a Public Law perspective. I even argued that both Labour and Land Laws ought to be approached as part of Public Law rather than from the standpoint of Private Law, as contract and property law respectively. Mr A Sawyerr, a Ghanaian who later became a great friend, taught me Negotiating Instruments, one of the five components of Commercial Law. For anyone interested in the workings of financial capitalism, Negotiating Instruments is a fascinating subject. It was made even more fascinating by a brilliant introduction written by Mr S Picciotto to the materials used by Sawyerr. Sawyerr handled the subject well; it was difficult but interesting. At the time, we, radical students, were indifferent to Sawyerr, mainly because for a while he headed the International Legal Centre, a Ford Foundation-funded outfit which radical students identified with imperialism.

There were also some young Tanzanians who had freshly joined the Faculty. Firoz Kassam taught Family Law which I did not take; instead I took Labour Law, which was preferred by very few students. But Kassam gave some lectures in

Evidence. I remember to have got into an argument with him on some issue in which we differed. Following the class, I did my research and using *Sarkar on Evidence*[19] as my authority, tried to show that he was wrong. He listened to me gracefully, nodded his head, and as gracefully continued lecturing. It was not unusual for the post-Arusha student generation, particularly left students, to question their lecturers. Professor UO Umozurike, a Nigerian, taught us International Law. He had studied international law 'at the feet' of the famous Professor Georg Schwarzenberger, a right wing radical with little sympathy for developing countries. I recall a heated argument we had with Umozurike on the international law rules on 'prompt, adequate and effective compensation' payable to an investor on nationalisation. Umozurike strongly defended the formula on the grounds that 'we' too stand to benefit from it should 'our' property, say, in the UK, were to be nationalised. We scoffed at the argument and asked the good professor to give us the extent of Nigerian investments in the UK which could be threatened with nationalisation! After leaving Dar, Umozurike became a famous international lawyer defending African interests. One would like to think that Dar students rubbed off some of their radicalism on him as they did on other expatriate lecturers, including a few Nigerians.

Mr Josephat Kanywanyi, a Tanzanian, who had just come back with an LL.M. from Berkeley, taught me Insurance. Joe was more a comrade than a teacher. Part of the examination in Insurance was a course work paper carrying, if I recall correctly, less than ten marks. I wrote a paper, some 50 foolscap papers. The paper was subsequently published in the *Eastern Africa Law Review*.[20] The word must have gone round among the staff. I remember once Ghai asking me rhetorically: Do you always write long papers? The way he said it, it was meant to be a complement. That happened as Ghai was coming down the library staircase during lunch hour, carrying volumes of books in both his arms. His feet were typically clad in *kanda-mbili* (flip-flops). That image of Ghai is permanently etched in my memory as an example of a prodigious, yet humble scholar wholly committed to research and writing.

While memories last, I should perhaps record another pleasant encounter with Yash while I was still a student. I believe I was in my second year when Yash asked me if I could help him to check the footnotes of his co-authored book *Public law*

[19] SC Sarkar, MC Sarkar, PC Sarkar and S Sarkar, *Sarkar's Law of Evidence: India, Pakistan, Bangladesh, Burma and Ceylon*, SC Sarkar, 1971.

[20] IG Shivji, 'Insurance and development' 3 *Eastern Africa Law Review*, 2 (1970), 143-173.

and political change in Kenya.[21] He had just received the galleys. It was a massive book, a *magnum opus* of his and Patrick McAuslan's.[22] I readily agreed. My library research to verify footnotes introduced me to all kinds of literature which I had not come across before as a law student nor did I know existed in our library. I believe I did the work meticulously, for which Yash apologetically offered me shs.100/=. For me it was a lot of money, one-fourth of my yearly book allowance. It fetched me five good Penguin books.

Another young lecturer who later became a very close friend and colleague of mine was Andrew Lyall. He came to Dar in 1966 as a British VSO and stayed on becoming one of us. My first acquaintance with Andrew was when he wrote a letter to the then English daily, *The Standard*, against its editorial that had harshly attacked radical students for preventing a Rag Day procession. The tradition of Rag Day was presumably borrowed from British Universities and organised under the auspices of the World University Service. On the Rag Day, students dressed in rags, go on a 'rampage' in the streets ostensibly begging money and collecting donations for the poor. Left students, versed in Robert Tressel's great novel *Ragged trousered philanthropists*,[23] considered this a mockery of workers and peasants. Organised under the University Students African Revolutionary Front (USARF), a leftist student organisation, radicals decided and successfully put an end to it. As was its tradition – to think before acting – the previous night USARF had met to discuss and analyse the role of charity in a capitalist society. Their view of charity was summed up as a 'euphemism for those who plunder by the ton and give by the ounce'.[24]

After I graduated, together with Abdul Paliwalla, another good friend, we (Andrew, Abdul and I) took over the editorship of the Faculty journal *Eastern African Law Review* and tried to steer it away from its 'law and development' perspective. In the introduction titled 'From analysis of forms to the exposition of substance: the tasks of a lawyer-intellectual' to the Special Issue on 'Public Enterprise and Law in Tanzania', I critiqued legal positivism and black letter law. Defining the task of a

[21] Yash Pal Ghai and JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present*, Oxford University Press, Nairobi, 1970.

[22] McAuslan also had a stint in the Faculty but had already left when I joined it.

[23] R Tressell, *Ragged trousered philanthropists,* Grant Richards, London, 1914.

[24] Quoted in Chris Peter and Sengondo Mvungi, 'The state and the student struggles' in Issa G Shivji (ed), *The state and the working people in Tanzania*, CODESRIA, Dakar, 1986, 176. I believe this phrase was originally coined by Walter Rodney during the meeting on the eve of the Rag Day. See also ZH Meghji, 'Sisterly activism' in KF Hirji (ed), *Cheche: Reminiscences of a radical magazine,* Mkuki na Nyota, Dar es Salaam, 2010, 78. The book also includes a nice poem by RN Meghji, 'The day the rags didn't show up', 124-126, discovered many years later.

lawyer-intellectual as one of analysing the law-form to reveal the real substance of exploitative and dominant relationships underlying it, I called upon the lawyer to expose law as an important part of the dominant, ruling class ideology. 'This means that he [sic!] would have to face the powers-that-be; but then that is the challenge to his intellectual commitment.'[25]

There are two other lecturers who have left in me a lasting intellectual memory for exactly opposite reasons. They are Picciotto and Robert Seidmann. Picciotto arrived at the Dar campus in 1964 fresh from University of Chicago's law school. He was already an anti-positivist with socialist and Marxist leanings. Dar was a congenial intellectual environment for him to read and research more in that direction.[26] The events of October 1966 described above were a traumatic experience for many of the liberal and radical faculty, including Picciotto, leading to soul-searching. While they were engaged in the process of rethinking the role of the University through University committees, the Arusha Declaration happened. In this context, a wider conference was held in March 1967 downtown on the 'Role of the University College, Dar es Salaam in Socialist Tanzania'. Picciotto was one of the nine lecturers who submitted a long paper to the conference recommending democratisation and participation of students in the University's decision-making structures and in nation-building projects at the initiative of students themselves. More importantly, the nine suggested a first year compulsory interdisciplinary course that would introduce students to the learning and understanding of the socio-economic and historical environment of their society beyond their own specialised disciplines.[27] This was accepted by the Conference in principle but while the University administration was taking time to introduce a University-wide Common Course, the Faculty of Law introduced a compulsory first year course titled *Social and economic problems of East Africa* (Soc & Eco). The course was organised, coordinated and partly taught by Picciotto. Mine was the first cohort to take it.

Through this course, Picciotto introduced us to some of the original radical and Marxist literature, which I have treasured to this day. Picciotto's image that I

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[25] Issa G Shivji, 'From analysis of forms to the exposition of substance: The tasks of a lawyer-intellectual' 5 *Eastern Africa Law Review*, 1-2 (1972), 7.

[26] Sio Picciotto, 'Law, life and politics', in Issa G Shivji (ed), *Limits of legal radicalism: Reflections on teaching law at the University of Dar es Salaam*, Faculty of Law, University of Dar es Salaam, Dar es Salaam, 1986, 36-47.

[27] C Hoskyns, et al, 'Proposals for discussion tabled by a group of staff members', in University College, *Report of the Conference on the role of the University College, Dar es Salaam, in a socialist Tanzania,* 1967, mimeo, 116-131. The nine lecturers were: Catherine Hoskyns, Frances Livingston, James Mellen, Sol Picciotto, Walter Rodney, John Saul, Herbert Short, Giovanni Arrighi and Grant Kamenju.

fondly recall is that of a short, young, unassuming teacher with a reddish Marxian beard. Picciotto was much more an interrogator, rather than a lecturer, who would make you think by raising searching questions, occasionally rhetoric, but more often inquisitive. Left students tended to be the main speakers in his class partly because they were the most engaging but mostly because they would have read in advance the mimeographed handouts that Picciotto prepared for the class. I bound them in one of the four volumes of what I called 'Wealth of Knowledge'. Picciotto's handouts in my volume are among the most heavily underlined with succinct marginal notes and keywords. There are extracts from Marx and Engels *The German ideology*,[28] chapters from Gordon Childe's *Man makes himself*,[29] and Paul Baran's *The political economy of growth*,[30] extracts from the writings of that great Polish Marxist political economist, Oscar Lange and chapters from the wonderfully crafted book of Barrington Moore *Social origins of dictatorship and democracy.*[31]

The most rewarding experience in Picciotto's course was the exposure to other lecturers from different disciplines, including those from among the nine signatories. We had lectures from political scientists like John Saul, who has remained a comrade-friend to this day, James Mellen, an American, who I remember took us through the theory of cyclical crisis in capitalism, Giovanni Arrighi, who wrote his famous paper on labour aristocracy which I critiqued in my *Class struggles in Tanzania*,[32] Grant Kamenju, our Kenyan comrade, a man of letters in the real sense of the word and of course our friend and bosom comrade Walter Rodney. I can picture in my mind Walter as he walked from one end of the platform to another in the science lecture theater lecturing in his piercing, sonorous voice unencumbered by academic decorum or reservations and qualifications, the typical 'buts' and 'on-the-other-hands' of petty-bourgeois academics. For Walter, academic lecturing was as much an act of politics as delivering a speech at a rally. Paying tribute to Walter in a memorial symposium on 22 July 1980, after his gruesome assassination by reactionary forces, I said the following on his contribution to the struggle:

> There is no doubt that his contribution was substantial and there is no doubt that the struggles and the intellectual ferment of the Dar Campus in turn contributed to Walter's formation. Eventually, like a true revolutionary, he felt he had to move out of the academia and

[28] Karl Marx K and Friedrich Engels, *The German ideology*, International Publishers, New York, 1947.

[29] VG Childe, *Man makes himself*, Watts and Co, London, 1936.

[30] P Baran, *The political economy of growth,* Monthly Review Press, New York, 1957.

[31] B Moore, *Social origins of dictatorship and democracy: Lord and peasant in the making of the modern world*, Beacon Press, Boston, 1966.

[32] Issa G Shivji, *Class struggles in Tanzania*, Heinemann, London, 1976.

immerse himself in the struggle of the people. This he could do only among those he knew well. So he returned to his country of birth, Guyana, where he made the greatest sacrifice that an individual can make, life itself.[33]

Walter was a fine comrade, absolutely brilliant and totally dedicated to the African revolution. For a while Walter was my PhD co-supervisor from the history department. Once overcome by the 'worthless' exercise of writing a PhD thesis, I told Walter: 'Walter, I don't see why I should be wasting my time on this bourgeois stuff instead of visits to factory and working class neighbourhoods doing political work.' Walter said something to this effect: 'No, no comrade. It is important for us to go through this bourgeois discipline and master their academic trade so that we can critique it more thoroughly.' Eventually, after some eight years, I did finish the thesis, which was immediately published as *Law, state and the working class in Tanzania*.[34]

For radical students, the class material did not end with classrooms. We took them out and discussed and dissected them in Sunday ideological classes organised by USARF and its sister organisation TANU Youth League (TYL). I remember Eriya Kategaya, one of our fine comrades from Uganda who was among the top leaders of Museveni's guerrilla army and served in various positions in Museveni's Government when they assumed power, was assigned to lead us through Gordon Childe's *Man makes himself*. My own first essay called 'The educated barbarians' which appeared in the maiden issue of *Cheche*,[35] USARF's theoretical mouthpiece, is replete with quotations from Paul Baran's *The political economy of growth* and Baran's and Sweezy's *Monopoly capital*. Same is the case with my long essay *Tanzania: The silent class struggle* which was published as a Special Issue of *Cheche*.[36] Ali Mchumo, one of my classmates, uses Fanon's thesis of the bankruptcy of the 'national bourgeoisie' and Mao's essay 'On contradictions' to chide his fellow petty bourgeois intellectuals for phrase-mongering rather than applying scientific method to analyse the world.[37] Another of my classmates, Charles Kileo, a brilliant comrade, presents a comprehensive and wide-ranging paper on 'Neocolonialism and the problems of

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33 Issa G Shivji, 'Rodney and radicalism on the Hill, 1966-1974' in Issa G Shivji, *Intellectuals at the Hill: Essays and talks, 1969-1993*, Dar es Salaam University Press, Dar es Salaam, 1993, 33.

34 Issa G Shivji, *Law, state and the working class in Tanzania*, James Currey, London, 1986.

35 IG Shivji, 'The educated barbarians' 1 *Cheche* (1969), 15-26. The story of *Cheche* has been told in great detail in KF Hirji (ed), *Cheche*, 78.

36 IG Shivji, *Tanzania: The silent class struggle*, *Cheche*, Special issue (1970). Together with comments by Rodney, Saul and Tzentes it was later published by Tanzania Publishing House (1972).

37 A Mchumo, 'Revolution or romanticism?' n.d. possibly 1969, typescript in author's possession presumably written for *Cheche*.

building socialism in Africa' to the Second Seminar of East and Central African Youth held on Dar Campus in December 1969.[38] All these writings and many others by our comrades show the analytical tools and theoretical framework that we picked up in the Soc & Eco course and sharpened them in USARF ideological classes.

Another lecturer I remember well, but for having disagreements with, was Robert Seidmann. Seidmann, with his wife Ann Seidmann, who taught in the Department of Economics, came to Dar straight from Ghana where they had to leave immediately after President K Nkrumah was overthrown in 1966. Seidmann was a 'Law and Development' guru. Law and Development was the counterpart in law of modernisation theories that reigned in political science, both being pushed by American academics. The central thesis of the Law and Development school was that social change could be brought about through building institutions that in turn would be defined by rules made by the state. So law was seen an instrument to lead change and lawyers as 'social engineers' to manipulate it. A few of us took Seidmann's course and still fewer had a running battle with him because we did not accept law and state as neutral instruments which could direct socialist development; rather we considered state and law as the instruments of the ruling class reflecting and reinforcing exploitative relations disguised under the ideology of justice and fairness.

Law and Development research was well funded by the Ford Foundation's International Legal Centre based in New York City. In the immediate post-independence period, when modernisation reigned supreme, the state was seen as an agency to pull the backward rural sector from traditionalism to modernisation. The African peasant was to be separated from his/her tradition and resettled in villages supervised by experts and run by expatriate managers with heavy capitalisation financed by the Government. Two pieces of elaborate legislation were passed, the Rural Settlement Commission Act,[39] and the Land Tenure (Village Settlement) Act,[40] to govern the modernisation of the 'backward' peasant and pastoralist. Pastoral communities like Maasai were to be modernised by being settled in large rangelands, centrally supervised by managers under the authority given them by the Range Development and Management Act.[41] The doctrinal justification for these projects came from the World Bank which had suggested the 'transformation' approach

[38] C Kileo, 'Neo-colonialism and the problems of building socialism in Africa' the Second Seminar of East and Central African Youth, Dar Campus, December 1969 (mimeo in author's possession).

[39] Act No 62 of 1963.

[40] Act No 27 of 1965.

[41] Act No 51 of 1964.

to agrarian reform as opposed to the incremental improvement approach.[42] The legislation was an illustration par excellence of 'law and development' perspective. Seidmann was excited:

> [The] act is the basis of a programme to introduce an entirely new way of life to the pastoral Maasai, who drift with their herds across vast arid plains in Northern Tanzania. It purports to convert them from a nomadic existence, organised in class and family, using cattle as the basis of subsistence and status, into sedentary co-operative villages producing cattle for the cash market … The present revolutionary thrust of the statute came about mainly during the drafting stage.[43]

The projects were neither co-operative nor revolutionary much less transformative. The relation between managers and settlers became one of employer-employee in which peasants and pastoralists took least interest. If anything, the relation was one of dependency and paternalism. Both schemes were monumental failures which became the harbinger for the change of policy from village settlement to *ujamaa vijijini,* which was based on voluntary building of co-operative villages from below.

In the long paper I wrote for Seidmann, I critiqued the projects, and therefore implicitly its law and development approach. I emphasised the centrality of socialist ideology and commitment and questioned the assumption of the neutrality of state and law. Instead, I argued for the need to analyse the social character of the state and therefore posed the question whether the existing state could act as an agency to bring about socialist development. Seidmann's running comment was that I had underestimated the importance of building institutions based on rules.[44] Given our youthful radicalism at the time, such comments made no dint on us.

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In the 1968/69 academic year, on Dean Ghai's watch, the Faculty of Law, then under considerable influence of liberal American lecturers driven by a variety of sub-schools of sociological jurisprudence, proposed a revised curriculum. According to Kanywanyi,[45] the final product was a compromise among three trends: a liberal 'law

[42] World Bank, *The economic development of Tanganyika*, World Bank, Washington, DC, 1961.

[43] Quoted in RW Tenga, 'The historical and socio-economic approaches in learning the law: Dar es Salaam and Third World perspectives in jurisprudence' in Shivji (ed), *Limits of legal radicalism,* 102.

[44] Issa G Shivji, 'Land tenure and agricultural development in Kenya and Tanzania', Notebooks, 29/09/1968.

[45] JL Kanywanyi, 'The struggle to decolonise and demystify University education: Dar's 25 years experience focused on the Faculty of Law (October 1961-October 1986)' 16 *Eastern Africa Law Review*, 1 (1989), 35-36.

in context' school which underscored teaching of law in the broad social context, meaning in effect taking account of policy environment; the 'law and development' school which saw state and law as instruments of change through institution-building and thus the task of law school being to produce socio-legal engineers; and the Marxist/neo-Marxist trend which desired a progressive curriculum that would inculcate in students 'a sympathetic disposition, …, towards the underprivileged and poor working people and their general political-economic interests.'[46] The new curriculum introduced a host of new subjects, including military law, law and development, public finance, and sales and secured transactions. These were non-professional subjects to which the students exposed to a typical LL.B. course on British lines were not used to. The British tradition was to concentrate on hard law professional courses. The student body opposed the new curriculum mainly on the ground that there was not sufficient consultation and they did not see the rationale of such subjects as military law. Led by more ideologically aware radical students, the opposition quickly developed into a struggle raising bigger questions.

A vigilance committee was formed. It issued two memoranda articulating student opposition. Both are written in a strident, militant language, including an allegation that 'imperialist spy lecturers', who were driving a neo-colonial agenda against Tanzania's socialism and East African nationalism, had infiltrated the Faculty.[47] They had particularly harsh words against 'military law' and 'law and development' both of which had been advocated by Americans. One of the Americans allegedly admitted that he had already made contacts with military officers who welcomed the opportunity for them to take the course. 'One can clearly see that the poison of bourgeois military propaganda which Tanzania can avoid by refusing to train her army officers at the British Imperial Defence College or West Point, will be duly compensated for with Military Law at the University College, taught by bourgeois military authorities sent by the agencies of neo-colonialism.'[48] The memorandum described the 'law and development' course, taught by Robert Seidmann, as "a crusade against socialism and a justification and beautification of capitalism."[49]

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[46] Kanywanyi, 'The struggle to decolonise and demystify University education', 36.

[47] Charles Kileo drafted the memoranda. I participated in drafting one; cannot remember whether the first or the second.

[48] Student Vigilance Committee, 'The new curriculum of the Faculty of Law, University College, Dar es Salaam: "A neo-colonialist conspiracy"' February 1969, First Memorandum, 3 (mimeo in the author's possession).

[49] Student Vigilance Committee, 'The new curriculum of the Faculty of Law, University College, Dar es Salaam', 4.

The Second Memorandum, titled 'Whoever calls for revolution must present alternatives for the system', was as militant in its language but more soberly argued. In its view, the real issue at stake was 'one concerning the ownership of this University College: whether the college will ultimately belong to the people of Tanzania and East Africa or to imperialism.' '[I]t is obvious that the struggle has already outgrown the Faculty of Law where it started, just as it has already outgrown the New Curriculum issue which sparked it off. In short, it is part and parcel of the anti-imperialist struggle.' The Vigilance Committee saw the student struggle on the Campus as part of the larger struggle between socialism and imperialism and in this struggle 'Whoever controls the minds of the students will control the leaders of tomorrow. This rule holds good for both ideological camps.'[50]

Under the well-known Leninist title 'What is to be done' the Committee put forward several demands including the 'Tanzanianisation' of the deanship and the 'East Africanisation' of the Faculty. It also demanded student participation in all decision-making committees of the Faculty and the University. The new curriculum was put off. The Faculty reverted to its previous British style curriculum. Dean Ghai resigned and Deusdedit Bishota, a Tanzanian, took over.

By no stretch of imagination was Bishota a socialist. He taught us evidence – almost half the class failed. But by now students were too exhausted to go though another round of struggle. In any case, the struggle had moved to other arena and issues. Furthermore, the law struggle was an alliance of convenience between a small group of radical students, many of them TYL and USARF members, and a large body of conservative students who cared little about bigger issues. They joined in for their own different reasons: some because they found the case-law, or Socratic method, preferred by American teachers, difficult; others because they were suspicious of new non-professional courses. They felt that it would dilute their professional qualification. Many others were simply fellow travellers mouthing radical slogans, not infrequently even racist ones. Although in terms of the curriculum we reverted to the *status quo ante*, yet the law struggle had prepared the ground for further contestations ahead, the discussion of which is beyond the scope of this essay.

[50] Student Vigilance Committee, 'The second memorandum of the student vigilance committee of the Faculty of Law, University College, Dar es Salaam' March 1969, Second Memorandum, 1 (mimeo in the author's possession).

V

History has its ironies. Karl Marx says somewhere that history indeed repeats itself, first as tragedy, then as farce. Ghai landed in Dar in 1963 with his legal positivist baggage from Oxford and a nodding acquaintance of the sociological school from Harvard.[51] Dar destroyed that baggage, he says, but did not put an alternative paradigm in its place. The smattering of the possible alternative paradigms that he heard from his colleagues was not satisfactory. Worse it came warped in 'radical sloganising'. Lawyers ought to have skills to use, interpret and craft rules, more so those who represented progressive governments, he rightly believed. This would require thorough legal training which did not leave time for socio-economic approach. If the latter were emphasised it would come at the expense of the former.

The struggle in the search for an alternative paradigm had begun while Yash was still in Dar. But as in all struggles, the new is born still wearing the ugly garb of the old. He was uncomfortable. 'For despite the scholarly analysis of some Marxists, what passed in general for radicalism in those days included a large amount of racism and xenophobia…'.[52] 'Xenophobia' is perhaps an exaggeration though, no doubt, there was a sprinkle of racism, particularly from fellow travellers. Real struggles are never pure or textbook tailored. Yash was an unfortunate, even unintended, I dare say, victim of the student struggle in the Faculty. Nonetheless the occupation of the Faculty and the radical leadership of Vigilance Committee had sown the seeds for the next phase of the struggle in search of alternative paradigms, more ambitiously, even a search for an alternative to bourgeois university. Eventually, the new paradigm, somewhat cumbersomely called 'historical and socio-economic approach' was officially recognised in the University Calendar. It was supposed to be contextualised in Marxist social analysis. The Faculty's vision was to produce society-conscious lawyers, both 'red and expert'. Did it succeed?

As an editor of the 25th Anniversary volume, I invited law lecturers from the '60s, '70s and '80s to reflect on their teaching experience at the Faculty and in particular on their efforts to integrate radical perspectives in the teaching of their specific law subjects.[53] In practice, the socio-economic method faced all kinds of problems, as some essays point out. A few lecturers were able to integrate the

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[51] Yash Ghai, 'Legal radicalism, professionalism and social action: reflections on teaching law in Dar es Salaam' in Shivji (ed), *Limits of legal radicalism*, 26-35.

[52] Ghai, 'Legal radicalism, professionalism and social action', 27.

[53] Shivji (ed), *Limits of legal radicalism*, 11.

method in the teaching of rules and legal doctrines but many more only paid it lip service. As Tenga observes a kind of schism developed between the treatment of the historical background to the subject, which applied the Marxian method, and the analysis of rules where positivism reigned.[54] Nonetheless, a significant number of lecturers did genuinely grapple with the issue. While recognising the limits of (bourgeois) law, they tried to explore 'law as a terrain of struggle', both in theory and practice. In practice, a vigorous legal aid practice developed at the Faculty in which many young radicals provided committed service to the working people.[55] The success of the struggle is in the struggle itself and by that standard, yes, indeed, the struggles at Dar have not been in vain.

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By late 1990s, the Faculty of Law at Dar had come full circle. Times had changed. We were now living in the neo-liberal era where only the market mattered. To remain in business, we, the University, were required to 'manufacture' marketable products, appropriately packaged and branded. Under the leadership of the late Dean Sengondo Mvungi, a member of the generation that had been brought up on the historical socio-economic approach to law and in a Faculty whose mission was to nurture society-conscious lawyers, the Faculty retreated to Arusha to reconsider its mission, vision and the curriculum. The meeting was held from 23 to 28 August 1999. The background paper noted that in changed circumstances, to sustain itself 'within a competitive market both to attract learners and market its products', the Faculty's new vision was 'to prepare students for the market.' The teaching method too had to change 'to underscore the practical aspects of law.' I could not attend the retreat because of an ailment but remember to have sent a note protesting the change of vision. I believed the so-called new mission was no vision. It was short-sighted. It would destroy the historical niche that the Faculty of Law at Dar had created for itself for reasons which were ephemeral. The market fad would pass, I argued. But mine was a voice in the wilderness.

What would Yash make of this new market mission and vision of a Faculty which, in his own words, was 'undoubtedly most formative in my intellectual development.'[56] Yash is a scholar not a cynic. For him it would not be an occasion for the last laugh but rather a moment for reflection and agonising.

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54 Tenga, 'The historical and socio-economic approaches in learning the law', 109.

55 See Kanywanyi, 'The struggle to decolonise and demystify University education', 56-57.

56 Ghai, 'Legal radicalism, professionalism and social action', 26.

In 1990 I gave my inaugural professorial lecture on 'The Legal Foundations of the Union'. Using Kelsen's theory of grundnorm, I argued that the Articles of Union of 1964 translated into domestic law as Acts of Union were the Constitution of the Union and that both the Zanzibar Constitution, 1984, and the Union Constitution, 1977, were subordinate to it. Further, applying the 'basic scheme' or 'essential features' doctrine laid down by the Supreme Court of India in *Kesavananda v State of Kerala*,[57] I submitted that the basic structure of the Union and the list of Union matters, at the time eleven, was unalterable. Hence the addition of union matters after 1964, constricting the autonomy of Zanzibar, was unconstitutional.[58] To the best of my knowledge, this argument was being made for the first time. However innovative in legal terms, the approach was undeniably doctrinal and textual, very much within the legal positivist tradition. I admitted so in one of my public lectures.[59] Yash was justly disappointed. In his Foreword to the second edition of my book he succinctly observed:

> Shivji's analysis is textual and doctrinal. It is abstracted from the social and political origins and contemporary context of Tanzanian federation. This comes as a surprise, for most of his work is distinguished by his sharp insights into the social and political origins of law. He has inspired the scholarship of many (including his former teachers – me certainly) to explore the intimate links of law to social formations and modes of authority. His major contribution has been to demystify the law and its rhetoric.[60]

Indeed times have changed. But the struggle continues. In my 2008 volume *Pan-Africanism or pragmatism: Lessons of the Tanganyika-Zanzibar Union*,[61] I did precisely what Yash would have liked me to do. The book explores the origins of the Union and the forces behind it. I hope it has made a contribution to Yash's rich writings on federalism and federal constitutions on which he has worked and written profusely. I end this essay in honour of Ghai by saluting his single-minded scholarship and in appreciation of his unstinting tribute to my Alma Mater.

> The Faculty of Law in Dar was pioneering in many ways, and its influence, in terms of the philosophy of teaching and the orientation of research, spread to other parts of Africa and

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[57] 57 1973 S.C. 1461.

[58] Issa G Shivji, *Tanzania: The legal foundations of the Union*, Dar es Salaam University Press, Dar es Salaam, 1990.

[59] Issa G Shivji, 'What is left of the Left intellectual at the Hill' in Issa G Shivji, *Intellectuals at the Hill,* 218.

[60] Yash Ghai, 'Foreword' in Issa G Shivji, *Tanzania: The legal foundations of the Union,* 2 ed, Dar es Salaam University Press, Dar es Salaam, 2009.

[61] Issa G Shivji, *Pan-Africanism or pragmatism: Lessons of Tanganyika-Zanzibar Union*, Mkuki na Nyota, Dar es Salaam, 2008.

beyond (e.g. Warwick and Papua New Guinea). Many of us who turned out to be birds of passage were profoundly influenced by insights we obtained in Dar, but a fuller working out of these insights took place elsewhere. But these flowerings are also part of the history of Dar.[62]

[62] Ghai, 'Legal radicalism, professionalism and social action', 26.

Activist art for social reform: The Judiciary in transition as seen by Kenyan cartoonists

Willy Mutunga[1]

Introduction

Yash Pal Ghai was my professor at the Faculty of Law in the University of Dar es Salaam. He has remained my professor. He also became my mentor, friend and fellow activist. He mentored me as a young lecturer in law, inviting me to many conferences and reading my think pieces. I turned to him to write a foreword to my second book, *Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997*.[2]

Ghai was one of the jurists who inducted the new Supreme Court of Kenya in 2012. As amicus curiae, individually, and through Katiba Institute (KI), of which he is co-founder and director, along with his wife Jill, he has continued to assist the Supreme Court, and indeed, all superior courts of Kenya, in developing an indigenous, decolonised, de-imperialised, progressive, rich and patriotic jurisprudence coming out of the transformative 2010 Constitution.

Ghai and KI have also pioneered a robust public interest litigation programme that has links with social movements. He and KI have written various books, and maintained a column in the Kenyan daily *The Star*, on the fundamental pillars of the 2010 Constitution. In doing so, they have armed Kenyans with material and interpretation that will help them breathe life into the implementation of their Constitution.

My ties with Ghai, forged in Dar es Salaam in the 1960s, have endured to date. I am particularly grateful that Ghai was on hand when I became CJ, for his stellar

[1] In writing this think piece I have benefitted immensely from comments by both Jill Ghai and Rakiya Omar. I thank my comrades JJ Nyagah, Patrick Gathara, Paul Kelemba (MADDO) and Godfrey Mwampembwa (GADO) for their comradeship and friendship. And above all, I thank them for allowing me to use their cartoons in this work. Humphrey Sipalla brushed up the syntax and made useful comments.

[2] Nairobi/Harare: MWENGO & SAREAT, 1999; 2nd Edition, Nairobi, Strathmore University Press, 2020.

contribution to the many challenges faced by the Judiciary in Kenya, but also as a reference for legal scholarship, as a friend and always, as a mentor.

Ghai and I share a great passion for supporting artists' movements (of which the cartoonists are a major pillar). Ghai has used the work of cartoonists in some of his works on the Constitution of Kenya. All the cartoonists whose work I use here are my comrades. And they are Ghai's too. Both of us value our critics, and the critics of our society and the world.

Cartoonists as public intellectuals and activists for social reform

Cartoonists are activists, whether they know it or not. They are, like all activists, either conservative (read reactionary) or progressive. The former promote and protect the status quo, be it local or global. The latter demystify and critique the status quo, in the process revealing its limitations and the interests at stake. Progressive cartoonists have messages for us that range from social reform and rebellion to revolutionary change. Progressive cartoonists are, therefore, clarion calls to action for social reform.

Artists' movements are part of the new frontier for human rights and social justice. Activist artists and social movements are replacing and challenging the now professionalised, middle class human rights movements which, at times, lack passion. This new frontier does not shy away from contesting for political power. It has also refused to accept the limited political choices we have been offered, conscious that such false choices can never change Kenya. This new frontier, in my view, captures the imagination of all social movements from the margins. I believe a strong bridge will be built giving the human rights and social justice movements (radical social democracy) a voice that hitherto has been a lone one and in the wilderness.

Great cartoonists, who are, indeed, our homegrown intellectuals, have their own vision of society. They use their expertise to force us to hold a mirror to ourselves, individually and collectively, to encourage reflection, to warn and to ridicule all, within the perspective of their vision of society. They make us laugh, but with very critical messages to boot.

I always made it my business to talk to the cartoonists to get their interpretation of their cartoons. This is never easy, going as it does to the core of their intellectualism, ideology, politics, as reflected in their freedom of expression and conscience. So, invariably, they will give you many interpretations. I learned to come up with my

own understanding of the cartoons, and then seek the artist's views later. I rarely succeeded in this latter venture. Progressive cartoonists invariably operate in very conservative status quo. They use the spaces available to promulgate thinking and imagination for social reform in a trajectory of continuous struggle against the status quo. Such a project is complex and fraught with many dangers. Having as many interpretations of their cartoons as possible has saved the lives and livelihoods of many cartoonists.[3]

I believe all our cartoonists, without exception, have served to deconstruct or demystify the 'cult of personality' in public office. On the other hand, our people and our leaders do not seem to have a notion of collective leadership. Yet, institutions are not built by one person. While a leader's ideas matter, without transformation champions among those they lead, the leader would fail.

In celebrating Ghai, in this article, I have decided to share some stories from the Judiciary that were captured by cartoonists. Through the work of four (4) cartoonists, Godfrey Mwampembwa (GADO), JJ Nyagah, Patrick Gathara (Gathara) and Paul Kelemba (MADDO), I reflect on the joys and sorrows of the Judiciary during my tenure as CJ. I have selected these to reflect on some of the thorniest questions we faced. All these questions revolve around the problem of judicial transformation in the context of the 2010 Constitution. As the first CJ of Kenya under the transformative demands of the 2010 Constitution, it was imperative that we take positive actions to reconnect the Judiciary with its sovereigns, the people of Kenya. In order to achieve this goal, we needed to rethink, sometimes, radically, our posture towards the people. Below, I reflect on some of the burning questions that exemplified the heavy task before us: the place of women in the Kenyan judicial exercise of personal *Sharia'*; access to the Judiciary in hitherto marginalised counties; public spending within the Judiciary; retirement of judges affected by constitutional transition; corruption and the Judiciary; and judicial dress and address.

[3] My conversations with MADDO, Charles Obbo, and GADO over decades have made this assertion abundantly clear.

A storm in a tea-cup?: Wo'men' Kadhis in Kenya

Between 2011 and 2016 when I served in the Judiciary, the Judicial Service Commission (JSC) advertised for positions of Kadhi in the Judiciary. By the time I left the number of Kadhis had increased from 14 to 57. All of them were male. A Muslim woman applied for the position. She did not qualify and she was not shortlisted for interviews. But suppose she had qualified? Would we have interviewed her? Heated debate ensued.

Gado's take on the debate seemed to be that the issue was not that women serve *in* Kadhi's courts, but rather that women should serve *as* Kadhis in the judicial system! The JSC took the unanimous view that if she had been the right candidate, we would have given her the job. As a Muslim, I knew this was a divisive issue among Muslims. It was not a simple matter in the genre of disputes about sighting the moon. In the latter disputes it seemed the consensus was to allow individual Muslims to make their own decisions.

Talking of the disputes over the sighting of the moon, I had an interesting experience with the late Sheikh Nassor Nady, a former Chief Kadhi. Sheikh Nady was close to my heart because he oversaw my conversion to Islam in 1981. He had asked Maalim Barua to take me through the process. Barua asked me to repeat in Arabic the words 'There is no God but Allah and Mohammed is his Prophet.' I protested. I did not speak Arabic. Sheikh Nady was great. '*Mtafsirie kwa Kiswahili au Kiingereza aelewe*/ Translate it to him in Kiswahili or English for him to understand.' Barua opted for Kiswahili and we were done. I chose the Muslim name Salim which I later changed to Wacllimohammed (the Prophet's Lawyer). The latter name was appropriate for my great esteem of the Prophet (SAW). My new Muslim name also had the initials of both my Christian and African name (Willy Munyoki). That did not bring about any dispute. The sighting of the moon did, later.

Flying from Amsterdam to Nairobi in the 1990s, and overflying Sudanese airspace, I clearly saw the new moon. Upon landing at Jomo Kenyatta International Airport I found out that the dispute over the sighting of the new moon was still raging. I called my Chief Kadhi, and announced very happily that I had sighted the new moon the night before. I suggested that should end the debate. '*Huu mwezi uliuona wapi?*/Where did you sight this moon?' I explained. I was stunned by his response. '*Basi, mwezi si wa Kenya huo!*/ That was not a Kenyan moon!' I protested.

I proceeded to give the Chief Kadhi a lecture: there were no planes during Prophet Mohamed's time. It was easy to see a new moon with naked eye in a desert. Islam has become global. Why not adopt the Bohra Muslims' solution of using the lunar calendar in the 20th Century? I did not get anywhere with my Chief Kadhi. I gave up.

As I reflected on the new dispute as CJ, I realised I had to implement the constitutional value of 'participation of the people'. Before I could think through this issue the Supreme Council of Kenya Muslims (SUPKEM), mainly Sunni in orientation, requested a meeting. We met. I was told in no uncertain terms that I had waded into dangerous terrain that could easily attract a *fatwa*! To cut a long story short, I was told that women cannot be Kadhis, on the basis that it was forbidden by the Holy Qur'an and Hadiths. It just could not be done. Then somebody added that during their menstruation women are irrational and cannot decide cases fairly. My response to this argument ended the discussion.

I told them the Shia did not have a problem with women Kadhis. Sheikh Ali Shee had given me a write up on the issue that I found persuasive. I wanted to

know why some Islamic countries have women Kadhis. I told them that even if it was argued that these women Kadhis were past their menopause, this was not the issue. I posed a question about Muslim women who were judges of the High Court and Court of Appeal respectively. Both could hear appeals from disputes arising from Kadhi courts. And Christian judges, too. So who would police these menstrual cycles? I pointed out that the Kadhi courts are accessed mainly by women on matters of divorce, maintenance, and inheritance. Did it not make sense that women should have women Kadhis, too, to hear these matters? I also warned them of the JSC consensus on the issue. Barring women from recruitment as Kadhis was clearly discriminatory and violated Articles 10 and 27 of the 2010 Constitution. I could see clearly I was not being heard. I had to come up with another strategy.

On a great note forward I suggested that I would ask the Chief Kadhi, Sheikh Ahmed Mudhar, to convene a meeting of all Muslim sects in Kenya to discuss the issue and reach a consensus. The convening had not taken place when I left the Judiciary on 16 June 2016. Thankfully, I do not have to worry about a *fatwa*. Judge Mohamed Warsame, a Muslim in the JSC, may have to worry about the decision the JSC may take in the matter. Gado understood this complex debate, but reduced it to a storm in a tea cup! That is his genius.

This controversy is not going away. A lot will depend on whether, in future, Muslim women apply to be Kadhis. Having talked to a wide range of Muslim women lawyers, it seems many are scared to even apply. Others however, agree with the sentiments expressed by the men of SUPKEM. The participation of women in legal and religious matters cannot be stopped. There are women Kadhis in other jurisdictions. The question of mixed gender prayers, and a woman leading those prayers, is still being debated. The late Professor Ali Mazrui was involved in this debate, both before and after his death.

Professor Horace Campbell, who also taught at the University of Dar es Salaam, recounts in his article 'The humanism of Ali Mazrui' (2014),[4] one example. Professor Mazrui died in Binghamton, New York, on Sunday, 12 October 2014. On Monday, 13 October 2014 prayers were held for him in a mosque in Binghamton. Three women, professors Betty Wambui, Ousseina Alidou, and Florence Margai were asked to pay tribute to Professor Mazrui's contribution to women's struggles. It quickly became apparent to the host, Professor Ricardo Laremont, that many of

[4] Now published in Seifudein Adem, Jideofor Adibe, Abdul Karim Bangura (eds) *A giant tree has fallen: Tributes to Ali Al'Amin Mazrui,* African Perspectives Publishing, 2016, 254-262.

those gathered for the prayers, through their body language, were concerned about this departure from the usual Islamic tradition.

Yet, Professor Mazrui, when he was alive, had been in favour of mixed gender prayers. On 18 March 2005, Professor Amina Wadud[5] led 60 women and 40 men seated together in Synod House, owned by the Episcopal Cathedral of Saint John the Divine, in Friday prayers. The call to prayer was made by another woman, Suheyla El-Attar. The organisation that sponsored the prayers was the Muslim Women's Freedom Tour, headed by Asra Norman. The prayers sparked off debate among Sheikhs and Muslim academics.

The issue of a woman leading the Muslim faithful in prayer, a role that male imams have performed for centuries, also captured the imagination of Professor Mazrui. He issued a statement unequivocally supporting Professor Wadud to lead in the prayers, and wrote in his annual newsletter to friends and family:

> Is Amina Wadud the Rosa Parks of modern Islam? On the bus of Islamic destiny, is Amina refusing to take a back seat as a female passenger? Rosa Parks' defiance helped to ignite the Montgomery bus boycott and the civil rights movement in the United States! Is Amina Wadud's defiance the first shot in a Muslim Reformation on the gender question? She led a gender-mixed congregation in Friday prayers in defiance of traditions of male leadership.
>
> It is too early to assess the historical significance of the Jum'a prayer, in New York on 18 March 2005, led by a single Muslim woman in a Christian Protestant Church. But we know this is not the first time that Amina Wadud has shaken a Friday Muslim congregation.

The Muslim umma in Kenya, and indeed the world over, will have to debate the matter of women Kadhis as well as a woman leading a gender-mixed congregation in one of our mosques! It is my hope that neither will deepen the existing splits on these matters among the Muslim faithful.

Riding a furious tiger!

One of the gifts Gado gave me when I joined the Judiciary in June 2011 was a cartoon he had published during the 'Grand Coalition' of Kibaki and Raila. Kenyans also remember it as the 'Grand Collision and Grand Corruption'. Gado's cartoon depicted what he called the Fourth Arm of Government. This arm was an octopus tightly enslaving, with its tentacles, State House, the Supreme Court, and

[5] Professor Wadud is an African-American Muslim scholar and is the author of two books, *Quran and the woman: Rereading sacred texts from a woman's perspective* (1999) and *Inside the gender jihad: Women's reform in Islam* (2006).

Parliament. I kept this gift and a statue of Wanjiku [a gift from the Ford Foundation Nairobi Office colleagues done by sculptor Kevin Oduor (Kevvo)] in my office until I retired from the Judiciary.

In one of our regular Friday hang-outs with Gado, Maddo and Charles Obbo, I made a suggestion to Gado, which he never took up. I said he should redo the cartoon and show there was only one arm. I told him that there is an invisible government that has hacked off the traditional three arms of Government. This invisible government was the cartels and their illicit economy. Maybe cartoonists do not want ideas from readers! They, perhaps, rightly decide whether your intervention is worth considering. Invariably they would be working on something more inciting and exciting. One's intervention makes sense only if it enriches a work in progress.

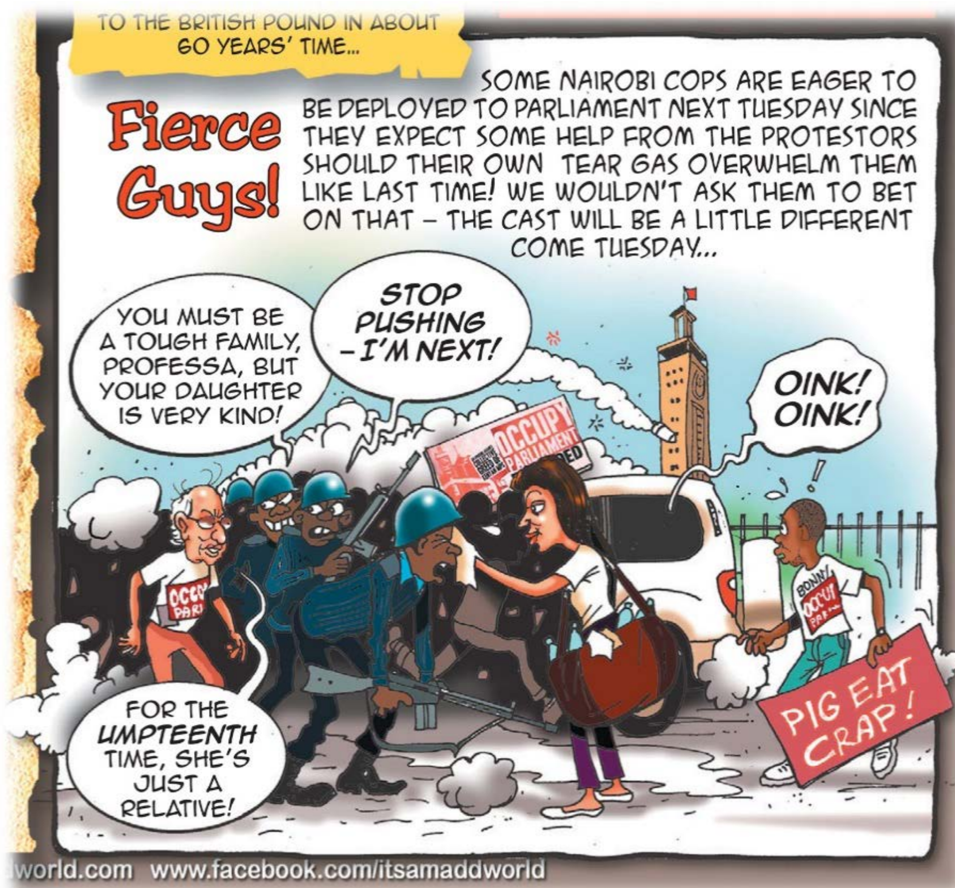
CHIEF JUSTICE WILLY MUTUNGA RIDES THE TIGER

Gathara picked up my idea four years later. A Dutch journalist, Koert Lindyier, had interviewed me about corruption in Kenya. I talked about the 'bandit economy' and the corrupt cartels that made it difficult to implement our progressive 2010 Constitution. In his 30 May 2016 cartoon, Gathara did not sketch me riding the back of the tiger. I saw this cartoon, which placed me at the mouth of a growling

tiger, with only my arms to keep its jaw shut, as a warning. I was also 'stupidly comfortable' in the circumstances, suggesting either that I was asleep or reckless. The cartoon made it clear that the ride would end where it normally ends, the devouring by the beast. Its teeth were clear to all to see and the die has been cast.

Curiously, the political elite never commented on my 'bandit economy' sentiments, a great surprise under the circumstances. I thought the international and national commercial elites would say something about illicit economy. If the cartels saw Gathara's cartoon, and interpreted it the way I did, they may as well have sighed, 'well, he has been well warned by his friend.' For the time being the beast did not devour me.

When teargas baptism brings 'foes' together



The 8 June 2013 'Fierce Guys' cartoon by Maddo is about one of the demonstrations Ghai participated in since his retirement. In this demonstration his niece, Aradhana 'Kuxi' Ghai, also joined in. She must have read about, or was aware of, the 31 May 1997 mass action when Dr Rev Timothy Njoya brought in a lot of water and wet handkerchiefs because he knew there would be a lot of tear gas.

The teargas the Kenyan authorities have used over time leaves demonstrators short of breath and unable to see. Using water immediately helps to mitigate these conditions. Rev Njoya called it 'baptism' as he baptised many of the activists who had been teargassed that day. I recall the good Reverend moving from one fallen activist to another, taking water from his bag that also contained the unexploded teargas canisters that he had tamed in his bag as well. Today, these canisters are in the Reverend's museum of mass action, his library.

Ghai's niece went a notch higher in this demonstration. She baptised the policemen who were also victims of their own teargas. Firing teargas is a double edged sword. Given which way the wind is blowing, the security forces could get a heavy dose of their own medicine as happened in this case. This is a striking example of the 'solidarity' between the activists and the workers and peasants in uniform. In this cartoon a very progressive message is reflected: a possible dialogue between activists and policemen. She was able to talk to these policemen as they queued up for 'baptism'. The solidarity is about the common oppressor, the state and its machinery of violence. Unfortunately, that difficult dialogue tends to happen when soldiers and other security forces have taken over power, and their compatriots run to them as their temporary liberators. It is, however, a dialogue worth engaging in. There is so much in the material interests of the security personnel on the streets that is reflected in the demonstrating activists. I recall a few demonstrations in support of police housing and welfare. A great way to start, but the efforts need continuity and consistency.

Of planes and buses: Transitional metaphors for the Judiciary

'Judiciary Airways': Judicious extravagance?

In 2012 I visited courts in jurisdictions invariably referred to as 'far flung areas'. The British called these areas the North Frontier District (NFD). We wanted to assess access to justice in these areas. We hired a plane and a helicopter from Kenya Wildlife Service (KWS). We visited Lokichar, Kakuma and Lodwar on the first trip.

On the second trip we visited Isiolo, Marsabit and Moyale. Three years later, in 2015, we visited Garissa. What we did during those visits is in the public domain. I am very happy we started the long journey to de-marginalise access to justice in the former NFD and to humanise justice there. However, those trips spawned a rather different controversy.

After the first trip in 2012, we inquired into the prices of planes and choppers. The KWS pilot gave us the relevant details. He also told us that if we bought a chopper, and appointed KWS as our agent, the chopper would be serviced regularly and leased to many individuals and companies that need choppers. We all thought it was a good idea. Our budget had increased from 3 billion Kenya shillings to over 15 billion Kenya shillings. A chopper would cost 3 million US dollars, then the equivalent of 300 million Kenya shillings. We could afford a chopper. If KWS were as good as their word we would be able to buy another chopper from the income made by the first chopper within two years of its purchase. We decided we would ask the National Assembly to approve our budget for the purchase of a chopper.

We thought we had a great case. Hiring planes and choppers was expensive. Giving the Judiciary 300 million Kenya shillings as a budget line for hiring planes and choppers did not sound clever at all. We had courts all over the country. It was our obligation to visit them regularly. We also knew that the police force had many choppers; so did the military and the Executive. The President, as the Commander-in-Chief of the armed forces, can use these helicopters without his office paying the bill. We were one of the three arms of Government and there was need for equity, equality and inclusiveness.[6]

The National Assembly, however, torpedoed these arguments and refused to approve the budget for the purchase of the chopper. Perhaps the National Assembly was convinced that hiring planes and choppers from national corporations, like KWS, was a laudable initiative. It brought income to the corporation. It was likely that our argument about equity meant the National Assembly was entitled to a plane or chopper. They were not interested in this kind of equity. They were happy with the system of purchase of airline tickets for them and the allowances that accompanied the trips. I sought to talk to a member of one of the influential parliamentary committees to argue the case for the Judiciary. I did not succeed. He told me: 'CJ. I hear you publicly say the Judiciary is not an arm of Government, but a stump. I totally agree.'

The debate about whether the Judiciary needed a plane or a chopper continued to rage in the public domain. There was no way the cartoonists would sit on the sidelines of this one. So, Gado came out with his 'Judiciary Airways'. From the cartoon it is clear that the two engines are smoking heavily. As captain of the plane, I was ordered by the control tower to land the plane safely. The little creature in Gado's cartoons, that has the same politics, ideology, and intellectualism of the other famous character, *Wanjiku*, is skeptical I would safely land the plane. My co-pilot clearly is the former Chief Registrar of the Judiciary. She has her own views on the matter.

My reading of this cartoon was that Gado used the metaphor of a junk plane to depict the state of the Judiciary at the time. He did not find our arguments convincing. His view was that we needed to focus on, and prioritise, strengthening the institution, first, without which we were going to 'crash'.

The Judiciary in my view still needs a plane. With the Judiciary Fund now in place, the Judiciary will eventually get its plane, and later more planes.

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[6] Article 10 of the Constitution of Kenya, 2010.

Pilotless planes and institutional leadership

By early 2016, there was much public commentary on my then expected retirement and successor. In his cartoon of 15 June 2016 (a day before my retirement), published in *The Star*, one of the dailies in Kenya, Gathara sketched a plane headed for a crash because the pilot has parachuted out of it. The doomed passengers were yelling 'Where is the pilot?' I was parachuting to some unsure safety. Cartoonists deal with the here and now as one of the contexts of interpreting their work. This cartoon was an example.

Gathara's cartoon did not address the pillars that the Judiciary had erected in its Judiciary Transformation Framework, 2012-2016. If he had done so, he would have been more optimistic about the transition in 2016. One needed only to read through our reports to find these pillars: the JSC, the Office of the Chief Registrar of the Judiciary, the Office of the Chief Justice that had grown serious capacity from the usual two secretaries and eight bodyguards. There was also the Judiciary Leadership Advisory Council (JELAC) that reflected the new leadership in the

Judiciary under the 2010 Constitution. The JELAC comprised the CJ (Chair), the Chief Registrar of the Judiciary, the President of the Court of Appeal (Vice-Chair), the Presiding Judge of the High Court, a judge from the Court of Appeal and High Court, the Director of Judiciary Training Institute, and a magistrate. The Chief of Staff in the Office of the Chief Justice also sat in JELAC as the Secretary. JELAC was a structure that reflected the collective leadership in the Judiciary. It had grown in strength by the time I left the Judiciary. These developments ought to capture the imagination of the cartoonists. If the Judiciary becomes a strong institution, this will signal the beginning of the end of the cult of personality in our institutions and politics.

I believe, however, there could be compelling reasons why the cartoonists are warning us of the risks of personality cults in governance.

Driving a road unworthy bus

Kenyans wanted the Judiciary disbanded and judicial officers asked to apply to rejoin the Judiciary. They wanted the 2010 Constitution to reflect that determination for a fresh start. They also wanted the police sent home (Poor police! They had been disbanded before following the short-lived Air Force coup of 1982). A consensus was reached under the 2010 Constitution that saved both institutions.

I believe this is the critique in Gado's cartoon of 8 February 2016 in which I am the driver of a dilapidated road unworthy bus that is clearly headed for a crash. The bus is appropriately called the Judiciary. I seem to justify the position I find myself in by saying: 'I am just the transitional guy.' His assessment is spot on. A strong judiciary needs pillars. I had no business driving a bus that did not have those pillars. It was a great caution. This, and other critiques, helped us design a blueprint to transform the Judiciary. Of course, I would have been happier if I was sketched having the bus parked at the graveyard of Judiciary toys at Milimani courts. That graveyard of Mercedes Benz caused us a lot of anguish. I believe, ultimately, we were able to educate Kenyans on how wastage happens and how bureaucracy makes it difficult to mitigate such wastage. I have learned my lessons.

Transitional retirement: Was it a supreme joke?

Within weeks of my retirement as CJ, a controversy was kicked up about the rightful age of retirement for judges appointed under the Repealed Constitution. I believe the two cartoons, by Gathara and Maddo, respectively were about the appeal in the Supreme Court on judges' retirement age. Was the retirement age for existing judges under the 2010 Constitution 70 or 74? The appeals in the Supreme Court had been launched by two judges of the Supreme Court and one judge of the High Court. Prior to this appeal before the Supreme Court, no fewer than twelve judges – five in the High Court and seven in the Court of Appeal – had held that the retirement age was 70.

I did not expect that the cases would end up in the Supreme Court. This is why in constituting the bench of judges in the High Court I had asked five judges to sit given the public interest in the matter. In most cases of multi-judge benches empanelled to hear constitutional matters, only three judges sit.

SUPREME COMEDY

Nairobi Saturday June 4, 2016

NEXT VEE APPEAL TO THE *U.N. SECURITY COUNCIL*. IF DAT DOESN'T VAARK, VEE GO EEWEN HIGHER, YOU KNOW VHERE...

I DUTIFULLY DISPENSE OF MATTERS WITHIN SECONDS WHEN MY REAL BOSSES DESIRE SO! C.J. OR NO C.J!

I AM ON DUTY UNTIL JULY 16, THE YEAR OF OUR GOOD LORD 2016, AT 23.59 HOURS KITUI TIME!

74

74

Sweet 16!

70+4

69+5

76-2

74

70

Supreme Egos

Dubai Homes

200lbs

Njoki to Njora direct mail (CJ bypass)

JUNE 16

TIC TIC TOC!

THE SUPREME COURT WAS ONCE HELD BY KENYANS IN THE HIGHEST ESTEEM; INCORRUPTIBLE, INDEPENDENT MINDED MEN AND WOMEN OF INTEGRITY WITH A SERIOUS SENSE OF DUTY. THAT CONFIDENCE HAS EBBED AWAY AS THE ZENITH COURT IS SHATTERED BY PERSONAL INTERESTS, GREED FOR RICHES, SELF CENTEREDNESS, TRIBALISM AND PRO-ESTABLISHMENTISM. THE JUDGES COULD SIMPLY NOT ESCAPE BEING "KENYAN".

■AFTER THE LATE C.B. MADAN, THIS IS THE LAST TIME FOR THE NEXT SEVERAL YEARS THAT WE'RE SEEING A CHIEF JUSTICE LIKE WILLY MUTUNGA.

Language...

When the judges lost in the High Court and filed appeals to the Court of Appeal I constituted a bench of seven judges instead of the normal five in such matters. I also called a meeting of the advocates representing the judges to discuss the fast-tracking of the appeal. Since there had been quite a number of judges who had recused themselves from the appeal, I wanted to be sure that such actions would not delay the hearing of the appeals. In that meeting we agreed, the advocates and I, on a bench of seven judges. Ordinarily, I would not have consulted the advocates for all the parties, but I had to do it. I could see a pattern of application for judges to recuse themselves. I feared the appeal would not be heard soon enough. I wanted to be sure that all parties were satisfied with the judges who heard the matter. On that basis, and in the interests of justice, I constituted the bench as decreed by the 2010 Constitution. There was a consensus, too, (although it had no constitutional force) that the decision of the Court of Appeal would be final. We all seemed to appreciate the constitutional and legal basis of that position.

I knew soon enough that the agreement on the bench would not hold. Two judges of the Supreme Court filed application seeking the disqualification of two of the seven Court of Appeal judges. These applications were dismissed by the bench of seven and the appeals were heard and concluded. The seven judges of the Court of Appeal dismissed the appeals.

It came to me as a great shock (I had just come out of hospital) when I was told that an application to stay the decision of the Court of Appeal had been filed under the certificate of urgency. What followed is all in the public domain. Three of us in the Supreme Court decided that the Supreme Court would not hear the appeals because of the perception of bias among other constitutional and legal reasons. Two of our colleagues disagreed with the majority decision. The majority judgment also decided that the judges had the right of appeal to the Supreme Court under a different bench when recruited and constituted. Our decision retired the two Supreme Court judges. I also retired. For the Supreme Court to have a quorum, three judges of the Supreme Court, including a Chief Justice (CJ) and Deputy Chief Justice (DCJ), had to be recruited. This has happened. The judges could pursue their appeals if they wish. Let us wait and see.

Free at last, free at last, Thank the Almighty I am free at last!

On 16 June 2016, I retired from my position as the 14th Chief Justice of Kenya since independence in 1963. I also retired as the first President of the Supreme Court of Kenya. Free of, and from, the Judiciary? Not at all. I certainly felt a great sense of relief. I had not realised how stressful the job had been until I handed back to the Judiciary the Kenyan flag, the number plates of my official vehicles (CJ1) and was driven to my apartment in Nairobi. I had also handed over the Supreme Court of Kenya flag to the Acting President of the Court, Justice Mohammed Ibrahim. We had designed our own judicial exit protocol for the outgoing CJ.

I believe Maddo got it right. 'Willy Exit' shows me smiling as I remove my green Supreme Court robes. I am followed by a crowd of judicial officers and staff who are both happy and sad to see me go. That was the reality. Judicial transformation in the five years of my leadership at the Judiciary had definitely radically affected the material interests of judges and staff. I was reviled and glorified in equal measure, depending on these material interests and other concerns.

When we crafted the blueprint, Judicial Transformation Framework (JTF), 2012-2016, I knew I would retire after those four years of the JTF. It was the right decision. It would be the time to reflect on gains made, on reforms that were irrevocable, irreversible, indestructible and those that were not. We had done that at the Judiciary. So, reversals and unfinished business did not weigh me down.

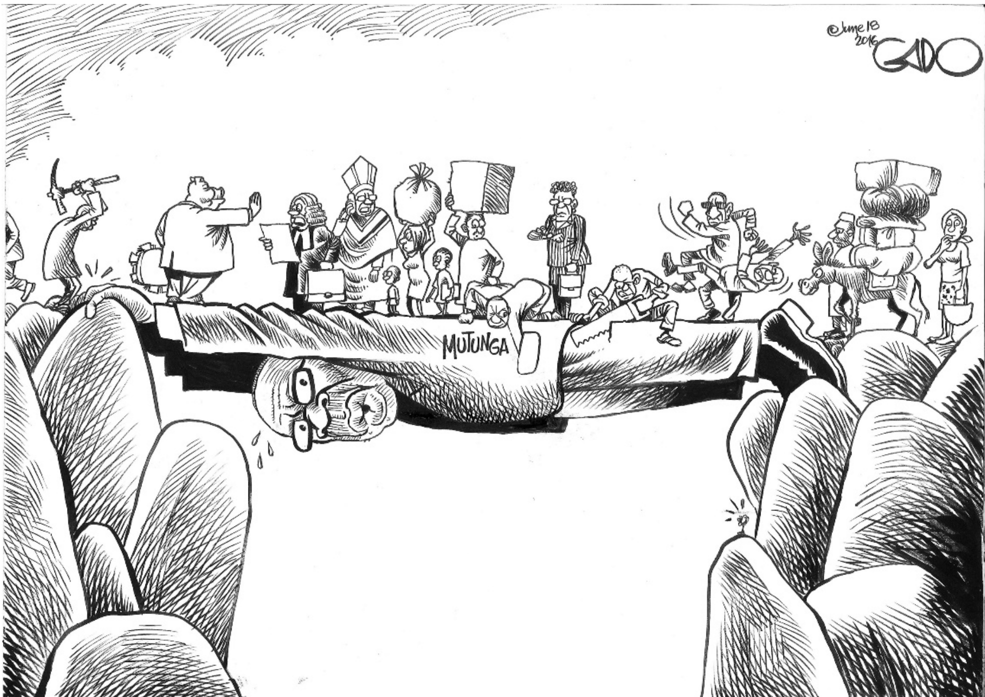
There was another reason for relief. On 22 May 2016 I was to travel to Holland and the US for the last time in my official capacity. I woke up early that morning to leave for the airport. As I was walked to the sitting room I fell, and passed out for less than a minute. I decided to walk back to the bedroom and I fell again and passed out again for less than a minute. I got back to bed and called my doctor. I had always had low heart rate. I had seen cardiologists in Kenya and in New York. I was told it had a lot to do with my sporting activities since my youth. I had been warned, however, of the symptoms to watch out for. What had just happened was one of the fundamental ones. My doctor and the paramedics arrived immediately. I was driven to hospital and admitted immediately. Later that day I had a pacemaker installed.

I had led a life of good health. I have been admitted in hospital only four times in my life. In 1962 because of malaria (and that was the last time I had malaria!). In 2006 I suffered chest pains and ended up having an angiogram procedure. In 2009 I had a prostate scare which fortunately I was able to put right with medication and supplements. The fourth admission in hospital is the one I have just described.

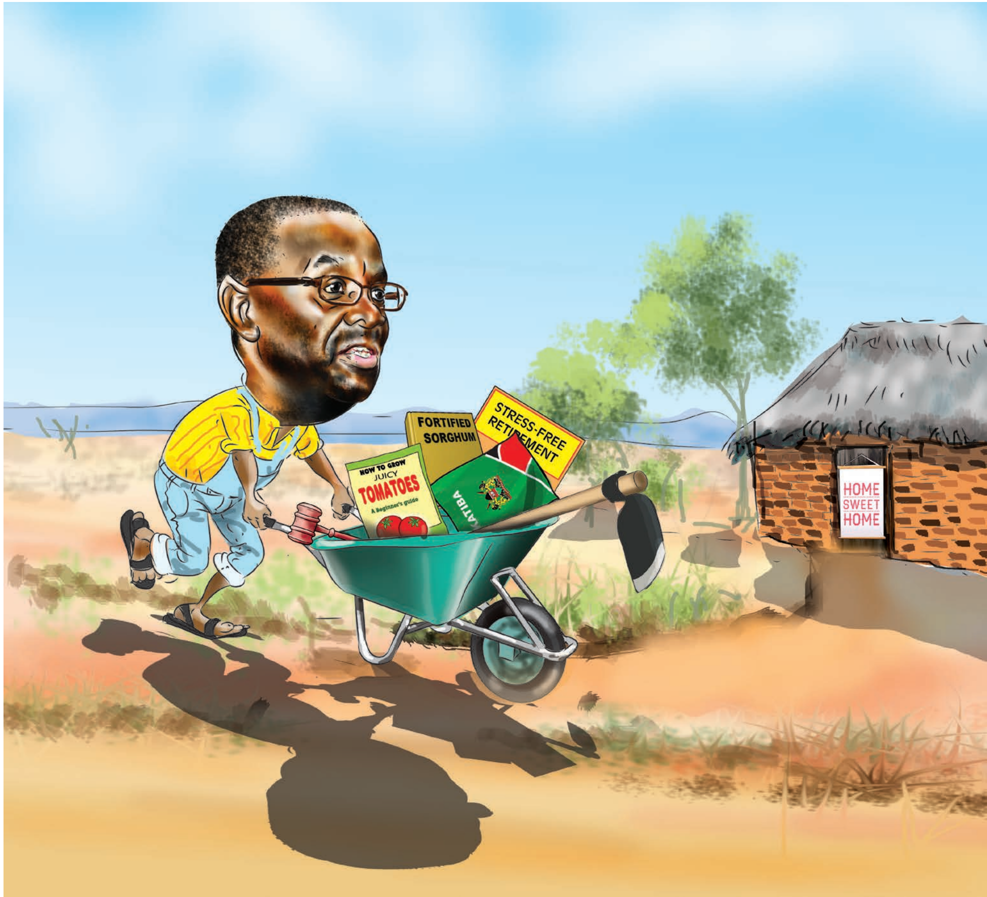
All in all, on 16 June 2016, as I drove away from the Supreme Court building I felt happy and free. I also realised that I had had fun learning about public service, a demon I had ruthlessly criticised in my life without knowing it. Now I was glad I knew something about it.

Jumping to retirement: Who retires when the struggle continues?

Gado sees my retirement, in the second cartoon, as one of bridge building, notwithstanding the gains and challenges of my tenure. The various difficulties faced by someone who wishes to build bridges among the Kenyan people, rich and poor, ethnic communities, religions and generations, are portrayed. I was amused that, given the position I am depicted in, someone would still want to shake me down for a coin. Gado could not resist the temptation to bring into the picture his usual corrupt, thieving, murderous devourers of our democracy, and development 'animals'. And rightly so. These 'animals', as Mwalimu Nyerere also called the foreign counterparts of the national ones, are the scum of the earth that stand between us and democracy, freedom, development, and the end of exploitation, domination, and oppression. These 'animals' will collectively destroy our planet unless we stop them, and overthrow them.



I will continue being an ambassador for the Kenyan Judiciary in my retirement. There is a struggle to implement CJ David Maraga's blueprint, Sustaining Judiciary Transformation (SJT). I read the SJT to mean: consolidating the gains made under the JTF that I worked under: remedying the weaknesses of JTF while reinforcing its strengths; working on the JTF's unfinished business; and making the Judiciary an 'institutional political actor' as envisaged by the 2010 Constitution.



JJ Nyaga has his own views about my retirement as his cartoon, 'Arriving home', clearly shows. I like the overalls of a worker, the peasant's hut, jembe, the 2010 Constitution, and the wheelbarrow. Why he thinks I need the judge's gavel, I will never know! I would definitely love to participate in structures that resolve disputes in my community, not as a judge, but as a son of the community. I already

have two projects in my community: community library and borehole. I have had to deal with the elite of the community who do not like my *Ujamaa* politics! This rural petty bourgeoisie comprises school teachers, pastors, and shopkeepers. In their shops they have become agents of Mpesa, our Kenyan version of Western Union. I have challenged the rural elite on where in the shops the Mpesa facilities should be. I have seen most of them are in rooms behind the shops away from the public view of shoppers. I do not know why this privacy is required in Mpesa transactions in the village. The community knows how much money comes in, and knows who the thieves are! I suspect the privacy is about facilitating sexual harassment of women. You cannot bet on the rural petty bourgeoisie not indulging in the human rights violations of women in the footsteps of their national mentors.

Actually I am thinking of using my family land for farming. The struggle also dictates that we live healthy and we know what we eat and drink.

The debate on judicial dress and address continues

When my successor CJ Maraga arrived for his swearing-in, clad in scarlet robes and a wig, I was not surprised the old debate on dressing and addressing the Judiciary was re-ignited. This discussion had been taken up by the Kenyan people when they appeared before Ghai's Constitution of Kenya Reform Commission (CKRC). CKRC heard Kenyans argue that the colonial robes and wigs had to be abandoned. CKRC did not deal with this suggestion in the Draft Constitution of Kenya 2004 (Bomas Draft).[7] Quite wisely, CKRC decided these matters would be part and parcel of reforming the Judiciary.

I recall on the morning of 20 June 2011 a colleague at the Judiciary sought my permission to dress me for the swearing-in ceremony at State House. I politely declined. I am sure the former DCJ Nancy Barasa declined the request too. There was, indeed, a member of staff whose duty it was to dress judges when they wore these robes and wigs.

Contrary to the impression given by the media that I banned wigs, the truth is that the subject was debated in the Judges' Colloquium in August 2011. I took the time to write a paper about it. I read it at the colloquium. The consensus reached by judges was as follows: we would not wear wigs. Each court, including the Magistrate's and Kadhi courts, would design its own functional and ceremonial robe. We also agreed that judges and magistrates would be addressed by lawyers and the public as Your Honour/Mheshimiwa. We got support for this latter reform from the Christian religious organisations that felt judges should not play God. In their opinion there was only one Lord! We were motivated by the constitutional values of equity and inclusiveness in arriving at these decisions. We also wanted to align the judicial hierarchy with the values of the 2010 Constitution. I re-worked the paper after the Colloquium and published it in a scholarly journal in 2012[8] and in 2017[9] it was carried as a chapter in a book. The short title in both publications was *Dressing and addressing the Judiciary.*

I believe that is what tickled Maddo in his cartoon. With tongue in cheek, he associates scarlet robes and wigs with judicial subservience to the Executive.

There may still be judges who want to reopen the topic. They are entitled to do that. There is some confusion at the moment because not all judges of the superior

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[7] Adopted by the National Constitutional Conference on 15 March 2004.

[8] *Buffalo Human Rights Law Review* Vol 20 (2013-2014), 212.

[9] Eunice N Sahle, (ed) *Democracy, Constitutionalism, and politics in Africa: Historical contexts, developments and dilemmas* (Palgrave/Macmillan, 2017), 131-166.

courts are wearing wigs. I believe reverting to the address of 'My Lord; Your Ladyship' will be easy because few lawyers addressed us as 'Your Honour'. After decades of using the old form of address, it requires a conscious and committed change of mindset for the old form to disappear. It seems the debate on addressing and dressing the Judiciary will continue.

Conclusion

I believe the artists' movement in Kenya is growing to be the next frontier for the promotion and protection of human rights. Its message of social justice and human rights will help implement the critical pillars of the 2010 Constitution. I believe the 2010 Constitution is not revolutionary (or as Ghai says, it is revolutionary without a revolution). But I hold the view that it could be a basis for fundamental changes. Otherwise, why would the Kenyan elite be so bent on subverting it? Kenyan rebels, reformers, and revolutionaries should make use of this great space for building strong movements for equitable distribution of resources, leadership of integrity, strengthening institutions, demolishing the imperial presidency (while making sure we do not grow vulturous imperial county counterparts). Above all, we must breathe life into the value and principle of the participation of the people. The participation of the people will ensure their sovereignty and bring into reality the people's power that has been donated to the Executive, Parliament, commissions, and public service. Otherwise, saying that political, public, and judicial power is derived from the people of Kenya is meaningless.

We know that our struggle is not provincial. We should identify our national interests, align them to the interests of the region and Africa. It is on the basis of those respective interests that Africa can stand up to the West and East and defeat neo-liberalism. I have great faith in the youth of Africa. My hope for a free, independent, just, equitable, peaceful, non-militaristic and non-violent, ecologically safe, prosperous, and socialist Africa lies with them. I will retire working for that dream.

Finally, perhaps the greatest ceremony I presided over as CJ was Ghai's admission to the Roll of Advocates in Kenya on 10 June 2016. I was able to get some of the judges of the Supreme Court to attend the ceremony. I was very happy. So was Ghai. The memories of the relationship of student-professor, mentee-mentor, professional collegiality, friendship, respect, and passion to change our Motherland flooded in. I had to hold back my tears.

A human rights consistent apartheid: Constitutional design of the African state, indigenous peoples' self-determination and the 'other native' question

Humphrey Sipalla

> Rights regulate the relationship of individuals and corporations to the state. ... the reality is that the State has effectively displaced the community, and increasingly the family, as the framework within which an individual or group's life chances and expectations are decided. *The survival of community itself now depends on rights of association and assembly*. Yash Pal Ghai[1]

> …the point of democratization cannot be just a simple reform of civil society. It also has to be a *dismantling* of the mode of rule organized on the basis of fused power, administrative justice and extra-economic coercion, all legitimized as the customary. Mahmood Mamdani[2]

Introduction

I was first introduced to the art and craft of festschriften by Jesse Mugambi when he invited me to copy-edit the liber amicorum in his honour in 2010.[3] Professor Mugambi later then invited me to again copy-edit the festschrift in honour of the great Tanzanian Africanist theologian-philosopher, Laurenti Magesa.[4] Soon after, my master's thesis supervisor Juan Carlos Sainz-Borgo, invited former students of my law of the sea professor Amb. Gudmundur Eiriksson, to contribute to his festschrift.[5] This time I got drawn in even more, not only as chapter contributor and copy editor but also as editor. Through these three experiences, and particularly the

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[1] Yash Ghai, 'Rights, duties, responsibilities' in J Caughelin, P Lim, B Mayer-Konig (eds), *Asian values: Encounter with diversity*, Curzon Press, London, 1998, 169. [emphasis mine]

[2] Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism,* Fountain/David Phillip/James Currey, Kampala/Cape Town/London, 1996, 296. [emphasis mine]

[3] Isaac T Mwase, Eunice Kamaara (eds) *Theologies of liberation and reconstruction: Essays in honour of Professor JNK Mugambi,* Acton, Nairobi, 2012.

[4] Jesse NK Mugambi, Evaristi Mogoti Cornelli (eds) *Endless quest: The vocation of an African Christian theologian, Essays in honour of Laurenti Magesa,* Acton, Nairobi, 2014.

[5] Juan Carlos Sainz-Borgo et al (eds), *Liber amicorum in honour of a modern Renaissance man, HE Gudmundur Eiriksson,* University for Peace, Universal Law, OP Jindal, San Jose, Sonipat, 2017.

tutelage of Professor Mugambi, I fell in love with two aspects of festschriften for a young scholar. First, the opportunity to sit at the feet of one's elders and learn, in a special and intimate way, the thinking of the people who have so greatly inspired our own incipient scholarship, and especially through listening to *their peers, their 'amici'*. Second, I got a chance to experience the cultural place of festschriften, as a time honoured way of paying tribute to a scholar. It feels like the cultural role of the young man, preparing the *nyamachoma* for the elders in return for the implicit permission to keep their company, hover within earshot, listen to their stories. Apprenticeship.

To honour our elder, Yash Pal Ghai, the reflection in this paper seeks an answer in his scholarship and practice, to a question that has troubled me since my indigenous peoples' rights class at the UN University for Peace (UPeace) in 2013. In this class, our teacher Mihir Kanade, with more questions than answers, had us interrogate how best to respect the rights of indigenous peoples to self-determination. Do we leave them alone, that is, not 'discover' them? Do we allow them semi-autonomy? Be so generous as to allow them Bantustans? Under what terms of government? Do we *make them* register 'municipal corporations' like in Australia? Or beguilingly recognise 'sovereign'[6] reservations like the US? Do we deny their existence like certain African nations that insist all Africans are indigenous? Why 'we'? Who is 'we' and why 'they'? Why this otherness? Amongst black Africans, whose is the dominant culture? In Africa, are we not all indigenous – meant black – on the continent after all?[7] How can we define African indigeneity[8] without defining

[6] *Worcester v Georgia*, 31 US (6 Pet.) 515 (1832).

[7] For the avoidance of doubt, this line of questioning in no way indicates a rejection of the multi-racial character of African societies. Such would be a contemporary blindness and a weak reading of history. Presently, black dominant culture is simply the locus of our contentions.

[8] Indigeneity as a function of self-identification is central to the African conundrum. Here, I mean the horror and instinctive revulsion of the dominant black African culture at self-identification, which obviously excludes them. For defining discussion on indigeneity, see S James Anaya, 'The evolution of the concept of indigenous peoples and its contemporary dimensions,' in Solomon Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa,* PULP, 2010, 23-42. For a discussion on the importance of self-identification as resistance against being defined from the outside, see S James Anaya, 'International human rights and indigenous peoples: The move toward the multicultural state' 21 *Arizona Journal of International & Comparative Law*, 1, 2004, 13-61.

Africa's dominant cultures[9] and recognising their imperial conduct,[10] if not nature?

Almost contemporaneously, the Inter-American Court on Human Rights was laying down the full meaning of free prior informed consent (FPIC).[11] The irony was sweet to contemplate. A supranational institution, created by 2-century old, largely neo-colonial states, was schooling those same states on how to be more devolved. It was almost mythical, like that mythological demi-god figure borne of the wretched race who comes to teach humans to be more humane. In a class of brilliant fiery opinionated students from all continents as was our UPeace class, no answer was possible. Only excruciating thought, especially after we watched Aaron Huey's TEDTalk.[12]

In 2017, while attending a course on the right to development at the Centre for Human Rights, University of Pretoria, an unexpected – ha! there goes my naiveté – push back exploded in the class about respecting the rights of indigenous peoples to make their own choices about 'development'. 'Why should we let them live in backward ignorance?' 'We must force them out of the forests and grass-thatched mud huts and into organised villages!' Such were the calls from the floor, greeted with deep hums of approval, like a call-response routine in a negro church in the Jim

[9] These that become dominant cultures are also the ones most impacted – and we contend, disfigured – by the brutal nature of colonialism, mainly those communities who practiced sedentary agriculture at the advent of the European disruption, who almost invariably occupied rich arable lands that Aaron Huey reminds us is 'the best part of the meat'. See 'America's native prisoners of war: Aaron Huey at TEDxDU' https://www.youtube.com/watch?v=Nv7n5jhrHGQ Accessed 10 October 2018; also, Joel Ngugi, 'The decolonisation-modernisation interface and the plight of indigenous peoples in post-colonial development discourses in Africa' *Wisconsin International Law Journal,* Vol 20, (2002), 279, 324; Solomon Dersso, 'Introduction' in Solomon Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa,* PULP, 2010, 7.

[10] Dersso, 'Introduction' in *Perspectives on the rights of minorities and indigenous peoples in Africa,* 9; also Obiora Chinedu Okafor, *Redefining legitimate statehood: International law and state formation in Africa,* Brill, 2000, 95.

[11] The Court held that "consultation does not constitute a mere formality," but instead should be a "true instrument of participation... responding to the ultimate goal of establishing a dialogue between the parties based on principles of mutual trust and respect, and with the view to reaching consensus between them." IACtHR, *Kichwa indigenous people of Sarayaku v Ecuador*, Judgment of 27 June 2012 (Merits and reparations), para. 186. This was at the time the apex of an increasing assertiveness of the rights of indigenous peoples along the following jurisprudential path: IACtHR, *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, IACtHR (Nov. 28, 2007); IACmHR, *Maya indigenous community of the Toledo District v Belize*, Case 12.053, Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004); IACmHR, *Mary and Carrie Dann v United States*, Case 11.140, Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5. Rev, ¶ 1 (2002); IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgement of 31 August 2001. Since then, *Kaliña and Lokono Peoples v Suriname, Judgment of 25 November 2015, (Merits, Reparations and Costs)* has been even more groundbreaking, asserting as a matter of law, that indigenous people's cultural practices are not incompatible with nature conservation, thus rejecting a long held statist view that indigenous people need to be displaced to protect the environment.

[12] Huey, 'America's native prisoners of war'.

Crow Deep South! Or so Hollywood says. The proverbial back breaking straw came, and I had to sneak out of class for a smoke, when one participant stood up and exercised his free speech rights in full *Handyside*[13] glory: 'we should even take their children to boarding schools, so that they come back and educate their [backward] parents!' I may be paraphrasing a word or two, but I doubt not the general thrust of my recollection. I especially recall the example given of how the Karamoja in Uganda should be, and *are*, being dragged, kicking and screaming, into 'modernity'!

This was a surreal scene. We were rejecting education because we had been educated! School was interfering with our education![14] Africans seeking 'separate but equal'[15] development for Africans! *Apartheid.* The setting was even more surreal. Africans flew across the continent, *to Pretoria*, to hail in populist Nuremberg-esque approval the cultural alienation of *other* – clearly not fellow – Africans. Truly, human rights and human dignity are 'neither popular nor democratic'.[16] This was classic 'neo-liberal turn'.[17] We had come to the [erstwhile] intellectual and political capital of apartheid to reject teaching that disabuses us of apartheid.[18]

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[13] In *Handyside v United Kingdom*, Merits, App No 5493/72, Judgement of 4th November 1976, para. 49, the European Court of Human Rights asserted the right to free speech that can 'offend, shock or disturb the State or any sector of the population'. If ever there were a Maslowian hierarchy of evils, this classroom scene must have been a glimpse. But to be fair to the Court, they were referring to pornography, not genocide.

[14] I must acknowledge that an old Jesuit philosopher friend, who lived his formative years in the tumultuous Central America of the 1980s, bequeathed me this line. Its ability to stun me never withers, nor does my gratitude to him.

[15] *Plessy v Ferguson*, 163 U.S. 537 (1896), upholding the constitutionality of racial segregation. This begins a line of partial and still unfinished constitutionality exceptions that *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) supposedly comes to reverse, to minimal avail. See below, our reference to *Milliken v Bradley* and the constitutionality of *de facto* segregation. See also, Trevor Noah – US and South Africa have the same racial past' essentially, that US racism was apartheid. 'Eight Times America Surprised Trevor - Between the Scenes | The Daily Show' [Minute 7.50ff] https://www.youtube.com/watch?v=LoBJOkhtDQQ Accessed 14 June 2020. For, refreshingly delivered poignant insights on the core nature of apartheid, see Trevor Noah, *Born a crime and other stories,* Pan MacMillan, Johhannesburg, 2016.

[16] Humphrey Sipalla, Karest Lewela 'Policed perceptions, masked realities: Human rights and law enforcement in Kenyan popular art' in Frans Viljoen, (ed) *Beyond the law: Multi-disciplinary perspectives on human rights.,* PULP, 2012, 215. In this instance, we gave the following list:' Fair trial for suspects, absolute prohibition of torture, abolition of capital punishment, women's and lesbian, gay, bisexual, transsexual and inter-sexual persons (LGBTI)'s rights' to which I now add the rights of indigenous peoples to self-determine.

[17] In reference to JT Gathii's thesis that we in the Global South are no longer being dragged into neo-liberal policies but we are now, willing, if not, eager participants. See James Thuo Gathii, 'The neo-liberal turn in regional trade agreements,' 86 *Washington University Law Review* 421 (2011).

[18] For the avoidance of doubt, I am not in any way suggesting that what was being taught at the Centre for Human Rights, University of Pretoria was inappropriate, but rather I describe my shock at the active populist rejection of the sound teaching of respect for indigenous peoples' right to development in accordance with their cultures and traditions by *some of* the students who had come to study the right to development in the short course.

Yash Pal Ghai, in theory and praxis, has applied the thesis that constitutional arrangements ought be so designed as to promote pluralistic modes of being within a contested polity. In this way, they can serve as institutional frameworks for devolution, as peace treaties, where rights – as entitlements to human dignity – undergird collaborative rather than competitive co-existence of disparate communities in such contestation.

In this paper, I will explore the proposition that seemingly progressive, mainstream human rights notions of indigenous peoples and their rights to self-determination are troublesome and fundamentally flawed because they *are a form of apartheid*. And that the Ghai approach to constitution-making as pluralistic nation-building within a state may offer some answers to the false choices presented to us by the tragic normativity of the centralised post-colonial African state, a tragedy laid bare by Mahmood Mamdani.

So we start in 'Pretoria'. With Mamdani. But first, an appraisal of the orthodox textbook.

The orthodox self-determination discourse and its two worldviews

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[19]

The right to self-determination is a troublesome one. This is witnessed in its history, its debated definitions and continuing concerns over its exercise. In this section, I will present a brief look at the right itself, its appearance in international legal texts, and the attempts made at reconciling this critical but subversive human right with the expediencies of international and municipal politics.

The right to self-determination is at odds with, and is curiously quite inimical to, the very system of laws that proclaim it – international law. Pejoratively, the right to self-determination can be seen as seeking to splinter states, which are themselves the only true legislators of international law. But to be fair, much of international law

[19] Common Article 1(1), International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

can be counter-intuitive.[20] Andrew Moravcsik[21] indirectly reflects on this question, when opining that states broadly enter into the restrictive regimes of human rights protection systems to lock in certain values and protect them from the vagaries of national political life, in the case of weaker states as a way to assert their legal entitlements, or to maintain their political and economic hegemony in the case of the larger powerful states.

But self-determination itself made its debut through the back door. The Atlantic Charter agreed to among the Allied powers at the dusk of the Great War in 1945 sought, in part, to dismantle empire. It brought in the idea that peoples deserve to determine for themselves their own socio-political and economic destiny, free from imperial power. This treaty was to affect the overt political constitution of the French and British empires in Africa, certainly with their consent as parties to the Atlantic Charter.

The principle of self-determination, once agreed to by the imperial powers themselves, quickly found expression in right-based international legislation. Ghai reminds us that 'the use of autonomy as a species of group rights has changed the character of international law. … groups also have obtained recognition, which has given impetus to the currency of self-determination.'[22] By 1928, India was exercising international personality, being party to the Kellogg-Briand Pact. At the United Nations, India and the Philippines are founding members. The Charter of the United Nations (UN Charter) insists on 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.'[23] Although recognised in some form in the UN Charter, the right to self-determination was left out of the Universal Declaration of Human Rights (UDHR) but is provided for in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR) in their Common Article 1.

From 1945 to the late 60s, the right to self-determination was arguably reserved for existing states and asserted for the colonised peoples, who were expected to

[20] Humphrey Sipalla, 'The historical irreconcilability of international law and politics and its implications for international criminal justice in Africa' in J Stormes, E Opongo, P Knox, K Wansamo (eds), *Transitional justice in post-conflict societies in Africa*, Paulines Publications Africa, Nairobi, 2016.

[21] Andrew Moravcsik, 'The origins of human rights regimes: Democratic delegation in postwar Europe' 54 *International Organization* 2, Spring 2000, 217-252.

[22] Yash Pal Ghai 'Ethnicity and autonomy: A framework for analysis' in Yash Pal Ghai (ed) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states*, Cambridge University Press, 2000, 2.

[23] Article 1(2), *Charter of the United Nations*, 1 UNTS XVI.

'develop into states'. To be clear, Eurocentric Westphalian states are here considered to be the apex of civilisation towards which backward peoples ought aspire, and advanced peoples ought so educate them. This worldview leads to the creation of the Mandate and Trusteeship systems of the League of Nations and the United Nations. To wit, existing states are legally obligated to this paternalism:

> The States Parties to the present Covenant, *including those having responsibility for the administration of Non-Self-Governing and Trust Territories,* shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[24]

One can discern two core and concurrent worldviews driving the standard setting of this age. The first is addressed to sufficiently advanced backward peoples who have achieved acceptable development as to be allowed self-determination including to form their own states recognisable[25] to the West. These can then be welcomed into the world of friendly relations among equal sovereigns. This worldview we will call, for our present purposes, the UN system worldview.

The crafty language of Common Article 1 of the ICCPR and ICESCR, adopted in 1966, was double-faced and forked-tongued. It allowed two oppositional views to co-exist. Colonial powers, then responsible for non-self-governing – a fancy term for colonised – peoples, saw in that language flexibility to either 'grant' independence or 'allow' internal self-determination. Meanwhile, the formerly colonised Global South peoples, including the tens of newly independent African states saw in the very same common Article 1 language, the full decolonisation rights asserted in their already existing Charter of the Organisation of African Unity of 1963 (OAU Charter).[26] Ghai seems to highlight the tension playing out here, diplomatically terming the minority rights provisions in Article 27 of the ICCPR as parsimonious.[27] Remember, at this time, large swathes of Africa's southern cone was still under full-fledged South African, Portuguese and British colonialism. Paternalistic as it

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[24] Common Article 1(3), International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. [emphasis mine]

[25] For a *useful* interrogation on how the doctrine of recognition as the operative principle in the creation of states navigates the creation of acceptable 'others' thus maintaining the colonial logic, see Anthony Anghie, *Imperialism, sovereignty and the making of international law,* Cambridge UP, 2005.

[26] 'Determined to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neo-colonialism in all its forms,' and, as purpose of the OAU, 'to eradicate *all forms* of colonialism from Africa' [emphasis mine], Preamble 6 and Article II(d), *Charter of the Organisation of African Unity*, 479 UNTS 39, 25 May 1963.

[27] Ghai 'Ethnicity and autonomy', 3.

sounds, this UN system worldview may, for the purposes of our discussion, be the better of the two concurrent attitudes. Here, the aim of decolonisation was explicit and unequivocal, even though arrogant.

It is at the International Labour Organisation (ILO),[28] before the 1960s, that we see the second worldview of self-determination rights for those indigenous or tribal peoples who, one can only surmise, were not expected to 'develop into states' so are best protected by *integration into the existing state*. And one thinks here mostly but not exclusively of the American continent.[29] ILO Convention 107 of 1957 is very state-centric, limiting participation rights of these indigenous and other tribal and semi-tribal populations in independent countries to concordance with national laws.[30] This ILO system worldview is equally paternalistic but probably the more sinister of the two worldviews,[31] from a self-determination point of view. It clearly does not expect these peoples to grow into the 'maturity' acceptable to have a state and as such must perpetually be cared for.[32] We will revisit this Hegelian paternalism below.

Only in 1989, in ILO Convention 169, does the notion that these indigenous – the terms semi-tribal and tribal are now dropped – peoples ought not simply be cared for but surely also be *listened to*, comes into play. Although still state-centric, state parties are now required to consult these peoples, who cannot be allowed to develop their own state, 'in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'.[33]

The 1963 OAU Charter, the 2002 Constitutive Act of the African Union, and later, the 1989 ILO Convention 169 on Indigenous Peoples and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), reveal a change of heart, well-

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[28] For a fuller treatment, see S James Anaya, 'The evolution of the concept of indigenous peoples and its contemporary dimensions,' in Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa*, 23-42, especially 31-4.

[29] See ILO, 'Ratifications of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107)' https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312252 Curiously, the states that automatically denounce ILO Convention 107 by ratifying ILO Convention 169 are exclusively American states.

[30] *ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO Convention No. 107) 1957, 328 UNTS 247.

[31] Ghai 'Ethnicity and autonomy', 3.

[32] For a recap of this 'honourable Western tradition' of seeing the 'native' as a perpetual child who is best protected by 'not forcing her institutions into an alien European mould', See Mamdani, *Citizen and subject,* 4ff.

[33] Article 6(2), *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)* 1989, 28 ILM 1382.

meaning I might add, as it became clearer that non-Eurocentric cultures will not simply wither away 'with development' but are here to stay and to assert their own terms. Political changes have been and continue to be made to allow these peoples to determine for themselves their governments. But as we note below, with overt and covert expectations to nevertheless not challenge the status quo or devise and practise their own worldviews.

And thus we can see the two equally paternalistic and subliminally bigoted but divergent attitudes to the rights of indigenous peoples to self-determination: *let* them develop into their own states, or integrate them by good faith consultation. Frankly, these two attitudes are not illogical. International law cannot reasonably be asked to be nihilistic – it cannot realistically be expected to provide for the dismemberment of its very constituents, especially the existing ones, *Kosovo*[34] notwithstanding. In fact, the relevant jurisprudential line of the International Court of Justice over the time period has been at best inconsistent and tortured.[35]

'My interest, [however] is in the method that guides these contending perspectives'.[36] It is important for our introspective discussion, especially for the black African dominant cultures, to remember that the states that were invested in this standard setting, particularly the ILO worldview, were actually the progressives,[37]

[34] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, p. 403.

[35] *South West Africa cases (Ethiopia and Liberia v South Africa), Preliminary objections*, Judgment of 21 December 1962, ICJ Report 1962, p. 319; *South West Africa, Second Phase*, Judgment, ICJ Reports 1966, p. 6; *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12; *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, ICJ Reports 2019, p. 95. See also, Rashmi Raman, 'Changing of the guard: A geopolitical shift in the grammar of international law' in Humphrey Sipalla, Foluso Adegalu, Frans Viljoen (eds) *African approaches to international law: Exploratory perspectives*, PULP, Pretoria, 2021.

[36] Mamdani, *Citizen and subject,* 13.

[37] Noam Chomsky delivers a sobering reminder of the evolution of what he terms liberalism, our progressives, from its anti-authoritarian foundations: 'If we go back to the classics … Humboldt's *Limits of state action*, ….the world that Humboldt was considering … was a post feudal but precapitalist world… it was the task of the liberalism that was concerned with human rights and the equality of individuals … to dissolve the enormous power of the state, which was such an authoritarian threat to individual liberties … Humboldt being pre-capitalist couldn't conceive of an era in which a corporation would be regarded as an individual… [Today] liberalism is essentially the theory of state capitalism, of state intervention, in a capitalist economy….This new view … accepts a number of centres of authority and control: the state on the one hand, aglomerations of private power on the other hand, all interacting with individuals as malleable cogs in this highly constrained machine which may be called democratic but given the actual distribution of power is very far from being meaningfully democratic … to achieve the classical liberal ideals for the reasons that led to them being put forward, in a society so different, we must be led in a very different direction. … it leads me to be a kind of anarchist, *an anarchist socialist*. [Emphasis added] Noam Chomsky interview with Bryan Magee on Limits of Language and Mind, https://www.youtube.com/watch?v=A1RrbexZ5LY Accessed 10 December 2020.

the ones seeking to bind themselves *in legislation*, to some form of just treatment of the indigenous peoples who find themselves in their territories. This is evident when one simply considers all the countries with aboriginal, first nation, 'non-self-governing' populations who, to date, have never bothered to engage in a system of international peer accountability. Curiously such a list would mirror the non-geographical selections of the UN WEOG group.

Despite divergent opinions by Global North and South peoples and their states during this period of standard-setting, the common pitfall of the period is in its fundamentally imperial/colonial logic that does not even contemplate the possibility that the tribal, semi-tribal now indigenous peoples may have their own worldviews and aspirations. This is manifested in the state-centricity of the standard setting.[38] The need to preserve the state's legitimacy is shared by both old Global North and new South states, despite its want of moral ground for colonial legacy and desperate need for recognition as equal because of colonial legacy, respectively. Robert Goldman[39] notes that in Latin America, there was an overriding focus on non-intervention proceeding from the Latin experience of US interventionism. The young states of the OAU too were for most of the 20th century, focused on non-interference and securing their then weak foundations.[40] Nonetheless, as the 20th century came to a close, it was increasingly indisputable that 'in both industrial and less-developed countries in which indigenous people live, the indigenous sectors almost invariably are in the lowest rung of the socio-economic ladder, and they exist at the margins of power.'[41] The history of systemic discrimination is not simply in the past, but continue as current inequities.[42]

[38] Article 2.7 of the UN Charter which prohibits interference in matters in the 'domestic jurisdiction' of the state and *ius ad bellum* – Articles 2.4 and 51 of the UN Charter that at once prohibit second party states from using force against others and give authority for states to use force to protect themselves, including against secessionists, testify to this centrality.

[39] Robert Goldman, 'History and action: The Inter-American Human Rights System and the role of the Inter-American Commission on Human Rights' *Human Rights Quarterly* 31 (2009), 856-887.

[40] Ben Kioko, 'The right to intervention under the African Union's Constitutive Act: From non-interference to non-intervention' 852 *International Review of the Red Cross,* 31 December 2003.

[41] Anaya, 'The evolution of the concept of indigenous peoples', 38.

[42] Anaya, 'The evolution of the concept of indigenous peoples', 38.

Indigenous peoples' self-determination is preeminently a state reform/ constitutional design question

> Rights are not necessarily deeply held values, but rather a mode of discourse for advancing and justifying claims. Yash Pal Ghai[43]

James Anaya introduces the finely balanced challenge that indigenous peoples' self-determination claims bring to the design of constitutions, which constitutes an imperative for state reform.

> Indigenous peoples have helped build a political theory that sees freedom and equality not just in terms of individuals and states, but also in terms of diverse cultural identities and co-existing political and social orders. Under this political theory, self-determination does not imply an independent state for every people, nor are people without states left with only the individual rights of the group members. Rather, peoples as such, including indigenous peoples with their own organic social and political fabrics, are to be full and equal participants in the construction and functioning of governing institutions under which they live at all levels.[44]

Erica-Irene Daes, former chair of the UN Working Group on Indigenous Populations, envisions a renewed process of 'belated state-building' where indigenous peoples negotiate with other peoples within their states not for individual citizenship inclusion but 'recognition and incorporation of distinct peoples *in the fabric of the state*.'[45]

The thrust of this paper is to add to the points raised by Daes. Group recognition and integration into the fabric of the state, of necessity, requires frank introspection to understand what are the warps and wefts and *how* they weave themselves to constitute the states we live in,[46] while rejecting universalising forces and unilinear evolutionism.

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[43] Yash Ghai, 'Universalism and relativism: human rights as a framework for negotiating interethnic claims' *Cardozo Law Review* 21 (2000), 1137.

[44] Anaya, 'The evolution of the concept of indigenous peoples', 38.

[45] Erica-Irene Daes, 'Some considerations on the right of indigenous peoples to self-determination' *Transnational Law and Contemporary Problems,* Vol 3, 1993, 9, cited in Anaya, 'The evolution of the concept of indigenous peoples', 39. [emphasis added]

[46] One authoritative analysis not treated of in the present discussion for want of scope, but forms an integral part of the corpus of understanding the contemporary African state is Peter P Ekeh, 'Colonialism and the Two Publics in Africa: A theoretical statement' *Comparative Studies in Society and History*, Vol. 17, No. 1. (Jan., 1975), 91-112.

Ghai's reflection in 2000 suggests the double-edged nature of autonomy systems:

> Autonomy has been used to separate as well as bring people together. …it has been seen as a panacea for cultural diversity, and as, under the influence of identity politics, the realization of extreme heterogeneity of states dawns on us, autonomy seems to provide the path to maintaining unity of a kind while conceding claims to self-government. But autonomy can also be used to marginalize communities, as in apartheid Bantustans; and in contemporary times can constitute subtle forms of control or isolation….[47]

'Even if autonomy is not granted, the very agitation for it is of considerable interest to constitutional scholars. … Autonomy has become an integral part of contemporary constitutions.'[48] In considering the constitutional design implications of indigenous peoples' self-rule systems, the question of participation in the centre or exercise of regional power is central to their typology and is a consequence of particular historical contexts. The Australian Indigenous Governance Toolkit is exemplary in demonstrating how, although indigenous peoples are said to be self-governing, their governance is required to abide by existing legal and social constructs of mainstream society. More importantly, their self-government demands no introspection of dominant culture, no reform of mainstream self-government.

Ghai presents a most exhaustive typological overview of these systems, with analysis of their distinctions and similarities.[49] What is of import for our discussion is the trend of unequal treatment of self-rule systems for indigenous peoples as opposed to other minorities and non-ruling majorities. Below we will discuss some of the political and cultural prejudices that stand as obstacles to the dangerous path to apartheid that current models present, not least of which are tenacious notions from 'a time when state-building through central management and homogenisation was the dominant paradigm [and consequently] concessions to ethnicity were reluctant and grudging'.[50] That even localised self-rule is considered a 'concession' from the centre rather than a constituent right from which the centre's existence is derived is central to the unfortunate paradigm.

'The right to self-determination has increasingly been reinterpreted in terms of internal constitutional arrangements for the political and autonomy rights of

[47] Ghai, 'Ethnicity and autonomy', 1.

[48] Ghai, 'Introduction' in Yash Pal Ghai, Sophia Woodman (eds) *Practising self-government: A comparative study of autonomous regions*, Cambridge University Press, 2013, 8.

[49] Ghai, 'Ethnicity and autonomy', 1-25.

[50] Ghai, 'Ethnicity and autonomy', 11.

minorities.'[51] The imperative in the language of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), especially Articles 3 - 5, to constitutional design and state reform is actually explicit in the plain reading. Most important is that this self-determination is expressed from the indigenous minority's point of view. 'We have always been our own peoples, living by our governance systems. We are simply reminding you of this fact and your obligation to let it be so.' It does not seek separation but asserts its existence. This must surely unnerve state centrists who cannot contemplate anything other than what Ghai calls 'singular nationalism'.[52] Ghai is explicit in asserting that 'autonomy is beginning to transform our notions of the organisation of the state, the rationalisation of public power and *the homogenising mission of the state*.'[53] The exhortation of *Re: Secession of Quebec* to enter negotiations once emphatic secession claims are made is advice well worth taking.[54]

From the indigenous minority vantage point as expressed in UNDRIP, extant constitutional structures are in urgent need of updating. This in turn means recognising existing variant power structures in our constitutional designs.

> The antidote to a mode of rule that accentuates difference, ethnic in this case, cannot be to deny difference but to historicize it. Faced with a power that fragments an oppressed majority into so many self-enclosed culturally defined minorities, the burden of resistance must be both to recognize and to transcend the points of difference.[55]

Ethnic, religious or linguistic minorities inarguably suffer much oppression across all five continents within the existing nation states. Proceeding from the overwhelming weight of an intolerant majority, ostensibly practicing 'democracy', minorities are denied use of their language – sometimes even in criminal trials – their cultures, shrines and worship centers in their areas of ancestral living, as well as access to the public life of the modern state. And with disadvantageous beginnings, children of indigenous minorities consistently find it hard to fight through and succeed in the normal education and social systems, conditions that breed ethnic consciousness and… resentment.[56] The European Court of Human Rights opined in *Sorensen and Rasmussen v Denmark* that 'democracy does not simply

[51] Ghai 'Ethnicity and autonomy', 3.

[52] Yash Pal Ghai, 'Preface to the 2001 Issue' in Yash Pal Ghai, JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, 2001.

[53] Ghai 'Ethnicity and autonomy', 2. [emphasis added] See also, Ghai, 'Introduction' in *Practising self-government*, 3.

[54] See generally, Ghai 'Ethnicity and autonomy', 3.

[55] Mamdani, *Citizen and subject,* 296.

[56] Ghai 'Ethnicity and autonomy', 5.

mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of dominant position'.[57] This point is critical for the purposes of our discussion into how the progressives of the respective dominant cultures, in willful ignorance, may promote a national apartheid against their 'other' cultures in the name of asserting self-determination of indigenous peoples.

Ghai is welcoming of asymmetries that make autonomy systems function. To our minds, it is an important deconstructive factor to the homogenising central state. In other words, the paradigmatic insistence that the centre must be all is inextricably linked to the insistence that any devolved powers must be equally done so across the entire polity, which, by operation, completely disenfranchises politically insignificant minorities, including indigenous peoples. Ghai notes in 2000 that few autonomy systems, negotiated at independence and driven by colonial demands, survived for very long,[58] although in 1970 Ghai and Patrick McAuslan noted that colonial disregard for the sanctity of constitutional arrangements, changing them even up to three times a year in Kenya in the 1950s, and expecting immutability after independence was rather disingenuous of colonial authorities.[59]

Self-determination offers a spectrum of political possibilities, from quota-ed representation in the state centre, politically autonomous regions, federations to full secession.[60] It battles for space with the right to nationality. Latin America adopted several conventions on nationality as a way of avoiding conflicts over the constitution of their nation states.[61] Conversely, Africa's Charter on Human and Peoples' Rights (African Charter) affirmed the right to self-determination but ignored the right to nationality, given the focus then on decolonising the southern cone from 'foreign domination'.[62] Europe's Convention on Human Rights and Fundamental Freedoms, though focused on civil and political rights, protects the right to participation in political life, and ignored its grandest form, that of self-determination, yet Europe is the continent that has witnessed the most frequent of violent internal rearrangements of self-determinative units – states – in the last 2 centuries!

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[57] Although in relation to right to association on an individual v state plane. *Sorensen and Rasmussen v Denmark,* applications nos. 52562/99 and 52620/99, Judgement of 11 January 2006, 58.

[58] Ghai 'Ethnicity and autonomy', 15.

[59] Ghai and McAuslan, *Public law and political change in Kenya,* 510.

[60] Using the term 'autonomy' see Ghai, 'Introduction' in *Practising self-government*, 1-31; Yash Ghai and Anthony J Regan, 'Unitary state, devolution, autonomy, secession: state building and nation building in Bougainville, Papua New Guinea' 95 *The Commonwealth Journal of International Affairs*, 386 (2006), 101-119.

[61] Goldman, 'History and action' 856-887.

[62] Article 20 (3), *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217.

The African Commission on Human and Peoples' Rights (ACmHPR) asserted in *Congrès du peuple katangais* that secession was not the meaning the framers of the African Charter had in mind when guaranteeing self-determination, and that secessionist self-determination can be resorted to only in the case of systemic oppression and as a last resort.[63] In *Kevin Gumne (on behalf of people of Southern Cameroons)*[64] the ACmHPR laid out specific remedies requiring redress for the marginalised Anglophones of Southern Cameroon in economic and political life as well as judicial process, but also required the secessionist groups to convert into political parties and claim their peoples' rights within the existing political systems of the state. Again, redress is sought *within* the state.

Therefore, it can be concluded that the right to self-determination is really only exercised in political agreement as opposed to judicial enforcement, and geared towards finding greater respect for human rights within existing states, again, *Kosovo* notwithstanding.[65] That is true of indigenous majorities at the dusk of colonialism, for whom the right to self-determination was first addressed, as it is today for minority indigenous peoples, for whom the right to self-determination is being tortured to redress.

> The [African Commission on Human and Peoples' Rights] has interpreted the protection of the rights of indigenous populations *within the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of State Parties,* in conformity with the principles and values enshrined in the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights (the African Charter) and the UN Charter.[66]

We can hardly tolerate the idea that the Ogiek just wants to be left alone to hunt, gather, and farm in *his* forest or that the Kichwa Sarayaku values *her* ancestral shrine more than petrodollars, new houses and roads, or that the Australian aboriginal would rather not have had *her* children taken to boarding school. Ghai

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[63] *Congrès du peuple katangais v Zaire,* Communication 72/92, 8th ACHPR Annual Activity Report, Decision of 22 March 1995, http://caselaw.ihrda.org/doc/75.92/ Accessed 10 October 2019.

[64] *Kevin Gumne (on behalf of people of Southern Cameroons) v Cameroon,* Communication 266/03, 26th Activity Report, Decision of 27 May 2009, http://caselaw.ihrda.org/doc/266.03/ Accessed 10 October 2019.

[65] See Goldman, 'History and action' 856-887, on the concerns of the Inter-American Commission on Human Rights that poor democracy and respect for human rights in American countries lead to state instability. See also, Ghai 'Ethnicity and autonomy', 15-16.

[66] *Advisory opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples,* adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana, para. 6. [emphasis *in original*].

notes that we struggle with that concept 'of tolerance and compromise, … unable to accommodate communities with *very* different ideals, beliefs and practices'.[67]

And for that reason, *at best*, the human rights regime for indigenous peoples that we, dominant culture Global South peoples, are constructing, cannot even paternalistically allow *them* to develop into their own states, but is only altruistically willing to integrate *them* into *our* state, in good faith consultation so that they find advancement in our ways. This is nothing more than a human rights affirming apartheid. A 'just' separate but equal development.[68]

States and the dominant cultures that run them are instinctively suspicious of the right to self-determination, especially if state unity is challenged.[69] Therefore, it seems that regardless of who runs the Westphalian nation-state,[70] or where it is located on the globe, *this* state and the dominant culture that runs it, skin colour notwithstanding, cannot compute that indigenous peoples may not want, may even be repulsed, by the things the dominant culture craves, and that it is okay to not want 'to develop'.

In its 2007 report *Progress can kill: How imposed development destroys the health of tribal peoples*, Survival International details with an abundance of data, how forcing indigenous communities into mainstream lifestyles destroys their overall health. Through loss of communal knowledge, self-pride, sedentarisation and introduction of pathogens unknown to their immune systems, this reports shows how and why mainstream lifestyle is precisely what destroys indigenous communities.

Contemporary African constitutional/state design and the 'other native question'

> On one hand, decentralized despotism exacerbates ethnic divisions, and so the solution appears as a centralization. On the other hand, centralized despotism exacerbates the urban-rural division, and the solution appears as decentralization. But as variants both continue to revolve around a shared axis – despotism. Mahmood Mamdani[71]

[67] Citing the examples of the US civil war, the rejections of a federal solution to the Jewish-Arab problem, the Muslim League's view in colonial India, Ethiopia-Eritrea and Quebec. See, Ghai, 'Introduction' in *Practising self-government*, 15.

[68] As late as 1974, and in a move that neutered *Brown v Board,* in *Milliken v. Bradley*, 418 US 717 (1974), the US Supreme Court affirmed that de facto segregation is not unconstitutional.

[69] 'The success of autonomy negotiations may therefore depend on diffusing, fragmenting or fudging sovereignty.' Ghai, 'Ethnicity and autonomy', 16-7.

[70] For definition relevant to our discussion, see Ghai, 'Introduction' in *Practising self-government*, 3.

[71] Mamdani, *Citizen and subject,* 291.

Mamdani forcefully reminds us that colonial state power relations and their legacy must be read as

> how the subject population was incorporated into – and not excluded from – the arena of colonial power. … [by this emphasis], no reform of contemporary civil society institutions can by itself unravel this decentralized despotism. To do so will require nothing less than dismantling *that form of power*.[72]

While accepting the historical place of the colonial state, Mamdani sees important similarities across time and space of the various entities, bounded by the 'native question': that is, 'how can a tiny and foreign minority rule over an indigenous majority'.[73] The clamour of indigenous peoples for clearer self-determination rights exercised in FPIC is a corollary and legacy of this colonial political posture, manifested in the bifurcated post-independence state.[74] To date, the direct/indirect rule bifurcation remains: 'urban power [speaks] the language of civil society and civil right, rural power of community and culture … each signif[ying] one face of the same bifurcated state'.[75]

Redistribution of the post-independence national cake maintained the same direct/indirect divisions, but was only deracialised as a consequence of the 1960s Africanisation programmes.[76] This preservation of colonial divides kept racial undertones in some African countries and was certainly manifested in dubiously acquired indigenous wealth and privilege in many others across Africa.[77] This further complicates the task of contemporary designers of constitutional rights. It is also at this nexus that the extent of FPIC rights fully reveal themselves as self-determination contestations.

Whereas for Mamdani's discussion in *Citizen and subject*, a tiny foreign minority seeks to dominate a homogenised indigenous majority, for the constitutional designer today, while burdened with that very colonial legacy, the question *rather* is how to balance the vested interests of the indigenous dominant majority with the various, possibly divergent claims of self-aware indigenous minorities. Or to put it more analogously to the Mamdani example, the contemporary question for the

[72] Mamdani, *Citizen and subject,* 15-16.

[73] Mamdani, *Citizen and subject,* 16.

[74] Mamdani, *Citizen and subject,* 17-8.

[75] Mamdani, *Citizen and subject,* 18.

[76] Mamdani, *Citizen and subject,* 20.

[77] Mamdani, *Citizen and subject,* 20-1. Mamdani refers to this as the fourth moment in the history of indigenous civil society in post-independence Africa.

indigenous majority ruling the barely post-colonial but mostly neo-colonial state is how to dominate other, not fellow, indigenous minorities *and non-ruling majorities*. We will call this, the 'other native question'. The ebbs and flows of constitutional design and redesign, progress towards and retreat from democracy and rule of law and instinctive dismantling of decentralisation efforts during the wave of constitutional reforms of the 1990s and 2000s, testify to the force of Mamdani's reflections.

Along with Mamdani, we reiterate that the 'other native question' is central to constitutional design upheavals and retreats from rule of law regimes. This retreat is not new. Ghai and McAuslan documented this retreat with exceptional clarity, contemporaneous to those events in the 1960s, in *Public law and political change in Kenya*. In the 1990s, Ghai and many others, in Africa and across the Global South, attempted to 'dismantle that form of power' in constitutional revisions and overhauls. These progresses in 2021 are almost universally under attack across the continent.

Consideration of minority rights in state reform and therefore constitutional design is central to achieving any deep rooted democratisation, or rather, to uprooting deep seated power structures that snap society back to colonially-inspired despotism. The case of Kenya is illustrative:

> The independence constitution established a regional system of parliamentary government, with a divided executive, an independent judiciary with security of tenure; an independent electoral commission; a multiparty political system of government; a bill of fundamental rights and freedoms; and safeguards for minority rights, including *majimbo*.[78]

The striking point here is the connection in this Kenyan Independence Constitution between the safeguard of minority rights and decentralisation, which was the core of state reform towards a post-colony. And just in case the importance of state centralisation is doubted, Ghai describes:

> …the first casualty after independence was *majimbo*…most of the powers of the regions, which were not specifically entrenched, were repealed on the first anniversary of independence (1964). Powers over the police and public services were restored to the Central Government. Soon after, provisions guaranteeing fixed revenue for the regions were removed. *Thus the* majimbo *system was effectively destroyed in little more than a year after independence.*[79]

[78] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*. '*Majimbo,* is a Swahili word which means an "administrative unit" or "region", and is generally used to refer to those provisions of the Constitution which established the regional structure.' Ghai and McAuslan, *Public law and political change in Kenya,* 178, note 6. It is noteworthy that the federated *majimbo* system was first laid out in the Self Government Constitution, Statutory Instrument 791/1963. See Ghai and McAuslan, *Public law and political change in Kenya,* 176, note 8.

[79] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*. See, in almost identical terms, the

The rest of the institutional safeguards of minority rights, the Senate, prohibition on altering of regional and district boundaries and the regions themselves were abolished in 1966 and 1968 respectively. The Kenyan example is one where state reform at independence took on a radical constitutional design centred on minority rights protection. It reinforces the view that respect for minority rights is antithetical to despotism, decentralised during colonialism and centralised in post-independence.

Such argument certainly also demands that we disabuse ourselves of the view, that lures us away from proper focus, that the state – or its government – is essentially tri-armed in structure. These structures, while extant, are not the true conduits of power relations as a Mamdanian analysis betrays, nor the target of despotic counter-revolution as Ghai's and McAuslan's historiography suggest.

The structure of Ghai and McAuslan's *Public law* is instructive. While they, as lawyers would, place some emphasis on the old three-arm government structure, it is the chapters on 'Agrarian administration' and 'Administration of justice' in the colonial era – rather than 'The Judiciary' that demonstrate the authors were alive to the true locus of power in *this* African state. In their treatment of the post-independence era, chapters on 'The administrative process', 'The administration of justice 2 – the legal profession' in addition to 'The administration of justice 1 – courts and law', rather than a bland 'Judiciary' chapter also indicate a similarly insightful appreciation of true power structures in that post-independence state that usually eludes lawyers. Here I would also stress the importance of a professional civil service insulated from political and executive control as part of this analysis outside the outdated and inaccurate tri-armed state/government structure.

The Kenyan example underlines that protecting the rights to self-determine of minority and indigenous peoples is necessary to protect the democratisation of the state, and the rights to self-determination of the non-ruling majorities.

Citizen and subject opens with Jan Smuts' 'progressive' views on 'the African'. While paternalistic and bigoted, one cannot help but recognise similarities with the human rights discourse on indigenous peoples.

> What Smuts called institutional segregation, the Broederbond called apartheid. … But neither institutional segregation nor apartheid was a South African invention. If anything,

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post-independence dismantling of devolution in Papua New Guinea by 'consolidation of central state apparatus' given that 'political and bureaucratic access to the state was the main accumulation of wealth'. Ghai and Regan, 'Unitary state, devolution, autonomy, secession', 106.

> both idealized a form of rule that the British Colonial Office dubbed 'indirect rule' and the French 'association'. … the institutions so defined and enforced were not racial as much as ethnic, not 'native' as much as 'tribal'. Racial dualism was thereby anchored in a politically enforced ethnic pluralism.[80]

In creating a duality of legal regimes and ensuring an all-consuming control of the African by the 'native authority', the colonial legacy not only accentuated tribe as identity, but even more insidiously took institutional control over the reproduction of African custom itself![81] Colonial authorities systematically replaced traditional authorities with all-powerful chieftaincies beholden to colonial power.[82] Of the myriad of African traditions available in the 19th Century, 'the tradition that colonial powers privileged as the customary was the one with the least historical depth … monarchical, authoritarian, and patriarchal [that] most accurately mirrored colonial practices'.[83]

An important corollary of this universal colonial practice for the contemporary constitutional designer is to accentuate the intolerance of the indigenous majority, who are the material beneficiaries of colonialism, to indigenous minority claims. This results in a hardening of positions, making the possibility of accommodating each other as equals even more remote. After over a century of the reproduction of initially colonially selected, inherently intolerant, indigenous governance variants, these monarchical, authoritarian and patriarchal strands are today asserted as irrevocably African customs as can be affirmed in living memory! Given the possible range of African customs practiced pre-colonially, that this intolerant variant of African custom has reigned supreme for a century is probably the greatest cultural impediment to rule of law constitutional orders in Africa. 'Where the source of law was the very authority that administered the law, there could be no rule-bound authority. In such an arrangement, there could be no rule of law.'[84]

This continuity of the colonial power logic is only possible by cloaking its power reproduction in disingenuous affirmation of cultural self-determination, thereby

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[80] Mamdani, *Citizen and subject,* 7.

[81] Mamdani, *Citizen and subject,* 22.

[82] 'The functionary of the local state apparatus was everywhere called the chief. One should not be misled by the nomenclature into thinking of this as a holdover from the precolonial era. … The authority of the chief thus fused in a single person all moments of power: judicial, legislative, executive, and administrative. This authority was like a clenched fist, necessary because the chief stood at the intersection of the market economy and the nonmarket one.' Mamdani, *Citizen and subject,* 23.

[83] Mamdani, *Citizen and subject,* 22.

[84] Mamdani, *Citizen and subject,* 33.

achieving the dual scoop of winning naïve allies from among the colonised and progressives, while disarming any critique of its intentions. In fact, it weaponises the conviction of the progressive against analytic critique that can expose its underbelly. Mamdani has recognised the value, to despotic power, of 'tapping authoritarian possibilities in [African] culture.'[85] As Ghai and McAuslan remind us, 'the colonial past of the law cannot be neglected.'[86]

The state as imperial and international *inter se…* plurinational?

> such notions as modernity, enlightenment, and democracy are by no means simple and agreed-upon concepts. Edward Said[87]

The internally imperial nature of the state is manifested in the practice of two concepts: the linear view of development, what Mamdani calls 'unilinear evolutionism',[88] and the primacy of homogeneity. The linear view of development, the delusion that that which came before is necessarily less advanced than that which is done today is fiercely oppositional to the John Mbiti view of the cyclic nature of time.[89] The manifestations of these oppositional worldviews in colonial and post-independence human rights conduct of states is stark.[90] The linear view[91] is exemplified by unabashedly repeated opinions of French presidents on Africa that follow the delusional views of HWF Hegel[92] and francophone Africa's bewildered

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[85] Mamdani, *Citizen and subject,* 25.

[86] *Public law and political change in Kenya,* 506.

[87] Preface to the Twenty-fifth Anniversary Edition' *Orientalism,* Vintage Books, 2004.

[88] Mamdani, *Citizen and subject,* 9.

[89] John S Mbiti, *African religions and philosophy,* Second Edition, Heinemann, 1990, 15-28. See correspondingly, Samir Amin, 'Underdevelopment and dependency in Black Africa: Origins and contemporary forms,' *Journal of Modern African Studies* 10 (1970).

[90] Bloch uses this very opposition of world views to explain the anguish of the communities of Northeastern Kenya in the forced sedentarisation or 'manyattazation' policy of the Shifta War '*gaf Daba'* of 1963-8, all in the name of '*maendeleo',* development. See generally Sean Bloch, 'Stasis and slums: The changing temporal, spatial, and gendered meaning of 'home' in Northeastern Kenya' *Journal of African History*, 58.3 (2017), pp. 403-23.

[91] The problems, in Africa but also by extension of all indigenous peoples across the globe, of human organisation – politics – lies in traditions and customs which are necessarily backward and their resolution comes in modernising – westerning – them, what Mamdani calls 'the politics of advanced capitalism'. See Mahmood Mamdani, *Politics and class formation in Uganda,* Monthly Review Press, 1976, 1-2. *This* traditional-modern dualism serves to sanitise colonialism.

[92] Discours de Nicolas Sarkozy à l'Université Cheikh Anta Diop de Dakar, prononcé le 26 juillet 2007. In classic '*plus ça change',* ten years later, Emmanuel Macron publicly asserted that Africa has a 'civilisational problem'. See Eliza Anyangwe, 'Brand new Macron, same old colonialism' *The Guardian,* 11 July 2017. Compare with Jan Smuts' Rhodes Memorial Lecture at Oxford in 1929 in Mamdani, *Citizen and subject,* 4-7.

responses to such unabashed bigotry.[93] Among its greatest dangers is not only that it is extractive in nature, that is, that today appears better precisely because it exploits and extracts from the past,[94] but that its glorifies such extractive tendency.

And this recalls our surreal scene in the Pretoria classroom described above. This moment forcefully reminds us that deluded notions of linear development from our Global South cultures to Eurocentric ones are imbedded in the dominant indigenous cultures. And these notions are of no mean significance.

The primacy of politico-cultural homogeneity as a necessary constituent of state stability is another unfortunate notion that conversely only ensures the instability and retardation of the state.[95] If the primacy of this notion prevents us from contemplating more progressive and truly human rights affirming constitutional designs, then its origins and validity are worthy of inquiry.

Ghai is clear on its Westphalian origins, noting that 'the state in Africa and Asia did not follow this trajectory' until 'the imposition and centrality of the state, with the logic of the nation-state, changed relationships between the diverse communities … becoming a straitjacket.'[96] Mamdani sees the tendency to homogeneity as a consequence of the colonial state form that created artificial jurisdictions of customary law, each exclusive to its neighbours and whose enactments were arbitrarily administratively produced by imposed chieftainships. This worked to eliminate the inherent heterogeneity of local communities, increase social tensions,

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[93] Adame Ba Konaré (ed), *Petit précis de remise à niveau sur l'histoire africaine à l'usage du président Sarkozy,* Essais solidaires, Dakar, 2008; Makhily Gassama (ed), *L'Afrique répond à Sarkozy: contre le discours de Dakar,* Editions Philippe Rey, 2008. See also, Babacar Camara, 'The falsity of Hegel's theses on Africa' *Journal of Black Studies,* Vol 36, No 1, September 2005, 82-96. While I am unaware of any book or journal length responses to Macron's remarks, it would seem, at this point, unbecoming of African intellectuals to keep responding to bigotry. As our ancestor Toni Morrison taught,

> 'The very serious function of racism … is distraction. It keeps you from doing your work. It keeps you explaining, over and over again, your reason for being. Somebody says you have no language and so you spend 20 years proving that you do. Somebody says your head isn't shaped properly so you have scientists working on the fact that it is. Somebody says that you have no art so you dredge that up. Somebody says that you have no kingdoms and so you dredge that up. None of that is necessary. There will always be one more thing.'

'12 of Toni Morrison's most memorable quotes: The author's thoughts on writing, freedom, identity and more' *The New York Times,* 6 August 2019.

[94] '… the "modern" plantation is productive precisely because it appropriates labor from the "traditional" village, that the "stagnation" of the village is a condition for the "dynamism" of the plantation'. Mamdani, *politics and class formation in Uganda,* 5.

[95] '… some constitutions prohibit or restrict the scope of autonomy by requiring some states be 'unitary' or some similar expression; such a provision has retarded the acceptance or implementation of meaningful devolution, in for example, Sri Lanka, Papua New Guinea and China'. Ghai, 'Ethnicity and autonomy'.

[96] Ghai, 'Introduction' in *Practising self-government*, 4.

and in turn accentuate the need to further enforce a top-down uniformity.[97] Ghai reminds us that 'economic and social developments can disrupt traditional patters and cause dislocations, on which ethnic resentment can feed. *Modernity is a potent cause of ethnicity*.'[98] Post-independence state reform only hastened this tendency. But history bears witness as to its fundamental error. 'Many of these impositions [of identity] are intended to replace class politics with ethnic politics'[99] unfortunately continuing along a clearly ineffective and 'explosive' democratisation.[100]

Osogo Ambani refers to the contemporary African state as 'inter*national*',[101] that is, made up of various nations. Jacob J Akol, speaks of the plurinationality of African states, and the desirability of the formal recognition of such plurinationality.[102] But this plurinationality is itself a product of colonial power reproduction. Indirect colonial rule required despotic force to be decentralised, and required a divisive multiplicity of native/customary laws. 'Europe did not bring to Africa a tropical version of the late nineteenth century European nation state. Instead it created a multicultural and multiethnic state.'[103]

Since the constitutional change of 7 February 2009, and 184 years since independence, Bolivia changed its official name to Plurinational State of Bolivia. Coincidentally, this was during the term of its first indigenous President, Evo Morales, in a country where indigenous peoples have *always* had a *numerical majority*.

> Following his election in December [2005], Mr Morales promised to undo centuries of dominance by descendants of Europeans. He told delegates at the ceremony in the city of Sucre: 'I really feel that right here starts a new Bolivian history, a history where there is equity, a history where there is no discrimination.'[104]

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[97] Mamdani, *Citizen and subject,* 289.

[98] Ghai defines ethnicity thus: 'When [language, race, religion and colour] cease to be means of social distinctions and, and become the basis of political identity and claims to a specific role in the political process or power, ethnic distinctions are transformed into ethnicity.' Ghai, 'Ethnicity and autonomy', 4-5. [emphasis mine]

[99] Ghai, 'Ethnicity and autonomy', 5.

[100] Mamdani, *Citizen and subject,* 289.

[101] Intervention by JO Ambani at the Promise of Constitutions Conference, held at Strathmore University Law School, 12 March 2019.

[102] Jacob Akol, *Burden of nationality,* Paulines Publications Africa, Nairobi, 2005. It is in this context that he welcomes the Ethiopian constitutional right to secede. See also the later scepticism of Mahmood Mamdani, 'The trouble with Ethiopia's ethnic federalism' *New York Times,* 3 January 2019 and Yonatan Tesfaye Fessha 'The original sin of Ethiopian federalism, *Ethnopolitics*, 16:3, 2017, 232-245, DOI: 10.1080/17449057.2016.1254410.

[103] Mamdani, *Citizen and subject,* 287. Mamdani in fact makes this claim explicitly, *Citizen and subject,* Conclusion, note 1, in reference to Basil Davidson, *The Black Man's burden: Africa and the curse of the nation-state,* 1992.

[104] "Push for a new Bolivia constitution" *BBC News,* 6 August 2006, http://news.bbc.co.uk/2/hi/americas/5251306.stm.

Nick Barber offers one more insight into this phenomenon of plurinational (or international *intra se*) states. Barber argues that it is precisely because of public law checks, of which human rights guarantees form an intrinsic part, that the single nation state is impossible to achieve today. All the repression of undesirable languages and cultures and physical ethnic cleansing that made it possible to forge the mostly single nation states in Europe in the preceding centuries is, hopefully, impossible today.[105]

The strength of recognising plurinationality lies in equally rejecting a top-down artificial uniformity,[106] what Ghai calls 'the homogenising mission of the state'.[107] With a post-modern lens that 'celebrated difference, urging the authenticity of ethnic, linguistic or religious groups,' Ghai criticises the liberal state for stifling diversity due its principled tendency to homogeneity and uniformity, instead of 'a pluralistic state of diverse cultural and national groups.'[108]

A Ghai-Mamdani nexus?

> 'the most important institutional legacy of colonial rule … may lie in the inherited impediments to democratization.[109] Mamdani

It is sobering to interrogate the convergence of politico-legal theory and praxis in understanding the nature of the African state, and the duality of 'philosophy and style of law [as] applied to [Africans and non-Africans]'[110] as well as its post-independence preservation. Colonial and post-independence attitudes to constitutional law and its sanctity as fundamental and immutable law took an 'old pattern of a contrast between rhetoric and practice'.[111] In fact, the obvious starting point of a Ghai-Mamdani nexus is the recognition that the tradition of law

[105] Personal communication with Nicholas Barber, at the 'Promise of the Constitutions Conference' held on Tuesday, 12 March 2019, at Strathmore Law School. And even there it did not work or took a very long time. Look at the Scots and Welsh, Corsicans, Basque, Catalans, Roma, etc. See also, Ghai's view of the centralising and exclusionary nature of the Westphalian nation-state 'which produce a degree of rigidity and inflexibility and are unable to accommodate diversity'. Ghai, 'Introduction' in *Practising self-government*, 3-4.

[106] Ghai calls this 'singular nationalism'. 'Preface to the 2001 Issue' in *Public law and political change in Kenya*.

[107] Ghai 'Ethnicity and autonomy', 2.

[108] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*.

[109] Mamdani, *Citizen and subject,* 25.

[110] The English settlers to live under common law and the Africans under an Austinian philosophy. Ghai and McAuslan, *Public law and political change in Kenya,* 507; 'The colonial state was a two-tiered structure: peasants governed by a constellation of ethnically defined Native Authorities in the local state, and these authorities … in turn supervised by white officials deployed from a racial pinnacle at the center.' Mamdani, *Citizen and subject,* 287.

[111] Ghai and McAuslan, *Public law and political change in Kenya,* 510.

and politics in much of the formerly colonised polities is hardly one of justice and fairness but is rather deeply rooted in hypocritical double-play.

As Leopold Sedar Senghor put it, 'Let us admit our weakness. It is the best method of getting over it.'[112] Knowing that we cannot simply rely on 'good traditions' concentrates our minds on why good constitutions are 'sad reminders of earlier hopes'[113] and to the need to freshly invent our polities, away from long-standing traditions of state and legal organisation.

> … the impact of multiparty elections – in the absence of a reform of rural power – turns out to be no just shallow and short-lived, but also *explosive*. Too many presume that despotic power on this continent was always or even mainly a centralized affair, in the process forgetting the decentralized despotism that was the colonial state … *in the absence of alliance-building mechanisms*, all decentralized systems of rule fragment the ruled and stabilize their rulers.[114]

In the absence of alliance-building mechanisms… explosion. The Lwanda Magere shadow,[115] the weakness of state/constitutional reform towards democratisation lies in not imagining innovative local level alliances. To our minds, indigenous peoples' self-determination in true equal autonomy to our dominant culture local states provides the elusive mental/conceptual framework and political real world project to surmount the seemingly intractable challenge of state reform and constitutional design.

Ghai provides both inspiration and caution:

> Because autonomy arrangements divide power, *they also contribute to constitutionalism*. The guarantees of autonomy and the modalities for their enforcement show the reliance on rule of law and the role of independent institutions.[116]

Yet,

> autonomy can be fragmenting, pigeonholing and divisive to societies. Sometimes… autonomy is so structured that it is difficult to find common ground … *and may itself become the cause of conflict*.[117]

[112] Speaking to the Drafting Committee of the African Charter on Human and Peoples' Rights in 1979. Hassan B Jallow *Journey for justice,* AuthorHouse, Bloomington, 2012, 62.

[113] Ghai and McAuslan, *Public law and political change in Kenya,* 512.

[114] Mamdani, *Citizen and subject,* 300. [emphasis mine]

[115] Lwanda Magere is a legendary Luo warrior in Kenya, circa 18th Century, whose great power lay in a rock hard body and a weak shadow which bled when cut. His shadow is thus his tragic flaw.

[116] Ghai, 'Introduction' in *Practising self-government*, 11. [emphasis mine]

[117] Ghai, 'Introduction' in *Practising self-government*, 12. [emphasis mine]

Ghai and McAuslan's 1969 reflection of the legal origins of colonial power in Kenya, for the purposes of our present discussion, is worthy of fuller reproduction:

> we have shown … lawyers constantly adjusting the law to the needs of the politicians and administrators who were carrying out the forward policy in Africa. … neither the lawyers nor the politicians saw the function of the law as standing impartially between two sides, or even leaning in favour of the weaker side, *but as making the way smooth for the stronger.* … it may be unrealistic to expect lawyers to have acted any differently, but then it is also unrealistic and not a little hypocritical to suggest that one of the main benefits of British colonialism was the introduction of the rule of law into Africa, for if that concept means anything, it means that the law should help the weak and control the strong and not vice versa. From the African point of view the English law introduced into East Africa was one of the main weapons used for colonial domination, and in several important fields remained so for most of the colonial period, only changing when Africans began to gain political power.[118]

In essence, just like the binaries of power relations described by Mamdani, rule by law 'legality', using the technicalities and minutiae of legal procedures almost laughably to achieve political ends continues uninterrupted to date. Africa, the graveyard of constitutions.[119]

Mamdani's great contribution to the study of the African state is demonstrating that the colonial state persists, and not for want of attempts at reform, but precisely because of want of introspective analysis informing such reform. For instance, it suffices to consider that it is only in late November 2020 that the Constitutional Court of South Africa declared the apartheid era law, Riotous Assemblies Act, 1956, unconstitutional,[120] much to the chagrin of the erstwhile liberation movement that bore the brunt of that law.

The progressive constitutional designer and human rights defender today is well advised of the *inherent* capacity of power to reproduce and therefore preserve itself, through co-option of the hitherto oppressed. And this is important because the discourse of self-determination unites the provinces of the progressive constitutional designer and the human rights defender. In other words, human rights

[118] Ghai and McAuslan, *Public law and political change in Kenya,* 34. One dares wonder though, if this is true of English law as enforced in East Africa, could it surely have been any differently applied in the greatness of Britain, a wondering best suited for the Welsh, Scots and Irish to contemplate. [emphasis mine]

[119] Wachira Maina, 'Africa's constitutional democracies: The case of a dissolving picture' *The East African* 12 March 2018, https://www.theeastafrican.co.ke/tea/news/rest-of-africa/africa-s-constitutional-democracies-the-case-of-a-dissolving-picture-1385846.

[120] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* (CCT201/19) [2020] ZACC 25 (27 November 2020).

is the framework by which the self-determination claim is expressed and enjoyed.[121] But human rights discourse itself finds worthy caution in the thought of Ghai. 'Self-determination came before rights.'[122]

Ghai warns against interpreting human rights discourse too literally or solely in ideological terms. Rather, he adopts 'a more pragmatic and historical, and less ideological, approach.'[123] In his experience, concerns about 'culture' have in practice been less important than the balance of power and competition for resources. Human rights rhetoric may be used – sometimes cynically manipulated – to further particular interests or, as in the Asian values debate, to give legitimacy to repressive regimes by emphasising the right to self-determination of sovereign states (but not necessarily of peoples or minorities within those states).[124]

Ghai presents the choices for the constitutional designer or state reformist thus:

> A pessimistic constitutional expert might well say that we have reached the age of the end of constitutions, since there is no such thing as autonomous state power. A more optimistic expert might see in this confusion and fluidity a challenge for the state to minimize its vulnerability to external forces by exploiting opportunities opened up by globalization, while at the same time *reexamining the state to accommodate local movements … rather than direct control.*'[125]

Ghai notes that in the independence era state reform, human rights became central to protection of minority rights as in Nigeria. For Kenya, adding a complex structure of minority self-determination, *majimbo,* was necessary.[126] This assertion again lends credence to the contention of the necessary link between state reform and the protection of the rights of minorities and non-ruling majorities in the construction of *the true post colony*. Ghai directly connects the effect of ethnic competition on state centre weakness and eventual dismemberment and the rise of pluralistic forms of unity that have challenged the liberal state model that is merely

[121] Ghai, 'Introduction' in *Practising self-government*, 20ff.

[122] Ghai, 'Introduction' in *Practising self-government*, 22.

[123] Ghai, 'Universalism and relativism', 1099.

[124] William Twining, 'Human rights, southern voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai, Upendra Baxi,' 11 *Review of Constitutional Studies,* 2006, 242, also citing Ghai, 'Universalism and relativism', 1099.

[125] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*. [Emphasis added]. See similarly, 'The core agenda that African states faced at independence was three fold: deracialising civil society, detribalising the Native Authority, and developing the economy in the context of unequal international relations.' Mamdani, *Citizen and subject,* 287.

[126] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*. Nigeria already had a federal structure, and a fourth state (Mid-West) was added around the time of independence precisely to give some self-determination to the assorted communities of that area.

centred on individual rights, towards group rights and the discrediting of 'singular nationalism'.[127]

In simultaneously critiquing globalisation's hostility 'to redistribution and, one might even say, the concerns of the poor'[128] and outdated constitutional disinterest with poverty and corruption, Ghai points to the legal tradition's poor appreciation of the structures of patrimonial networks forged under the decentralised despotism of the colonial era,[129] morphed into centralised despotism of the post-independence era. As Ali Mazrui recounted of a tragic common saying in Ghana in the 1960s, 'Nkrumah has killed an elephant. There is more than enough for us to chop.'[130] It is rather the debilitating effects of corruption and poverty on state stability that should further concentrate the mind of the constitutional designer, and not the false appeal of singular nationalism.

A close reading of a Ghai-Mamdani nexus accentuates the intractability of the colonial state design and its networks that perpetuate poverty while advancing corruption on the one hand, and the post-modern call to pluralistic state formations anchored on rejection of singular nationalism, in order for groups to self-determine 'their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.[131]

Ghai's approach to constitution-making harnesses the social transformative capacity of a constitution-making process, transforming law from a potentate, an oppressor, to agent of resistance and refuge of the poor and downtrodden. This approach is catapulted to its most efficacious when undergirded by historiographical analysis of the power relations that insidiously govern our polities, and our group roles in such power reproduction.

The Ghai-Mamdani nexus also speaks to the tenacity of the local state and its hold of customary power over the majorities of contemporary African states. Through this hold, the local state is able to retard and reverse the construction of

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[127] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*.

[128] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*.

[129] …patrimonialism … was in fact a form of politics that restored an urban-rural link in the context of a bifurcated state, albeit in a top-down fashion that facilitated the quest of bourgeois fractions to strengthen and reproduce their leadership.' Mamdani, *Citizen and subject,* 20.

[130] He sadly concludes: There hasn't been much of a change to African attitudes to government property since those old colonial days." *The Africans: A triple heritage,* 'Programme 7- A Garden of Eden in decay', minute 45.40-47.47, 1986, https://www.youtube.com/watch?v=98DeZLWnkJg&list=PLJ5clxSkEmwNjJlQ5CZjN7VBB6tswuDPN&index=7

[131] Article 22 (1), *African Charter on Human and Peoples' Rights,* 1520 UNTS 217.

stable, pluralistic, truly post-colonial societies. Mamdani highlights that the customary created by colonial fiat was inescapable to the colonised.[132] In circumstances hardly dissimilar to the *Worcester v Georgia*[133] and related cases in the US Supreme Court in the 19th Century, Ghai and McAuslan recount a corresponding account, that of the *Masai case*.[134]

This case hinged on the Maasai claim that British colonial authorities breached the 1904 Anglo-Masai Treaty which was to 'endur[e] so long as the Masai as a race shall exist, and that Europeans or other settlers shall not be allowed to take up land in the Settlements'[135] by signing the 1911 Anglo-Masai Treaty. By arguing it was treaty not contract – and therefore Act of State – colonial authorities conveniently excluded the jurisdiction of the municipal court, while still explicitly rejecting the sovereignty of the Maasai nation[136] because the Maasai were 'subjects of their chiefs or their local government whatever form that government may take'.[137] The Maasai, dispossessed of cattle and rich land, is therefore neither sovereign nor rights-bearer. With neither escape nor remedy,[138] the 'native' acclimatises to the power overwhelming him, and, in the now centralised post-independence era, claims it for his narrow self-interest, cultivated by colonially reproduced 'monarchical, authoritarian, and patriarchal notion of the customary … most accurately mirrored in colonial practices.'[139]

No wonder the contemporary post-independence state is plagued by perennially destabilising tendencies whose life source is the Mamdanian rural. The legal origins of colonial power tainted with discrimination, infect the post-independence legal order, as law flows from power structures. '… Changing the law, any law, partakes of legislation, which is not a purely legal but an *eminently political activity*.'[140] The

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[132] Mamdani, *Citizen and subject,* 22.

[133] 31 US (6 Pet.) 515 (1832).

[134] *Ol le Njogo and others v AG of the EA Protectorate* (1914), 5 EALR 70, cited in Ghai and McAuslan, *Public law and political change in Kenya*, 20-3.

[135] *Ol le Njogo and others*, at p. 92.

[136] *Ol le Njogo and others*, at p. 91-2.

[137] *Ol le Njogo and others*, at p. 93.

[138] '[The removal of the Maasai from their land] may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. [However, t]hese are considerations into which this Court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy.' *Ol le Njogo and others*, cited in James Gathii, 'Imperialism, colonialism and international law' 54 *Buffalo Law Review*, No. 4 (January 2007), 1013.

[139] Mamdani, *Citizen and subject,* 22.

[140] Georges Abi-Saab, 'Membership and voting in the United Nations' in Hazel Fox (ed) *The Changing Constitution of the United Nations*, British Institute of International & Comparative Law, London, 1997, 19 [emphasis mine].

legal order, as the political order, will not simply become liberating simply by its differential staffing.

Ghai's and McAuslan's motivation for historicising Kenya's constitutional order remains germane, and more so, for the constitutional designer and human rights defender of dominant culture extraction in the contemporary state:

> law and attitudes to towards law have hitherto been rather neglected in studies of developing nations, yet are relevant in any attempt to understand how these nations are governed today. … little attempt to examine or investigate the effect of such reception on attitudes towards law, government and power, or to consider the relationship between methods of government in African states, *including breakdowns and revolutions,* and the imported system and concepts of law used in governing.[141]

It is curious that Ghai, framing his analysis on the liberal-communist framework, sees self-rule systems as more likely to work where there is an established tradition of democracy and rule of law.[142] Mamdanian analysis almost entirely excludes the possibility of such established tradition in the post-independent state since the existing 'tradition' is precisely what was the foundation of apartheid, however variably called. This point of divergence is not insignificant for constitutional Afrofutures. However, Ghai further points out that this is because pluralism is more likely to be valued in such traditions. This then becomes a point of pragmatic if not programmatic convergence: the harnessing of traditions of pluralism that were dimmed by colonial and independence despotism is necessary for the construction of contemporary rule of law systems.

Viability of indigenous peoples' equal and interdependent self-determination

> the last chapter in any successful genocide is the one in which the oppressor can remove their hands and say 'My God! What are these people doing to themselves. They are killing each other. They are killing themselves'. Aaron Huey[143]

While the integration of indigenous peoples' governance systems in equal stead to our dominant culture ones has been presented above as a possible remedy to the rule of law blindspots and centralising tendencies witnessed in post-independence

[141] Ghai and McAuslan, *Public law and political change in Kenya,* 505. [emphasis mine]

[142] Ghai, 'Ethnicity and autonomy', 16.

[143] Huey, 'America's native prisoners of war'.

African state/constitutional design, such integration is not without its pitfalls. The peculiar problem of indigenous peoples' self-determination is the extreme power imbalance vis-à-vis dominant cultures, and the very real risk that their integration can only lead to *de facto* apartheid.

Ghai is consistently wary of complex autonomy systems, which he regards as requiring high administrative capacity and fine political skills.[144] Among the worst elements of integrationist self-determination is that dominant culture lacks legal and ontological constructs that can be harmonised with indigenous ones in such areas as individual versus communal benefit, and inter-generational rights and responsibilities. Others include a pervading unspoken requirement for indigenous constructs to satisfy mainstream ideals and therefore not challenge the status quo. Such conditions can only lead to perpetuating inequality, but without socio-political responsibility on the part of the state. In other words, an equal game with unequal players results in unequal scores.

Apartheid is inherently a self-determination model that disposes of socio-political responsibility while maintaining vestiges of integrationism. At its heart is the refusal of the mainstream to accept the intrinsic equality of non-dominant worldviews. Apartheid, separate development, seems self-determinationist and human rights affirming. Each is allowed to enjoy the benefit of culture-sensitive governance. Help by the mainstream is afforded the struggling peoples out of the mainstream's kind heart. Any civil unrest sown by the frustrating structures of injustice is simple criminal conduct that ought, in the interests of justice, to be met with the full force of the law.

But apartheid is intrinsically inimical to human rights. At its basis is inequality in human dignity and non-responsibility for causing such inequality. Like a tree whose nature is evident in its fruit, apartheid disguised as self-determination reinforces community decline, maintains a disdain for all traditional worldviews, from governance to scientific and artistic knowledge, and keeps whole peoples in open air prisons of structural injustice, the frustration from which is inevitably manifested in protest art and recurrent civil unrest.

'Autonomy is seldom granted because it is considered a good thing in itself, so it may come bundled with suspicions and resentments.'[145] Only when destinies are

[144] Repeated in 1970 and 2000. Ghai and McAuslan, *Public law and political change in Kenya,* 505-21; also Ghai, 'Ethnicity and autonomy', 10.

[145] Ghai, 'Introduction' in *Practising self-government*, 25.

inextricably intertwined and the mainstream cannot socio-politically insulate itself from the unenviable fate of indigenous and minority peoples can the plurinational states we live in avoid this beguiling apartheid.

A true self determinationist model would embrace of overt integration of *indigenous forms* of self-governance into dominant mainstream power structures of the state *as equals*. This may mean acceptance of indigenous governance entities into the tri-armed structure of government.

Ghai cautions against opportunistic use of and over-ambitious expectations in the autonomy, urging a sober reflection of its potential and pitfalls.[146] Autonomy, it can be argued, 'is perhaps more fundamentally, a process … connotes attitudes, a spirit of mutual respect and tolerance … [and] cannot be understood a consideration of process and values.'[147]

Mamdani insists that in order for an African democratisation to stand a chance of confronting the legacy of the colonial bifurcated state should entail the deracialisation of civil power and detribalisation of customary power.[148] It requires 'dismantling and reorganizing the local state, the array of Native Authorities organized around the principle of fusion of power, fortified by an administratively driven customary justice and nourished through extra-economic coercion.'[149]

Conclusion

In this paper, we have attempted to use self-determination rights of indigenous peoples as a framework to appraise post-independence state design and the imbedded structure of power relations in our polities while remaining 'in search of some kind of accommodation through the political reorganisation of space'.[150]

We cannot overemphasise the danger, for the progressive human rights defender, the overzealous constitutional designer, in delinking the colonially-inspired governance over indigenous peoples by the central state from the tendencies to despotism inherent in the nature of that inherited state. Such delinking would be tantamount to the view that 'the inmates of a concentration camp are able … to

[146] Ghai, 'Ethnicity and autonomy', 4.

[147] Ghai, 'Ethnicity and autonomy', 10-1.

[148] Mamdani, *Citizen and subject,* 25.

[149] Mamdani, *Citizen and subject,* 25.

[150] Ghai, 'Ethnicity and autonomy', 2.

live by their own cultural logic. But one may be forgiven for doubting that they are therefore "making their own history"'.[151]

We are caught in a miasma of tragic *fait accompli* to which there are no easy answers, from which no quick escapes exist. We can neither undo the past nor continue down a path of repeatedly superficially reforming an inherently unjust state structure.

Legally speaking, among the benefits that could accrue from a more honest self-determination model is offering new political impetus to resolve certain incongruences in the laws governing intellectual property. For instance, as concerns traditional knowledge, the global intellectual property rights under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and regime proposed by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) stand at great odds. Indigenous knowledge, with its lack of single identifiable inventor, communal ownership, very poor documentation, diminished legal status of UNDRIP vis-a-vis TRIPS and almost nonexistent political capital against gargantuan trans-nationals, stands no chance of remaining indigenous. Especially as concerns patenting and bio-resources, the provisions of TRIPS (Article 27) may be used to usurp traditional knowledge of both indigenous and minority peoples. Across the legal framework, in the particular case of patenting varieties through genetic modification, the law is fragmented. Under the TRIPS agreement, the patent holder, usually corporate in legal nature, holds the rights of ownership; under UNDRIP, it is the indigenous communities. Under the Convention on Biological Diversity (Article 3), states have ownership of natural resources in their territories, yet under another provision, there exists a state obligation to 'respect, preserve and maintain indigenous knowledge' but subject to national law (Article 8). The same state-centric ownership of natural resources is repeated in the UN Convention on the Law of the Sea, despite what traditional knowledge indigenous and minority peoples may hold over sea resources.

As long as the Global South state does not consider indigenous people as an intrinsic part of the state, but as an inconvenient appendage, obvious common interests will remain elusive where some non-state actors far exceed the economic, political and even physical presence of whole continents of states.

[151] Talal Asad, *Genealogies of religion, discipline and reasons of power in Christianity and Islam,* John Hopkins University Press, 1993, 4, cited in Mamdani, *Citizen and subject,* 10.

If indigenous peoples continue to be parallel to the state they live in, then their ability to exercise state protection will remain equally diminished. Without the proactive aid of an instrumentality of their state, indigenous peoples stand little chance to gain, even morally, from their knowledge. Their continued exclusion in separate development will assure their destruction and only destabilise the nation state as a whole.

Ghai insists that self-rule systems do not promote but rather prevent secession,[152] thus making them important peace and stability guarantees in multi-ethnic states. More recently and in the Kenyan context, Ghai was opposed to decentralised/devolved units being strongly ethnic-based. Yes to more control over your lives but no to exclusionary ethnicity. It is safe to surmise that Ghai had recognised that curious irony, that the use of self-rule systems to secure long-term stability is reminiscent of Smuts! Which then bring us back to the main argument of the paper: beware of beguiling apartheid.

In addressing what we argue is a necessary slide to apartheid, we contend that self-rule systems for indigenous peoples need to be inextricably linked to the fate of dominant culture self-rule systems, that is the state in its central and/or federated structure. As long as the other native's fate does not bother 'us', full democratisation of our polities will remain elusive. Ghai notes that federalism emphasises 'shared rule',[153] or 'participation in the centre'[154] while autonomy 'often wants to be left alone'[155] and gives examples of countries with overlays of both systems.[156] Indigenous peoples' self-determination that does not hold apartheid as corollary will need to bear elements of both: shared fate, if not rule, and being left alone. In other words, the non-elite, non-ruling majorities[157] of the dominant African cultures will never be free unless we champion the true independence of our compatriot indigenous.

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[152] Ghai, 'Ethnicity and autonomy', 23. Ghai further points to the need to distinguish secession from termination of a federation, as he does federation by aggregation as opposed to that by disaggregation, which tend to instability and secessionist claims flowing from their creation due to separatist pressures [24, 23].

[153] Ghai, 'Introduction' in *Practising self-government*, 16.

[154] Ghai, 'Ethnicity and autonomy'. …

[155] Ghai, 'Introduction' in *Practising self-government*, 16.

[156] Also using the term 'quasi-federalism' referring to the devolution provisions in the 1975 Papua New Guinea Independence Constitution and the 1976 national government-Bougainville devolution package. See Ghai and Regan, 'Unitary state, devolution, autonomy, secession', 104-5.

[157] See Willy Mutunga, *Constitution-making from the middle,* 2nd edition, Strathmore University Press, 2020, for an incisive reflection on the dilemmas the African middle class face is seeking to find their place in a nation-building model that values the grassroot and struggles against elite Machiavellianism.

The tragedy of public lands in Africa: The continuing struggle to challenge state landlordism and decolonise property relations in Africa

Liz Alden Wily

The argument

Expanding recognition of customary tenure as a legal property system has the potential to propel agrarianism into a more inclusive social and economic mode, avoided over several centuries of expanding capitalist industrialisation.[1] Emerging reforms are, contrarily, deepening the land security of millions of the world's rural poor and engaging them more equitably as owners and decision-makers in the protection or development of their land-based economies. This land reform departs from those of last century which narrowly targeted farmland redistribution between large landlords and their tenants and bonded labourers, or, as in Africa, sought to bring more land into the marketplace through mass farm titling programmes converting family farms into individual parcels registered to male household heads.[2] We need not dwell on the dispossessory effects of either reform other than to observe that while both carefully avoiding disturbing the acquired role of governments as majority owners of unfarmed lands in agrarian economies, this role was in practice enhanced. Governments are assumed as the rightful owner of forests and rangelands which could not be easily subdivided.

Globally, land reform today focuses principally on the status and scope of customary landholding systems, and through this, challenges the utility or justice of denying that affected lands are lawfully owned. Such lands are almost certainly the major landholding class by area. In Africa, for example, customarily held untitled lands exist in all but three island states and account for between 75% and 98% of

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[1] E Hobsbawm, *The age of capital 1848-1875*, Abacus, 1975. E Hobsbawm, *The age of empire, 1875-1914*, Abacus, 1984.

[2] C Kay, 'Land reform in Latin America: Past, present, and future,' LARR 2019, 54 (3): 747-755. R. Sharma and P Jha, 'Land reform experiences: Some lessons from across South Asia' FAO & AGTER, 2018.

country area in 24 of 54 states.[3] The complication for those holding lands and rights under customary regimes is the overlap of much of these lands as de facto or de jure state lands. This arises from the colonial habit of denying customary tenure produced registrable property interests, and/or that these lands and especially those held communally were unowned and only permissively used and occupied. While the indigenous land rights movement in the Americas and Oceania played an early role in challenging this from the 1980s, present-day reforms embrace all untitled customary or comparable community-based landholding in up to 140 countries in 2020.[4]

This is not so surprising when it is recognised that less than 15 of today's 196 independent countries did not endure colonial-led reconstruction of indigenous tenure.[5] As pertinent, around 150 countries remain land-based (agrarian) despite three centuries of industrialisation.[6] These include the emerging major economies of Brazil, China, India and South Africa. Each is more agro-industrial than industrial, retaining large rural populations, requiring governments to institute more equitable rural paths for growth.[7] Additionally, a key growth node in present global transformation targets rural hinterlands of agrarian economies where customary land-holders have historically felt less cause to secure title. Developments now actively extend infrastructure and connectivity for lucrative, state-driven land and natural resource exploitation, of which the continental Programme for Infrastructure Development in Africa (PIDA) initiative is a good example.[8]

Millions of rural Africans and their lands are affected, many already caught in the crossfire of dispute as to what constitutes state and peoples' lands, as mining, oil and gas exploitation and conversion of natural forests to oil palm in the Congo Basin and West Africa take their toll.[9] While investors are learning to better protect themselves against disputes their lease of vast lands from governments generate,

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[3] L Alden Wily, 'The fate of *res communis* in Africa: Unfinished business' Chap. 9 in P Kameri-Mbote and C Odote (eds) *The gallant academic: Essays in honour of HWO Okoth Ogendo,* 2017: 103-118.

[4] L Alden Wily 'Collective land ownership in the 21st Century: Overview of global trends' *Land* 2018, 7, 68.

[5] Saudi Arabia, Japan, Bhutan, Afghanistan, Sweden, Thailand, Korea, Nepal, Iran, Tonga, and more disputed Norway, Ethiopia, Liberia and China.

[6] United Nations, *World economic prospects: Situation*, New York, 2019.

[7] H Reisen, *Economic policy and social affairs in the BRICS*, Bertelsmann Stiftung, Gutersloh, 2012.

[8] African Union, African Development Bank and Economic Commission for Africa (AU, ADB & ECA), *Programme for infrastructure development in Africa*, 2015.

[9] The World Bank and French Agency for Development, 'Mining in Africa: Are local communities better off?' Washington DC. 2017. Alliance against Industrial Plantations in West and Central Africa, 'Communities in Africa fight back against the land grab for palm oil' Yaounde, 2019.

lenders are becoming more demanding that ground truthing be undertaken before funding enterprises are commenced. Affected communities are also significantly more cognisant of risks and there are less complaints with state-led encroachment on their lands than was surely the case last century.[10] Political democratisation and new bills of rights demonstrably offer sources of enlightenment and protection, but regularly running ahead of traditional growth strategies. Justiciable norms in domestic and international law routinely conflict with practices.[11]

In short, classical growth strategies are presently handicapped by popular demand for inclusion, power and wealth sharing in circumstances where the underpinnings of property ownership are in as fundamental dispute as ever, and from which gross inequities and subordination of rights at scale enabled easy pickings in the past. Reliance upon mass factory employment and urbanisation leaving swathes of land and resource available for elites and administrations to harden their possession, compound difficulties of doing business as usual. Equally aggravating, the customary regimes assuring land rights and access for millions also failed to disappear as had been presumed would naturally occur with advancing class formation and privatisation.[12]

Contrarily, the huge values of lands and resources still keep millions on the land, especially in Asia and Africa.[13] The absorbency of urbanisation is also tested. While the proportion of rural to urban population will rise further before it plateaus, three billion people will be rural land dependents in 2050, and multiply beyond.[14] Moreover, as farming becomes more competitive, communities grasp the value of their naturally communal rangeland, forest and other assets, and seek clarified ownership of these with vigour. Threats to livelihood are also better understood as not leading inevitably to breakdown of community-based norms, instead often enhancing the socio-economic assurance attached to community membership. Tine De Moor identifies this as revitalising *homo cooperans* in times of crisis.[15] David Bollier

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[10] B White, S Borras Jr., R Hall et al. 'The new enclosures: Critical perspectives on corporate land deals' 39 *The Journal of Peasant Studies* (3-4), 2012, 619-648. Front Line, *Front Line Defenders global analysis 2018,* Dublin, 2019.

[11] Y Ghai and J Cottrell (eds) *Marginalized communities and access to justice* Routledge, Abingdon, Oxon, 2010. Y Ghai and J Cottrell, *The Millennium Declaration, rights and constitutions.* Oxford University Press, 2011.

[12] U Patnaik and S Moyo, *The agrarian question in the neoliberal era, primitive accumulation and the peasantry* Pambazuka Press, Cape Town and Nairobi, 2011.

[13] Respectively 893,578, and 697 million people in India, China and Africa in early 2018; UN, 'Revision of world urbanization: Prospects'. Department of Economic and Social Affairs, New York, 2018.

[14] United Nations, 2018 Revision of world urbanization.

[15] T de Moor, *Homo cooperans: Institutions for collective action and the compassionate society*, University of Utrecht, The Netherlands, 2013.

and Silke Helfrich identify the surge in 'commoning beyond the market and State'.[16]

Transformation itself takes unpredicted turns. Research in Africa suggests that the growth point in farming is not the large commercial estate but middle-sized farms, created by city professionals and retired civil servants with links to the locality.[17] These linkages cause these investments to less voraciously undermine majority smallholding than anticipated, instead injecting money into the local economy, stimulating local youth employment, and opening sales outlets and machinery hire from which all farmers can benefit. Elites may join hands with poorer community members to challenge unwanted takings of the local communal forests, rangelands and swamplands, and which remain vulnerable to co-option and encroachment by state agencies.

These small to medium investors are part of another now well-documented transformation in Asia and Africa, manifest less in whole families moving into town than sending members to town for education and jobs.[18] This is reconstructing the socio-economic community across country-city lines, linking foodstuffs, money, and expertise, and hardening the shareholding interest of urban based members along with rural cousins in securing community lands. Nevertheless, state governance tends to resist and persist in old ways, dispossession still a widely overused default to support growth projects with minimal attention to alternatives, such as land leasing from communities and equitable partnerships. African governments also continue to demonstrate a tendency to avoid paying compensation for untitled lands, even where law such as in Kenya directs otherwise. Yet tenure reform persists in its challenge to such norms.

The reform

To step back briefly and clarify the context, contemporary land reform can validly be described as liberating in its primary output thus far being formal recognition that customary lands are already owned by citizens, and lawfully governed by the communities to which they belong, using customary (or more accurately neo-customary) norms – or in some cases, as imposed in where the regime has been

[16] De Moor, *Homo cooperans* ; D Bollier and Silke Helfrich (eds), *The wealth of the commons: A world beyond market and state*, Levellers Press, Amherst, 2012.

[17] T Jayne, J Chamberlin et al, 'Africa's changing farm size distribution patterns. The rise of medium-scale farms' 47 *Agricultural Economics*, no. S1 (Nov 2016), 197-214.

[18] C Kay, 'Development strategies and rural development: Exploring synergies, eradicating poverty' 36 *The Journal of Peasant Studies* 1, 2009, 103-137.

State-instituted as in China. As observed above, the sector is vast at an estimated 5-6 billion hectares, or covering half the world's land mass. As permanently cultivated lands are still factually much smaller than massive dependence upon them suggests at 11% of the world's lands,[19] it may be safely assumed that the global community estate is also comprised of mainly unfarmed rangelands, swamplands, forests and mountain ranges. This fact helps explain why community-based jurisdiction is sustained and why communities are seemingly as interested in securing collective title as much as family title for their homesteads within these domains. Community land dependents number at least 2.5 billion people, now nearer three billion.[20]

Pervasive points of reform may include; first, that the landholding regime acquires political and legal recognition as a property system (rather than a land use system), delivering legal ownership; and second, that the definition of norms on ownership, access, and use of lands is so defined and regulated by the living community, so long as these do not offend rights due community members as citizens of nation states. Third, the community is acknowledged as the lawful land regulator and administrator, dramatically devolving authority to the grassroots. Fourth, the community estate may be entirely or partly owned in common by all members, and fifth, include rangelands, forests, and other unfarmed lands historically forests as historically attached to the community. Sixth, modern land laws generally provide for case by case survey, entitlement and registration of the community as the legal owner in common. Moreover, this is a form of registered entitlement which, while equitable with private ownership in force, effect and due protection, need not necessarily conform to the attributes of property as understood in the received civil and common laws of Europe.

The last is significant for, in addition to this reform bringing millions of community members into the realm of legally acknowledged and even registered land ownership, the scope of what constitutes property is broadened. Conventions that land property only exists if it is inherently fungible and alienable as a commodity, or the owner a natural person or corporate entity disappear. Accordingly, the customary land sector has given rise to new typologies of indefeasible property which include estates which may be declared indivisible or inalienable in perpetuity. Mirror conditions are at times placed upon the state, legally preventing governments from seizing, extinguishing or converting such land without majority consent.

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[19] FAO, *The state of the world's land and water resources for food and agriculture*, Rome, 2011.

[20] Oxfam, International Land Coalition, Rights and Resources Initiative, *Common ground: Securing land rights and safeguarding the Earth*, Oxford, 2016.

The reform has been adopted with alacrity in recent decades. My own research in early 2018 showed that at that time 73 of 100 national land laws sampled from all regions recognise customary and other community-derived rights as lawfully possessed property.[21] 53% of these laws were first enacted since 2000. Three-quarters establish collective property with equivalent legal force and effect as private property. Constitutional change had been the trigger in 45% of cases (eg Brazil, East Timor, Kyrgyzstan, Laos, Uganda and Vanuatu,). Most of the 73 countries had enacted provisions to encourage or require communities to seek formal survey and register of their properties. Around half present this as in effect, no more than double-locking acknowledged existing ownership, while the laws of the remainder imply that recognition and protection is only achieved through survey and registration.

Notably, even where customary tenure has been fully extinguished as feudally exploitative (eg China, Cuba, Egypt, Eritrea, and Mauritania) community-based land collectives replace these. Thus, by the 1980s, over two-thirds of rural China was vested in village collectives and within which the parcels of individual families have become steadily more saleable. The institutional mechanisms for community ownership vary. In post-Soviet Armenia, one third of the country is now governed by around 900 elected community governments, pasturelands registered as communally-owned and used lands. This is similarly the case in Tanzania where 60% of the country area is governed by 12,450 elected village councils who regulate rights within their respective 12,450 distinct village areas, each comprising a mix of family and community properties. Kenya's Community Land Act, 2016 pursues similar intentions, using an elected committee as land manager in lieu of an elected village government. The law vests ultimate title in community members in common.

There are also countries where collective possession is provided only for unfarmed natural resources. Examples include titling of forestlands to forest communities in Guyana, and issue of exclusive rights to pasturelands to communities, now instituted in much of Central Asia, from Uzbekistan to Mongolia. Community tenure is also sustained in many European economies on the basis of sustained customary rights over centuries, inter alia, covering swathes of pastures and forests in the Austrian and Swiss Alps and many forests in Scandinavia. More recently, several million hectares of forests and pastures in Portugal, Romania and Spain have been restored to community ownership as offering more effective protection than

[21] L Alden Wily, 'Collective land ownership in the 21st Century: Overview of global trends' 7 *Land*, 2, 2018, 68.

their centralisation into remote state agencies last century proved able to deliver. Many overlap designation as national parks or reserves, expressing distinction between the protected status of lands and their owners.

Reformism continues to expand and refine. Newer laws are notable for their stronger requirement that governance be vested in elected bodies accountable to community members, the latter termed community assemblies in countries as far apart as India, East Timor, Liberia and Vanuatu. New laws also provide clearer guidance on how individual and family rights may be nested under collective title, often gaining attributes as transferable or even alienable within limits established by community rules. Formalising communities as legal entities and titling procedures is continually simplified and made cheaper. Older, bureaucratic mechanisms such as those instituted in Australia are now critiqued as more disempowering than empowering, binding communities to dependence of funders and intermediary agencies. In contrast, and with the main exception of Ivory Coast, new African land laws such as in Liberia and Kenya enable a community to register itself on the basis of a complied register of all living members, young and old, to be updated annually.

Community lands in Africa

Community lands in Africa may be roughly estimated at around 2 billion hectares or 78% of the continental area, by excluding privately titled rural lands (only 10%), urban areas (c. >1%) and major categories of public lands.[22] Around three-quarters of community lands are unfarmed communal resources (1.7 billion hectares), excluding permanently cultivated areas as updated by the Food and Agriculture Organisation (FAO). Customary land-holders are estimated as 630 million people in 2020 to rise to more than 1 billion in 2050.

Improved or new national law recognition of customary lands as lawful property rises annually, variously through new constitutions or new or improved land laws. Some 30 of 54 states have done so (55%) since 1990, most recently Togo and Liberia in new land laws of 2018 and an important amendment to existing law in Tunisia in 2019. The extent of alteration varies; it is difficult, for example to favourably compare the status of one third of Zimbabwe lands set aside for customary occupation and use, with blanket acknowledgement of customary lands

[22] LandMark, *National level data and methods,* 2015, accessed on 1 October 2019 at: http://www.landmarkmap.org/data/

as ownership in Burkina Faso. Legal provision for collective tenure is strongest in 10 countries.[23] Reform is broadly positive with one or two distinctive limitations in 20 other laws.[24] Commonest limitations acknowledge the land is owned by a community but fails to provide for this to be formalised (eg Ghana); enable customary lands to be registered only by their exclusion from customary tenure as leaseholds from the state (eg Zambia); retain customary land under state overlordship in circumstances where this is not the case for privately registered properties (eg Namibia); or fail to provide easily for collective ownership (eg Madagascar).

Application of new laws is problematic, always slow, often delayed by belated recognition by governments that the state will lose areas of lands should it fully apply recognition and protection of customary rights. New limitations may be introduced, public property more expansively defined by land type and leased to commercial ventures without consultation (eg Gabon, Uganda and Zambia), growth corridors, dams and roads instituted with limited regard to existing rights and land values (Ethiopia, Kenya, Mozambique and Tanzania), national parks defiantly expanded into even registered village lands (Tanzania) and new protected areas created and vested in state agencies unbeknownst to customary owners (eg Kenya).

Roadblocks also emerge through taut alliances between state and traditional leaders. Presidential assent of Malawi's Customary Land Act was withheld for a year after chiefs demanded changes. Zambia's National Land Policy has struggled for approval for twenty years, as chiefs resist losing lucrative allocation powers should communities be deemed owners. For similar reasons, Namibian chiefs rejected ministry proposals in 2014 to enable communities to secure title to traditional grazing lands around their villages, although family and group title were admitted in respect of cultivated lands.

Towards fairer compulsory acquisition

Understandably, rural communities resist state-led taking of their lands and thus livelihoods and for which they receive minimal compensation or benefit. The 21st century opened with a rise in globalised search for resources, markets, and lands to grow lucrative food, fibre and oil crops, accelerating with the 2008 financial

[23] Uganda, Tanzania, Kenya, Mozambique, South Sudan, Burkina Faso, Malawi, Mali, Benin, Liberia.

[24] Angola, Namibia, Swaziland, Lesotho, Sierra Leone, Gambia, Nigeria, Guinea, Ethiopia, Zambia, Togo, Morocco, Algeria, Niger, Ghana, Senegal, Tunisia, Madagascar, South Africa, Ivory Coast.

crisis.[25] Tracked foreign investments have since shown a bias towards poor but land rich countries where institutional transparency is low, toleration for corruption high, and rural tenure security fragile.[26]

Protest from the grassroots has exponentially risen, communities petitioning offices and courts against both government and investors, at times forcing the former to go to court against an investor.[27] Documentation on the impacts of dispossessory acquisition on local populations abound.[28] Following a string of broken agreements and cancelled bilateral investment treaties, those rewritten are more protective of the investor's interests, less trusting of claims by governments that they hold undisputed rights to the lands they so freely lease out, and more demanding of ground-truthing before they sign.[29] Overall, it could be said that the experiences of the last two decades have been a factor in driving local demand for acknowledged rights, and reform in the grounds and procedures through which titled and untitled customary lands are taken.

Most international and regional lenders now require governments to treat acquisition as a development opportunity for affected poor.[30] Already in 2006, and again in 2012, the International Monetary Fund warned of the need for reformed approaches, progressively, advocating negotiated settlements with local populations, heard and adopted by the Asian Development Bank in its advisories, and adopted in new laws in Indonesia (2012), Laos (2016) and East Timor (2017). It would take the World Bank until 2017 to respond with fully revised safeguards, and which the African Development Bank is yet to embrace. Governments are advised to avoid forced evictions, pay equal attention to untitled and titled holdings, and implement resettlement and rehabilitation schemes over meaningful time frames. Impacts are to be assessed by gender, and compensation paid individually to men and women. Special procedures are advocated where indigenous peoples and other vulnerable

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[25] S Borras and J Franco 'Global land grabbing and political reactions from below' *Third World Quarterly*, Vol 34, 2013, 1723-1747.

[26] J Lay and K Nolte, 'Determinants of foreign land acquisitions in low and middle income countries' 18 *Journal of Economic Geography*, 2018, 59-86.

[27] J Perez et al., *Sleeping lions: International investment treaties, state-investor disputes and access to food land and water*, Discussion Paper, Oxfam, Oxford, 2011.

[28] S Price and J Singer (eds) *Country frameworks for development displacement and resettlement*: *Reducing risks, building resilience*, Routledge, 2019.

[29] K Singh, and B Ilge (eds) 'Rethinking bilateral investment treaties: Critical issues and policy choices' *Both Ends, Madhyam and Somo,* New Delhi, 2016.

[30] The World Bank, *Environment & social framework for IPF operations ESS5: Land acquisition, restrictions on land use and involuntary resettlement*, The World Bank, Washington, DC, 2018.

sectors lose lands. New sector-led guidance seeking to bridge the gap between investors and community land-holders emerge annually.[31]

India's landmark law

Already by 2000, communal protest had boiled over so extensively in India that compulsory acquisition became a subject for mobilisation among major political parties and the long search for fairer laws began.[32] The resulting law of 2011 is held as an exemplar, its title reflecting reorientation of compulsory acquisition as 'The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013'. Its purpose is described as

> 'An Act to ensure … a humane, participative, informed and transparent process for land acquisition … and for ensuring that the cumulative outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement in their post-acquisition social and economic status' (Preamble).

The law's innovations include paying compensation at twice the market rate in rural areas and then doubling this to cover intangible losses; prohibition of acquisition of Scheduled Areas historically held by disadvantaged groups; required majority consent where private companies or commercial public partners are the beneficiaries; and prohibiting eviction prior to both payment of all compensation and evidence of alternative sites for resettlement of those affected. Where those affected are relocated outside their locality, they are granted an additional 25 benefits along with lump sum payment of 50,000 rupees (USD 700). To safeguard food security, limits are also imposed upon the amount of cultivated land which may be acquired. Communities and individuals may also request compensation for lands acquired during the previous decade when these safeguards were not provided. Acquired land may not be sold for more than 40% of its appreciated value, and the profit to be shared with the original owner.

While some 10 or so of 29 Indian states have diluted terms in the federal law, most have adopted it with no alteration and even added their own social justice mechanisms; particularly where acquisition is for housing schemes and for which

[31] F Vanclay and P Hanna, 'Conceptualizing company response to community protest: Principles to achieve a social license to operate' *Land*, 2019, 8(6), 1-31.

[32] A Kabra, B Das, 'Global or local safeguards? Social impact assessment insights from an urban Indian land acquisition' in S Price, J Singer (eds) *Country frameworks for development displacement and resettlement: Reducing risk, building resilience*, Routledge, Abingdon, Oxon 2019.

land pooling is facilitated, enabling households to receive smaller but higher value plots or apartments. Anwarul Hoda writes that the Indian law has resulted in '… a quantum increase in the bargaining power of poor landowners, tenants and sharecroppers', and that while they grumble, state governments and investors are reconciled to the vastly raised costs as 'justified for fairness and equity', along with evidential sharp reduction in violent conflicts.[33]

Oceania's advanced paradigm

Customary ownership in Oceanic countries ranges between 81 and 99% of country area in 10 of the 15 island states from Papua New Guinea to Vanuatu.[34] Management of these properties varies from unincorporated village land committees, councils of heads of families chaired by chiefs, to incorporated trusts and land groups. Laws since the 1980s have founded the rights and values of customary properties too high to casually acquire even for obvious public purposes like roads, colleges, or government buildings. While compulsory acquisition may legally occur, this rarely eventuates in practice in 8 island states and never in 3 where only lease is permitted.[35] Lease is also legally favoured by five others, alongside negotiated purchases should the community find this preferable. This is also the legal norm in Australia and New Zealand. These governments do not consider regulatory powers as dependent upon the state as majority landowner, and on the contrary seek to diminish its holdings to the minimum; now below 2% of country area in the Solomon Islands, Marshall Islands and Vanuatu. This remains a far-off reality in Africa where so much of national or government estate continues to overlay customarily-owned lands.

The unusually protective elements of compulsory acquisition legislation in Australasia and Oceania clearly arise from liberating attitudes to indigenous property rights in general. This is also sometimes the case in Latin America where indigenous lands are legally described as inviolable and unseizable in Ecuador and Nicaragua and irrevocable in Panama. These 3 countries along with 12 others in Latin America have signed up to the International Labour Organisation's (ILO) Convention 169, which inter alia requires that the lands of indigenous peoples are not interfered with without their prior and informed consent through consultation and negotiation.

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[33] A Hoda, 'Land use and land acquisition laws in India' *Working Paper No. 361*, India Council for Research on International Economic Relations, 2018, 17.

[34] Asian Development Bank (ADB), 'Strengthening safeguard capacity in the Pacific', Performance Evaluation Report, 2019, Table 2 pp 7.

[35] ADB, 'Strengthening safeguard capacity in the Pacific', Table 3, page 9.

A work in progress in Africa

Constitutional law is a good place to start to assess change in Africa, as compulsory acquisition is one of its oldest subjects. Despite only 6 of 54 African constitutions being older than 1993, most are yet to pledge beyond the three fundamentals provided 230 years ago in America's Constitution and in France's Declaration of the Rights of Man; viz; that takings must be for a public purpose, executed through a legal process, and subject to a fair and prior indemnity. In fact, only a third of African constitutions require prior indemnity.[36] Only 36% guarantee the deprived holder access to a court. Meantime, the scope of public purpose has grown exponentially since African countries secured independence. New provisions include listing economic development as justified public purpose (11 constitutions) along with stated protection of rights of investors to whom these lands are sold or leased by government. The proportionality clause traditionally found in Anglophone laws that hardship caused to owners must not outweigh the value of the taking's purpose, has largely disappeared.

Not a single African constitution obliges the state to enter into consultation with affected possessors towards amicable consensus or negotiated settlement at compulsory acquisition. Yet, as a study of litigation in Kenya suggests that conflict could be dramatically reduced through such consultation; 87% of cases studied involved abuse of process and procedure.[37] Judges in one case advised that '… the public need not only be invited but also must be given adequate opportunity to participate… to the extent that the end product must be deemed owned by the same public'.[38]

Globally, compulsory acquisition laws are more generous than constitutions suggest. From a sample of 50 acquisition laws from Africa, Asia and Latin America, Nicholas Tagliarino shows that 54% are new since 2000.[39] However, among the 20 African states in the sample, only Rwanda's law provides a sufficiently clear definition of public purpose to allow for judicial review. Only Lesotho obliges Government

[36] L Alden Wily, 'Compulsory acquisition as a constitutional matter: The case in Africa' 62 *Journal of African Law* 1, 2018, 77-103.

[37] R Omwoma, 'Learning from courts: Challenges related to compulsory acquisition in Kenya', Institute of Surveyors of Kenya, Nairobi, 2016.

[38] *Maurice Anthony Wanjala Musee v Anna Wanyama Wanjala and 11 Others,* Environment and Land Court at Kitale, Case No. 17 of 2011, Judgement of 31 July 2019. Accessed on 10 October 2019 at: http://kenyalaw.org/caselaw/cases/view/179477/

[39] N Tagliarino, *National level adoption of international standards on expropriation, compensation and resettlement: A*

to minimise the amount of land taken. Burkina Faso, Ethiopia, Lesotho, Rwanda, South Sudan, Tanzania and Zambia require government to consult with, rather than inform, those affected. Only Ghana and Tanzania require intangible values of the land to be assessed. Legal obligation to resettle displaced persons is weak in all laws excepting Ghana.

While signs of change exist in emerging new resettlement policies across the continent, progressive law reform is limited. Only one article in Liberia's new land rights law addresses compulsory acquisition but does helpfully oblige Government to explore leasing in preference to acquisition. Ethiopia placed a progressive new Bill before Parliament in 2019. Inter alia, that law distinguishes between compensation for property, displacement, economic loss, and, like Tanzania and Ghana, for 'discontinuance of social ties and moral damage'. Ethiopia's Bill also stipulates a generous resettlement package where 100 or more households are displaced, including financing for income-generating projects. Communal holdings are to be valued on the basis of lost benefits and livelihood from the land. Those losing houses will be provided rent-free housing for two years while they reconstruct new houses with compensation provided. All payments must be made prior to removal and/or only after the resettlement site has been developed. Persons displaced for commercial investment projects are to be assisted by the investor to buy shares in the investment.

In contrast, a new Land Values (Amendment) Act, 2019 in Kenya, raises alarm, and doubts as to its constitutionality.[40] The law removes existing commitments in the Land Act 2012 to pay compensation promptly and to value community lands outside the market to avoid undue losses. It is ambiguous as to whether unfarmed community lands will be valued at all and removes the only explicit provision in Kenyan law expressly requiring the free, informed and prior consent of persons whose lands are taken, referring to internally displaced persons. Additionally, the right of communities under the Community Land Act to negotiate compensation has been ignored. This backtracking is of concern, not least in light of the millions of hectares of community lands now exposed to takings under the aegis of an economic growth corridor project (Lamu Port-South Sudan-Ethiopia-Transport, LAPSSET) including threatened loss of some thousands of square kilometres from

comparative analysis of national laws enacted in 50 countries across Asia, Africa and Latin America, Eleven International Publishing, The Hague, 2019.

[40] Natural Justice, Dryland Learning and Capacity Building Initiative, L Alden Wily, *Analysis of the Land Value (Amendment) Act, 2019*, Nairobi.

pastoral rangelands.[41] Civil society actors are piloting more modern approaches to valuing pastoral lands.[42]

Similar concerns have been raised in Uganda, where takings of customary lands for oil development have raised loud complaints, but where there have been more positive attempts, yet undelivered, to improve procedures. A new acquisition law was drafted (2013), rejected (2016), a new framework developed jointly by oil companies and government (2016), found wanting, a new resettlement and rehabilitation policy offered (2017), still under revision in early 2020. A relevant constitutional amendment was tabled in 2017 but withdrawn in 2018, amendments instead made to the elderly Compulsory Land Acquisition Act, and a new regulation on land valuation issued (2018). In April 2019, a Commission of Inquiry into Land Matters recommended the launch of a special land tribunal to handle acquisition-related disputes and is to recommend new legal measures in its final report to the President in 2020.

Developments of a different vein are underway in South Africa. These follow heated debate around the proposal to expropriate some private lands without compensation, in a context where takings are primarily from the vast private estate sector; 97% of agricultural land is owned by 7% of landowners.[43] An advisory panel reported to the President in July 2019, concluding there were few cases where no reparation could fairly apply. It proposed a Differentiated Compensation Policy. This is to list distinct situational typologies and relevant measures for each.[44]

Towards acquisition as proactive development

Seven reforms are required to achieve fairness for customary majorities in Africa. First, expanding definitions of public purposes need to be reined in, and acquisition made subject to demonstrated and documented effort to find a better alternative to the site, and to consider leasing rather than acquiring the land absolutely. Leasing should over time become the norm. Communities should also

[41] R Kibuugi, I Mwathane & M Makathimo, *Large scale land acquisition in Kenya*, Land Development and Governance Institute, Nairobi 2016.

[42] M Makathimo, *Report on valuation of community rangelands in Kenya,* Drylands Learning and Capacity Building Initiative, Nairobi, 2019.

[43] Republic of South Africa, *Land audit report November 2017,* Department of Rural Development and Land Reform, Pretoria 2017.

[44] Republic of South Africa, *Final report on land reform and agriculture*, Presidential Advisory Panel on Land Reform and Agriculture, Pretoria, 2019.

be permitted to engage directly with investors, state or civil society actors serving as mediators. While this is already entered into community land acts in several African countries including Kenya, application has not been pursued. Arguably there is no better route to inclusive decision-making and benefit, or, as land use conversions continue, no better prompt to state-supported identification and formalisation of more than a billion hectares of unregistered customary property on the continent. This too is often legally provided for as touched upon earlier, but rarely adopted by responsible authorities with vigour, or funding.

Second, where acquisition is unavoidable, this historically punitive process deserves reconstruction as a proactive development, not merely to replace but to improve the livelihood of those affected. Myriad measures are practised in the development sector that can be applied at acquisition, along with legal obligation to fund these.

Third, especially where whole communities are affected, a participatory approach towards consensus should be entrenched as elemental to good governance, also launched from the outset, and cover all matters. A number of African constitutions, notably including Kenya's, require levels of participation which lead logically to free, prior and informed consent if not so expressed. These principles are barely entrenched in acquisition laws, which are still characterised by top-down decision-making. The mining sector may be an emergent exception, with newer laws normally requiring negotiated consent and formalised agreements as to benefit-sharing; Kenya's Mining Act, 2016 is such an example.

Fourth, compensation should prioritise provision of appropriate replacement lands even where delivery on this requires land purchase from the private sector. Dispersion of communities must be guarded against at all costs. While displacement removes land and resources from communities, dispersion extinguishes the community's social history, identity, and the accessible social assurance mechanisms among members. Without these, recovery from displacement is difficult. Absence of such conditions undermines the importance of community throughout African society, including its role in helping mitigate negative impacts of social change generally.

Fifth, valuation of losses must include social, economic and asset losses. These need to be in addition to disturbance costs. It goes without saying that should payments and material assistance not be afforded prior to eviction, then commercial interest should be annually paid on outstanding payments.

Sixth, is the contextual challenge of moving out of the colonial-induced thinking that the state is rightfully and appropriately the majority landowner, that in all cases it must own each and every asset of even tangential public purpose. Some states overcome this by realigning public lands away from its entrenched position as state property by providing for public land to be vested directly in communities, as well as local and national government. This is already the case in Mozambique and Tanzania. In the latter (and setting aside the confusing fact that the entire country area is named public land), each land authority may set aside land for public use. Land authorities comprise the Commissioner of Land, in charge of general land (mainly urban areas), and around 12,450 elected village governments designated as the lawful manager of the respectively discrete 12,450 community land areas ('village lands'). Each government is legally obliged to identify and record collectively-owned forests, rangelands, and service areas prior to issuing titles for family homesteads. Formally declared and sometimes gazetted community-owned protected areas bountifully now exist in these areas. This expresses a long overdue distinction between protected areas as a class of land management and the ownership of such areas. This is addressed below, using the example of forest tenure in Kenya.

That example is also relevant to a final, seventh, needed trend; that administrations complement limitations as to what constitutes public purpose with limitation upon the type of community lands which may be absolutely acquired rather than leased or set aside by the owner for the agreed purpose. Of course, this only works with fair rule of law.

Contested ownership of protected areas in Africa

Wanted: More effective conservation

If the largest public land sector in Africa comprises uncertain millions of hectares of untitled customary properties which so many governments still classify as unowned lands or hold in trust for communities, a more tangible sector comprises the 14% of the continental land area gazetted as 8,422 Terrestrial Protected Areas (TPA). These are predominantly national parks and reserves held under de facto or de jure government ownership.[45] Global increase of especially forested TPA is a sustainable development goal (SDG) and climate change objective. The Zero Draft

[45] IUCN, *World database of protected a*reas, IUCN Geneva, 2020, as updated in August 2020 at www.protectedplanet.net. Only 3% of TPA in Africa are reported as governed by communities.

for the post-2020 Convention of Biodiversity Declaration aims for 30% of global land area under TPA by 2030.[46]

This raises concern; 'Without safeguards', a global coalition writes, doubling TPA will 'entrench an outdated model of conservation that could dispossess the people least responsible for crises of their lands and livelihoods'.[47] African customary owners could be widely effected as virtually all forested TPA derive relatively recently from customary lands, withdrawn originally from native occupation for settler estates and commercial logging and clearance for faster growing exotic plantations, often only earmarked for conservation in the 1970s. A large but unknown number overlap actively occupied or claimed customary lands.

The presumption of state tenure over protected areas arose from the circumstances of colonial norms which found it convenient for control and extractive purposes to limit definition of lawful occupation and use to houses and farms. With such expansive resources in government hands, the fallacy that only the state can safely protect natural resources grew, rationalised as resources held in trust for the nation. This combines nationalisation of local resources and centralisation of authority, a persisting device in post-colonial African states.[48] While acceptable for subterranean resources, this is more troublesome in respect of forests, the primary target of conservation today. It also ignores widely acknowledged rise of community-owned forests as a major growth point in protected areas, and consequent expansion of international classes of TPA to cater to these.[49]

Even if it were not for the improved status of customary tenure globally, new conservation strategies have long been needed for a long time. As FAO informed the Earth Summit in Rio de Janeiro in 1992, forest protection in particular was a misnomer in the tropics and sub-tropics.[50] This persists 25 years on in tropical Africa and Brazil, and more alarming in the case of Africa, in protected areas.[51] To illustrate, Uganda acknowledges a loss of 30.2% of cover in State forests between

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[46] UNEP, *Convention on Biological Diversity. Zero draft of the post-2020 global biodiversity framework*, Kunming, China February 2020.

[47] Rainforest Foundation UK and others, 'NGO concerns over the proposed 30% target for protected areas and absence of safeguards for indigenous peoples and local communities', Zero Draft July 2020.

[48] For example, Uganda, Kenya, Angola, DRC and Madagascar among others have reinforced the nationalisation of protected areas and/or forests in new constitutions since 1990.

[49] IUCN, *World database of protected a*reas.

[50] FAO, *1948-2018. Seventy years of FAO's global forest resources assessment: Historical overview and future prospects*. Rome, 2018.

[51] M Heino et al., 'Forest loss in protected areas and intact forest landscapes: A global analysis' 10 *PloS One* 10, 2015.

1990 and 2015.[52] The Kenya Forest Service still reports an annual loss from national forest reserves ('public forests') of more than 5,000 hectares.[53] Unlawful logging, excisions, and rent-seeking plantation development by which farmers pay foresters to cultivate crops whilst tending seedlings are identified in both countries as main causes of degradation and loss. On excisions, a salutary route was described by the *Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land* in 2004; large areas of protected forests had been degazetted for other public purposes (eg for prisons or schools) as a cover for onward disposal of most of the excised areas to politicians, officials and housing estate developers.[54] Yet it has remained the refrain of governments that local communities are to blame for degrading protected areas, justifying tightening their legal hold on these lands, and prioritising gazettement of more national and government-owned reserves, inevitably drawing from untitled community lands.[55]

Moreover, sustained loss of area and forest cover continues despite widespread adoption of semi-autonomous forest authorities from the 1990s in lieu of civil service forest departments. These were promoted to better limit corruption and to focus more business-like revenue generation. Affected citizens may be justified in claiming that that institutional move has instead triggered yet more rent-seeking along with resurgent unviable logging and natural forest clearing for commercial plantation extraction. Significant funding opportunities such as REDD+, grants from the Global Environmental Facility, and now the multi-billion dollar Green Climate Fund are reportedly raising the disinclination of these institutions to further devolve such valuable assets to communities.[56]

The rise of community-owned protected forests

In the interim, robust evidence has been gathering that devolving or acknowledging existing customary ownership of natural forests significantly aids their conservation. This follows upon an expensive litany of strategies designed

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[52] Republic of Uganda, *State of Uganda's forestry*. Ministry of Water and Environment, Kampala, 2016.

[53] Republic of Kenya, *Taskforce report on forest resources management and logging activities in Kenya,* Ministry of Environment and Forestry, Nairobi, 2018.

[54] Republic of Kenya, *Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land* (Ndungu Commission*)*, Nairobi, June 2004.

[55] Republic of Kenya, *Trees for better lives: Strategic plan 2017-2022*, Nairobi, 2017.

[56] J Fairhead, M Leach and I Scoones, 'Green grabbing: a new appropriation of nature? *Journal of Peasant Studies* 2012, 39:2, 237-261. M Bayrak, L Marafa, 'Ten years of REDD+: A critical review of the impact of REDD+ on forest dependent communities' *Sustainability* 2016, 8, 621.

to limit the alleged rapacious behaviour of local communities in respect of public properties. These ranged from investing heavily in on-farm tree planting to reduce local dependence on protected forests in the 1970s, demarcation of buffer zones around protected areas in the 1980s, to engaging communities as workers, granting improved access and use rights, and latterly, requiring state agencies to share a percentage of forest revenue.[57] Following Rio in 1992, participation in decision-making was urged, delivered as participatory, joint or collaborative forest management in which communities were, in any event, always the junior partner.[58] Or, as the case in the Congo Basin from the late 1990s, communities have been offered harvesting concessions over limited areas of fast-growing tropical forests on short term contracts.[59]

Periodic successes aside, these diversionary strategies have broadly failed to resonate with customary communities, including causing resentment that outsiders, not necessarily even from the locality, are able to secure rights to traditional forests of others by forming community forest associations eligible for granted use rights. Along with loss of customary lands for mining, oil and gas extraction and commercial oil palm and other agricultural enterprises, communities in Africa, Asia and Latin America also now experience resurged loss of forests for gazettement of new nationally-owned TPA.[60]

Two contrary trends suggest pause. The first is possibly dawning recognition among policy-makers that national forest ownership can itself be flawed when applied to conservation; for however legally termed or vested, national or government lands tend to provoke precisely the open access, free-for-all behaviour associated with lands which are 'owned by everyone and no one', as so roundly condemned in respect of customary commons in the 1970s.[61] While Garrett Hardin's remarkably short but influential theory on this was accurate in its principle that recognised ownership begets custodianship, his example of customary commons was misplaced, not least in refusal of governments to acknowledge these lands as owned, albeit collectively,

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[57] D Gilmour, *Forty years of community based forestry*, FAO Forestry Working Paper 176, Rome 2016.

[58] Gilmour, *Forty years of community based forestry*.

[59] L Alden Wily, *Whose land is it? The status of customary land tenure in Cameroon*. CED, FERN & RFUK, London, 2011.

[60] H Moon and T Solomon, 'Forest decline in Africa: Trends and impacts of foreign direct investment: A review'. *International Journal of Current Advanced Research*, Vol. 7 (11C), 2018: 16356-16361. Rise in state owned PFA is indicated in the changing annual statistics at www.protectedplanet.net As an example, refer the listing of new public forests in Kenya in 2017 in Republic of Kenya, Ministry of Environment and Forestry, *National strategy for achieving and maintaining over 10% tree cover by 2022*, Republic of Kenya, Nairobi, May 2019, 38-48.

[61] G Hardin, 'The tragedy of the commons,' 162 *Science* 1968 (3859): 1243-1248.

and failing until the 1990s to provide legally for socially collective ownership, as described earlier. All the same, provision is not demonstrably seen by state forest authorities as opportunity to advantageously transfer forests to communities, illustrated in the case of Kenya below.

The second suggests a different trend via grants of native title or other forms of lawful possession over indigenous forest lands from the 1980s in the Amazon Basin and much of Central America, along with the Philippines, parts of Malaysia, Papua New Guinea, India, and most recently, Indonesia. Support for community-owned forests also grew in Asia in the 1990s (eg Cambodia, China, Laos, Vietnam), and in several countries in Africa, responsive less to land rights than the need to devolve ownership to support more localised and effective protection. By the time of the 12th World Forestry Congress in 2003, owner-conservator conservation by communities was high on the agenda and subject to supporting resolutions.[62] Tracking of forest tenure was recognised as an indicative factor in conservation that has been sustained until the present. A survey of 56 sampled countries published in 2018 found that 527 million hectares of natural forests were titled to communities, with Africa having the least proportion.[63]

Scientific appraisal of the approach has been active, leading global forest research agencies to increasingly stress the importance of localised tenure for sustaining forests into the future.[64] Some compare forests by state or community tenure.[65] Governance studies add weight to tenure-based approaches as securing livelihoods which in turn encourage sustainability of forests, and empowering mechanisms through which a community can legitimately limit capture of forest resources by elites and limit collusion with corrupt state foresters or enterprises.[66] Deforestation in Bolivia, Brazil, Colombia and Guatemala has recently been shown

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[62] J Sayer (ed) *Forestry and development*, The Earthscan Reader. London, 2005.

[63] Rights and Resources Initiative, *At a crossroads: Consequential trends in recognition of community-based forest tenure from 2002-2017*, Washington, DC, 2018.

[64] IUFRO, *Forests under pressure: Local responses to global issues*, International Union of Forest Research Organizations, IUFRO World Series Vol. 32, 2014. A Larson, J Springer, *Recognition and respect for tenure rights,* Natural Resource Governance Framework Paper, IUCN, CEESP, CIFOR, 2016. W Sunderlin, 'Why tenure is key to fulfilling climate and ethical goals in REDD+. CIFOR. Bogor, 2017. FAO, *The state of the world's forests – Forest pathways to sustainable development*, Rome, 2018.The World Bank, *Securing forest tenure rights for rural development. An analytical framework*. Program on Forests, Washington DC., 2019.

[65] R Bluffstone, E Robinson (eds) *Forest tenure reform in Asia and Africa: Local control for improved conservation*, RFF Press, 2015. P Cronkleton, et al. 'How do property rights reforms provide incentives for forest landscape restoration? Comparing evidence from Nepal, China and Ethiopia' 19 *International Forestry Review* (S4) 2017.

[66] E Robinson, et al, 'Does secure land tenure save forests? A meta-analysis of the relationship between land tenure and tropical deforestation,' 29 *Global Environmental Change*, 2014, 281-293. M Butane, et al., 'Titling

to be two to three times less in community-owned as compared to state-owned forests.[67] Global analyses by geospatial scientists in 2018 and the Intergovernmental Panel on Climate Change in 2019 concluded that secure customary tenure has strong potential to advance climate mitigation at scale.[68]

The case in Africa

Purposive recognition of community forest ownership came to the fore in a FAO Conference for Sub-Saharan Africa in 1999 at which Directors of Forestry from The Gambia and Tanzania described measurable positive effects in their countries.[69] The examples from Tanzania were especially influential as this had been community-driven in the fury of eight communities informed in 1994 that their adjoining upland forests would be re-designated as a national forest catchment reserve. Confronted with the promised threat to clear and settle the 9,000 hectares forest prior to gazettement, the Forestry Director acceded to their demand to be given the chance to prove themselves superior conservators with empowerment to regulate access and use, through village government by-laws, and corollary demand that Government foresters be stopped from issuing logging, clearing and charcoal making permits in the forest.[70]

The results were fast and dramatic and began prompt replication in 1996 in another forest which had also been earmarked for nationalisation. By 1997-98, projects assisting communities to bring forests under regulation had expanded into eight districts. Provisions for village-owned and protected forests were entered

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community land to prevent deforestation: An evaluation of a best-case program in Morona-Santiago, Ecuador' 33 *Global Environmental Change*, 2015, 32-43. J Oldekop, et al., 'Reductions in deforestation and poverty from decentralized forest management in Nepal,' 2 *Nature Sustainability*, 2019, 421-428. S Levy-Tacher, et al., 'Are Mayan community forest reserves successful in fulfilling people's needs and preserving tree species?' *Journal of Environmental Management*, (2019), 16-27.

[67] IFRI & RRI, 'The science is in: Community governance supports forest livelihood and sustainability', Washington DC, 2016; A Blackman and P Veit, 'Titled Amazon indigenous communities cut forest carbon emissions' 153 *Ecological Economics,* 2018, 56-67.

[68] S Garnett, et al., 'A spatial overview of the global importance of indigenous lands for conservation,' 1 *Nature Sustainability* (2018), 369-374. IPCC (Intergovernmental Panel on Climate Change), *Special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*. 2019.

[69] FAO, *Proceedings of the international workshop on community forestry in Africa, Banjul, The Gambia, April 1999*. Rome, 2000.

[70] L Alden Wily, *Villagers as forest managers and governments 'learning to let go' The case of Duru-Haitemba & Mgori Forests in Tanzania,* IIED Forest Participation Series No. 9, International Institute for Environment and Development (IIED), London, 1997.

into the new national forest policy in 1998 and legislation in 2002.[71] This included limiting national forest ownership to cases where communities could not activate forest protection themselves.[72] It was also found logical to remove assumption that protected areas were automatically Government property by distinguishing Government land ('general land') from reserved land, enabling reserves to be declared and gazetted in either general and village lands, and further providing directly for transfer of reserved lands (protected areas) in general land to be transferred to village land.[73]

By 2012 480 village land forest reserves covering 2.36 million hectares were recorded. Another 3 million hectares of national catchment forests had also been brought under co-management with national authorities.[74] Already in 2009, by which point the first village land forest reserves were 10-15 years old, the Director of Forestry concluded, that despite some poor examples, village forest reserves were in better condition, better protected, and more cheaply and amicably managed than national forests. He attributed this to the empowerment and incentive which secure tenure gives communities to sustain time and effort for protection in their own interest beyond initial enthusiasm.[75] This remains the conclusion in the wealth of critique on still growing numbers of village forest reserves in the country.[76]

Community forests now operate in more than 20 African countries, many adopting the signature construct of village or community forests, but not always endowing ownership or enabling communities to operate as independent forest authorities.[77] Notable exceptions are The Gambia, an early actor, which has successfully transferred more than 500 national forests to communities since 1998. By 2015 Namibia had registered 32 community-owned forests covering 302,000 ha, with 27 others in the process of formalisation. Liberia's Forest Rights Act in 2009 provided for community forests, now producing several hundred applications

[71] L Alden Wily, *Moving towards a community-based forest future*? *Unasylva* 203:19-26 FAO, Rome. 2000.

[72] The Forest Act (Tanzania), 2002, section 3(b) and (d).

[73] The Land Act, 1999, sections 5.

[74] Republic of Tanzania, *Participatory forest management in Tanzania. Facts and figures*. Ministry of Natural Resources and Tourism Dar es Salaam, 2012.

[75] T Blomley, and S Iddi, *Participatory forestry in Tanzania: 1993-2009. Lessons learned and experiences to date*, Ministry and Environment and Tourism, United Republic of Tanzania, Dar es Salaam, 2009.

[76] R Trupin, et al., *Making community forest enterprises deliver for livelihoods and conservation in Tanzania,* Africa Biodiversity Collaborative Group, USAID, Washington, DC, 2018.

[77] Gilmour, *Forty years of community based forestry*.

to sustainably harvest these under forest authority regulation. Ethiopia is the most recent African State to provide for community-owned forests in its new law of 2019.

Kenya provided similarly in its forest law of 2016 for registration of community forests on community lands. Yet in practice the Kenyan State has continued to draw natural woodland and forests from this sector via new gazettements as public forests, noted earlier as numbering 70 in 2017 alone. The draft new National Forest Policy released in June 2020 for public consultation suggested that community forests are for plantation development, not a mechanism for communities to secure existing woodlands and forests. This orientation is also implied in the recommendations of the Mau Ogiek Taskforce Report presented to Government in April 2020 in its advice that any intact natural forest found within the 6% of forest area it proposes be allocated to the indigenous forest Ogiek people, be excluded and vested in the Kenya Forest Service.[78] These recommendations belatedly follow the ruling by the African Court on Human and Peoples' Rights in May 2017 against the Government of Kenya for failing to respect the rights of the indigenous Ogiek, a forest people whose ancestral hunter-gatherer territories extend over the Mau Forest Complex.[79] A further Court hearing is scheduled for September 2020 to determine, in effect, whether the community's pleading for restitution subject to conservation regulations as reparation, or Government's preference to resettle them with compensation be ruled as required remedy. Despite its inability over three decades to conserve the Mau Forests, and held to be largely responsible for the loss of forest area and quality by its own policies,[80] the Government of Kenya has found it inconceivable thus far that the ancestral forest owners could do a better job. This includes ignoring the signed commitment of numerous Mau Ogiek representatives to compromise by accepting restitution without any right to transfer or alienate any part of the community territory, to limit occupation to un-forested locations agreed with the Forest Service, to be legally bound to bring all existing forest under protection as guarded community forest reserves, and to bring degraded areas under monitored rehabilitation.[81]

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[78] Republic of Kenya, 'Task force on the implementation of the decision of the African Court on Human and Peoples' Rights issued against the Government of Kenya in respect of the rights of the Ogiek community of Mau and enhancing the participation of indigenous communities in the sustainable management of forests', Final Report, Nairobi, 24 January 2020.

[79] *African Commission on Human and Peoples' Rights v. Republic of Kenya*, AfCHPR, Application No. 006/2012, Judgement of 26 May 2017.

[80] Republic of Kenya, *Report of the Prime Minister's task force on the conservation of the Mau forest complex*, Nairobi, 2009.

[81] Mau Ogiek Community, 'Memorandum to the Task force on the implementation of the decision of

Resistance to devolutionary forest tenure

In sum, community forest reserves remain a work in progress in much of the African forestry sector. A main symptom is that community forests are almost entirely limited to customary/community lands outside the existing protected forest sector. Progress in devolving state forests to communities on the basis of historical and present claim, or to advance persistently faltering conservation, has thus far been limited to The Gambia, South Africa, and legally provided for in community managed catchment forests in Tanzania. Related, with as few exceptions, governments have not taken the important step of reconceptualising protected area status as regulatory instrument applicable to private, community and public/government lands, or at least to extend existing avenues for this from private to community-owned lands. Nor have many African administrations come to grips with the notion that it is viable, and, as below, even quite common for a community to own and conserve a protected forest of national importance, as in both its own and national interest.

These limitations are less common elsewhere, although categories of federal or national protected forests appropriately remain available on the menu of protected area owners. For example, 67 million hectares or 44% of Australia's forest parks and reserves are owned today by indigenous peoples.[82] Cambodia has issued ownership of 190,000 hectares of reserved forests to indigenous forest peoples. 84 of 221 Certificates of Ancestral Domain Titles issued over 5.4 million hectares in the Philippines since 2002 overlap protected areas. More than 30 communities in Indonesia have been granted ownership of State forests following a constitutional court ruling in 2013 and amended forest law in 2016. Many millions of hectares of natural forests in India are in the process of being titled to scheduled forest peoples.[83] Land restitution to indigenous peoples in Latin America has seen 46 forest reserves absorbed under 37 indigenous territories, 24 national parks overlap indigenous or Afro-Colombian community lands in Colombia alone, and 31% of indigenous peoples lands overlap protected forests in Mexico.[84] State regulation and

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the African Court in respect of their inalienable rights to dignity, survival and well-being', Submission made in Nakuru Town, 6 February 2019.

[82] Federal Government of Australia, 'Ownership of protected areas', Ministry of Environment and Energy, Canberra, 2019.

[83] A Quizon and N Marquez (eds) *State of land rights and land governance in eight Asian countries*. Asian NGO Coalition for Agrarian Reform and Rural Development (ANGOC), Manila, 2016.

[84] Rights and Resources Initiative, 'Protected areas and the land rights of indigenous peoples and local communities', Washington DC, 2015.

obligation to provide technical services are normally defined. Forest communities in Colombia, Mexico, and Peru are among those so confident of their tenure that they have sought designation of their territories as community-owned TPA to enhance protection against pressure to permit mining.[85]

Overlap of protected areas and community property is not limited to forest peoples. In Romania, 225 of 1,500 community-owned forests and pastures have been declared national parks, nature reserves, or scientific reserves.[86] Government encourages these communities to declare protected areas as responsible on-hand owners, keen upon their own behalf to denounce any sign of illegal logging. EU Policy encourages integrated human and natural values systems in modern landscape and protected areas approaches. Austria, parts of Italy. Germany and Switzerland are among its members which have long practised common ownership of upland forests and pastures, adopted more recently by Spain and Portugal which restored some nationalised forests to community ownership to anchor urgently needed localised management to limit dry season fires, and supported communities to revitalise management of their local commons.[87]

In Africa, government resistance is also structurally contained by retention of all natural forests as state property (eg Angola, Cameroon, Gabon, Tunisia, Uganda,) or as a consequence of absent provision for collective land entitlement upon which community-owned forests logically build (eg Botswana, Burundi, Zambia). It is not uncommon for community rights to be limited to leases or contracts in respect of the fast-growing tropical forests in the Congo Basin and West Africa where commercial logging including by foreign companies remains the preferred norm and revenue earner for governments. For example, 430 user groups hold 1.7 million hectares under 25 year contracts for commercial harvesting in Cameroon. More positively, through a new forest law in 2014, DRC enables communities to apply for secure rights in perpetuity to sustainably exploit up to 30,000 hectares of their respective traditional forests.[88] In CAR, three villages have also been granted exclusive rights to 15,000 hectares in the middle of major private logging concession,

[85] Most recently 19 indigenous communities in Colombia secured agreement that their lands be declared as the Yaigoje Apoporis National Natural Park to better regulate mining. Rainforest Concern, 2019.

[86] M Vasile, 'Written presentation to the Mau Ogiek Task Force, Kenya,' 2 September 2019. 'Community owned forests and pastures in Romania', Rachel Carson Center for Environment and Society, Munich.

[87] New Constitutions in Spain 1978 and Portugal in 1975 enshrined common property and exclude these from acquisition for public purposes. X. Tubio, 'Common land in Spain and Portugal'. Brussels, 2015.

[88] Rainforest Foundation UK, 'Community forests in Democratic Republic of Congo', London, 2019.

with 25 other villages awaiting similar grants.[89] Nevertheless, in all these countries the strengthening of customary land rights remains on the agenda, and probably spilling over into more equitable forest tenure reforms.

Conclusion

This paper has examined two problem areas arising from improving legal recognition of customary lands as lawfully-owned and registrable properties in relation to contrarily claimed lands and interests pursued by governments. The path to tenure security for customary land-holders in Africa is largely constrained and politically ill-supported, including by some administrations, which have remedied the legal situation around property in land. Governments are wilfully slow in delivering on this when it comes to compulsory acquisition, still easier to avoid by claiming untitled lands as public property at will. This is problematic in the midst of a growth surge opening up customarily-owned hinterlands in Africa, spurred on by bilateral investment. Shortfalls in inclusive approaches to such land takings risk further pauperisation by loss of essential lands by thousands of communities, and for still minimal redress. Purposive restructure towards partnership projects on the basis of land leased from communities remain poorly developed. Comparable problems are echoed where so many governments refuse to abandon conservation strategies that have been unable to save protected areas under their care, where this means surrendering these to traditional communities, inter alia, interfering with embedded state rentier relations.

Both examples illustrate difficulty in adjusting economic growth and environmental strategies to changing property relations between governments and citizens. They also illustrate insufficient recognition or positive utilisation of the vibrantly sustained existence of 'community' in modern land-based economies. The common core is entrenched state landlordism. This cannot be helpful for the maturation of the modern African state as less owner than regulator, less manager than facilitator, or, more worryingly, primary provocateur of social conflict. More optimistically, it can be concluded that with state-people contestation over rights to lands and resources increasingly coming to the fore in all African states, and with majority empowerment occurring with or without government support, one can hope to see roadblocks to equitable property relations incrementally removed.

[89] IIED, Forest Peoples Programme, and Rainforest Foundation UK, 2019. 'Securing customary rights is key to sustainable community forestry'. *Briefing*. Issue September 2019.

Part Three
Ghai and/in Asia Pacific

Yash Ghai and the constitutional experiment of 'One country, two systems' in Hong Kong

Cora Chan and Albert HY Chen

In 1997, Hong Kong was returned to Chinese sovereignty after over 150 years of British colonial rule. The Sino-British Joint Declaration – the international treaty that underpinned the handover – guaranteed that Hong Kong shall, for 50 years (until 2047), practise different economic, social and legal systems and enjoy a high degree of autonomy, an arrangement known as 'One country, two systems'. These guarantees were elaborated in the territory's post-handover constitutional charter, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (BL). The governing framework of 'One country, two systems' is novel, not in that it accommodates two systems of law within the same sovereign state – such arrangement can be found all over the world – but in that it seeks to fit a vibrant capitalist economy and a liberal common law legal system within a one-party state that practices a 'socialist market economy' and a legal system of Soviet lineage – a unique arrangement that saw no precedent. The key challenge facing Hong Kong's constitutional order has been that of maintaining the distinctiveness of Hong Kong while accommodating Chinese sovereignty.[1]

In his 16 years as Sir YK Pao Chair of Public Law at the University of Hong Kong (1989-2005), Yash Ghai made an enormous contribution to the understanding of Hong Kong's constitutional order. His works have been cited with approval by post-handover Hong Kong courts extensively. His monograph, *Hong Kong's new constitutional order: The resumption of Chinese sovereignty and the Basic Law*, first published in 1997 (second edition 1999) remains to this day the authority on the constitutional law of the Hong Kong Special Administrative Region (HKSAR). Ghai insists that only a contextual approach to the study of law would enable us to

[1] Yash Ghai, *Hong Kong's new constitutional order: The resumption of Chinese sovereignty and the Basic Law*, second edition, Hong Kong University Press, Hong Kong, 1999) (hereinafter 'Ghai, *Hong Kong's new constitutional order*'), 139.

understand how the law came about, what it means, what its implications are, and how it should be applied.[2] This approach is all the more important in the case of the HKSAR, whose sovereign treats law as a tool for facilitating political agenda rather than as an independent discipline. Ghai's analysis of the Basic Law was informed by economics, politics, history, and sociology. Unlike some critical legal scholars, however, he does not denigrate the role of law or argue that everything is politics. Rather, he believes that we should acknowledge both the power and limits of the law; he affirms the 'legal character of the Basic Law' and propounds 'the role of legality in its application'.[3] He draws on a wide array of sources, including Chinese documents, and his wide knowledge of and experience in drafting and implementing constitutions elsewhere. Situating Hong Kong's constitutional order in the Chinese and comparative contexts, he analyses the unique *nature* of that order, projects what the likely *risks* of that order are, and the *possibilities* that might ensue, and offers the first, and perhaps so far only, *theory* of how that order should be understood and developed.

In what follows, we will first discuss Ghai's work on 'One country, two systems' and the Basic Law. Given space limitations, we will not be able to do justice to Ghai's rich and sophisticated analyses of a wide range of issues in Hong Kong constitutional law, but we will seek to identify and describe the main themes of his scholarship on the constitutional order of the HKSAR. We will then review briefly what we consider the most significant constitutional developments in the HKSAR since the last edition of Ghai's book on *Hong Kong's new constitutional order* was published in 1999.

Autonomy and separation of systems

A major theme in Hong Kong's constitutional law that Ghai debunks is autonomy. On the face of it, the Basic Law gives Hong Kong a large degree of autonomy vis-à-vis the Chinese Government. The powers it enjoys are wider than many autonomous regions in the world. Hong Kong has its own executive, legislative and independent judicial powers (BL article 2). It seems that except for foreign affairs and defence, all subject matters fall within the territory's purview. Even in relation to the excluded matters, the Basic Law distinguishes external affairs and public order from foreign affairs and defence respectively, and authorises Hong Kong to conduct

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2 Ghai, *Hong Kong's new constitutional order*, 495.

3 Ghai, *Hong Kong's new constitutional order,* 495-496.

the former on its own (BL 13, 14).[4] Hong Kong can issue its own passport (BL 154) and its own currency (BL 111), does not need to pay tax to the Chinese Central Government (BL 106), and can control the movement of population across its own border (BL 154). The Basic Law grants Hong Kong people an extensive list of rights and freedoms (BL ch 3), entrenches international human rights treaties (BL 39), and even guarantees eventual universal suffrage of the territory's top executive post, the Chief Executive, (BL 45) as well as its legislature (BL 68). Apparently, the Basic Law bears out promises of 'Hong Kong people ruling Hong Kong'. It is common for scholars to treat autonomy as singularly the thrust of 'one country, two systems'.

On this perception, four important observations by Ghai should be highlighted. First, he argues that '"autonomy" suffered something of a sea change in the transformation of the Joint Declaration into the Basic Law.'[5] The international treaty envisages a spatial delineation of powers: Hong Kong 'will enjoy a high degree of autonomy except in foreign affairs and defence which are the responsibilities of the Central People's Government',[6] suggesting that other matters will be within Hong Kong's purview. It guarantees what appear to be free-standing powers of governance without stipulating an overarching supervisory role for China: Hong Kong 'will be vested with executive, legislative and independent judicial power, including that of final adjudication'.[7] However, these legal guarantees of autonomy have, in their transformation into constitutional law provisions, become discretionary grants of power by China: the Basic Law repeatedly uses the formula 'the [National People's Congress] NPC authorises Hong Kong to exercise…' to stipulate Hong Kong's powers of autonomy. The phrase 'a high degree of autonomy' is 'no longer juxtaposed' to 'except in foreign and defence affairs', suggesting that there may be matters other than foreign and defence affairs that are outside of Hong Kong's autonomy.[8] Open-ended formulations of China and Hong Kong's respective competences,[9] such as 'foreign affairs and defence as well as other matters outside

[4] See Cora Chan, 'Subnational constitutionalism: Hong Kong' in David S Law (ed), *Constitutionalism in context* Cambridge University Press, 2020.

[5] Chan, 'Subnational constitutionalism: Hong Kong', 146.

[6] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (signed 19 December 1984, entered into force 27 May 1985) 1399 UNTS 33, para 3(2).

[7] Joint Declaration, para 3(3).

[8] Ghai, *Hong Kong's new constitutional order*, 146.

[9] Ghai, *Hong Kong's new constitutional order*, 204.

the limits of the autonomy of the Region as specified by this Law', did not bode well for autonomy. The Basic Law also institutes important supervisory roles for China over Hong Kong, including the National People's Congress Standing Committee (NPCSC)'s ultimate power of interpreting the Basic Law (BL 158), the Chinese Government's powers of appointing top officials in Hong Kong (BL 45, 68) and of controlling the pace and substance of democratic reform (BL Annexes I & II).[10]

The tone of the Basic Law echoes that in the Chinese Government's latest published policy on Hong Kong (see e.g. the controversial White Paper issued by China in 2014[11]), which emphasises that China has 'comprehensive jurisdiction' over Hong Kong and that Hong Kong's autonomy is 'not an inherent power, but derives solely from the authorisation by the central leadership', the implication being that all exercises of power are subject to central supervision.[12] In response to criticisms that these constitute new policies for Hong Kong, the Chinese Government asserted that these positions simply reiterated the policy in the Basic Law. Ghai's analysis demonstrates that this is indeed the case: the fundamental change in the nature of the China-Hong Kong relationship has already occurred in the process of concretising the international treaty's promises into domestic constitutional law.

A second point he exposes in relation to the theme of autonomy is its secondary role in Hong Kong's constitutional order. Contrary to common perception, the central theme in the Basic Law is not autonomy, but continuity of previous systems. The primary goal of the Basic Law was to preserve a *particular* kind of capitalism for Hong Kong: the colonial system that favours a free economy, strong executive, governance by co-option of business elites rather than democracy. Autonomy is important but only to the extent that it serves this larger goal: it is 'secondary, and is contingent on the other, larger aim'.[13]

While preservation of the special kind of capitalism may coincide with the imperatives of autonomy – and it probably did during the drafting process of the Basic Law, in that most people desired preservation of the status quo – the overlap is contingent rather than inherent.[14] The Basic Law is not designed primarily to

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[10] This paragraph is drawn from Chan, 'Subnational constitutionalism: Hong Kong'.

[11] *The practice of the 'One country, two systems' policy in the Hong Kong Special Administrative Region*, Information Office of the State Council, People's Republic of China, 10 June 2014.

[12] *The practice of the 'One country, two systems' policy*, Ch V, section 1. See also Chan, 'Subnational constitutionalism: Hong Kong'.

[13] Ghai, *Hong Kong's new constitutional order*, 139, 140 and 184. This paragraph is drawn from Chan, 'Subnational constitutionalism: Hong Kong'.

[14] This paragraph is drawn from Chan, 'Subnational constitutionalism: Hong Kong'.

give effect to the will of Hong Kong people. Political institutions 'are drawn from the logic of the special kind of capitalism prescribed for the HKSAR – or what is assumed to be its logic (which works against democracy and favours a powerful executive), rather than from the logic of general autonomy or self-realization'.[15] The Basic Law institutes a strong head of the executive – the eventual democratisation of which is subject to Beijing's approval – and a weak legislature – the eventual democratisation of which does not, in theory, have to be endorsed by Beijing.

> Political values and institutions, [such as democracy] which might elsewhere be regarded as essential or important to capitalism are seen as antithetical to the prosperity and stability of Hong Kong, and are to be avoided in favour of an outdated colonial political order under the cover of 'current systems'. There is thus a curious but deliberate imbalance in One Country Two Systems: a dying socialist economic system clothed with a strong communist political apparatus and a vibrant capitalism clad in a restrictive political order.[16]

The potential tension between autonomy and continuity also arises from the fact that the Basic Law entrenches current systems in considerable detail:

> A government required to preserve capitalism would enjoy great flexibility in deciding social, economic, and political policies and the institutions to adopt and execute them; in brief it would be bestowed with a high degree of autonomy. But the Basic Law goes on to prescribe many of the details of the capitalist system that Hong Kong must preserve; and thus erodes the autonomy that the HKSAR might otherwise have enjoyed.[17]

For instance, the Basic Law stipulates numerous features of the economic system: Hong Kong shall take the low tax system as reference, strive to achieve a fiscal balance, and shall have a freely convertible currency backed by 100% reserve fund.[18] The Basic Law seeks to freeze certain features of the colonial systems for 50 years, with the result that even if the general public would like to deviate from them (say, by pursuing a high tax policy and turning Hong Kong into a welfare city) their hands would be tied. The tension has materialised in numerous respects. For example, the general public does not seem supportive of protecting the rights of 'indigenous inhabitants' of the New Territories, but such rights are entrenched in the Basic Law. Certain sections of the public seem also to support granting more powers to the legislature, the relatively more democratic branch of the government,

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[15] Ghai, *Hong Kong's new constitutional order,* 139-140. This paragraph is drawn partly from Chan, 'Subnational constitutionalism: Hong Kong'.

[16] Ghai, *Hong Kong's new constitutional order,* 139-140. 141.

[17] Ghai, *Hong Kong's new constitutional order,* 139-140. 139.

[18] See BL ch V.

but the Basic Law entrenches the colonial system of government that gives extensive powers to the Chief Executive and systemically handicaps the legislature.

Moreover, it is worth noting that while the courts have used provisions entrenching the status quo to expand the scope of constitutional protection beyond what was provided in the colonial era (e.g. in *Kong Yunming*,[19] the Court of Final Appeal interpreted the right to social welfare as guaranteeing, at a minimum, social welfare benefits that stood as at 30 June 1997), such provisions have at times functioned as a cap on constitutional entitlements (e.g. the court held, in *Kong Yunming*,[20] that administrative measures count as 'law' and in *Chan Yu Nam*,[21] that corporate voting was constitutional, in both cases partly because the measure under challenge existed prior to the handover) or as a limit on Hong Kong's autonomy vis-à-vis China (e.g. the Court of Appeal in *Ma Wai Kwan*[22] held that post-handover Hong Kong's courts have no jurisdiction to question the acts of the National People's Congress (NPC) or its Standing Committee because pre-handover courts had no jurisdiction to question acts of the British Crown or Parliament).

Third, Ghai highlights the implications of the economic basis of Hong Kong's autonomy for the sustainability of the autonomy arrangements. Such arrangements were put in place to assure businessmen in Hong Kong that the territory's economy will continue to prosper, to prevent a brain drain, and to ensure that Hong Kong will be useful to China's opening up of its economy. 'Autonomy is an imperative of the economic system – in that sense the basis of HKSAR's autonomy is different from many other examples where it is founded in the accommodation of social, cultural or ethnic diversity.'[23] Ghai rightly forewarns that when the imperative of autonomy is economic, its normative basis is weaker,[24] and it is less safe, 'especially as the economic paradigms of the two parts of China converge increasingly.'[25]

When the Basic Law was being drafted in the 1980s, China's economy was just beginning to open up; Hong Kong, in contrast, was a thriving capitalist economy. Autonomy and separation of systems were the means to ensure economic prosperity

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[19] *Kong Yunming v The Director of Social Welfare* [2013] HKCFA 107; (2013) 16 HKCFAR 950; [2014] 1 HKC 518.

[20] *Kong Yunming* at [25].

[21] *Chan Yu Nam v The Secretary for Justice* [2010] HKCA 364; [2012] 3 HKC 38, at [81]-[108].

[22] *HKSAR v Ma Wai Kwan David and others* [1997] HKCA 652; [1997] HKLRD 761; [1997] 2 HKC 315 at [57]

[23] Ghai, *Hong Kong's new constitutional order*, 140.

[24] Ghai, *Hong Kong's new constitutional order,* 139-140. 184-185.

[25] Ghai, *Hong Kong's new constitutional order,* 185; see also Yash Ghai, 'Hong Kong's autonomy: Dialects of powers and institutions' in Yash Ghai and Sophia Woodman (eds), *Practising self-government: A comparative study of autonomous regions,* Cambridge University Press, New York, 2013, 326.

then. Three decades on, however, China has emerged as one of the most lucrative markets in the world. The way to ensure economic prosperity in Hong Kong, it seems, is no longer autonomy or separation of systems, but placation of China and integration of systems. This highlights a dilemma that emerged for Hong Kong people as China's economic power grows.[26] Before the handover, the imperatives for economic prosperity and self-governance coincided; Hong Kong people can comfortably prioritise the former without sacrificing the latter. But as the imperatives of the two goals are beginning to part, the people of Hong Kong need to seriously consider their priorities. Are they willing to accept less autonomy for more immediate economic growth? A key question that Hong Kong people would have to consider *if* and *when* they have an opportunity to participate in constitution rebuilding for 2047 is this: is autonomy important for self-realisation or only as a means to guarantee economic prosperity? Depending on what the answer is, the constitutional arrangements that ensue might look very different. Ghai might be prophetic in observing that autonomy has become a transitional arrangement to full integration.[27] By the end of 50 years (which amount to five ten-year plans), China and Hong Kong's economies might be completely integrated, in which case there would no longer be any need for autonomy or segregation.[28]

Finally, Ghai saw the increasingly divergent expectations of 'One country, two systems' between the Chinese Government on the one hand and certain sections of the public in Hong Kong on the other.[29] To the Chinese Government, maintenance of sovereignty and territorial integrity take priority over segregation of systems. If the latter threatens the former, the latter should give way. To certain sectors in Hong Kong, the two imperatives are at least on a par with each other. 'One country, two systems' is a single concept; its components cannot be discussed separately. To the Chinese Government, the basis for having separate systems is economic. But to certain sectors of Hong Kong, the basis is 'more than economic; it is also different political and cultural values, and indeed on a distinctive Hong Kong identity'[30] – an identity that is becoming stronger. To these people, autonomy is important for the territory's self-realisation. To the Chinese Government, the promise for Hong Kong

[26] Cora Chan, 'Thirty years from Tiananmen: China, Hong Kong, and ongoing experiment to preserve liberal values in an authoritarian state' (2019) *International Journal of Constitutional Law*, 439, at 449.

[27] Ghai, *Hong Kong's new constitutional order*, 326.

[28] Chan, 'Thirty years from Tiananmen', 449.

[29] See e.g. Ghai, *Hong Kong's new constitutional order,* 185.

[30] Ghai, *Hong Kong's new constitutional order,* 185. See also Chan, 'Subnational constitutionalism: Hong Kong'.

has been economic autonomy, not political autonomy. To certain sectors of Hong Kong, there is no meaningful autonomy without political autonomy.[31]

These divergent expectations have led to major political clashes in the territory. They were played out, for instance, in the rift over democratic reform and, in its aftermath, the controversies over how the rise of pro-independence forces in Hong Kong should be handled. The Chinese Government insists on absolute control over who can be the political leader of Hong Kong, lest the region goes out of hand and becomes a base for subversion. Hence in a decision issued in 2014,[32] it sought to control who could run for the election via a pro-China nomination committee. In contrast, the pan-democrats insist on universal suffrage that guarantees the free expression of the will of Hong Kong people. The 79-day illegal occupation of roads known as 'Umbrella movement' or 'Occupy Central' was a protest against China's refusal to grant genuine universal suffrage. The slow pace of democratic reform has generated voices calling for Hong Kong to be given the right to determine its constitutional future, including the option of becoming an independent state. China has been adamant on suppressing pro- self-determination forces, witnessed by the fact that it issued a fifth interpretation of the Basic Law,[33] apparently to stop affiliated individuals from becoming legislators. Ghai was far-sighted in predicting that the 'pervasiveness of "Chineseness"' weakens the argument that Hong Kong people have a distinct identity: 'it will be increasingly hard to advance it [the argument] when there is such an emphasis on "compatriotism" (with its ambiguities), and the distrust in Beijing of regional differences.'[34]

Going forward, peaceful co-existence of these two camps (holding opposing views and expectations) is only possible if a common understanding is forged on the nature of the relationship between mainland China and Hong Kong. For 'One country, two systems' to serve as a meaningful governing framework and not just as rhetoric, the major challenge would be to build consensus over its meaning.[35]

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[31] Cf Ghai, 'Hong Kong's autonomy' 325.

[32] Decision of the NPCSC on Issues Relating to the Selection of the Chief Executive of Hong Kong by Universal Suffrage and on the Method for Forming the Legislative Council in Hong Kong in the Year 2016 (adopted at the Tenth Session of the Standing Committee of the Twelfth National People's Congress on 31 August 2014).

[33] Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (Adopted by the Standing Committee of the Twelfth National People's Congress at its Twenty-fourth Session on 7 November 2016).

[34] Ghai, *Hong Kong's new constitutional order*, 185.

[35] Cf Chan, 'Subnational constitutionalism: Hong Kong'.

Interpretation of the Basic Law

Ghai rightly points out that while Hong Kong is granted extensive powers of self-governance, the institutional guarantees of its autonomy are weak: 'Indeed we note a curious paradox here: HKSAR has more powers than any autonomous region or federal unit, but their exercise will be subject to closer scrutiny and supervision than powers elsewhere.'[36] The most important supervisory power is the NPCSC's ultimate power of interpreting the Basic Law.

The Basic Law is both the constitution of a common law legal system and a piece of legislation of a socialist[37] legal system.[38] The power of interpreting the Basic Law is divided between these two systems: courts in Hong Kong have powers of interpreting the Basic Law in the course of adjudication (BL 158(2) and (3)), subject to a duty to refer provisions relating to China's prerogatives to the NPCSC for interpretation (BL 158(3)), and an overall plenary power of interpretation by the NPCSC (BL 158(1)). Dividing the power of interpretation of a constitution between two institutions is not so much of a problem if the two institutions share similar legal traditions, but it is a problem here, because the NPCSC and Hong Kong courts adopt highly contrasting methods of interpretation.[39] Hong Kong courts ascertain the meaning of the text in light of its purpose and context. They do not give words a meaning that they cannot bear. There is, at least in principle, a clear distinction between interpretation and rewriting legislation. In contrast, the NPCSC has no principled and coherent approach to interpretation. In practice, legislative interpretations may clarify or supplement legislation.[40] Ghai observes that these different interpretative methods reflect 'more profound social and political differences, and of perceptions of the nature and purpose of law'.[41] In the common law tradition, the purpose of the law is to guide human conduct. Legal certainty is important. Courts may not change the meaning of the law retrospectively in

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[36] Chan, 'Subnational constitutionalism: Hong Kong'.

[37] It is more common for the Chinese legal system to be described as a socialist legal system than communist legal system. The PRC officially states that China is in the 'preliminary stage of socialism' and 'communism' is only to be achieved at the indefinite point in time in the future.

[38] Chan, 'Subnational constitutionalism: Hong Kong'.

[39] Yash Ghai, 'Litigating the Basic Law: Jurisdiction, interpretation and procedure' in Johannes MM Chan, HL Fu, Yash Ghai, (eds) *Hong Kong's constitutional debates: Conflict over interpretation* Hong Kong University Press, Hong Kong, 2000, 36.

[40] Cf Lin Feng, 'The duty of Hong Kong courts to follow the NPCSC's interpretation of the Basic Law: Are there any limits?' (2018) 48(1) *Hong Kong Law Journal* 167.

[41] Ghai, *Hong Kong's new constitutional order*, 213.

the name of interpretation. In contrast, in a socialist regime, law is, amongst other things, a tool to serve the party's political agenda. Legal certainty is less important than flexibility to suit political demands.[42]

The Basic Law is torn between these two legal traditions. Since what the law means depends on whether an NPCSC interpretation is issued, the Basic Law suffers from a 'novel element of unpredictability'.[43] Ghai argues that 'it is clearly necessary for the coherence of the Basic Law that some uniform and fundamental principles of and approaches to interpretation be adopted.'[44] 'It is important to avoid a situation when the two systems are locked (or are seen to be locked) in a struggle for the soul of Hong Kong; instead the struggle must be towards coherence.'[45] Whilst there are signs that Hong Kong courts are increasingly disposed to rule in harmony with Chinese decisions,[46] it may be doubted whether coherence would be in the interest of preserving the integrity of Hong Kong's legal system, in light of the divergence between the Chinese and common law approaches to law. Given that Chinese interpretative methods are unlikely to be susceptible of common law influences, the only way to achieve coherence seems to be for common law reasoning to accommodate Chinese approaches. Nevertheless, even though common law reasoning is flexible, there are limits to how far it can be stretched. Asking courts to accommodate Chinese interpretative approaches may amount to asking them to compromise principled reasoning, tainting Hong Kong's legal methods with Socialist praxis. It is argued that the way to enable the two contrasting legal systems to co-exist may instead be for institutions in each to insist on their own methods.[47] The Court of Final Appeal's adoption of common law methods to construe an NPCSC interpretation in *Chong Fung Yuen* is an example of such insistence. Such

[42] See Cora Chan, 'The legal limits on Beijing's powers of interpreting the Basic Law', HKU Legal Scholarship Blog, 3 November 2016, available at www.researchblog.law.hku.hk/2016/11/cora-chan-on-legal-limits-of-beijings.html; Chan, 'Thirty years from Tiananmen', 443; Chan, 'Subnational constitutionalism: Hong Kong'.

[43] Anthony Mason, 'The role of the Common Law in Hong Kong', in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2005* Faculty of Law, University of Hong Kong, 2006, 1.

[44] Ghai, *Hong Kong's new constitutional order,* 191.

[45] Ghai, *Hong Kong's new constitutional order,* 212.

[46] See e.g. *Chief Executive of Hong Kong Special Administrative Region v The President of The Legislative Council* [2016] HKCA 573, at [55]-[58]; [2017] HKCFA 54, at [35]-[36]; *Leung Chung Hang, Sixtus v President of Legislative Counsel and Secretary for Justice* [2018] HKCFI 2657, [53]-[76]; *Chan Ho Tin v Lo Ying-Ki Alan and others* [2018] HKCFI 345, at [46]-[49]. Cf *Kwok Wing Hang and others v Chief Executive in Council and another* [2019] HKCFI 2820, CACV 541/2019 (see n 148 below). See also Chan, 'Thirty years from Tiananmen', 447-448.

[47] Cora Chan, 'How Hong Kong's courts interpret Beijing's interpretation of the Basic Law may yet surprise', *South China Morning Post*, 9 November 2016, available at http://www.scmp.com/comment/insight-opinion/article/2044385/how-hong-kongs-courts-interpret-beijings-interpretation.

insistence will lead to tension, yes, but such tension is precisely the beauty of 'One country, two systems'. The legal unpredictability that results from such tension is the inherent price for adopting a governing framework whose essence is tension, not harmony.[48]

Ghai discerns why the NPCSC reserved to itself the ultimate power of interpreting the Basic Law. Knowing that patently political solutions are not available in Hong Kong, where there is a strong rule of law tradition, China maintains supervision by controlling what the highest law in the territory means.[49] The irony, then, as Ghai suggests, is that the Chinese Communist Party, which normally prefers the flexibility of politics over law, has resorted to legalisation of politics in Hong Kong.[50] The double irony, though, is that as a result, in Hong Kong, a jurisdiction which boasts itself of the rule of law, politicisation of the law is destined. The law that lies at the foundation of its legal system may not bear a meaning free from politics; rather, its meaning is subject to the will of a political body.

According to Ghai, the NPCSC's plenary power of interpretation is the 'Achilles heel' of Hong Kong's autonomy.[51] It is the loophole that renders the Basic Law a 'device for control' rather than 'an instrument for the empowerment of the people of Hong Kong'.[52] He predicted that if the powers of interpretation were used to the full, there would be no basis for autonomy, and it is not difficult to see why. First, key guarantees on autonomy could be nullified by interpretations. Second, since local laws could be invalidated if they contravene the Basic Law, it would be possible for China to determine the content of the former by issuing an interpretation of the latter.[53] Third, Hong Kong courts' power of final adjudication is more limited than that in other common law jurisdictions in that it does not include the final power of interpreting the highest law. Where adjudication hinges on an interpretation of the Basic Law, it would be possible for the NPCSC to dictate the outcome of the case

[48] Chan, 'How Hong Kong's courts interpret Beijing's interpretation of the Basic Law may yet surprise'.

[49] Cora Chan, 'Legalizing politics: An evaluation of Hong Kong's recent attempt at democratization' (2017) 16(2) *Election Law Journal* 296, 298; Yash Ghai, 'The intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of technique or politics?' (2007) 37 *Hong Kong Law Journal* 363, 404.

[50] Ghai, 'Hong Kong's autonomy: Dialects of powers and institutions' 341, 348; Ghai, 'The intersection of Chinese Law and the Common Law' 363, 403-404; Ghai, 'Litigating the Basic Law', 8.

[51] Yash Ghai, 'Autonomy and the Court of Final Appeal: The constitutional framework' in Simon NM Young and Yash Ghai (eds), *Hong Kong's Court of Final Appeal: The development of the law in China's Hong Kong*, Cambridge University Press, 2014, 58.

[52] Ghai, *Hong Kong's new constitutional order,* 496.

[53] Chan, 'Subnational constitutionalism: Hong Kong'.

by issuing such interpretation.[54] The NPCSC could also extinguish the precedential effect of a court ruling by issuing an interpretation.[55] Hence, as one of us has argued elsewhere, 'whereas in most other jurisdictions, the stipulation of guarantees in a constitution can entrench them against political vagaries; in the case of Hong Kong, it exposes them to that of the Chinese Government.'[56]

The concerns that the NPCSC's interpretative powers would nullify autonomy have partly materialised. By giving the NPCSC an additional power of controlling when democratic reform could be kick-started, the NPCSC's second interpretation of the Basic Law has restricted Hong Kong's say over the pace of democratisation.[57] The NPCSC's fifth interpretation has effectively elevated certain content of the local law on oath-taking to constitutional status, restricting the local legislature's power to amend such law by ordinary legislative process.[58] The NPCSC's first interpretation, issued in the aftermath of the Court of Final Appeal's ruling in *Ng Ka Ling*, extinguished the precedential effect of such ruling.[59] All three interpretations were issued pursuant to the NPCSC's plenary power of interpretation.

A theory of Hong Kong's constitutional law

Ghai not only discerns the potential issues in the nature of Hong Kong's constitutional order; he propounds a theory that ought to guide the resolution of those issues as well. He argued that to understand the essence of the Basic Law, one must go back to the 'twin foundations' of the Basic Law:[60] 1) the Sino-British Joint Declaration and 2) Article 31 of the PRC Constitution, which states that the NPC may, when necessary, set up regions that practise different systems, and pursuant to which the NPC set up the Hong Kong Special Administrative Region. The spirit of

[54] Chan, 'Subnational constitutionalism: Hong Kong'; Chan, 'The legal limits on Beijing's powers of interpreting the Basic Law'.

[55] Chan, 'The legal limits on Beijing's powers of interpreting the Basic Law'.

[56] Chan, 'Subnational constitutionalism: Hong Kong'.

[57] Interpretation by the NPCSC of Article 7 of Annex I and Article III of Annex II to the Basic Law (adopted at the Eighth Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004). See the discussion in section IV(3) below.

[58] See the discussion in section IV(2) below.

[59] The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Tenth Session of the Standing Committee of the Ninth National People's Congress on 26 June 1999).

[60] Ghai, 'Litigating the Basic Law', 46.

the latter, Ghai argues, is clearly to free certain regions of China from the 'shackles and restraints' of systems in the Mainland.[61] Hence,

> [i]t is from the logic of these [Hong Kong's] systems that the precise scope of powers of the HKSAR and its relationship with the Central Authorities when the Basic Law provisions are unclear should be drawn… It is thus not simple considerations of autonomy but the complex logic of systems that we must turn.[62]

The scope of Hong Kong's powers should therefore be determined by the imperatives of it being able to function as a separate economic and social entity. Various provisions in the Basic Law also confirm that the Basic Law has a special status within the Chinese legal order. The NPC has unlimited powers of amending ordinary Chinese laws, but its ability to amend the Basic Law is circumscribed both in procedure and in substance (no amendment shall contravene China's basic policies towards Hong Kong) (BL 159).

Once the nature of Hong Kong's constitutional order is conceived in that way, the answers to certain unresolved issues in the Basic Law seem clear. One such issue, for instance, is whether Hong Kong enjoys 'residual powers', i.e. powers that are not expressly granted to it by the Basic law. While many scholars approach the issue as one of whether Hong Kong is a part of a federal system (and hence possesses residual powers) or a unitary system (and hence does not), Ghai believes that the scope of Hong Kong's powers should not be distilled through the concept of residual powers:

> [T]he conceptualization of the powers of the HKSAR is to be derived from the integrity of the 'Hong Kong' system in which capitalism plays a key but not exclusive role. Many powers which are not expressly granted to the HKSAR are ancillary to the operation of the market economic system (for example the stock exchange) or the administration of Hong Kong (like a water or power supply system). These clearly must be deemed to be vested in the HKSAR... Since the recognition of Hong Kong's separate systems is itself an exercise of Chinese sovereignty, the logic of those systems must also prescribe operational limitations on that sovereignty. The powers necessary for the operation of Hong Kong's systems are thus a mirror image of the limitations on Chinese sovereignty. In this conceptualization, there is little scope for the notion of 'residual powers'.[63]

His theory also provides an answer to an issue that was left deliberately open in the drafting of the Basic Law: that of the relationship between such Law and the

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[61] Ghai, *Hong Kong's new constitutional order*, 222.

[62] Ghai, *Hong Kong's new constitutional order*, 223.

[63] Ghai, *Hong Kong's new constitutional order*, 150-151.

PRC Constitution. The NPC passed a resolution on the same day that it enacted the Basic Law to affirm that the Basic Law was consistent with the PRC Constitution. However, the question remains as to which provisions of the PRC Constitution are applicable to Hong Kong and whether other laws enacted by the NPC could override the Basic Law. This question has been the subject of debate recently.[64] Ghai argues that for guarantees of autonomy in the Basic Law to be safe, and for its provisions giving it special status to make sense, such Law has to be as 'self-contained' as possible.[65] Provisions in PRC law, including provisions of the PRC Constitution, should not be applicable to Hong Kong unless there is a basis for their application in the Basic Law itself.[66] The NPCSC's power of interpreting the Basic Law, for example, should be viewed as deriving solely from BL 158, and not from Article 67 of the PRC Constitution,[67] the implications being that the scope of that interpretative power should be consistent with the other provisions of the Basic Law as well.[68]

Ghai emphasises that Hong Kong's constitutional order is constantly shaped by the dialectics between law and politics. He is fully aware of the influence that China's overwhelming political power has on Hong Kong: he argues that the Chinese legal system has 'triumphed' over the common law, not because of the former's superior techniques, but because of its 'predominant political power'.[69] Nevertheless, his *descriptive* account of the reality is not to be confused with his vision on how the Chinese-Hong Kong relationship *ought* to be developed. He firmly believes that Hong Kong's constitutional order should be developed in a direction that gives law a greater role. Currently, the fragility of such order lies in the fact that the highest decision-maker is not, as a matter of domestic law and political reality, subject to any legal limits.[70] There seem to be no substantive constraints on the NPCSC's final powers of interpretation. Ghai believes that this is not an ideal state of affairs. For autonomy to be secure, the Basic Law ought to be treated as '"hard law" in the common law tradition'.[71] It ought to deliver what it promises. The NPCSC should

[64] See e.g. recent remarks by Wang Zhenmin, Head of the Legal Division of the China Liaison Office in Hong Kong: 'Chinese constitution applies to HK: Wang Zhenmin' *RTHK news* (14 July 2018), available at http://news.rthk.hk/rthk/en/component/k2/1406989-20180714.htm.

[65] Ghai, *Hong Kong's new constitutional order*, 218; Ghai, 'Litigating the Basic Law', 46.

[66] Chan, 'Subnational constitutionalism: Hong Kong'.

[67] Chan, 'Subnational constitutionalism: Hong Kong'.

[68] Ghai, 'The intersection of Chinese Law and the Common Law' 392-393.

[69] Ghai, 'The intersection of Chinese Law and the Common Law' 403-405.

[70] Chan, 'The legal limits on Beijing's powers of interpreting the Basic Law'.

[71] Ghai, *Hong Kong's new constitutional order*, 220.

not wield unlimited power.[72] 'Interpretation' by the NPCSC under BL 158 should mean interpretation understood in the common law sense, and should not be used to 'limit or extend legal provisions', as might be allowed under the Chinese system.[73] Otherwise, the integrity of the Basic Law would be tarnished, and China may amend the Basic Law in the name of interpretation, rendering the special provisions for amendment under BL 159 nugatory.[74] 'Given the likely pressures from the Mainland on the autonomy of Hong Kong, the Basic Law is largely meaningless without the shield of legality – few legal instruments seem so desperately in need of it.'[75]

Ghai is not clear on how such 'shield of legality' can be enforced against China.[76] He seems to support the view that Hong Kong courts should police the Basic Law even as against the NPC or NPCSC, striking down acts by these organs that contravene such Law.[77] Such jurisdiction was boldly asserted by the Court of Final Appeal in *Ng Ka Ling*, but has never been exercised. The Court of Final Appeal subsequently held in *Lau Kong Yung* that courts are bound by interpretations issued by the NPCSC. The relationship between these two rulings is unresolved: does *Lau Kong Yung* imply that the Court of Final Appeal may not question NPCSC interpretations that in the court's view contravene the Basic Law?

Whether there are substantive limits on an NPCSC's interpretation, and whether courts can enforce those limits, have been a focus of the *Leung and Yau* oath-taking litigation.[78] The applicant argued that the NPCSC's fifth interpretation has added new content to BL 104 – the provision being interpreted, and was as such an amendment rather than interpretation of the Basic Law. The argument goes that since the procedure for amendment under BL 159 was not followed, the court should refuse to enforce the fifth interpretation. The Court of Appeal rejected this argument, and leave to Court of Final Appeal was refused. In a subsequent case, in

[72] Ghai, *Hong Kong's new constitutional order*, 495.

[73] Ghai, *Hong Kong's new constitutional order*, 201, 220.

[74] Ghai, *Hong Kong's new constitutional order*, 201, 210, 211, 220.

[75] Ghai, *Hong Kong's new constitutional order*, 498.

[76] Indeed, he recognises that it will 'require very considerable change of philosophy and habits on the part of the Central Authorities to accept the Basic Law as 'hard law' with the capacity to govern relationships that are widely perceived by them as between a sovereign entity and a local administration.' (Ghai, *Hong Kong's new constitutional order*, 186-187).

[77] See e.g. Ghai, *Hong Kong's new constitutional order*, 179-180; Ghai, 'The intersection of Chinese Law and the Common Law' 376.

[78] *Chief Executive of the Hong Kong Special Administrative Region Secretary for Justice v The President of the Legislative Council, Sixtus Leung Chung Hang and Yau Wai Ching* [2016] HKCA 573; [2017] 1 HKLRD 460; [2016] 6 HKC 541. *Chief Executive of the Hong Kong Special Administrative Region Secretary for Justice v The President of the Legislative Council, Sixtus Leung Chung Hang and Yau Wai Ching* [2017] HKCFA 55; (2017) 20 HKCFAR 390.

face of a decision issued by the NPCSC that is apparently outside the Basic Law's framework, the Court of First Instance even implied that the NPCSC could act outside the Basic Law, that the courts could not challenge it, and that the decision in question ought to be given significant weight.[79] These judgments seem to foreclose, at least for the moment, the possibility of Hong Kong courts imposing substantive limits on the NPCSC's supervisory powers over Hong Kong.

Constitutional developments in the HKSAR since 1999

The second edition of Ghai's book on *Hong Kong's new constitutional order* was published in 1999. To enable readers of that book to have a quick update and to read the book with the benefit of hindsight, we provide in this section of the chapter a brief review of major constitutional developments in the HKSAR since 1999.

The attempt to implement Article 23 of the Basic Law ("BL23")

BL 23 requires the HKSAR to 'enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government'. It also addresses the protection of state secrets and the activities of foreign political organisations in Hong Kong. Many of the issues raised by BL 23 are considered politically sensitive. Ever since the Basic Law was enacted in 1990 and brought into effect in July 1997, there have been anxieties over the implementation of BL 23.

The publication on 24 September 2002 of the government's Consultation Document on *Proposals to implement Article 23 of the Basic Law* opened a three-month consultation exercise on the legislative proposal. On 28 January 2003, the government published the results of the consultation, and announced nine sets of clarifications or modifications of the original legislative proposal. This was followed by the publication of the National Security (Legislative Provisions) Bill on 13 February 2003 and its first reading in the Legislative Council on 26 February 2003. During the Bills Committee's deliberations on the bill, the government agreed to some amendments. However, critics said that these amendments were insufficient,[80] and in any event the

[79] *Leung Chung Hang, Sixtus v President of Legislative Council and Secretary for Justice* [2018] HKCFI 2657, [53]-[76]. Chan, 'Thirty years from Tiananmen' 447-448. See n. 153 below.

[80] Hualing Fu, Carole J Petersen and Simon NM Young, (eds), *National security and fundamental freedoms: Hong Kong's Article 23 under scrutiny,* Hong Kong University Press, Hong Kong, 2005. For a collection on the future of Article 23 legislation, see Cora Chan and Fiona de Londras (eds), *China's national security: Endangering Hong Kong's rule of law?* Hart Publishing, 2020.

government's timetable for passing the bill in the Legislative Council's week-long meeting beginning on 9 July did not allow sufficient time for deliberation.

On 1 July 2003, a hot summer day that was also a public holiday marking the anniversary of Hong Kong's return to China, an estimated half a million Hong Kong residents took to the streets to demonstrate against the BL 23 legislative exercise and to express other grievances against the Tung Chee-hwa administration. The demonstration had the effect of tilting the balance in the Legislative Council between legislators who supported the bill and those who opposed it: the Liberal Party, which had hitherto supported the bill, now advocated its postponement and opposed the Tung administration's decision on 5 July to adhere to the original 9 July deadline for its passage. Not having enough votes in the legislature to pass the bill, the government decided to postpone it.[81] On 17 July 2003, Tung announced that the government would re-open public consultations on the bill. However, in an about-turn on 5 September 2003, he announced that the bill was to be withdrawn. Since then, the implementation of BL 23 has been shelved indefinitely. However, in view of the development of a pro-independence discourse in Hong Kong after the failure of the 'Occupy Central Movement' to achieve its immediate goals of democratisation, it is likely the BL 23 issue will return to the government's legislative agenda some time in the future.

Interpretations of the Basic Law by the NPCSC

As explained above, the NPCSC possesses final powers of interpreting the Basic Law. In the last two decades, a total of five interpretations have been issued. The first interpretation was issued in 1999, which was well covered in the second edition of Ghai's book. After 1999, the NPCSC has exercised the power of Basic Law interpretation on four other occasions.

In 2004, acting on its own initiative (instead of at the request of the Chief Executive of the HKSAR), the NPCSC issued an interpretation of the Basic Law provisions relating to electoral reform.[82] In 2005, upon the request of the Acting Chief Executive of the HKSAR, the NPCSC issued an interpretation to clarify the term of office of a Chief Executive who succeeds one who resigns before completing his term of office.[83] In 2011, the Court of Final Appeal in the *Congo*

[81] Albert Chen, 'A defining moment in Hong Kong's history,' *South China Morning Post*, 4 July 2003; 'How the Liberals stopped a constitutional crisis,' *South China Morning Post*, 8 July 2003.

[82] Albert HY Chen, 'The constitutional controversy of spring 2004' (2004) 34 *Hong Kong Law Journal* 215.

[83] Albert HY Chen, 'The NPCSC's interpretation in spring 2005' (2005) 35 *Hong Kong Law Journal* 255.

case[84] used for the first time the reference procedure in Article 158(3) of the Basic Law to refer certain Basic Law provisions relating to foreign affairs and 'acts of state' to the NPCSC for interpretation.[85] This *Congo* case concerned whether the applicable law of foreign sovereign immunity in the HKSAR was the same as that in the Mainland.

In November 2016, the NPCSC, acting on its own initiative, issued an interpretation of article 104 of the Basic Law, which relates to the oath-taking requirements applicable to officials, judges, and members of the Legislative and Executive Councils. This interpretation was particularly controversial, as it was issued three days after Hong Kong's High Court heard a case on oath-taking and before the court delivered judgment. In this case,[86] the government argued that two pro- 'Hong Kong independence' Legislative Councillors had been disqualified by reason of their failure to comply with the oath-taking requirements stipulated in Article 104 of the Basic Law and other Hong Kong legislation.

The pace of democratisation

The Basic Law provides for the development of the political system of the HKSAR in the longer term. It declares that the 'ultimate aim'[87] of the political evolution of the HKSAR is the election of both the CE and all members of LegCo by universal suffrage. Such political evolution would depend on 'the actual situation in the [HKSAR]' and should be 'in accordance with the principle of gradual and orderly progress'. The Basic Law does not provide any timetable for the eventual realisation of universal suffrage. But Annexes I and II to the Basic Law expressly provide that the methods for electing the CE and LegCo may change after 2007. They also expressly provide for the procedure for such constitutional change, which involves the support of a two-thirds majority in LegCo, the CE's consent,

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[84] (2011) 14 HKCFAR 95, 395.

[85] Albert HY Chen, 'The *Congo* Case' (2011) 41 *Hong Kong Law Journal* 369.

[86] *Chief Executive of the HKSAR v President of the Legislative Council and Leung Chung Hang Sixtus*, HCAL 185/2016 (Court of First Instance, 15 November 2016), [2017] 1 HKLRD 460 (Court of Appeal), (2017) 20 HKCFAR 390 (CFA). The two Legislative Councillors were disqualified. For other cases relating to the NPCSC interpretation of 2016, see *Nathan Law Kwun Chung* [2017] 4 HKLRD 115 (disqualification of 4 other LegCo members); *Chan Ho Tin* [2018] HKCFI 345 (disqualification of a candidate in the LegCo election of 2016 on the ground that he advocated Hong Kong's independence: see generally Hong Kong newspapers of 3 August 2016, e.g. 'Protests shut down electoral commission briefing as Hong Kong indigenous' Edward Leung disqualified from Legco elections', 'Hong Kong's returning officers' power to dismiss potential LegCo candidates called into question', both published in *South China Morning Post* (on-line edition), 2 August 2016.

[87] Articles 45, 68, Basic Law.

and the approval of (in the case of a change in the electoral method for the CE) or 'reporting for the record' to (in the case of a change in the electoral method for LegCo) the NPCSC.

In the second half of 2003, after the failure of the Hong Kong government's attempt to enact a national security law for the purpose of the implementing Article 23 of the Basic Law, the 'pan-democrats', who led the movement against the bill, launched a movement to demand the speedy democratisation of the HKSAR.[88] In early 2004, Beijing decided to respond to the democracy movement in Hong Kong. On 6 April 2004, the NPCSC issued an Interpretation of the Basic Law.[89] It elaborates upon Annexes I and II to the Basic Law by stipulating a procedure for initiating changes to the relevant electoral methods. The procedure requires the CE to submit a report to the NPCSC on whether there is a need to introduce electoral reform, whereupon the NPCSC will decide the matter in accordance with Articles 45 and 68 of the Basic Law.

Since April 2004, three reports on electoral reforms have been submitted to the NPCSC by CEs in Hong Kong, in 2004, 2007 and 2014 respectively. In response to the 2007 report, NPCSC decided that 'the election of the fifth CE of the HKSAR in the year 2017 may be implemented by the method of universal suffrage; that after the CE is selected by universal suffrage, the election of the LegCo of the HKSAR may be implemented by the method of electing all the members by universal suffrage.'[90]

In 2013, activists proposed the idea of an 'Occupy Central' campaign to put pressure on Beijing and the Hong Kong government to introduce a model for universal suffrage in 2017 that is consistent with international standards of democratic elections.[91] On 15 July 2014, Chief Executive CY Leung initiated the procedure for electoral reform, and submitted a report to the NPCSC. On 31 August 2014, the NPCSC rendered its Decision on political reform in the HKSAR.[92] It stated that the

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[88] See Ming Sing, 'Public support for democracy in Hong Kong' (2005) 12 *Democratization* 244; Lynn T. White III, *Democratization in Hong Kong – and China?* Lynne Rienner, Boulder, 2016.

[89] See Chen, 'The NPCSC's interpretation in spring 2005' 255.

[90] See Albert HY Chen, 'A new era in Hong Kong's constitutional history' (2008) 38 *Hong Kong Law Journal* 1.

[91] See generally Alvin Y Cheung, 'Road to nowhere: Hong Kong's democratization and China's obligations under public international law' (2014) 40 *Brooklyn Journal of International Law* 465, 494-98; Michael C Davis, 'The Basic Law, universal suffrage and rule of law in Hong Kong' (2015) 38 *Hastings International and Comparative Law Review* 275, 289.

[92] Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016.

'broadly representative nominating committee' that would nominate candidates for election of the CE by universal suffrage in accordance with Article 45 of the Basic Law should be modelled on the existing Election Committee.[93] 'The nominating committee shall nominate two to three candidates... Each candidate must have the endorsement of more than half of all the members of the nominating committee.' The Decision explained as follows:

> [T]he principle that the Chief Executive has to be a person who loves the country and loves Hong Kong must be upheld. This is a basic requirement of the policy of 'one country, two systems'. It … is called for by the actual need to maintain long-term prosperity and stability of Hong Kong and uphold the sovereignty, security and development interests of the country. The method for selecting the Chief Executive by universal suffrage must provide corresponding institutional safeguards for this purpose.

The Decision of the NPCSC was met by strong protests from pro-democracy forces in Hong Kong, which condemned the electoral model as 'fake universal suffrage' because it was perceived that only pro-China political figures and no pan-democrats would be able to gain majority support from the nominating committee so as to become candidates in the election of the CE by universal suffrage. Students and other democracy activists launched the 'Umbrella Movement' or 'Occupy Central Movement' that started in late September and continued until mid-December 2014.[94] The bill to introduce universal suffrage for the election of the CE was eventually rejected by LegCo on 18 June 2015; with the pan-democrats voting against the proposal, it failed to secure the requisite two-thirds majority for amendment of Annex I to the Basic Law. The veto meant that the existing system of the election of the CE by a 1200-member Election Committee would continue.[95]

The jurisprudence of the Basic Law

Although the NPCSC on 23 February 1997 in its Decision on the Treatment of the Laws Previously in Force in Hong Kong[96] declared the non-adoption, inter alia,

[93] See Article 45, Basic Law. Article 45 refers to 'the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures'.

[94] See generally Yongshun Cai, *The Occupy Movement in Hong Kong,* Routledge 2017; Ngok Ma and Edmund W Cheng (eds), *The Umbrella Movement* Amsterdam U Press, 2019.

[95] See generally Albert HY Chen, 'The law and politics of the struggle for universal suffrage in Hong Kong, 2013-15' (2016) 3 *Asian Journal of Law and Society* 189; Cora Chan, 'Legalizing politics: An evaluation of Hong Kong's recent attempt at democratization' (2017) 16 *Election Law Journal* 296.

[96] For an English translation of this Decision, see (1997) 27 *Hong Kong Law Journal* 419.

of three interpretative provisions in the Hong Kong Bill of Rights Ordinance,[97] the operative force of the Hong Kong Bill of Rights and the Hong Kong courts' power of judicial review of legislation on human rights grounds and related principles of proportionality have survived the handover. This is clear from the case law of the post-1997 era, particularly the Court of Final Appeal's decisions in *Ng Kung Siu*[98] and *Leung Kwok Hung*.[99] The Hong Kong courts' post-1997 approach to human rights protection is that the courts may review whether any legislative or executive action violates rights guaranteed by the Basic Law or by the Hong Kong Bill of Rights (which gives effect to the applicable provisions of the ICCPR, which in turn is given effect to by Article 39 of the Basic Law). The courts have interpreted Article 39 to mean that the relevant provisions of the ICCPR as incorporated into the Hong Kong Bill of Rights have the same constitutional force as the Basic Law itself, thus overriding laws that are inconsistent with these provisions.

The net effect of the coming into force of the Basic Law in July 1997 and the HKSAR courts' interpretation of their judicial review power and of Article 39 is that the grounds on which legislative and executive actions may be challenged by way of judicial review have been broadened compared to the pre-1997 era. After 1991 but before 1997, it was possible to launch such a challenge on the basis of the provisions of the Hong Kong Bill of Rights, which are identical to those provisions of the ICCPR that are applicable to Hong Kong. After 1997, a challenge may still be launched on this basis, but in addition a challenge may also be based on other provisions of the Basic Law, particularly those which confer rights that are not expressly or adequately provided for in the ICCPR.

The Court of Final Appeal decisions in *Ng Kung Siu*[100] and *Leung Kwok Hung*[101] provide illustrations of constitutional judicial review, employing proportionality analysis, of Hong Kong laws restricting human rights. The two cases concerned freedom of expression and freedom of assembly and procession respectively. Whereas the impugned flag desecration law was upheld as a proportionate restriction on freedom of expression for the protection of *ordre public* in *Ng Kung Siu*, one

[97] The interpretative provisions concerned were sections 2(3), 3 and 4 of the Ordinance. The invalidation of the interpretative provisions was apparently on the ground that they purported to give the Ordinance a superior status overriding other Hong Kong laws, which was said to be inconsistent with the principle that only the Hong Kong Basic Law is superior to other Hong Kong laws.

[98] (1999) 2 HKCFAR 442.

[99] (2005) 8 HKCFAR 229. See PJ Yap, 'Constitutional review under the Basic Law' (2007) 37 *Hong Kong Law Journal* 449.

[100] (2005) 8 HKCFAR 229.

[101] (2005) 8 HKCFAR 229.

provision in the existing Public Order Ordinance was struck down in *Leung Kwok Hung*. In the latter case, the Court of Final Appeal reiterated the proportionality test for the constitutional review of laws restricting constitutional rights (other than absolute rights such as the right not to be tortured), which involves a three-stage analysis: Is the statutory restriction of the relevant right for the purpose of achieving a legitimate aim? Is the restriction 'rationally connected with one or more of the legitimate purposes'? Is the restriction 'no more than is necessary to accomplish the legitimate purpose in question' (or is the restriction so designed as to involve minimum impairment of the relevant right)? In the subsequent case of *Hysan Development*, the Court of Final Appeal, following English and European jurisprudence, added a fourth step (proportionality *stricto sensu*) to the test, which is to consider whether a 'reasonable balance' has been struck between the interests of the individual or group concerned and the 'societal benefits' flowing from the restriction on the relevant constitutional right of the individual or group, 'asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual'.[102]

The proportionality test has been applied by the Hong Kong courts not only to human rights guaranteed by the ICCPR and the Hong Kong Bill of Rights, but also to other rights guaranteed by the Basic Law, such as the right to travel,[103] and even to adjudicate on the constitutionality of a restriction on appeals from a lower court to the Court of Final Appeal.[104] In the context of the right to equality and non-discrimination, proportionality analysis has been undertaken under the 'justification test', which is structurally similar to the proportionality test. In considering a constitutional challenge on the basis of equality and non-discrimination on the ground of sexual orientation, the CFA decided in *Yau Yuk Lung*[105] that where persons in 'comparable situations' are subject to differential treatment by law, the Government must justify such differential treatment by showing that:- the differential treatment pursues 'a legitimate aim', in the sense that there is 'a genuine need for such difference'; 'the difference in treatment' is 'rationally connected to the legitimate aim'; and 'the difference in treatment' is 'no more than is necessary to accomplish the legitimate aim'. After *Hysan Development*, a fourth step has also been added to the justification test.[106]

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[102] *Hysan Development v Town Planning Board* (2016) 19 HKCFAR 372, particularly paras.73, 76, 78, 135.

[103] See e.g. *Gurung Kesh Bahadur v Director of Immigration* [2002] 2 HKLRD 775; *Director of Immigration v Lau Fong* [2004] 2 HKLRD 204.

[104] *A Solicitor v Law Society of Hong Kong* (2003) 6 HKCFAR 570.

[105] (2007) 10 HKCFAR 335.

[106] See *Director of Immigration v QT* [2018] HKCFA 28; [2018] 4 HKC 403; FACV 1/2018 (4 July 2018) at [86].

In cases concerning socio-economic policies such as the right to social welfare and the provision of social services, the courts have adopted a less rigorous version of the proportionality or justification test by modifying the third limb of the test ('no more than necessary to accomplish the legitimate aim', which may be called the standard of 'necessity') to become a standard of 'reasonableness' (or 'manifestly without reasonable foundation'). The modified test was first enunciated by the Court of Final Appeal in *Fok Chun Wa v Hospital Authority*,[107] a case concerning differential charges for obstetric services in public hospitals based on whether the woman giving birth was resident in Hong Kong. The Court of Final Appeal noted that this case concerned a matter of 'socio-economic policies'[108] and 'allocation of public funds' under conditions of 'limited financial resources'.[109] Furthermore, the differential treatment that was challenged in this case was based on residence, rather than 'core values relating to personal characteristics'[110] and involving 'the respect and dignity that society accords to a human being', such as 'race, colour, gender, sexual orientation, religion, politics, or social origin'.[111] In this domain, the court considered it appropriate that a greater 'margin of appreciation'[112] or degree of 'deference'[113] be accorded to the government. Hence in applying the third limb of the 'justification test', the court would only strike down the differential treatment if it is 'manifestly beyond the spectrum of reasonableness' or 'manifestly without reasonable foundation'.[114] Applying this test, the court upheld the differential hospital fees in this case. Subsequently, this modified version of the proportionality test was also applied by the Court of Final Appeal in *Kong Yunming v Director of Social Welfare*,[115] but with the outcome of the impugned restriction (also based on residence) of the right to social welfare being struck down in that case. In *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*,[116] the application of the proportionality test was relaxed by the CFA on the ground that the constitutional issues raised by the impugned legislation involved a political question or a political judgment.

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[107] (2012) 13 HKCFAR 409.

[108] *Fok Chun Wa v Hospital Authority,* para. 61, 65.

[109] *Fok Chun Wa v Hospital Authority,* para. 70.

[110] *Fok Chun Wa v Hospital Authority,* para. 78.

[111] *Fok Chun Wa v Hospital Authority,* para. 77.

[112] *Fok Chun Wa v Hospital Authority,* para. 61.

[113] *Fok Chun Wa v Hospital Authority,* para. 62.

[114] *Fok Chun Wa v Hospital Authority,* para. 76.

[115] (2013) 16 HKCFAR 950.

[116] (2017) 20 HKCFAR 353.

The operation of the HKSAR's political system has generated a body of case law in which the courts have recognised that there exists a separation of powers within this system.[117] For example, as regards the CE's power under the Basic Law to issue 'executive orders',[118] it has been held that the Public Service (Administration) Order issued by the CE for the purpose of the regulation of the civil service was valid,[119] but the Law Enforcement (Covert Surveillance Procedure) Order 2005 was unconstitutional as fundamental rights guaranteed by the Basic Law may only be restricted by law and not by executive order.[120] As the Basic Law vests the judicial power of the SAR in the courts, it has been held that legislation that conferred power on the CE to determine the length of sentence of under-aged offenders convicted for murder was unconstitutional.[121] Drawing upon jurisprudence in other common law jurisdictions on judicial non-intervention in the internal operation of Parliament (due to considerations of separation of powers and the need to enable the legislature to perform its constitutional functions effectively), the HKSAR court decided in one case not to intervene in an inquiry conducted by a LegCo committee,[122] and in another case not to intervene in the decision of the President of LegCo to put a stop to filibuster.[123] Referring to rules in Hong Kong's colonial LegCo and in the British Parliamentary system that limit the right of legislators to propose an increase in public spending, the Hong Kong court has upheld a provision in LegCo's Rules of Procedure to limit a legislator's right to propose an amendment to a bill if the amendment has a charging effect on public revenue.[124] The doctrine of separation of powers was also directly relevant to the controversy over the constitutionality of the Emergency Regulations Ordinance which confers law-making powers on the Chief Executive in Council during occasions of emergency or public danger.[125]

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[117] See generally PY Lo and Albert HY Chen, 'The judicial perspective of "separation of powers" in the Hong Kong Special Administrative Region of the People's Republic of China' (2018) 5(2) *Journal of International and Comparative Law* 337-362.

[118] Article 48(4).

[119] *Association of Expatriate Civil Servants of Hong Kong v Chief Executive* [1998] 1 HKLRD 615.

[120] *Leung Kwok Hung v Chief Executive*, CACV 73/2006 (CA, 10 May 2006); *Koo Sze Yiu v Chief Executive* (2006) 9 HKCFAR 441.

[121] *Yau Kwong Man v Secretary for Security*, HCAL 1595/2001 (CFI, 9 Sep 2002).

[122] *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555.

[123] *Leung Kwok Hung v President of the Legislative Council* (2014) 17 HKCFAR 841.

[124] *Leung Kwok Hung v President of the Legislative Council* [2007] 1 HKLRD 387.

[125] See *Kwok Wing Hang and others v Chief Executive in Council and another* [2019] HKCFI 2820, CACV 541/2019, note 147 below and the accompanying text.

The attempt to introduce an extradition bill[126]

On 9 June 2019, Hong Kong became the focus of international attention as hundreds of thousands of demonstrators marched to oppose the imminent enactment of a legislative bill [the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, hereafter referred to as 'the Extradition Bill'].[127] The Extradition Bill would introduce a rendition arrangement as between Hong Kong and other parts of China (including mainland China, Taiwan and Macau), as well as new extradition arrangements as between the HKSAR and over 170 States with which the HKSAR has not yet entered into extradition treaties.[128] This Bill not only led to the largest protests in Hong Kong's history, it also brought about the most serious crisis of governance in the HKSAR.

The saga began with a murder suspected to have been committed by a Hongkonger in Taiwan. In March 2018, Chan Tong-kai, a 20-year old Hong Kong permanent resident travelling with his girlfriend to Taiwan on holiday, was suspected of having murdered his girlfriend and then fleeing to Hong Kong. He was subsequently arrested in Hong Kong and prosecuted for money laundering. Taiwan authorities requested Chan's extradition to Taiwan. In any event, under the existing law, Hong Kong courts have no jurisdiction to try a murder case where the murder has been committed outside Hong Kong.[129] It seemed therefore, that justice would require Chan's extradition to Taiwan for trial.

Hong Kong's law of extradition was contained in the Fugitive Offenders Ordinance ('FOO') enacted in April 1997. This Ordinance enabled extradition to

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[126] This section of this article draws on Albert HY Chen, 'A perfect storm: How the proposed law on Hong Kong-Mainland China rendition was aborted', *VerfBlog,* 19 June 2019, https://verfassungsblog.de/a-perfect-storm/. See also Cora Chan, 'Demise of "One country, two systems"?: Reflections on the Hong Kong rendition saga', *VerfBlog,* 28 June 2019, https://verfassungsblog.de/demise-of-one-country-two-systems/. See also the revised versions of these articles in (2019) 49 *Hong Kong Law Journal* 419-430, 447-458.

[127] https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf (last accessed 28 December 2019).

[128] See generally Albert Chen, 'A commentary on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019', http://researchblog.law.hku.hk/search?q=commentary+-fugitive+offenders (first published on 3 May 2019).

[129] Under Hong Kong's existing law, the courts have extraterritorial jurisdiction over a number of criminal offences, but they do not include murder: See *Archbold Hong Kong 2019* (Sweet and Maxwell), sections 2-111 – 2-155F. The provisions on homicide in Hong Kong's Offences against the Person Ordinance were largely modelled on the provisions on homicide in the Offences against the Person Act 1861 (UK), particularly sections 1 (murder), 4 (conspiring or soliciting to commit murder), 5 (manslaughter), 6 (indictment for murder or manslaughter), 7 (excusable homicide) and 10 (provision for the trial of murder and manslaughter where the death or cause of death only happens in England or Ireland). However, section 9 (on the extraterritorial jurisdiction of the British courts over murder or manslaughter committed abroad by a British subject) of the 1861 Act does not have any counterpart in the Hong Kong Ordinance. I am indebted to Dr PY Lo for his drawing my attention to this point.

be practised as between Hong Kong and foreign States with which the HKSAR has entered into extradition treaties. Since 1997, the HKSAR has entered into extradition treaties with 20 countries;[130] more than 100 persons – largely foreign nationals – have been surrendered by Hong Kong pursuant to these treaties, with the USA being the destination of the largest number of surrenders.[131] However, it was expressly provided in the FOO that it is not applicable to 'any other part of the PRC' (including mainland China, Taiwan and Macau). Apparently, at the time of enactment of the Ordinance, it was considered that given the vast differences between Hong Kong's common-law based legal system and the socialist legal system in mainland China, Hong Kong was not yet ready to enter into rendition arrangements with the mainland.

Given the exclusion of other parts of China from the application of the FOO, the Hong Kong government found that there was no legal basis for Chan Tong-kai's extradition to Taiwan. Chief Executive Carrie Lam henceforth decided to embark on a legislative exercise to introduce into the FOO a mechanism of making ad-hoc extradition arrangements on a case-by-case basis (in the absence of extradition treaties) with any foreign jurisdiction – including more than 170 states with which Hong Kong has not entered into any extradition treaty, as well as mainland China, Taiwan and Macau. The original version of the proposal was first published on 13 February 2019 and discussed in the Legislative Council's Panel on Security on 15 February 2019.[132] After some consultation and taking into account the concerns of the business community regarding rendition to the Mainland for business-related offences which they may have committed in the past, the proposal was refined; the Bill was gazetted on 29 March 2019 and introduced into the Legislative Council (LegCo) on 3 April 2019.[133]

Hong Kong politicians and civil society became highly polarised since the introduction of the Bill, with the 'pro-China camp' (the 'pro-Establishment' camp) supporting the Bill and the 'pro-democracy camp' (the 'pan-Democrats') strongly opposed to the Bill. The momentum of protests against the Bill built up gradually,

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[130] See www.doj.gov.hk/eng/laws/table4ti.html (last accessed 28 December 2019).

[131] See generally Glenville Cross, 'Fugitive surrender: Rights and responsibilities', *China Daily*, 12 June 2019, https://www.chinadailyhk.com/articles/186/73/64/1560307116859.html.

[132] See https://www.legco.gov.hk/yr18-19/english/panels/se/papers/se20190215cb2-767-3-e.pdf (last accessed 28 December 2019).

[133] See the government's press release of 26 March 2019: https://www.info.gov.hk/gia/general/201903/26/P2019032600708.htm . For the Legislative Council Brief, see https://www.legco.gov.hk/yr18-19/english/bills/brief/b201903291_brf.pdf (last accessed 28 December 2019).

with the first demonstration against it on 31 March 2019, followed by another demonstration of a larger size on 28 April (with 130,000 participants as estimated by the organisers and 22,800 estimated by the police).

Many politicians and members of the legal community[134] opposed the Bill on the ground that it would put innocent people in Hong Kong at risk of being extradited to face trial in the Mainland. The legal system in the Mainland was not trusted by many Hong Kong people, who doubt whether it would provide a fair trial for the accused. There were also concerns that once the rendition process is initiated in a case by the Chief Executive at the request of Beijing, there is little which the Hong Kong courts can do to reject the request. This is because the existing law on extradition only requires the requesting state to provide written evidence that would constitute a prima facie case against the accused, and the accused cannot adduce evidence or call witnesses to prove his or her innocence. Furthermore, some people who opposed the Bill did not fully understand the scope of its application. Some were fearful that they could be extradited to mainland China even if the alleged crimes were committed in Hong Kong rather than in mainland China.[135] Others worried that they might be framed and falsely accused for the purpose of extradition to mainland China.

The LegCo formed a Bills Committee to study the Bill which met for the first time on 17 April 2019.[136] However, the Committee failed to operate because the pan-Democrats filibustered at its first two meetings leading to its failure to elect

[134] For the views of the legal community, see, e.g. 'Observations of the Hong Kong Bar Association on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019', 2 April 2019, available at https://www.hkba.org/events-publication/submission-position-papers; Law Society of Hong Kong, 'Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, Submission', 5 June 2019, available at http://video3.mingpao.com/typeset/stb/inews/20190605/20190605law.pdf ; 'Withdraw the Fugitive Offenders Bill', joint statement of all members of the Election Committee Subsector Election (Legal), 8 April 2019, https://www.change.org/p/%E5%85%A8%E9%AB%94%E6%B3%95%E5%BE%8B%E7%95%8C%E9%81%B8%E5%A7%94-%E6%92%A4%E5%9B%9E%E9%80%83%E7%8A%AF%E6%A2%9D%E4%BE%8B%E8%8D%89%E6%A1%88-withdraw-the-fugitive-offenders-bill. On 6 June 2019, more than a thousand lawyers joined a 'silent march' against the Bill; this was the fifth march of its kind since 1997: see "'Record 3,000" Hong Kong lawyers in silent march against controversial extradition bill', *South China Morning Post*, 6 June 2019, https://www.scmp.com/news/hong-kong/politics/article/3013461/thousands-hong-kong-lawyers-launch-silent-march-against.

[135] An article published in the left-wing Wen Wei Po on 23 May 2019, quoting from an 'authoritative source', seems to suggest that rendition to the mainland may be applicable to certain crimes committed by people outside mainland China: see 'An authoritative source explains the spirit of Mr Han Zheng's speech' (權威人士解讀韓正講話精神), Wen Wei Po, 23 May 2019.

[136] See https://www.legco.gov.hk/yr18-19/english/rescindedbc/b201903291/general/b201903291.htm (last accessed 28 December 2019).

a Chairman, and the pro-China legislators then convened further meetings of the Committee whose legality and validity were contested by the pan-Democrats.[137] On 20 May 2019, the government decided to by-pass the Bills Committee and to commence the final stage of the legislative process on 12 June. In an attempt to compensate for the lack of deliberations on the Bill in the Bills Committee, the LegCo Panel on Security was convened to discuss the Bill on 31 May-5 June.[138] A slightly revised package had been announced by the government on 30 May 2019 to narrow down the offences covered by the proposed extradition arrangement and to try to improve the safeguards for the rights of the accused.[139]

The social movement against the Bill culminated in a march of hundreds of thousands of people on 9 June 2019 (with 1.03 million participants as estimated by the organisers and 240,000 estimated by the police).[140] Despite the fact that the demonstration on 9 June 2019 was the largest of its kind since the demonstration against the national security bill in 2003, Chief Executive ('CE') Carrie Lam decided to press ahead with the final stage of the legislative process that was scheduled to begin with the commencement of the Legislative Council debate on the Bill on 12 June.[141] On the morning of that day, Hong Kong's downtown area and streets surrounding the Legislative Council building were occupied by tens of thousands of demonstrators. In the afternoon, the protest escalated into what the Hong Kong

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[137] After the first two meetings of the Bills Committee, the 'pro-China' camp of legislators secured a direction from LegCo's House Committee to replace the (temporary) chairman of the Bills Committee (who belonged to the pan-Democrat camp) by a LegCo member from the pro-China camp. Then both the pan-Democrats and the pro-China camp purported to convene their own Bills Committee meetings twice.

[138] See https://www.legco.gov.hk/yr18-19/english/rescindedbc/b201903291/papers/b201903291_ppr.htm (last accessed 28 December 2019).

[139] See the press releases dated 30 May 2019: https://www.info.gov.hk/gia/general/201905/30/P2019053000811.htm (Secretary for Security's speech in Chinese); https://www.info.gov.hk/gia/general/201905/30/P2019053000960.htm (replies to questions in English). These webpages and those cited below were last visited on 16 January 2020.

[140] The number of people who participated in this march and subsequent marches is difficult to estimate and has been a contested issue in Hong Kong. As regards the number of participants in the 9 June march, the estimated numbers include 1.03 million (estimate by the organisers of the march – the Civil Human Rights Front (CHRF)), between 810,000 and 1.08 million (by Prof. HUI Shu Yuen Ron), 240,000 (by the police), and 199,000 (by Prof. Francis T Lui). The estimated numbers in the 16 June march are 2 million (CHRF), 1.5 million (Prof. Hui), 400,000 (Prof. Lui) and 338,000 (the police). For comparative purpose, the estimated numbers at the annual 1 July march in 2019 may be noted: 550,000 (CHRF), 265,000 (Prof. Paul SF Yip and Prof. Edwin T Chow), 215,000 (Prof. Lui) and 190,000 (the police). The figures here appear in Ming Pao and other Hong Kong newspapers on the relevant dates.

[141] See the Chief Executive's speech at her press conference on 10 June 2019: https://www.info.gov.hk/gia/general/201906/10/P2019061000615.htm.

police called a 'riot' (a label which opponents of the Bill strongly contested),[142] to which the police responded with large volumes of tear gas, pepper balls, baton rounds and even rubber bullet shots and bean bag shots. The President of the Legislative Council decided that the circumstances were such that it was impossible for the Council to begin the series of meetings on the Bill that were originally scheduled for 12-20 June, which would consist of several days of debates on the Bill and the Bill being put to a vote on 20 June. Then, on 15 June, CE Carrie Lam announced that the legislative process on the Bill would be immediately suspended.[143]

Even after the suspension of the Bill, an even larger protest occurred on 16 June (with close to two million participants as estimated by the organisers and 338,000 estimated by the police) to demand complete withdrawal of the Bill and to protest against police use of excessive force against demonstrators on 12 June. In response CE Lam publicly apologised on 18 June for 'deficiencies in the work of the HKSAR government' on the legislative amendment exercise, which 'has led to controversies, disputes and anxieties in society'.[144] However, as the CE did not accede to the principal demands of the protestors (including the withdrawal of the Bill, the lifting of the label of 'riot' from the 12 June protest, non-prosecution of protestors, and the establishment of an independent commission of inquiry to investigate the incident), civil unrest and sporadic rioting has continued in Hong Kong even after legislative proceedings on the Bill had been shelved. For example, crowds of protestors laid siege to the Police Headquarters in Wanchai on 21 and 26 June 2019. On 1 July 2019 they stormed the Legislative Council building and damaged its facilities to an extent that the legislature would not be able to meet in the venue for the next few months. On 21 July 2019 the building of the Liaison Office of the Central Government was besieged, and the national emblem on the building was defaced. Public outcry followed massive assaults on the same evening

[142] Subsequently, the Commissioner of Police at a press conference on 17 June 2019 clarified that the use of the term 'riot' only referred to the behaviour of some violent protesters and not to all or most of the participants in the protest on 12 June 2019: see https://www.news.gov.hk/eng/2019/06/20190617/20190617_224726_031.html.

[143] For the full text of the CE's statement, see https://www.info.gov.hk/gia/general/201906/15/P2019061500707.htm. The government subsequently explained that all work on the Bill had been stopped, and stated that it would accept that the Bill would lapse upon the expiration of the current term of the Legislative Council in summer 2020. However, opponents were not satisfied and insisted that the Bill must be 'withdrawn'.

[144] Government of HKSAR Press Releases, 'Opening remarks by the Chief Executive, Mrs Carrie Lam, at a media session this afternoon (June 18 [2019])' https://www.info.gov.hk/gia/general/201906/18/P2019061800812.htm; and Government of HKSAR Press Releases, 'Transcript of remarks by the Chief Executive, Mrs Carrie Lam, at a media session this afternoon (June 18 [2019])' https://www.info.gov.hk/gia/general/201906/18/P2019061800950.htm.

by suspected triad society members on protestors and other commuters at the Yuen Long subway station with suspected acquiescence or even collusion by the police.

On 4 September 2019, the CE announced the formal withdrawal of the Extradition Bill and the establishment of an 'investigative platform to look into the fundamental causes of the social unrest and suggest solution'[145] However, this still fell short of what the protestors demanded at that point of time. Three months from the first community-wide protests, the movement had evolved into one for, amongst other things, universal suffrage for the elections of the CE and all members of the legislature, and independent investigation into the police's use of force against protestors. Between September and November 2019, the use of force on the part of both radical protestors and the police escalated, culminating in violent clashes on the campuses of the Chinese University of Hong Kong[146] and the Hong Kong Polytechnic University[147] in November. Meanwhile, on 4 October 2019, the CE and Council relied on the Emergency Regulations Ordinance (Cap 241) to issue the Prohibition on Face Covering Regulation (Cap 241K), which was purportedly aimed at facilitating police investigation and deterring violent acts by masked protestors. On 18 November 2019, the Hong Kong Court of First Instance found parts of the Ordinance and Regulation unconstitutional.[148] This judgment provoked rebuke from a spokesman of the Legislative Affairs Commission of the NPCSC, who stated that the NPCSC was the only body that could decide whether a Hong Kong law complied with the Basic Law,[149] a position that was at odds with the long-standing practice of constitutional review by post-handover Hong Kong courts. At the time of writing, the judgment is on appeal before the Hong Kong Court of Appeal.

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[145] SCMP reporters, 'Hong Kong leader Carrie Lam announces formal withdrawal of the extradition bill and sets up a platform to look into key causes of protest crisis' *South China Morning Post* 4 September 2019 https://www.scmp.com/news/hong-kong/politics/article/3025641/hong-kong-leader-carrie-lam-announce-formal-withdrawal. The bill was formally withdrawn from LegCo on 23 October 2019.

[146] Kris Cheng & Holmes Chanm, 'CUHK turns into battleground between protesters and police as clashes rage on across Hong Kong universities' *Hong Kong Free Press* 12 November 2019 https://www.hongkongfp.com/2019/11/12/cuhk-turns-battleground-protesters-police-clashes-rage-across-hong-kong-universities/.

[147] Chris Lau and Kinling Lo, 'Hong Kong protests: police to send negotiators and psychologists to PolyU to convince holdouts to come out' *South China Morning Post* 25 November 2019 https://www.scmp.com/news/hong-kong/politics/article/3039293/hong-kong-protests-polyu-wants-peaceful-humane-end-campus.

[148] *Kwok Wing Hang and others v Chief Executive in Council and another* [2019] HKCFI 2820. The court's decision has been appealed to the Court of Appeal (CACV 541/2019), which at the time of writing has not yet rendered its judgment.

[149] https://www.scmp.com/news/hong-kong/politics/article/3038325/hong-kong-judges-slammed-chinas-top-legislative-body.

The landslide victory of the pan-democrats in the Hong Kong District Council elections on 24 November 2019,[150] coupled with the US enactment of the Hong Kong Human Rights and Democracy Act which many protestors in the anti-extradition movement had lobbied the Congress to pass,[151] seemed to have relieved the tension in society,[152] although at the time of finalising this chapter there are still small-scale violent demonstrations and larger-scale peaceful ones from time to time. The HKSAR government experienced a most severe crisis of governance.

Concluding reflections

Although Ghai's treatise on the Hong Kong Basic Law was published more than two decades ago, the conceptual framework developed by him to study and analyse the constitutional operation of 'One country, two systems' is still basically valid and highly relevant today. Ghai's work demonstrates that the principal challenge for 'One country, two systems' is how to maintain in the HKSAR a legal system that is based on English common law and that seeks to protect civil liberties according to the norms of international human rights law, while mainland China continues to practise an authoritarian mode of rule that is incompatible with some of the basic values and aspirations of Hong Kong people. As this chapter shows, the possible contradictions and tensions between the 'two systems' that Ghai identifies in his scholarship on Hong Kong constitutional law have actually become more apparent and intensified in the last two decades.

Since the publication in 1999 of the last edition of Ghai's book *Hong Kong's new constitutional order*, the tensions and conflicts arising from the co-existence and interaction of the 'two systems' have been evidenced in the promulgation of four more interpretations of the Basic Law by the NPCSC, the failed attempts to legislate on national security and on rendition of fugitive offenders as between Hong Kong and the Mainland, the continuing struggles for Hong Kong's democratisation

[150] Under the influence of the social movement against the extradition bill, the pan-democrats secured an unprecedented victory in the District Council election on 24 November 2019, in which they won 57% of the popular votes and 85% of the seats (see Ming Pao (newspaper in Chinese), 26 November 2019).

[151] The Act (S. 1838, Pub.L. 116-76) was passed by both Houses of Congress in November 2019 and was signed into law by President Trump on 27 November 2019.

[152] Jeffie Lam, Sum Lok-kei, Ng Kang-chung, 'Hong Kong elections: pro-democracy camp wins 17 out of 18 districts while city leader says she will reflect on the result' *South China Morning Post* 25 November 2019 https://www.scmp.com/news/hong-kong/politics/article/3039151/hong-kong-elections-tsunami-disaffection-washes-over-city.

culminating in 'Occupy Central', and the increasing polarisation of the community, particularly during 'Occupy Central' and the social movement against the extradition bill. Legal controversies in recent years also testify to the difficulty of mutual accommodation as between the two systems. For example, the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Colocation) Ordinance 2018, which allows Chinese immigration and customs officers to be stationed in a port area in the West Kowloon express rail station, was criticised as being inconsistent with the Basic Law provision on the non-application of mainland laws in Hong Kong.[153] The Court of Final Appeal's judgment[154] on the lenient sentencing of some Occupy Central activists was criticised by opponents of the civil disobedience movement. Other Occupy Central activists have been convicted by the District Court but the cases are being appealed.[155] In the meantime, pro-independence activists barred from running in Legislative Council elections since 2016 litigated to challenge the decisions of returning officers.[156] And prosecutions of protestors in the anti-extradition bill movement are being heard in the courts.

The 2019 extradition controversy revealed the difficulties of preserving Hong Kong's autonomy and liberal values within China's one-party regime. The lack of a fully democratic political system in Hong Kong, for example, in part accounts for why the extradition dispute arose and for the inability of the Hong Kong *government* to resolve the crisis.[157] The extradition saga marks an important chapter in the ongoing constitutional experiment of 'One country, two systems': it shows that the approaches that have hitherto been adopted by Beijing and the people and institutions of Hong Kong as well as the institutional arrangements governing the

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[153] The Hong Kong Bar Association criticised the scheme as unconstitutional, but the Court of First Instance upheld the scheme in *Leung Chung Hang v President of Legislative Council* [2018] HKCFI 2657. As of January 2020, the case is on appeal before the Court of Appeal. The possible presence of mainland law enforcement officers in Hong Kong engaged in 'cross-border enforcement of mainland law' has been politically sensitive. In early 2016, the 'Lee Po incident' touched a nerve in the Hong Kong community. Mr Lee Po of the bookstore Causeway Bay Books, which was believed to have published books considered objectionable by the mainland authorities, disappeared from Hong Kong in late 2015, fuelling speculation that he had been abducted by Mainland policemen. His subsequent re-appearance in Hong Kong and claim that he had voluntarily gone to Mainland did not remove lingering doubts. For the aftermath, see 'Beijing and Hong Kong sign deal on notification procedures when residents are detained', *South China Morning Post*, https://www.scmp.com/news/hong-kong/politics/article/2124316/beijing-and-hong-kong-sign-deal-notification-procedures-when (first published 14 December 2017).

[154] *Secretary for Justice v Wong Chi Fung* [2018] HKCFA 4 (6 February 2018).

[155] *HKSAR v Tai Yiu Ting* [2019] HKDC 450.

[156] See *Chan Ho Tin* [2018] HKCFI 345; *Chow Ting v Teng Yu Yan* [2019] HKCFI 2135 (2 September 2019); *Au Nok Hin v Teng Yu Yan Anne (the Returning Officer of the Hong Kong Constituency) and another* [2019] HKCFA 50, FAMV 307/2019 (20 December 2019); *Lau Wing Hong v Chan Yuen Man* [2019] HKCFI 2287 (13 September 2019).

[157] Chan, 'Demise of "One country, two systems"?'

relationship between the two jurisdictions are probably in need of major overhaul. Yet what those reforms should be and how they could be achieved are far from clear. In navigating these and other complex questions in the unprecedented journey of 'One country, two systems', we will continue to derive guidance and draw inspiration from Ghai's exemplary work.

Reflections on the role of rights in Chinese citizenship

Sophia Woodman

This chapter has had a long gestation. Its origins lie in a time of intense and sometimes disillusioned reflection on the meaning of rights that followed my decade of work in a human rights NGO. Yash Pal Ghai provided me with much inspiration and support during that reflective period. This came from several directions: his own scholarship and practice of law; sitting in on some of his courses on human rights; and work as his research assistant at the University of Hong Kong, during which I had the opportunity to study the Chinese constitutional system. While this chapter draws on later fieldwork, much of the groundwork was laid during my years working for Ghai. He was always busy, and let me get on with what interested me much of the time, occasionally returning to provide stimulating suggestions and wonderful warm company. For all of that, I am deeply grateful.

We are said to live in an 'age of rights' in which these have virtually displaced 'all other ethical languages'.[1] However, the universal acceptance of a rubric of rights derived from international models of modernity as a mechanism for regulating relationships between the state and individuals and groups has had differing effects. Rights language has developed distinct meanings and implications for questions of social justice and citizenship in different parts of the world. This chapter uses the relationship between rights and citizenship in China to explore questions around these differences, drawing on ethnographic fieldwork in rural and urban parts of Tianjin in north China,[2] analysis of the development of the Chinese legal system and related literatures.

In the routine practices of citizenship observed in my fieldwork in China, the language of rights was rarely deployed. This is not to say it was entirely absent. One

[1] Upendra Baxi, 'Voices of suffering and the future of human rights' *Transnational Law and Contemporary Problems* 8, no. 2 (1998), 1.

[2] In 2008-2009, I spent 10 months conducting ethnographic research in two urban resident committees and two rural villager committees in Tianjin Municipality, north China. These committees are called 'basic level organisations' and are the most local form of engagement between the state and communities. For more details, see Sophia Woodman, 'Local politics, local citizenship? Socialized governance in contemporary China' *The China Quarterly* 226 (June 2016), 342-62.

area where rights occasionally came up was in conversations about people's conflicts with the authorities over control of their private property. For example, speaking of a family who had been blocking access through their apartment for renovation of pipes and electrical wiring for one of the neighbourhood's buildings, an urban neighbourhood committee worker remarked that taking such action was 'their freedom, their human rights'. Another form was two opposing versions of 'political rights'. One was linked to elections to resident and villager committees and prompted individuals to participate in a scripted performance of democratic accountability; another was apparent when regular 'petitioners' drew on national laws and regulations to claim specific rights through sit-ins and other forms of civil disobedience.

The limited reach of 'rights talk' in daily citizenship practice is in distinct contrast to its relevance to China in the transnational public sphere. China's human rights practices are the subject of continuing international contention, in bilateral and multilateral relationships; in media reporting and NGO advocacy; and among scholarly observers. Almost every year, human rights groups point to deterioration in the Chinese Government's respect for international human rights standards, while the Chinese Government frequently claims that under current conditions Chinese people enjoy more extensive rights than at any previous period in history. Fairly comprehensive rights provisions were incorporated into the 1982 Constitution.[3] Specific recognition of 'human rights' was added in a 2004 amendment that stated, 'the state respects and protects human rights'.[4] But despite this explicit recognition and China's ratification of most major international human rights treaties, the Chinese Government actively seeks to prevent reporting and discussion of international evaluations of human rights practice in China in the domestic media and public sphere.[5] A dedicated, yet embattled, community of activists has long been attempting to bridge the divide between the transnational debates over China's human rights practices and the domestic public, but with very limited success, given the central and local governments' hostility to such efforts.

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[3] PRC Constitution 1982, Chapter II, The fundamental rights and duties of citizens.

[4] PRC Constitution 1982, as amended 2004, Article 33.

[5] Sophia Woodman, 'Human rights as "foreign affairs": China's reporting under human rights treaties' *Hong Kong Law Journal* 35, Part 1 (2005), 179-204. This practice has continued into the present day. An extreme result of Government efforts to limit the visibility of its engagement with UN human rights mechanisms was the death of lawyer and human rights activist Cao Shunli, who pressured the authorities to open up the consultation over review of China's human rights record for the UN's 2008 Universal Periodic Review, among other activities. Cao's activism led to detention and ill-treatment that resulted in her untimely death at the age of 50. R Xia, and P Link, 'China: detained to death,' *NYRblog* (blog), 15 May 2014, http://www.nybooks.com/blogs/nyrblog/2014/may/15/china-detained-to-death/.

Why the contrast, and what are its implications? I have argued that citizenship in China has been primarily a local relation, anchored in the post-1949 socialist period in collectives that connect citizens to the state and combine political and social dimensions of citizenship in one institutional setting.[6] Rights have not been a feature of this relation, either in form or in practice. While the institutional form of such collectives has been changing in recent years – and their hold on citizens is much more variable now than in the Mao Zedong period – a degree of continuity shapes how people think about equality, entitlement and political claims-making, and the continuing importance of the *hukou* household registration system means that local citizenship remains the predominant mode of connection between the state and citizens. In this analysis, I draw on an institutional approach to citizenship that points to factors beyond censorship and active repression of cross-sectoral organising that limit the salience of rights in citizenship as practiced on the ground. This focus links to Marshall's account of how the different sets of rights he describes are embedded in specific institutions.[7]

Drawing on my arguments about the character of Chinese citizenship, in this chapter, I examine how civil, political and social rights are relevant to citizenship in China today. I begin with a brief genealogy of rights in modern China and then explore some manifestations of each of the three types of rights to sketch out how they feature in the overall pattern of relations between the state and citizens. Given China's socialist history and official claims that the state prioritises economic and social rights, I examine social citizenship in more detail, both in the Chinese context and in the terms of the relationship between social citizenship and 'rights' more broadly.

My approach here focuses on rights in a 'genealogical' fashion, rather than attributing to them any intrinsic philosophical meaning, as they take on different forms as they migrate in time and space, through unequal exchanges of 'meaning value'.[8] 'Rights' appear here in several different senses: as institutional relationships defined formally, in laws, regulations and policies; as political claims that may go beyond the provisions of an actually-existing constitutional or legal order; as socially-situated practices that may vary from place to place; and finally, as concepts derived

[6] Woodman, 'Local politics, local citizenship?'.

[7] T Marshall, *Citizenship and social class* Pluto Press, London; Concord, MA, 1992.

[8] LH Liu, 'Introduction' in LH Liu, (ed.) *Tokens of exchange: The problem of translation in global circulations* Duke University Press, Durham, NC, 1999, 2.

from globally-connected historical complexes of ideas and practices.[9] I view rights as essentially contradictory: they can be both sites of contestation and mechanisms of incorporation,[10] and their meaning is always in dispute, whether in the domestic sphere, or in international models. This multiplicity of forms, I argue, means that identifying *how and where* rights language is used, and *how and where* institutional forms of rights are activated is crucial in analysing their import. In my view, labelling as 'rights' matters that participants in the action refer to in other ways can obscure the specific cultural politics at play.

A Chinese genealogy of rights

It is a widely noted that the version of rights that has been developed in China, and in East Asia more generally, is state-centred[11] and does not envisage avenues for citizens to make claims *against* the state. Since rights emerged in a context where the territorial integrity of the nascent Chinese nation was under threat for close to a century, it is not surprising that rights were interpreted to make sovereignty the primary concern. Rights arrived at a time when the Qing Empire was under extreme pressure from gunboat diplomacy, often justified in terms of international legal principles. With Chinese colleagues at the newly-formed Qing Government office designated to deal with foreign affairs, American missionary William Martin translated a series of books on international law into Chinese in the latter half of the 19th century.[12] The first of these translations included the term 'human rights', which was rendered into a Chinese neologism that can literally be translated as 'human natural rights' and employed Chinese characters with significant negative connotations (权*quan*: power/domination and 利 *li*: selfish interest). Thus the concept of human rights entered into Chinese in a sense that reflected how international law had been used by Western traders to force their way into China.[13]

[9] S Woodman and Z Guo, 'Introduction: practicing citizenship in contemporary China,' *Citizenship Studies* 21, no. 7 (2017), 737-54.

[10] Baxi, 'Voices of suffering and the future of human rights'.

[11] RR Edwards, L Henkin, and AJ Nathan, *Human rights in contemporary China,* Columbia University Press, New York, 1986.

[12] LH Liu, 'Legislating the universal: The circulation of international law in the 19th Century,' in Liu (ed.), *Tokens of exchange*, 127-64.

[13] Liu, 'Legislating the universal' 152.

So at the dawn of the 20th century, 'The freedom that officials and elites were both seeking… was the freedom of the Chinese nation'.[14] By the end of World War II, when China had experienced years of warlordism, weak and venal governments and brutal occupation, it is hardly surprising that,

> The overwhelming majority of intellectuals, like the political leaders, gradually became less concerned with citizen participation and more concerned with enhancing the power of the state so that China once again could become united, rich, and powerful.[15]

In China and East Asia more generally, the 'strong state' model is linked both to ideal types in world models that included constitutionalism and rights as solutions to problems of state formation and to resistance to colonial incursions. Chinese and Japanese thinkers reinterpreted liberal doctrines in terms of their own political traditions, but these doctrines were themselves contradictory and hypocritical. As Mann notes, the combination of selective repression and sham parliaments was more the rule than the exception in the late 19th century.[16] From the perspective of the colonised, rights were often a tool of subjugation, rather than a source of empowerment.[17]

In the early years after the formation of the People's Republic of China (PRC) following the communist victory in 1949, the Soviet Union was a key model for the formation of rights and citizenship. In Joseph Stalin's rehabilitation of the state culminating in the 1936 Soviet Constitution, 'bourgeois' legal institutions, including ideas about rights, were adapted to the needs of socialism. Here law was to act as a principal mechanism for regulating society, but this view of law presumed convergence between the interests of the state and citizens, and placed no constraints on the exercise of state power.[18] The corollary of such a view was that those who asserted rights *against* the state were enemies of the state and of socialism.

China's initial efforts at building a legal regime on the Stalinist model were relatively short-lived, but reflect similar imperatives. Thus the term for 'citizen' that was eventually incorporated into the PRC's first Constitution in 1954, 公民

[14] RB Wong, 'Citizenship in Chinese history,' in C Hanagan and C Tilly (eds) *Extending citizenship, reconfiguring states*, Rowman & Littlefield Publishers, Lanham, MD, 1999, 102.

[15] M Goldman, *From comrade to citizen: The struggle for political rights in China* Harvard University Press, Cambridge, MA, 2005, 11.

[16] M Mann, 'Ruling class strategies and citizenship', in M Bulmer, and AM Rees, (eds) *Citizenship today: The contemporary relevance of TH Marshall*, UCL Press, London, 1996, 125-44.

[17] Baxi, 'Voices of suffering and the future of human rights'.

[18] AL Unger, *Constitutional development in the USSR – a guide to the Soviet constitutions* Methuen, London, 1981.

(*gongmin*) uses the character '公' (public) which traditionally has the connotation of public spiritedness contrasting with selfish interests.[19] During the rule of Mao Zedong, class became the dominant framework for categorising the people, rather than citizenship.[20] The PRC's population was divided into 'the people' (comprised of the classes that support the people's democratic dictatorship) who enjoyed rights and 'class enemies' who did not. All were ostensibly 'citizens,' but those citizens who were class enemies had only duties, not rights, and all had to put the interests of the state first.[21] During the Cultural Revolution (1966-76) rights were almost excised from official discourse, exemplified in the 1975 Constitution which reduced the rights of citizens to only three articles from a previous 19 in its 1954 predecessor.[22]

In the period after Mao's death in 1976, the idea of equal citizenship was revived, expressed in the Constitution of 1982 which gave prominent place to the rights and duties of citizens, expanding the number of articles in this section to a total of 35, with a principal focus on basic civil rights. The focus on rights and equality (as well as duties) under the rubric of 'socialist legality' was in large part a response to the perceived lawlessness of the Cultural Revolution decade. Since that time, the Chinese leadership has made establishing a comprehensive legal system and ruling in accord with the law a central theme of governance and a key element of its legitimation strategy.[23]

Rights did not become contentious in China's international relations until after the June Fourth Massacre of 1989, which elicited a torrent of criticism of China's human rights record. This coincided with a changing configuration of forces at international level and the increased salience of rights in bilateral and multilateral relations. Following a period of outright rejection of the international critique starting in 1991, the Chinese Government began to put forward its own version of

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[19] M Goldman and EJ Perry (eds), *Changing meanings of citizenship in modern China*, Harvard University Press, Cambridge, MA, 2002.

[20] P Harris, 'The origins of modern citizenship in China' *Asia Pacific Viewpoint* 43, no. 2 (2002), 186-203.

[21] X Yu, 'Citizenship, ideology, and the PRC Constitution,' in Goldman and Perry, *Changing meanings of citizenship in modern China*, 293.

[22] Harris, 'The origins of modern citizenship in China,' 196. Admittedly, these three articles packed in a number of rights that had been enumerated separately in the 1954 version, but this still represented a significant reduction in the scope given to rights in the Constitution. The statement that all citizens are equal before the law was excised, and replaced with the following:

> Article 26: The fundamental rights and duties of citizens are to support the leadership of the Communist Party of China, support the socialist system and abide by the Constitution and the laws of the People's Republic of China (Constitution 1975).

[23] CK Lee, *Against the law: labor protests in China's rustbelt and sunbelt,* University of California Press, Berkeley, CA, 2007.

what human rights should mean. Central to these efforts was the proposition that the 'right to subsistence' is the primary right of concern to Chinese people, which has been interpreted widely as meaning that the State gives priority to social and economic rights. But a careful reading shows that subsistence rights are envisaged as the right of the state to independent existence as the collective expression of the Chinese people. As China's State Council's 1991 White Paper put it, 'The preservation of national independence and state sovereignty and the freedom from imperialist subjugation are, therefore, the very fundamental conditions for the survival and development of the Chinese people'.[24] This frames all kinds of intervention into domestic politics on human rights grounds as an act of imperialism. The rights provisions in the 1982 Chinese Constitution are thus framed as an aspect of a State project of national development and revitalisation, presenting the state as an enabler of the realisation of rights.

However, just as the idea of 'natural rights' is a foundational myth for liberal ideas of rights,[25] the Chinese State-centred version of rights is *also* a form of mythification. Focusing solely on this version neglects alternative versions of rights, which have appeared throughout China's modern history.[26] In Jeremy Paltiel's elegant formulation, 'Rights are part of the contemporary Chinese vocabulary, which is as different from the classical Chinese lexicon as a Long March rocket is from a sedan chair'.[27] In the contemporary period, new legal frameworks have provided resources for people to contest the meaning of rights,[28] particularly apparent in the emergence, since the early 2000s, of a 'rights defence' (维权运动) movement, which spans the divide between oppositional regime-critics and localised efforts to defend rights to land and property, and basic labour rights.[29] Yet rights defence itself depends

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[24] Information Office of the State Council, *Human rights in China*, 1991, unpaginated.

[25] A Woodiwiss, *Human rights* Routledge, London; New York, 2005.

[26] M Svensson, *Debating human rights in China: A conceptual and political history* Rowman & Littlefield, Lanham, MD, 2002; SC Angle and M Svensson (eds), *The Chinese human rights reader: documents and commentary, 1900-2000* M.E. Sharpe, Armonk, NY, 2001.

[27] J Paltiel, *The empire's new clothes: cultural particularism and universal value in China's quest for global status* Palgrave Macmillan, Houndsmill, UK, 2008, 89.

[28] AE Kent, *Between freedom and subsistence: China and human rights* Oxford University Press, Hong Kong, 1993; AE Kent, *China, the United Nations, and human rights: The limits of compliance* University of Pennsylvania Press, Philadelphia, 1999; WC Kirby, *Realms of freedom in modern China*, Stanford University Press, Stanford, CA, 2004; Lee, *Against the law: labor protests in China's rustbelt and sunbelt.*

[29] See for example, E Pils, 'Land disputes, rights assertion, and social unrest in China: A case from Sichuan,' *Columbia Journal of Asian Law* 19, no. 1 (2005), 235-92; E Pils, 'Asking the tiger for his skin: rights activism in China,' *Fordham International Law Journal* 30 (2006), 1209-87; J Benney, 'Rights defence and the virtual China,' *Asian Studies Review* 31, no. 4 (2007), 435-46; Lee, *Against the law: labor protests in China's rustbelt and sunbelt*; H Fu and R Cullen, 'Weiquan (rights protection) lawyering in an authoritarian state: Building a culture of public-interest

on the state in a new role: as facilitator, regulator and arbiter of a more complex set of relations in which private parties and individuals are seen as contributors to the realisation of the state's project. This new role is vividly apparent in growing contention over civil rights.

Civil rights

From the perspective of citizenship, arguably the main impact of the Chinese State's project of 'legal construction' has been in establishing a legal framework for civil rights on the basis of equality among citizens, although the extent to which this has actually been achieved is hotly debated. The sense of law as an arbiter of behaviour, as well as a recourse for the resolution of disputes, was apparent in my field sites particularly around issues of property rights, as mentioned above. Yet a meaning of civil rights that goes well beyond that articulated in State laws and regulations was also in evidence in small ways: a sense that expression, association and assembly could be legitimate vehicles for citizens to pursue grievances.

Legal construction in the field of civil rights has primarily focused on two areas: criminal law (such as rights related to detention and fair trial and clearer provisions on what behaviours constitute criminal acts); and the formation of a system of civil law for arbitrating disputes among citizens, particularly related to employment, one of the most prominent areas of law-making. Related to the second area are provisions on land and property. These developments give the state two roles in relation to civil rights: that of public enforcer of criminal sanctions; and that of arbiter between private parties. Legal institutions or entitlements based on legal documents (whether laws or local regulations) have thus become a new arena for claims-making in which citizens are supposed to be equal.

The micro-level claims I observed in my fieldwork are part of a rising tide: 'Defending *hefa quanyi* (legitimate rights and interests) has been a common claim underpinning various popular actions across China'.[30] Since the early 1990s, there

lawyering', *The China Journal*, no. 59 (January 2008), 111-27; H Fu and R Cullen, 'Climbing the weiquan ladder: A radicalizing process for rights-protection lawyers', *The China Quarterly* 205 (2011), 40-59; S Woodman, 'Law, translation and voice: transformation of a struggle for social justice in a Chinese village', *Critical Asian Studies* 43, no. 2 (2011), 185-210; H Fu, 'Challenging authoritarianism through law', in JP Béja, H Fu and E Pils (eds) *Liu Xiaobo, Charter 08 and the challenges of political reform in China*, Hong Kong University Press, Hong Kong, 2012, 185-204; E Pils, *China's human rights lawyers: Advocacy and resistance* Routledge, Abingdon, UK, 2014.

[30] F Chen and M Tang, 'Labor conflicts in China: Typologies and their implications,' *Asian Survey* 53, no. 3 (June 2013), 561.

has been a phenomenal rise in contentious collective actions, with what are known as 'collective public security incidents' rising from 8,700 in 1993 to 87,000 in 2005, according to police statistics.[31] Frequently protesters frame their claims by asserting that the harm they challenge is 'against the law' or a violation of existing policies, a tactic labelled by Kevin O'Brien and Li Lianjiang as 'rightful resistance' since it legitimates protest actions often dubbed 'illegal' by local authorities through reference to other government norms.[32] The central theme of such protests has been efforts to protect livelihood and property, with the most prominent issues being labour rights, land expropriation, urban development and environmental degradation and risks, as well as official corruption.[33] Often the aim of protests is to pressure central or local authorities into intervening to remedy a situation where the relevant rules (such as on compensation for expropriated land, payment of migrant wages or proper disposal of hazardous waste) are not being applied in the manner complainants think they should be. The particularly savvy usually combine making complaints through formal channels (such as the petition system and their resident and villager committees) with 'trouble-making' tactics (such as marches and sit-ins) to draw attention to their claims.[34]

As evident in my field sites, disputes around land and property have been one of the most prominent areas in which citizens deploy their civil rights. Urban residents displaced in redevelopment projects have deployed both legal strategies and disruptive tactics to push their claims. Such actions are often based on a sense of property rights as civil rights recognised under the law, and often involve collective action to address common experiences of dispossession and inadequate compensation.[35] Rural people have widely engaged in struggles over

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[31] JH Chung, H Lai and M Xia, 'Mounting challenges to governance in China: Surveying collective protestors, religious sects and criminal organizations', *The China Journal*, no. 56 (July 2006), 1-31. Police stopped releasing these figures annually after 2005, but available evidence indicates that the numbers continued to rise, if at a less precipitous rate.

[32] KJ O'Brien and L Li, *Rightful resistance in rural China* Cambridge University Press, Cambridge, UK, 2006; Lee, *Against the law: Labor protests in China's rustbelt and sunbelt.*

[33] Y Tong and S Lei, 'Large-scale mass incidents and government responses in China,' *International Journal of China Studies* 1, no. 2 (2010), 487-508; CJ Chen, 'Growing social unrest in China: Rising social discontents and popular protests', in G Wu and H Lansdowne (eds) *Socialist China, capitalist China: social tension and political adaptation under economic globalization*, Routledge, Abingdon, UK, 2009, 10-28.

[34] X Chen, *Social protest and contentious authoritarianism in China* Cambridge University Press, Cambridge, UK, 2012; CK Lee and Y Zhang, 'The power of instability: Unraveling the microfoundations of bargained authoritarianism in China', *American Journal of Sociology* 118, no. 6 (May 2013), 1475-1508; X He, 'Maintaining stability by law: Protest-supported housing demolition litigation and social change in China', *Law & Social Inquiry* 39, no. 4 (2014), 849-73.

[35] L Zhang, 'Forced from home: Property rights, civic activism, and the politics of relocation in China', *Urban*

land expropriation.[36] These struggles frequently draw on Government laws and policies related to land expropriation and compensation, seeking intervention by higher levels of the State against developers in league with the local state. Another area of contention around property has been activism among middle-class homeowners seeking to defend their living conditions against environmental harms and encroachment on the green space or other amenities in their neighbourhoods.[37]

Such developments indicate a grudging state acceptance of citizens' exercise of their civil rights to freedom of assembly. An official shift towards de facto acceptance of protests as a 'normal and neutral phenomenon' is evidenced in a change since the early 1990s from labelling such actions as instances of 'illegal assembly' carried out by 'thugs' to the less politically-loaded term 'mass incidents'.[38] Indeed, regulatory weakness means that in many fields State agencies with an interest in enforcing rules at local level (such as in environmental protection) actually depend on citizen complainants to identify violations.[39] But given the stringent sanctions that may be imposed on such actions under the law – according to data on collective resistance, state retaliation against protesters was seen in 60% of cases[40] – the prevalence of contentious collective action on the street also reflects a sense of civil rights that goes well beyond what is legally permitted. The project of 'ruling according to law' has thus contributed to a growing assertion of civil rights that overflows the institutional terms of that project, with law and legal institutions trying to play catch up. For example, in labour cases where workers take their case to the street in

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Anthropology and Studies of Cultural Systems and World Economic Development 33, no. 2/4 (2004), 247-81.

[36] Pils, 'Land disputes, rights assertion, and social unrest in China'; E Pils, 'Peasants' struggle for land in China', in Y Ghai and J Cottrell (eds) *Marginalized communities and access to justice*, Routledge, London, 2009, 136-61; S Brandtstädter, 'The law cuts both ways: Rural legal activism and citizenship struggles in neosocialist China,' *Economy and Society* 40, no. 2 (May 2011), 266-88; A Zhang and Z Zeng, 'Little Wukan, big China: Lessons to be drawn from the Wukan Incident for China's political and economic development', *The China Nonprofit Review*, 5.1 (2013), 3-16; S He and D Xue, 'Identity building and communal resistance against land grabs in Wukan Village, China', *Current Anthropology*, 55 (2014), 126-37.

[37] BL Read, 'Democratizing the neighbourhood? New private housing and home-owner self-organization in urban China,' *The China Journal* 49 (January 2003), 31-59; L Tomba, 'Residential space and collective interest formation in Beijing's housing disputes', *The China Quarterly* 184 (2005), 934; J Zhu and C Wang, 'Seniors defending their rights', *Chinese Sociology & Anthropology* 40, no. 2 (2007), 5-34; J Zhu and P Ho, 'Not against the state, just protecting residents' interests: An urban movement in a Shanghai neighborhood,' in P Ho and RL Edmonds (eds) *China's embedded activism: Opportunities and constraints of a social movement*, Routledge, London, 2008, 151-70.

[38] B Van Rooij, 'The people's regulation: Citizens and implementation of law in China,' *Columbia Journal of Asian Law* 25 (2012), 172.

[39] Van Rooij, 'The people's regulation'.

[40] Y Cai, *Collective resistance in China: Why popular protests succeed or fail* Stanford University Press, Stanford, CA, 2010.

south China, courts may intervene to diffuse protests by finding a legal resolution, sometimes even going beyond what the law allows.[41]

The rapid expansion of legal institutions and the legal profession – judges, lawyers and procurators – has created new avenues for citizens to assert their civil rights,[42] although these opportunities are more accessible to those of higher socio-economic (and political) status. Only a small minority of lawyers are interested in representing clients who are of low status with little ability to pay.[43] The central State has made some moves to redress this imbalance, for example by establishing a fairly comprehensive system of legal aid provision for people without means to pay for lawyers to support legal claims against private parties.[44] Although the All-China Federation of Trade Unions is constrained in acting as a representative of workers due to its close ties to Party and Government,[45] it has played an active part in informing workers of their legal rights and representing them in legal actions to assert rights under the labour laws.[46] Yet the central and local state have also acted to punish lawyers who assert expansive versions of rights or represent clients seen as 'enemies,' a trend that has become pronounced with recent arrests and prosecutions of human rights lawyers.[47] While localised efforts to assert civil rights may be tolerated, when these go beyond the bounds of the local and involve cross-regional organising, repression can be fierce. This is related to unwritten rules on the permissible bounds for the exercise of political rights, which I discuss below.

Political rights

Where people are recognised as citizens, political rights can provide avenues for asserting entitlements. However, as discussed above, I argue that this recognition in

[41] Y Su and X He, 'Street as courtroom: State accommodation of labor protest in south China,' *Law & Society Review* 44, no. 1 (2010), 157-84.

[42] See for example, NJ Diamant, SB Lubman and KJ O'Brien (eds), *Engaging the law in China: State, society, and possibilities for justice* Stanford University Press, Stanford, CA, 2005.

[43] E Michelson, 'The practice of law as an obstacle to justice: Chinese lawyers at work,' *Law & Society Review* 40, no. 1 (2006), 38.

[44] BL Liebman, 'Legal aid and public interest law in China', *Texas International Law Journal* 34, no. 2 (1999), 211-86. In contrast to the legal aid system being set up in post-WWII Britain that Marshall describes in *Citizenship and social class*, China's legal aid system enlists state agents to aid claimants seeking their rights against private parties. I am indebted to Leslie Jacobs for pointing out this comparison to me.

[45] T Pringle, *Trade unions in China: The challenge of labour unrest* Routledge, London, 2011.

[46] Chen and Tang, 'Labor conflicts in China'.

[47] Pils, *China's human rights lawyers: Advocacy and resistance.*

China occurs primarily at a local level, where people's household registration (*hukou*) is situated. In this location, authorities have some obligation to deal with claims, particularly from citizens facing dire circumstances, such as indigence. In the place of their *hukou* registration, citizens have a constitutionally and legally recognised right to complain[48] and should be listened to.[49]

The aspect of citizenship overtly linked to rights by the central and local governments is that of 'political rights' to be exercised in local elections. These rights are formalistic, and aim at evoking a performance of managed democracy without contention or expression of divergent opinions. These 'rights' set a script for participation, with each citizen supposed to fit interchangeably into the overall scheme set by the central and local lawmakers. Rights in this form evince a unified populace of citizens that goes along with the roles provided for them; rights granted by the State may only be exercised in the way it wishes.

But this version of what political rights should mean is widely contested, including in some ways in my fieldwork sites, where I observed three election processes. An example is the widespread informal denunciation of elections as 'fake' and the alternative formulation in Tianjin that frames them as 'going through the motions'. Critics in a peri-urban village I studied alleged fraud in the initial phases of the election, and posted comments on these events on internet bulletin boards. Their complaints focused largely on the suppression of their fraud claims, while some of the posts said, 'we need human rights' and described their action as seeking to 'protect legal rights'. These postings assert an alternative vision of elections – and political rights more generally – as a means to challenge corrupt and unfair practices in the allocation of resources during expropriation of village land, a view that is widely echoed in contention around village elections.[50] This oppositional version of political rights sometimes deploys participation as a means to achieve social entitlements.

[48] PRC Constitution, 1982, Articles 41 and 111. This 'right to complain' is also elaborated in national and local laws on resident and villager committees.

[49] Woodman, 'Local politics, local citizenship?'; Sophia Woodman, 'Legitimating exclusion and inclusion: 'Culture', education and entitlement to local urban citizenship in Tianjin and Lanzhou,' *Citizenship Studies* 21, no. 7 (2017), 755-72.

[50] See for example, Y Yao, 'Village elections and redistribution of political power and collective property,' *The China Quarterly* 197 (2009), 123-44; Y Yao, 'Village elections and their impact: An investigative report on a northern Chinese village,' *Modern China* 39, no. 1 (2013), 37-68; S Sargeson and Y Song, 'Land expropriation and the gender politics of citizenship in the urban frontier,' *The China Journal* 64 (2010), 19-45.

The extent to which such alternative versions of political rights connect to overtly *oppositional* projects is highly questionable, however. Oppositional versions of rights have been limited both in scope and nature, circulating primarily in a transnational public sphere to which the Government actively seeks to restrict domestic access.[51] For those seeking resolution of specific grievances, linking their contention to such oppositional efforts is risky, even counterproductive, in that it may invite retribution rather than resolution of their claims.

Yet activists linked to such oppositional publics often seek to connect local struggles to broader claims for political rights. For example, as I describe in my account of a 2005 protest movement in Taishi Village, Guangdong Province, opposition activists who made common cause with the local people seeking a fair share of the resources generated by the 'development' of their village translated protesting villagers' original claims into a struggle for democracy and legal rights.[52] While this framing reflected the consensus among China's loose-knit liberal opposition that solutions to many, if not most, of the nation's problems can be found in rule of law and constitutionalism, their translation did little to address the original grievances the villagers raised. The Taishi events drew on the Government's preferred institutional frame for the expression of complaints through local institutions such as villager committees, thus putatively linking official and unofficial versions of political rights, but met with fierce repression, in part related to the appearance of the contention as an international cause and the involvement of opposition activists from outside the village community. But these outside activists did not bring any rights framing to the socio-economic concerns of the villagers.

Social rights

Given the Chinese leadership's focus on 'ruling by law,' China's socialist history, the widening of inequality in recent years and widespread conflicts over incursions of capitalist-style economic relations into areas of life previously outside such a calculus, one might expect that social rights would be a major focus of contention in China. But although the Chinese Government has deployed a rhetoric prioritising economic and social rights over civil and political liberties to defend its policies internationally, domestically this has not often been taken up in contention over inequality and access to local resources. In fact, as outlined above, claims related to

[51] Woodman, 'Segmented publics and the regulation of critical speech in China'.

[52] Woodman, 'Law, translation and voice: Transformation of a struggle for social justice in a Chinese village'.

social and economic entitlements tend to be made through the vehicles of civil rights (legal rights and citizen equality), political rights (entitlement through inclusion in a specific local political community) or as what Feng Chen and Mengxiao Tang call 'moral economy' claims.[53]

In the reform era, inequality in China has risen at an exponential rate, as commentators agree that during this period the country has moved from being among the most egalitarian in the world to one of the most unequal.[54] By the mid-2000s, the UN Development Program rated China as more unequal than the United States.[55] In both urban and rural areas, inequality in terms of income, welfare and access to public goods has widened significantly since the 1990s, while the gap between urban and rural areas has also continued to grow. 'Painful gaps in China's public social service net' are reflected in 'hardening patterns of socio-economic inequality' that have moved China in the direction of inequity on the level of Mexico and Brazil.[56] The main axes of inequality are urban-rural, regional, by gender and between different social groups, particularly between rural-to-urban migrant workers and the population with urban *hukou*.[57] Redistribution through social security programmes remains limited.[58] Efforts to establish new 'socialised' forms of social security in urban areas, mainly by moving from work-based programmes to social insurance systems, have sometimes served to increase inequality of provision.[59] Until the late 2000s, most such programmes did not cover the rural-registered population at all,[60] and although some progress has been made in extending social security to rural-registered people, including migrants, coverage remains limited.[61] Efforts in some richer areas to overcome the rural-urban divide through 'harmonisation'

[53] Chen and Tang, 'Labor conflicts in China', 560.

[54] V Shue and C Wong (eds), *Paying for progress in China: Public finance, human welfare and changing patterns of inequality* Routledge, London & New York, 2007.

[55] UNDP and China Development Research Foundation, *China human development report 2005. Development with equity'* UNDP, Beijing, 2005.

[56] Shue and Wong, *Paying for progress in China*, 1–2.

[57] UNDP and China Institute for Reform and Development, *China human development report 2007-2008. Access for all: Basic public services for 1.3 billion people,* UNDP, Beijing, 2008.

[58] UNDP, 'China human development report 2005. Development with equity', 62.

[59] S Liu, 'Social citizenship in China: Continuity and change,' *Citizenship Studies* 11, no. 5 (2007), 465-79.

[60] H Thelle, *Better to rely on ourselves: Changing social rights in urban China since 1979* Nordic Institute of Asian Studies, Copenhagen, 2003.

[61] See for example, Z Cheng, I Nielsen and R Smyth, 'Access to social insurance in urban China: A comparative study of rural-urban and urban-urban migrants in Beijing', *Habitat International* 41 (January 2014), 243-252; L Sun and T Liu, 'Injured but not entitled to legal insurance compensation – Ornamental institutions and migrant workers' Informal Channels in China', *Social Policy & Administration* 48, no. 7 (2014), 905-22.

creating uniform social policy across this boundary in a locality *still* exclude non-*hukou* holders from coverage, thus cementing regional inequalities in social security provision.[62]

Elizabeth Perry argues that China's Confucian tradition of stress on the obligation of rulers to ensure people's livelihoods means that socio-economic rights have particular resonance in contemporary China, in contrast to the Anglo-American tradition's emphasis on civil and political rights.[63] While such a focus on livelihood is apparent both from State pronouncements and protest slogans, the framing of livelihood-related claims in terms of *rights* seems to appear primarily in the arena of foreign affairs.[64] Claims-making for resolving grievances is rarely framed explicitly in terms of economic or social rights.

An absence of 'socio-economic rights talk' is evident among China's opposition activists. Given the authoritarian context, the oppositional version of rights, often framed in terms of claims for internationally recognised 'human rights,' focuses primarily on liberal freedoms, and adopts a version of rights that is strongly influenced by the United States model of liberalism, but frequently invokes generalised appeals for respect for international norms of 'civilised' nations. A notable example is a call for the Chinese Government to respect rights contained in Charter '08, released by Chinese human rights activists in December 2008. The Charter mentions the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (which China has signed and not yet ratified), but it makes no reference to the International Covenant on Economic, Social and Cultural Rights, to which China has been a party since 2001. Most of the rights the Charter identifies as in need of protection are civil and political rights, while among economic rights, only the right to private property is highlighted. For other dimensions of social rights, 'social security' is emphasised rather than rights.[65]

This absence of a rights framing for social citizenship was also evident in my fieldwork, as I never heard the rights frame being used in talk or texts in relation to

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[62] S Shi, 'Towards inclusive social citizenship? Rethinking China's social security in the trend towards urban-rural harmonisation', *Journal of Social Policy* 41, no. 4 (October 2012), 789-810.

[63] E Perry, 'Chinese conceptions of "rights": From Mencius to Mao – and now,' *Perspectives on Politics* 6 (2008), 37-50.

[64] The example cited by Perry of such a framing is from an English-language article by the Chinese Human Rights Study Society, an officially sponsored 'NGO'. Perry, 'Chinese conceptions of rights', 46.

[65] 'We should establish a fair and adequate social security system that covers all citizens and ensures basic access to education, health care, retirement security, and employment,' reads the Charter's Article 16. P Link, 'China's Charter 08,' *New York Review of Books*, 15 January 2009.

welfare issues, which were a principal focus of my research. At the end of the formal interviews I conducted, I asked my interviewees some questions on whether there is a right to social welfare, and if so, what this right consisted of.[66] These interviews were mostly with people involved in welfare work or recipients of welfare.[67] While the sample is small, these data provide interesting pointers on how people think about rights and welfare on the ground – far from the setting of contentious politics.

Many interviewees had some difficulty with the question, and I sometimes had to let them read the text. The two villager committee cadres I asked initially did not understand the question at all, as if the relation between 'rights' and 'social welfare' juxtaposed things that did not belong together. While all the urban interviewees quickly said, yes, there was such a right, most people found it difficult to articulate what this meant. While five respondents said this right was held equally by all citizens, the urban local government official I talked to said that ex-convicts under sentence of deprivation of political rights were excluded from exercising this right.[68] Most people saw the right as being a function of present need expressed through officially-recognised categories such as 'the disadvantaged', 'households in difficulty', or conditions diagnosed by medical experts, such as disabilities and chronic health problems. For welfare recipients, 'meeting the conditions' was considered the main criterion for being a rights holder, yet more than half thought that even people who were eligible might have difficulty getting welfare, as the 'higher ups' had discretion in such cases. Some distinctions were apparent in understandings of entitlements based on differences in local social norms in the urban locations, with broader views of entitlement in a neighbourhood where more egalitarian norms drawing on the socialist past circulated.

Both the local government official and a middle-class couple I spoke to thought of social rights in contractual terms. They said the role of Government was to create opportunities for people to provide for their own welfare through contributing to social insurance schemes, and then to establish the regulatory

[66] The questions were: 在这儿，人有权利受到社会福利吗？如果有，具体谁有这个权利？ 有怎么一个权利有什么意义呢？谁有义务履行这个权利？

[67] These questions were asked in nine interviews with residents of resident committees, a total of 12 people, seven of whom were recipients of the minimum livelihood guarantee or (in one case) had applied for the benefit on behalf of an elderly parent; four interviews with resident committee workers, including the Party Secretaries of my two field sites; one street office official; and two villager committee cadres from Dragon Peak Village.

[68] There is no such provision in national law, to my knowledge. However, ex-convicts may be deprived of their 'political rights' as part of their sentence. This is discussed in Woodman, 'Segmented publics and the regulation of critical speech in China'.

framework to ensure that these benefits were delivered as promised. Likewise, one of the villager committee cadres thought of provision as largely through the market, as the collective had no money to spend on benefits, even though everyone did have this right. Here, the State's role in fulfilling the right is as a regulator of the marketplace for insurance schemes and other forms of individual risk management. Most people identified the 'Government' or the 'State Government' as having the obligation to fulfil the rights to social welfare, but some thought of this obligation as mainly facilitative, and some considered the obligation to be more diffuse, while several thought of obligations as being both with Government and with the right holder. Given that the respondents seemed to be thinking on their feet about a subject that seemed to them rather speculative (since rights did not seem the correct way of thinking about such things) not too much should be read into these results. However, they certainly show that it was hard for people to conceptualise welfare entitlements in terms of 'social rights'.

Law and social rights

So how are these rights framed in the Chinese Constitution? In that document, rights are generally presented as manifest reality, as already realised, rather than a standard for state behaviour, or the basis for claims. Despite many years of debate, there is still no mechanism for enforcement of constitutional provisions, either in abstract terms (such as through adjudicating the constitutionality of laws and policies) or in deciding actual cases in which people claim to have suffered violations of their constitutional rights.[69]

Constitutional provisions regarding social rights are fairly limited in scope, although a little-noticed amendment to the Constitution in 2004 (added at the same time as the amendment that incorporated the term 'human rights' mentioned above) represented a more expansive view of state obligation than had previously been the case: 'the State should construct an all-round social security system which goes

[69] While there was a great deal of excitement in legal circles about a Supreme People's Court interpretation that instructed a lower court on how the constitutional right to education should be understood in the adjudication of a civil suit in 2001, in 2009 this interpretation was withdrawn by the SPC. Observers have analysed this development as an indication that the SPC was considered to have exceeded its powers in interpreting constitutional rights in this case. See for example, T Kellogg, 'The death of constitutional litigation in China?', The Jamestown Foundation, accessed 2 February 2015, http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=34791&tx_ttnews%5BbackPid%5D=414&no_cache=1; T Kellogg, 'Constitutionalism with Chinese characteristics? Constitutional development and civil litigation in China,' *International Journal of Constitutional Law* 7, no. 2 (1 April 2009), 215-46.

well with the pace of economic development'.[70] Previously, welfare provision had not been mentioned among the overarching General Principles in the Constitution. Specific provisions on welfare form part of Chapter II of the Constitution, 'The Fundamental Rights and Duties of Citizens.' Article 45 outlines a broad expression of responsibility for the vulnerable, but notably this is shared by state and 'society'. The full text reads:

> Citizens of the People's Republic of China have the right to material assistance from the state and society when they are old, ill or disabled. The state develops social insurance, social relief and medical and health services that are required for citizens to enjoy this right.
>
> The state and society ensure the livelihood of disabled members of the armed forces, provide pensions to the families of martyrs and give preferential treatment to the families of military personnel.
>
> The state and society help make arrangements for the work, livelihood and education of the blind, deaf-mutes and other handicapped citizens.

However, Article 44 limits the right to old age security stating that 'the livelihood of retired personnel is ensured by the state and society,' but applying this only to government staff and workers in 'enterprises'. Work[71] and education[72] are presented as both rights and duties, with the State providing conditions for their exercise. By contrast, families are required to support their members[73]. All these provisions must be read in conjunction with Chapter I, 'General Principles,' which describes how the state creates *conditions* for citizens to exercise their rights through developing the economy, education etc.

Moves towards 'ruling the country in accordance with law' during the Deng era have had little effect on the formal codification of social rights. Social welfare remains largely governed by policy, rather than law. A notable exception, the Social Insurance Law, passed in 2011, provides a general framework for a contributory social security system that is to be implemented in specific fashion through local regulatory schemes, reinforcing the regional character of such regimes.[74] Labour rights are a notable exception to this trend, where significant progress has been made both in enacting legislation and in channelling labour disputes into the legal arena. Labour-related litigation and arbitration has grown exponentially over the

[70] Article 14, Constitution of China.

[71] Article 42, Constitution of China.

[72] Article 46, Constitution of China.

[73] Article 49, Constitution of China.

[74] Shi, 'Towards inclusive social citizenship?'

past 20 years.[75] In this field of contention, workers fight against employers – either private businesses or the local state. The main role of the state here is in providing a forum for and mediating the contention.

Thus although the legitimacy of Chinese socialism hinges on fulfilling people's aspirations for 'a better life', as China embraces a version of capitalism, the State is increasingly seeking to shift its role from provider to regulator in the sphere of social entitlements. Wong calls this shift an 'individualisation' of social rights, in that during the reform era people are becoming increasingly responsible for their own welfare.[76] As an aspect of the official programme of constructing a 'socialist rule of law state', this role means the State should establish rules that provide for fair and rational distribution of social protection through the market and adjudicate disputes that arise from failure to abide by them. Universal welfare standards have been difficult to formulate, given extensive inequality in the distribution of social welfare and services. So far, there are few indications of a shift to universal, legally-supported social rights that apply to all citizens equally, provide remedies for non-provision and make the central State responsible for their realisation.

Rights in social citizenship

So what can we learn from the China case about the position of social rights in a citizenship order? Clearly, socio-economic entitlements are central to contention in China today, yet these are rarely framed in terms of 'social rights'. China's socialist heritage might appear to make it a fertile ground for the emergence of such rights claims, yet it is far from unique in showing a weak sense of social rights in law and practice. In general, the citizenship literature does not define 'social rights' very precisely, and scholars have often failed to identify the extent to which what they term 'social citizenship' is actually framed in terms of 'rights' or has institutional recognition in these terms. Below I outline briefly some of the meanings given to social citizenship, and how the kind of institutional, genealogical approach sensitive to the terms used in citizenship practice might be productive in this field.

Marshall saw the rights of social citizenship as enabling those disadvantaged by the capitalist system to exercise their civil and political rights; by moderating the

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[75] See generally, Lee, *Against the law: Labor protests in China's rustbelt and sunbelt*; Chen and Tang, 'Labor conflicts in China'.

[76] L Wong, 'Individualisation of social rights in China,' in S Sargeson (eds) *Collective goods, collective futures in Asia*, Routledge, London, 2002.

polarising effects of the class system, social rights make possible a modicum of substantive citizen equality.[77] He uses the term social rights in an expansive fashion, incorporating much of what are now recognised as economic, social and cultural rights in the international arena: 'the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society'.[78] However, Marshall's is in part a *normative* argument, one that makes a case that universal social rights *should be* an entitlement of equal citizenship. The rollback of such rights in the UK and elsewhere from the 1980s on reveals, among other things, the shaky character of the institutionalisation of social rights *qua* rights.

The subsequent literature on social citizenship often uses provision of social welfare as a yardstick for the degree to which social rights are accepted in a particular society.[79] It is in this sense that State socialist countries, including pre-reform China, were said to have given priority to social rights. Accounts on the subject in modern China have generally adopted similar definitions, using the extent of social welfare provision as a yardstick for measuring enjoyment of 'social rights'.[80] From Marshall on, most authors make distinctions between social rights and civil and political rights, sometimes arguing the latter are more evidently 'rights' than the former.[81]

Such questions point to a need for a more careful approach to the question of social rights. One such approach is genealogical in showing how one set of institutional forms and practices sets the conditions for what comes next. My reading of Marshall is that the fact that social rights came to be considered *rights* in the English case is linked to the fact that civil and then political rights were established and then extended to previously excluded groups. The idea of equality before the law inherent in civil rights is a key element both in the extension of the franchise and then in claims for the social rights that make equality meaningful.[82] In this sense, Marshall's is an evolutionary argument – a predominant critique of his

[77] Marshall, *Citizenship and social class*.

[78] Marshall, *Citizenship and social class*, 8.

[79] T Janoski, *Citizenship and civil society: A framework of rights and obligations in liberal, traditional, and social democratic regimes* Cambridge University Press, Cambridge, 1998, 192.

[80] See for example, Kent, *Between freedom and subsistence: China and human rights*?; Thelle, *Better to rely on ourselves: Changing social rights in urban China since 1979*; Liu, 'Social citizenship in China: Continuity and change'.

[81] See for example, J Barbalet, *Citizenship: Rights, struggle, and class inequality* Open University Press, Milton Keynes, 1988.

[82] Marshall, *Citizenship and social class*. See also M Roche, 'Social citizenship: Grounds of social change,' in E Isin and B Turner (eds) *Handbook of citizenship studies*, Sage Publications, London, 2002, 69-88.

account – but this does not mean he implies that extensions of rights were in any sense automatic, or occurred as an ineluctable result of the expansion of markets as some have asserted.[83]

Distinguishing between social rights and social benefits is essential in understanding the political effects of the state's recognition of socio-economic rights, making the question of why states formalise them a crucial measure of the kinds of politics they engender:

> If a government voluntarily gives social (including economic) rights as entitlements to all citizens, that is a recognition of these rights as components of true citizenship. If they are given only as concessions to ease the hardships of the poor, that is state charity. If they are given as a preventative of social upheaval, that is prudential conservation of social stability. The test of social citizenship, initially therefore, is the state's motive; though, true, once this arrangement is made it can harden into an accepted component of the citizen's status.[84]

Adding to this typology, the extension of social rights in the process of state formation may have distinct dynamics, creating a form of citizenship more focused on national state projects.[85] From the state's point of view, the rationale for different types of social provision vary, and the study of 'welfare' should not presume a focus on care and concern, or mitigation of inequality.[86] Political legitimacy and economic development – rather than equality or general welfare – have been the main objectives of state welfare programmes in East Asian countries, some scholars assert.[87]

As well as the state's motivations, analysis of social rights also requires consideration of the role played by citizens in achieving them, and citizenship theorists have pointed out that rights have frequently been an outcome of popular struggles, particularly involving groups excluded from 'equal' citizenship such as workers, women and ethnic minorities.[88] By contrast, in cases where the state

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[83] See for example, D Solinger, *Contesting citizenship in urban China: Peasant migrants, the state, and the logic of the market* University of California Press, Berkeley, CA, 1999.

[84] D Heater, *A brief history of citizenship* Edinburgh University Press, Edinburgh, 2004, 141-42.

[85] See for example, K Chang and B Turner (eds), *Contested citizenship in East Asia: Developmental politics, national unity, and globalization* Routledge, Abingdon, UK, 2011.

[86] A Orloff, 'Social provision and regulation: Theories of states, social policies, and modernity,' in J Adams, E Clemens and A Orloff (eds) *Remaking modernity: Politics, history, and sociology*, Duke University Press, Durham, 2005, 190-224.

[87] A Walker and C Wong, *East Asian welfare regimes in transition: From Confucianism to globalisation* Policy Press, Bristol, 2005.

[88] B Turner, *Citizenship and capitalism: The debate over reformism* Allen & Unwin, London, 1986; B Turner, 'Outline of a theory of citizenship,' *Sociology* 24, no. 2 (1990), 189-217.

established social provision or other rights of citizenship in the absence of or to pre-empt such struggles, more 'passive' citizenship creates distinctive patterns of interaction between state and citizens.[89] Struggles for social citizenship have often been based on the principle of equality, carrying over equality in civil and political rights into new arenas. The example of 'controlled inclusion' in some Latin American countries highlights this linkage: systems of welfare benefits for a narrow, privileged segment of workers co-existed with massive inequality and deprivation for the majority.[90] For such reason, a significant expenditure on welfare may not be a useful measure of either diminishing inequality or social rights.[91]

These examples highlight the fact that social rights are not an automatic outcome of a certain level of 'development,' as some have claimed.[92] Comparative studies of welfare states and welfare regimes have found no simple relationship between industrialisation – or capitalism – and the development of welfare across the Western states that have been the main focus of these studies.[93] While a common set of activities are usually involved, from pensions, social insurance, health care and unemployment benefits to public provision for the care of the elderly, people with disabilities and pre-school children, there is great variation in matters such as the extent of state involvement in specific areas, the division of responsibilities between public and private, market and family, and the ways needs are interpreted and defined.[94]

Studies of post-communist welfare in Eastern Europe indicate that the transitions in social provision in these states have not followed a singular logic, and

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[89] Mann, 'Ruling class strategies and citizenship'; Turner, 'Outline of a theory of citizenship'.

[90] P Oxhorn, 'From controlled exclusion to coerced marginalization: The struggle for civil society in Latin America,' in J Hall (eds) *Civil society: Theory, history, comparison*, Polity Press, Cambridge, 1995, 250-77; P Oxhorn, 'Social inequality, civil society, and the limits of citizenship in Latin America,' in S Eckstein and T Wickham-Crowley (eds) *What justice? Whose justice?: Fighting for fairness in Latin America*, University of California Press, Berkeley, CA, 2003, 35-63.

[91] E Huber, 'Politics and inequality in Latin America and the Caribbean,' *American Sociological Review* 71 (2006), 943-63.

[92] See for example, R Peerenboom, *China modernizes: Threat to the West or model for the rest?* Oxford University Press, Oxford, 2007.

[93] G Esping-Andersen, *The three worlds of welfare capitalism* Polity Press, Cambridge, 1990; A Hicks and G Esping-Andersen, 'Comparative and historical studies of public policy and the welfare state,' in T Janoski (eds) *The handbook of political sociology: States, civil societies, and globalization*, Cambridge University Press, Singapore, 2005, 509-25.

[94] Orloff, 'Social provision and regulation: Theories of states, social policies, and modernity'; N Fraser, *Unruly practices: Power, discourse, and gender in contemporary social theory* University of Minnesota Press, Minneapolis, 1989; Lister, *Gendering citizenship in Western Europe: New challenges for citizenship research in a cross-national context*; B Siim, 'Gender, diversity and transnational citizenship,' in P Stoltz, et al.(eds) *Gender equality, citizenship and human rights: Controversies and challenges in China and the Nordic countries*, Routledge, London, 2010, 74-91.

differing outcomes have depended on institutional, political, cultural and religious elements. For example, despite similar approaches to women's emancipation in this region in the communist period – official promotion of equality and labour market participation combined with continuing traditional divisions of labour in the family – post-socialist transitions have had very variable effects, and the situation is more complex than the caricature of a return to tradition for women might suggest.[95] Conceptions of entitlement, risk and need are shaped by cultural norms that circulate in institutions, media and popular discourses.[96]

In East Asia too, practice is more heterogeneous than some scholars have asserted; the idea of an East Asian welfare 'model' is largely a reflection of 'welfare Orientalism' (often put into service in neoliberal projects of welfare downsizing in the West).[97] However, 'welfare systems' in the region do share some common features: a combination of low spending on social provision and 'achiev[ing] welfare goals by other means'.[98] Most notable of these is state-directed economic development. For China, showing the continuing impact of the Maoist strategy of full employment and the role of local collective institutions in social provision is essential in understanding the social entitlements that exist there, as well as the ways these connect to other dimensions of citizenship.

As noted above, the container model of the state can obscure transnational factors in the development of social citizenship and rights, as these have also contributed to turning socio-economic needs into rights. The brief post World War II international consensus allowed for a framing of rights in the 1948 UN Universal Declaration of Human Rights that brought together civil, political and social rights. However, the Cold War made this amalgamation problematic, although international norm-setting on socio-economic rights proceeded gradually. The extent of provision is one of the measures of whether states have met their obligations under the International Covenant on Economic, Social and Cultural Rights. Yet, economic and social rights still have a relatively weak status in the

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[95] L Haney, *Inventing the needy: Gender and the politics of welfare in Hungary* University of California Press, Berkeley, 2002; L Haney and L Pollard (eds), *Families of a new world: Gender, politics, and state development in a global context* Routledge, London, 2003; G Pascall and A Kwak, *Gender regimes in transition in Central and Eastern Europe* Policy Press, Bristol, 2005; K Verdery, *What was socialism, and what comes next?* Princeton University Press, Princeton, 1996.

[96] M Kremer, *How welfare states care: Culture, gender, and parenting in Europe* Amsterdam University Press, Amsterdam, 2007; Orloff, 'Social provision and regulation: Theories of states, social policies, and modernity'.

[97] G White and R Goodman, 'Welfare orientalism and the search for an East Asian welfare model,' in R Goodman, G White and H Kwon (eds) *The East Asian welfare model: Welfare orientalism and the state*, Routledge, London, 1998, 3-24.

[98] White and Goodman, 'Welfare orientalism and the search for an East Asian welfare model', 13.

international human rights regime, a fact that undoubtedly owes much to hostility of liberal states, particularly the United States, to the idea that these are rights at all.[99] However, this weak status also reflects a Soviet assumption (reflected in the Chinese constitutional order as well) that the interests of the state and citizens are identical, and thus mechanisms for enforcement of these kinds of rights are not required. In the socialist world, state projects of national development have been seen as the key to achieving rights; this is reflected in the programmatic nature of the Chinese and other socialist constitutions.

This brief survey has highlighted how the particular political, social and economic intent and circumstances of the extension of social provision shape its subsequent character, determining in large part whether claims for such provision can be considered 'rights'. But evidently, a key element is the normative claims of citizens themselves to 'social rights' on the basis of civil equality, and the political institutions, formal and informal, that enable such claims.

Consciousness, rights and claims-making

So what can this brief review of contention around different dimensions of citizenship in China tell us about the 'rights consciousness' of citizens today? This question has been the subject of heated debate in Chinese studies, with some asserting that an awareness of rights challenging existing State meanings of the term is on the rise,[100] while others argue that most forms of contention today reflect a 'rules consciousness' that harks back to long-standing historical dynamics of protests.[101] One central question in this debate appears to be whether those engaging in contentious politics are largely affirming the legitimacy of state rules – and viewing the central state as an ally in their struggles with local state agencies – or asserting claims to 'rights' that go beyond what is acceptable to the state and, in the process, reframing the meaning of rights as part of a counterhegemonic language.

[99] A Woodiwiss, 'Human rights and the challenge of cosmopolitanism,' *Theory, Culture and Society* 19, no. 1-2 (2002), 139-55.

[100] See for example, L Li, 'Rights consciousness and rules consciousness in contemporary China,' *The China Journal* 64 (2010): 47-68; L Wong, 'Chinese migrant workers: Rights attainment deficits, rights consciousness and personal strategies,' *The China Quarterly* 208 (December 2011), 870-92, https://doi.org/10.1017/S0305741011001044.

[101] Perry, 'Chinese conceptions of 'rights'; EJ Perry, 'A new rights consciousness?,' *Journal of Democracy* 20, no. 3 (2009), 17-20.

In everyday claims-making and protest actions, as discussed above, citizens assert their demands in ways that both accord with and diverge from the State's preferred meanings of civil and political rights. It seems counterintuitive to insist that it does not matter whether the state and complainants call something a 'right', or that the emergence of the law and legal institutions as a major framework for resolving disputes will have no effect on how people understand their actions to pursue grievances. As O'Brien says, the consciousness debate has not focused on divergent interpretations of fact, but over how to 'label' certain social phenomena.[102] But I have argued that the kinds of rhetoric people deploy matters, and we should pay attention to the specific forms it takes, highlighting the relative absence of a sense of socio-economic entitlements as being 'rights' in the Chinese context. One of the problems with assessing the extent to which rights are actually deployed on the ground has been the tendency of transnational media, NGOs and academics to interpret all kinds of protests in China as expressions of 'rights consciousness'.[103] Whether or not protesters are using rights language, episodes of contention are often translated into such a form by transnational Chinese-language media and advocacy organisations associated with the Chinese diaspora.[104]

However, framing the question as one of 'consciousness' is problematic, as it conceptually situates the awareness of individuals and groups outside institutions, or social life more generally. Viewed from the more institutional perspective on citizenship I adopt, it is evident that rules consciousness and rights consciousness are frequently not really very different, in that both primarily seek intervention into local matters of dispute by state institutions, based on established state rules, whether law or policy. However, a pervasive ambivalence among claims-makers about the capacity of these institutions to resolve their grievances is also apparent. Disgruntled citizens simultaneously seek to fit their claims into acceptable forms and make enough trouble to get some resolution, and the latter action often means exercising civil rights – to expression and assembly – in ways the State actively discourages.[105]

This ambivalence highlights a parallel instability in rights as a form. In many instances, they reflect the state's attempts to monopolise decisions over what is

[102] KJ O'Brien, 'Rightful resistance revisited,' *Journal of Peasant Studies* 40, no. 6 (November 2013), 1059, https://doi.org/10.1080/03066150.2013.821466.

[103] Perry, 'Chinese conceptions of 'rights'.

[104] Woodman, 'Law, translation and voice: Transformation of a struggle for social justice in a Chinese village'.

[105] Lee and Zhang, 'The power of instability'; Chen, *Social protest and contentious authoritarianism in China*.

just.[106] Seen from this perspective, rights only become effective when they are incorporated into a legal or policy framework by a state, and are thus dependent on some form of state acceptance and action.[107] This is evident in the Chinese state's preferred meaning of 'political rights', which implies that 'rights consciousness' affirms Government-sponsored democratic procedures without creating space for divergent individual or collective rights claims. This is the citizen as cog in a well-oiled machine. Even in more contentious vein, the individualising character of rights may make the formation of collective identities around them particularly problematic, pointing to questions around links between rights consciousness and mobilisation. In the China context, such a dynamic is particularly apparent in the field of contention over labour rights.

> '[T]he legalization of rights-based disputes… serves the state's purpose of containing labour mobilisation by, in effect, pulverising the army of complaining workers into individual claim makers and emasculating their ability to act collectively,' with legal strategies thus serving to 'atomise' workers despite their 'shared claims and goals'.[108]

As a political force, rights can serve to constrain the state even when they are not fully codified, a sense that can be observed in Chinese citizens' exercise of their civil rights in particular. Rancière proposes that rights can be transformative because of their generality. In such an incarnation, they do not represent a settled consensus, which locks in a certain distribution of rights and benefits to set populations.[109] By contrast, their openness means that they provide scope for political claims and dissensus against an existing order, particularly by previously excluded groups.

Yet even the assertion of an alternative version of political rights does not automatically lead to either a sense of villagers (or others) as 'rights bearing subjects' or to a broader critique of a systemic lack of accountability. Yao shows how the failure of a series of contested elections in the village he studied to address ordinary villagers' concerns about the mismanagement and appropriation of collective property ended up *disempowering* villagers who had previously been enthusiastic about the potential of these elections, leaving them cynical and willing to go along with later rounds of polling openly being decided through vote buying.[110] In a study of gender and expropriation on the urban margins, Sargeson and Song point out

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[106] P Bourdieu, *Practical reason: On the theory of action* Stanford University Press, Stanford, CA, 1998.

[107] Barbalet, *Citizenship: Rights, struggle, and class inequality.*

[108] Chen and Tang, 'Labor conflicts in China,' 576.

[109] J Rancière, 'Who is the subject of the rights of Man?' *South Atlantic Quarterly* 103, no. 2 (2004), 297-310.

[110] Yao, 'Village elections and their impact'.

the situatedness of outcomes, with women's strategies – and appeals to rights – depending on their nominal inclusion or actual exclusion from structures of village governance.[111]

Rights are not merely a set of institutions, nor an aspect of individual consciousness that can be separated from social processes. Merry argues that the question of whether participants in political struggles in which rights claims are a central concern take on durable identities as rights-bearing subjects is contingent on the outcome and context for such struggles.[112] Such a transformation depends, she asserts, on whether or not an individual or group's use of rights-oriented approaches achieves its goals, and whether or not such an identity receives institutional support,[113] which could come from the state or from a 'counter-public' that creates space for claims about needs to be translated into rights talk.[114] However, outcomes cannot be simply assessed by criteria of 'success' or 'failure' in terms of policy change or state responsiveness to claims. As McCann points out, even when activists mount successful legal actions, this has not necessarily led to mobilisation around rights, and rights-oriented mobilisation can occur in the absence of obvious legal victories.[115]

In China, the collective institutions – formal and informal – in which individuals operate are the site for formation of claims, and shape their framing and substance. I have argued elsewhere that institutions of local citizenship create a distinctive ground for asserting entitlements.[116] Beyond the framework of these state-mandated institutions, collectives are more fragile and subject to the severe constraints the state imposes on independent organising. Guo demonstrates the importance of active collective strategies in creating the grounds for rights claims by migrant workers, as 'collective resistance is where the rights are learned and where the ideas and perceptions of rights are disseminated'.[117]

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[111] Sargeson and Song, 'Land expropriation and the gender politics of citizenship in the urban frontier'. Women who have married out of their natal villages generally lose their rights to land, and thus to a political say in these villages.

[112] S Merry, *Human rights and gender violence: Translating international law into local justice* University of Chicago Press, Chicago, 2006.

[113] Merry, *Human rights and gender violence.*

[114] J Johnston, 'Pedagogical guerrillas, armed democrats, and revolutionary counterpublics: Examining paradox in the Zapatista uprising in Chiapas Mexico,' *Theory and Society* 29, no. 4 (2000), 463-505.

[115] M McCann, 'Law and social movements: Contemporary perspectives,' *Annual Review of Law and Social Science* 2, no. 1 (2006), 17-38.

[116] Woodman, 'Local politics, local citizenship?'

[117] T Guo, 'Rights in action: The impact of Chinese migrant workers' resistances on citizenship rights,' *Journal of Chinese Political Science* 19, no. 4 (2014), 432.

Conclusion

Rights as institutional forms and discursive claims are widely observable in China today, in people's interactions in the capitalist economy and with a 'privatised' local state, in their assertions of claims against business owners and local officials through legal channels or using the rhetoric of law. Under what Lee terms the 'decentralised legal authoritarianism' pursued as the Chinese State's current strategy of rule, the principal imperative of the local state is accumulation, while the main means of legitimation of the central State is through law.[118] A perception of the local state as 'privatised' emerges from the alliance between business and local officials.

By contrast, the central State – and less 'privatised' aspects of the local state – retain the mantle of protector of rights, with claims on commitments to social welfare commonly made through moral appeals, such as the system of petitioning higher authorities, or, at a more local level, through assertion of local membership and using relational ties to local leaders. The central State has actively encouraged the deployment of individual rights as a mechanism for regulating market-based relationships, such as by establishing a nationwide network of Government-run legal aid institutions and by enacting detailed labour laws giving workers grounds for legal action against employers.[119] Here the State plays a role as regulator and arbiter among claims.

However, at the same time the central State has sought to discipline the meaning of rights and the kind of claims they address. For example, the Government has often acted in draconian fashion to suppress attempts by opposition activists to bring debate about 'human rights' against the State into China's domestic public sphere, even when these efforts largely affirm its own rule of law project.[120] Yet a sense of rights that goes well beyond what central and local governments find acceptable is widely in evidence in contentious claims-making, and on the ground, local officials are forced into bargaining with 'trouble-makers' to preserve the 'stability' that is valued by the central State.[121]

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[118] Lee, *Against the law*.

[119] Lee, *Against the law*; Chen and Tang, 'Labor conflicts in China'; Guo, 'Rights in action'.

[120] P Potter, S Woodman, 'Boundaries of tolerance: Charter 08 and debates over political reform,' in J Béja, H Fu and E Pils, (eds) *Liu Xiaobo, Charter 08 and the challenges of political reform in China*, Hong Kong University Press, Hong Kong, 2012, 97-117; Woodman, 'Segmented publics and the regulation of critical speech in China'.

[121] Lee and Zhang, 'The power of instability'.

While civil and political rights provide fertile ground for contention in China – related to the (re)formation of legal institutions and local self-government – social citizenship (such as a basic social safety net) is not seen so much as an entitlement, but a State commitment; a result of State action, local and national, rather than of popular struggle. State commitments are not envisaged as state obligations; the state is seen as having other legitimate priorities than helping people with their daily difficulties.[122] These understandings are related to the history of the formation of rights and citizenship in China, and this genealogy may be part of the explanation for the persistently high degree of inequality in welfare provision, and the lack of equality-based frontal challenges to this unequal distribution.

Such patterns are not merely a reflection of a retreat from Maoist egalitarianism; patterns of differential citizenship began to be formed in the early years of the PRC, particularly in the urban-rural bifurcation of the country. Today's highly differentiated system of welfare provision and public services combines location with status in a complex mix. It is also connected to cultural and social norms that create hierarchies of modernity, with access to welfare further valorising those whose 'quality' is higher, and thus of more 'value' to a modernising State.[123] Many people internalise these hierarchies, struggling to improve their quality so that they can become fitting beneficiaries of State commitments.[124] Such strategies effectively embrace the neoliberal messages of the State's withdrawal from social welfare: you yourself are responsible for your own fate.[125] As I have argued elsewhere, they also reflect a regime of citizenship that has focused on local equity, to the exclusion of discussions of demands based on a more expansive meaning of citizen equality.[126]

Despite a rising tide of contention over livelihood issues across China, oppositional efforts to insert rights into local contention tend to focus on civil and political rights and not socio-economic rights. When lawyers and semi-professional activists engage with grassroots contention, they frequently transform contention about livelihood and equity into cases focused on democratic and legal rights and participation. This process of 'translation', which is then magnified in transnational circulations of meaning, can sometimes result in the disempowerment of local

[122] Interviews, Tianjin, 2009.

[123] Woodman, 'Legitimating exclusion and inclusion'.

[124] V Fong and R Murphy, *Chinese citizenship: Views from the margins* Routledge, London, 2006.

[125] Y Yan, 'The Chinese path to individualization,' *The British Journal of Sociology* 61, no. 3 (2010), 489-512.

[126] Woodman, 'Local politics, local citizenship?'.

communities and their struggles.[127] References to international human rights discourses that connect civil and political rights with economic and social rights are notable by their absence. This is partly due to the Chinese Government's efforts to keep 'human rights' in the sphere of 'foreign affairs' discussed above,[128] but it also reflects long-standing conceptions of the nature of rights and State commitments. The much-cited amendment of 2004 adding the sentence, '[T]he state respects and protects human rights', to the Chinese Constitution may be read as an articulation of these conceptions, rather than purely as a concession to China's international critics. The relative obscurity of the amendment on social welfare made in the same year also highlights the limited political salience of social rights in the current Chinese polity.

This chapter's focus on identifying the specific institutional and discursive forms of rights has highlighted the value of such an approach to thinking about social rights more generally. The connections between different dimensions of citizenship matter greatly to how citizens may (or may not) contest inequality or rollback of their entitlements under economic restructuring and austerity. However, the focus on rights here does not imply that this is the only possible language for campaigns for social justice; indeed, in some contexts other forms of entitlement (or the notion of social justice itself) might prove to be more transformative than the individualising institution of rights. What matters more than 'rights consciousness' is the potential of collective forms of social life to act as a medium for translating individual claims into collective demands.

[127] Woodman, 'Law, translation and voice: Transformation of a struggle for social justice in a Chinese village'.

[128] Woodman, 'Human rights as 'foreign affairs': China's reporting under human rights treaties'.

Self, determination, and self-determination in decolonisation: Issues, progress and prospects in the Pacific Islands in the early twenty-first century*

Edward P Wolfers

Introduction

Professor Yash Pal Ghai has a unique record of active, onsite engagement as an adviser on constitution-making in Africa, Asia, and the Pacific islands. His contributions include serving as a consultant in the transition to independence by Papua New Guinea (then still the Australian Territory of Papua New Guinea) in 1975; Solomon Islands (the former British Solomon Islands Protectorate) in 1978; and Vanuatu (the former Anglo-French Condominium of the New Hebrides) in 1979. The author worked with Professor Ghai in Papua New Guinea and Solomon Islands.

Following independence, Professor Ghai went on to provide advice on the constitutions of the provincial governments established in Papua New Guinea, and then, following the conflict between supporters and opponents of Bougainville's secession from the late 1980s to the late 1990s, in the negotiation of the *Bougainville Peace Agreement,* which provided the basis for amending the *Constitution of the Independent State of Papua New Guinea,* and the making of the *Organic Law on Peace-Building in Bougainville – Autonomous Bougainville Government and Bougainville Autonomy.* Implementation of these constitutional laws led to the establishment of the Autonomous Bougainville Government (ABG) in 2000 and the conduct of a referendum on Bougainville's political future in 2019, when 97.7% of eligible voters supported a separate independence for Bougainville (an issue which is subject to consultations between the National Government and the ABG and the final

* This contribution draws on a paper, 'Self, determination and self-determination in decolonisation – Issues, progress and prospects in the Pacific' (PRS/2014/DP.4), which the author presented at the Pacific Regional Seminar held by the United Nations Special Committee on Decolonisation at Denarau, Nadi, Fiji, in May 2014.

decision-making authority of the National Parliament). He subsequently served as Chair of the Constitutional Commission charged with preparing a constitution for the Republic of Fiji following the 2006 military coup (though the military did not accept the Commission's report).

Meanwhile, consistent with his commitment as an accomplished, respected scholar, Professor Yash Ghai continued to conduct research, reflect and write about significant aspects of constitutional law. His publications include editing a pioneering regional survey, *Law, politics and government in the Pacific island states* (Institute of Pacific Studies, University of the South Pacific, Suva [Fiji], 1988), in which his chapters provide remarkable, insights - based on close personal and professional experience, observation, and reading – into the relationship between constitution-making and decolonisation, the systems of government that evolve, and the political consequences of constitutions.

As Yash Ghai has observed, the emergence of nation-states in the Pacific islands has been

> the result of colonialism (even in Tonga where both the incentive, and the advice, to centralise state institutions came from outside). But in the colonial period, the state, although powerful in varying degrees, was not 'national', was not based on consensus and tolerated a wide measure of autonomy at various levels (so long as this autonomy did not threaten colonial purposes).[1]

To paraphrase, self, determination, and self-determination (or identity, sense of purpose, and shared commitment to decolonisation) have been – in varying aspects, combinations, and significance – issues in non-self-governing territories in the region. The situation outlined is not unique in history or to the region. In fact, it applies to the seven Pacific island territories still on the United Nations (UN) list of non-self-governing territories in the 2020s (the list totals 17 globally).

This paper focuses on the role of self-determination in the history of decolonisation and the UN's approach towards colonialism. It discusses the diverse ways in which issues concerning self, determination, and self-determination affect contemporary efforts at decolonisation in the Pacific islands. This is not intended to suggest that these are the only – or necessarily the most significant – issues in each of the entities on the UN list of non-self-governing territories. But they are certainly relevant to ongoing deliberations on the future of colonial rule in the region.

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[1] Yash Pal Ghai, 'Constitution making and decolonisation', in Yash Pal Ghai (ed) *Law, government and politics in the Pacific island states*, Institute of Pacific Studies, University of the South Pacific, Suva, 1988, 49.

Decolonisation and the United Nations

The *UN Charter* contains references both to self-determination and to the specific circumstances of non-self-governing territories. The former include the statement in Article 1(2), Purposes and Principles, that member-states are committed to the development of

> friendly relations among nations … based on respect for equal rights and self-determination of peoples.

This commitment appears to be focused on the circumstances which gave rise to World War II – namely, the German, Italian and Japanese invasions of other countries – and not specifically on non-self-governing territories. The circumstances and rights of the latter are addressed directly in Chapter XI (Articles 73-74), the Declaration Regarding Non-Self-Governing Territories, and with specific regard to Trust Territories (the former German territories and Ottoman provinces administered under the League of Nations' mandates system following World War I) in Chapter XIII.

Thus, Article 73 states very firmly that UN members responsible for the administration of non-self-governing territories recognise the principle that the interests of the inhabitants of these territories are paramount, and are committed [the actual words employed are 'accept as a sacred trust the obligation'] to promote to the utmost … the well-being of the inhabitants of these territories.

Of particular relevance to this paper, the same Article then specifies that they will –

> a. … ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment, and their protection against abuses;

and

> b. … develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

The Article goes on (in e.) to commit UN members to facilitate transparency and a measure of accountability by providing the UN Secretary-General with regular reports on the non-self-governing territories for which they are responsible.

Chapters XII and XIII (Articles 75-91) build on the League of Nations' mandates system which applied to former German colonies by establishing the UN Trusteeship system.

The *UN Charter* does not clearly define 'non-self-governing territory' or 'self-government' in Article 73. It seems unlikely that the term 'self-government' refers specifically or is limited to – though it also does not preclude – the stage frequently described as '[internal] self-government' that has often been the penultimate step in non-self-governing territories' transition from colonial rule to independence.

Apart from the commitments, including the reporting requirement, the *UN Charter* itself does not require that the UN be directly involved in the decolonisation of non-self-governing territories. This is true, except in the case of trusteeships – where criticisms and recommendations included in triennial visiting missions' reports on trust territories could have quite powerful influence on colonial governments and their representatives on the ground (the colonial administrations).

However, successive UN General Assembly (UNGA) resolutions, particularly from 1960 on, have both expressed and reinforced an international atmosphere in which self-determination leading to decolonisation of non-self-governing territories has come to be widely regarded as not only right but inevitable.

According to the list on the UN website[2], more than 100 entities have, at different times, been classified as non-self-governing or trust territories (New Caledonia was restored to the list in 1986 and French Polynesia in 2013, in both cases at the initiative of countries in the region, and against the opposition of the Government of France. However, useful as the list is when assessing the UN's role in monitoring formal colonial rule and decolonisation, it is pertinent to observe that the list contains separate entries for some entities which were, in fact, governed together (it does not, for instance mention Algeria, which was governed as part of France until it became independent, following a referendum, in 1962).[3] The list also makes no mention at all of other areas and populations which have, for at least part of their recent history, been subject to what many of their people have regarded as foreign regimes, but which those regimes regard as secessionist movements, and the UN General Assembly has not resolved to admit as independent members of the UN or even include on the list of non-self-governing territories (examples include

[2] 'Trust and non-self-governing territories (1945-1949)', online http://www.un.org/decolonization/nonselfgove.shtml on 4 December 2016.

[3] Moreover, Algeria's decolonisation had significant widespread influence on critics and opponents of colonialism elsewhere.

Indonesian Papua and West Papua, Papua New Guinea's Bougainville Province, Fiji's Rotuma, and Australia's Norfolk Island).

1960 was, in many respects, a turning-point in the history both of colonialism and of decolonisation. Nineteen countries emerged from the UN's list of non-self-governing territories to become independent states. They include some former French territories, which were formed out of much larger colonial entities, as well as the former British and Italian Somalilands, which combined to become Somalia. The admission of newly-independent states to UN membership was widely regarded as an important sign of their legitimacy – and, in effect, the end-point of formal decolonisation, as other independent states acknowledged their status as independent actors in international relations. The number of recently decolonised UN members more than doubled. Many of these states have been pro-active in promoting further decolonisation around the world.

In most cases, independence has been the product of nationalist – or, at least, anti-colonial – agitation (the two have not always coincided) and/or concern on the part of the colonial powers at the foreign policy, economic, and other costs of continuing colonial rule.

In December 1960, the UNGA adopted Resolution 1514(XV), which was both a product and a source of significant change in international attitudes and the UN's role in regard to decolonisation. The Declaration on the Granting of Independence to Colonial Countries and Peoples contained in the Resolution was a product of the way in which the governments of new states – and others (for diverse historical, ideological and other reasons) – worked through the UN to promote an end to colonialism globally. However, their number did not include any Pacific island states, the first of which to become independent was Samoa[4] in 1962.

The Preamble to the Declaration on the Granting of Independence to Colonial Countries and Peoples, recognises what it describes as

> the passionate yearning for freedom in all dependent peoples and the decisive role of such people in the attainment of their independence;
>
> the perception that – the peoples of the world ardently desire the end of colonialism in all its manifestations;
>
> the negative impacts colonialism has on many different aspects of development and international relations; and the ways in which it 'militates against the UN ideal of peace'. This is presumably in reference to the force that was deployed in defence of continued colonial

[4] The country was known as 'Western Samoa' until 1997.

> rule in Algeria and a number of territories, and the growing disorder to which resistance and outright opposition to colonial rule was giving rise elsewhere. Referring to the racism which was common practice in many colonies – and, in some cases, legally enforced[5] – the Preamble describes liberation from colonial rule as 'irresistible and irreversible'.

The substantive provisions of the Declaration then go on to describe '[t]he subjection of peoples to alien subjugation, domination and exploitation' as 'a denial of human rights', and contrary to the UN Charter (Article 1).

Article 2 proclaims that –

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Addressing, at least by necessary implication, the claim often made by their rulers that they are 'preparing' the people of non-self-governing territories to play a greater role in government and/or aspects of development,[6] Article 3 proclaims declares that –

> Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

Article 5 suggests that such inadequacies can never be other than a pretext, as distinct from a reason, by calling for 'immediate steps' to be taken in all non-self-governing territories –

> to transfer all powers to the peoples of those territories without any conditions or reservations in accordance with what it expects to be 'their freely expressed will and desire.'

In condemning any attempt at 'partial or total disruption of … national unity and the territorial integrity of a country', Article 6 makes clear the expectation that the boundaries of new states will coincide with those of their colonial predecessors, a provision to which there have been noteworthy exceptions. In the Pacific, these exceptions include the division of the former Gilbert and Ellice Islands Colony into Kiribati and Tuvalu, following a referendum in the latter in 1974 which was monitored by a Visiting Mission sent by the UN Special Committee on Decolonisation at the

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5 See, for example, Edward P Wolfers and FS Stevens (eds), 'Colonialism and after', *Racism: The Australian experience. A study of race prejudice in Australia*, Australia and New Zealand Book Co, Sydney, Volume 3, 1977 (2nd edition).

6 For a thoughtful and thought-provoking analysis and critique of colonial preparation written while the concept or, at least, the claim was widely proclaimed by colonial powers, see BB Schaffer, 'The concept of preparation: Some questions about the transfer of systems of government', *World Politics*, 18 (1), October 1965, 42-67.

invitation of the colonial power (the United Kingdom) [UK];[7] the separation of the former United States Trust Territory of the Pacific Islands into the Federation of Micronesia, the Republics of Marshall Islands and Palau, and the Commonwealth of the Northern Mariana Islands in 1986; as well as the integration of the former UN Trust Territory of New Guinea and the Australian Territory of Papua, which were governed initially as the 'Territory of Papua and New Guinea' following World War II, and became the Independent State of Papua New Guinea in 1975.

In setting out the principles which should guide member-states in determining whether Article 73e of the *UN Charter* requires them to transmit information on a particular entity, Resolution 1541(XV)[8] specifies the characteristics of a non-self-governing territory, as well as the possible, internationally acceptable outcomes of decolonisation.

Filling the gap in the *UN Charter* previously observed, this Resolution defines a non-self-governing territory as one which is 'geographically separate and … distinct ethnically and/or culturally' from the administering power (Principle IV).

Decolonisation – or attaining the 'full measure of self-government' specified in the *UN Charter* – can be achieved in three ways:

(a) Emergence as an independent State;

(b) Free association with an independent State; or

(c) Integration with an independent State (Principle VI).

The UN's acceptance of (b) or (c) is dependent on certain conditions. Thus –

- free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes; they must retain the right to modify its status through processes which are both democratic and constitutional; and the internal constitution of the freely associated entity must be made by its people 'without outside interference'[9] – though this does not preclude consultations in accordance with the agreement on free association (Principle VIII); while

[7] WD McIntyre, 'The politics of Gilbert and Ellice Islands,' *Island Studies Journal,* 7(1), 2012, 143.

[8] UNGA, 'Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter' A/Res/1541(XV), 15 December 1960.

[9] In terms which are familiar in the Pacific, it should be 'home-grown'.

- integration with an independent state follows attainment of 'an advanced stage of self-government with free political institutions' which enable informed and democratic choice, in which the UN 'could, when it deems it necessary', provide supervision (Principle IX).

Almost a year later, the UNGA reviewed implementation of the previous Declaration.[10] In reference to Article 5, which calls for the immediate, unconditional transfer of all powers to the people of non-self-governing territories, it 'noted with regret that, with a few exceptions', this had not occurred (Resolution 1654 (XVI), preamble). Article 4 of the new Resolution provided for the establishment of the Special Committee on Decolonisation to monitor progress, make recommendations, and report to the UNGA on implementation. Thus the foundations were laid for contemporary understandings of the nature and outcome of colonial rule, together with arrangements for monitoring implementation through the UN's Special Committee on Decolonisation.

Significant aspects of these Declarations and the work of the Special Committee have subsequently been elaborated in UNGA Resolutions including the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (2625 (XXV) of 1970), the Declaration on the Establishment of a New International Economic Order (3201 (S-VI) of 1974), and the Declaration on the Right to Development (41/128 of 1986). They have also been cited and elaborated in other Resolutions, including the Declaration embodying the Millennium Development Goals (whose values and principles section refer to both the right to development and the right to self-determination of peoples under colonial domination and foreign occupation (UNGA Resolution A/55/L.2, III.11 and I.4 respectively).

Interestingly, the preamble to the UNGA's 2007 Declaration on the Rights of Indigenous Peoples (A61/295)

> affirms the fundamental importance of the right to self-determination of all peoples,

and asserts that

> nothing in this Declaration may be used to deny any peoples their right to self-determination exercised in conformity with international law.

[10] UNGA, 'The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples,' A/Res/1654 (XVI), 27 November 1961.

In language which seems to have obvious – if controversial – implications for non-self-governing territories with substantial indigenous populations now in the minority, namely New Caledonia and Guam, the operational paragraphs of the 2007 Declaration go on to assert that indigenous peoples –

> have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

and

> in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (Articles 3 and 4).

Thus the UN has been both a driver and a stage for member-states, particularly former colonies, to press for self-determination and decolonisation. Pacific island countries have been among the beneficiaries, particularly when it comes to the visits and recommendations of UN Visiting Missions to the former Trust Territories of Nauru, the Pacific Islands, and New Guinea, and the flexible outcomes of decolonisation established in Resolution 1541(XV) in 1960 and given enhanced legitimacy by Resolution 1654(XV) in 1961. The Special Committee on Decolonisation has followed – and built on – precedent by sending visiting missions of its own to non-self-governing territories in the Pacific. These missions have generally been more purpose specific, for example to monitor the 2006 and 2007 referenda in Tokelau, and to assess the situation in New Caledonia in March 2014, with particular regard to the electoral roll for the May 2014 provincial elections – though the latter also addressed preparations for the referendum on New Caledonia's political future, as well as the need for a constructive dialogue among all actors to find common ground, preserve peace and promote a 'common destiny', and to provide enhanced opportunities for the education and training of young people.[11]

Further afield, Alaska and Hawaii had become states of the United States of America, in 1959, before the adoption, on 14 and 15 December 1960, respectively, of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514(XV)), and Resolution 1541(XV)[12] specifying the alternative outcomes to which decolonisation may lead. The Indian Ocean territory of Cocos Islands was integrated as a territory of Australia in 1984.

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[11] *Report of the United Nations mission to New Caledonia, 2014*, A/AC.109/2014/20/Rev.1, 23-24.

[12] 'Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter' A/Res/1541(XV), 15 December 1960.

Meanwhile, the enhanced international legitimacy of outcomes other than independent statehood – specified in Resolution 1541(XV) – facilitated the transition of Cook Islands and Niue into free association with New Zealand (in 1965 and 1974) respectively. The Commonwealth of the Northern Mariana Islands, part of the former UN Trust Territory of the Pacific Islands, entered into free association with the former trustee power, the United States of America in 1990.

However, even so, at time of writing, following the UN's Third Decade for the Eradication of Colonialism, just over a third (six out of 17) of non-self-governing territories on the UN's list are in the Pacific. In fact, with the re-inscription of French Polynesia in 2013, the list has continued to grow.

The references to non-self-governing territories in the UN Charter remain. While the UN Trusteeship Council has completed the work assigned to it at the UN's foundation, relevant provisions in the *UN Charter* are still in place. The chamber where the Trusteeship Council used to meet at UN headquarters in New York continues to be available for the purpose. It is accordingly unclear if the UN's role in relation to trusteeship is now just a matter of history – with some of the consequential changes yet to receive attention, or if it might possibly be invoked again in changed circumstances, as activists in some former colonies and other entities incorporated in other, larger entities might hope.

What is clear from the case of French Polynesia (and the previous re-inscription of New Caledonia) is that inclusion on the UN list of non-self-governing territories is not simply a matter of applying a definition framed in general terms but of diplomacy: the considered decision – and resulting vote(s) – of UN member-states. Thus, having previously had both territories included on the UN list, France subsequently took advantage of a political climate at the UN favourable to colonial powers and had French Polynesia removed in 1947 and New Caledonia in 1957. Growing anti-colonial sentiment in the two territories has subsequently received the diplomatic support of the governments of independent Pacific island countries (as well as others), and led to re-inscription. Such support included the adoption of supportive resolutions by the French Polynesia Council of Ministers and Assembly in 2011.

Similar reasons help explain why other entities which might be classified – and which some residents, outside observers, and activists regard – as non-self-governing territories are not on the list. Examples in the Pacific include the French territory of Wallis and Futuna; Chile's 'special territory' of Easter Island (Rapa Nui); and, to the West, the particularly controversial instance of former Dutch New

Guinea, now Indonesian Papua. The UN played an important – and controversial – role in the latter's formal decolonisation and (re-)integration as part of Indonesia.[13] The same reasons noted above might also, arguably, apply to the Australian territory of Norfolk Island following the suspension of previous arrangements for its government in 2015.

In the case of Indonesian Papua, the Indonesian Government – in apparent response to continuing pressure for international recognition by activists from the former Dutch territory – issued an invitation at the 2013 Summit of the Melanesian Spearhead Group (MSG – whose members are Fiji, Papua New Guinea, Solomon Islands, Vanuatu and New Caledonia's Front de Liberation Kanak et Socialiste ['Kanak Socialist National Liberation Front' – FLNKS]) to send a delegation to see conditions in Papua for themselves. Interestingly, the Summit was hosted by the FLNKS in Noumea, the capital of the French 'overseas collectivity', New Caledonia, where a growing population of immigrants from metropolitan France means that advocates of independence do not have majority support in the Congress. The Government of Vanuatu decided not to participate in the delegation, which visited Indonesian Papua in January 2014.

Consequences of inclusion in the UN list of Non-Self-Governing Territories

What are the issues involved in defining the self, developing and expressing determination, and giving practical effect to self-determination and decolonisation? The formal status of non-self-governing territories is determined, at least for the UN, by inclusion in the UN's list. Therefore, formal decolonisation is officially recognised by removal from this list. The decision to enlist or delist requires majority support in the UN General Assembly.

Despite their significance, perceived political domination, dependency, neo-colonial exploitation, underdevelopment, or cultural and other forms of intellectual colonialism do not necessarily lead to inclusion in the list. Conversely, removal from the UN's list of non-self-governing territories does not mean that such issues have been successfully addressed. The right to development, the Millennium Development Goals, the Sustainable Development Goals, and other commitments

[13] Edward P Wolfers, 'Self-determination and decolonization in the Pacific – Links, lessons and future options for the United Nations' in L Crowl, MT Crocombe and R Dixon (eds), *Ron Crocombe: E Toa! Pacific writings to celebrate his life and work*, USP Press, Suva, 2013, 182.

by UN members continue to be accordingly important. In fact, for many Pacific island states and territories, pro-active efforts to prevent and deal with the consequences of global warming are becoming increasingly urgent.

The self (or identity)

The boundaries and populations of many non-self-governing territories and countries decolonised since the formation of the UN have been defined by decisions made in the late nineteenth century by government ministers and officials in Europe drawing lines on maps. Often ignorant of – and indifferent towards – local circumstances, the boundaries they drew – and, in some cases, agreed – were frequently straight-lines which took little account of geography or differences, similarities and connections between communities whose inclusion/exclusion in regard to a particular territory were being defined. The same is, incidentally, true of many internal administrative boundaries drawn up under colonial rule. In some cases, particularly in inland Papua and Papua New Guinea. Significant inland areas in the highlands were entered – and 'explored' – by outsiders only as recently as the 1930s, and, in some areas, even later.

However, the circumstances of colonial rule mean that, somewhat ironically, anti-colonial nationalism has often been a product of shared experiences of colonial rule. In the case of some sub-national and separatist movements, the shared experience have been of internal administrative arrangements. While other shared characteristics – such as physical appearance, language(s), and culture – have contributed, the construction of an imagined community[14] which draws on the history and shared experiences of colonialism has often been critical. The latter may include both positives in areas such as health, education, and the rule of law, as well as negatives such as economic exploitation, environmental degradation, and the insensitivity of immigrants to local conditions, cultures, and aspirations.

As decolonisation proceeds, questions arise as to who really belongs, who is entitled to participate in determining a non-self-governing territory's future? Who is entitled to stay on and on what terms? These questions can have a significant influence on a territory's constitutional design if and as colonial rule comes to an end.[15]

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[14] B Anderson, *Imagined communities: Reflections on the origin and spread of nationalism*, Verso, London, (revised text and edn) 1991.

[15] For a detailed account of the issues and debates concerning future citizenship in a former trust territory

Pitcairn Islands is unique among the remaining non-self-governing territories in the Pacific – and, perhaps, globally – in that all of its regular inhabitants are descended from immigrants (though the ancestors of most current residents arrived there more than 200 years ago). It might be regarded as a colony of settlement in an extreme form. Numbering only about 50, the people living on Pitcairn total less than 1% of the population of the smallest independent country, Nauru. They are dependent on short-term appointments from overseas (usually, the UK) for the provision of vital services, including a doctor, a teacher, and a policeman, and on communications with and visits by the UK High Commissioner to New Zealand and other officials normally stationed offshore for other aspects of government. In such circumstances, it is scarcely surprising that, conscious and proud as the resident inhabitants of Pitcairn Islands might be of their shared historical heritage, the need and opportunity for self-determination does not appear to be a prominent issue. Consistent with the commitment by former Prime Minister, David Cameron, that where the people of the remaining British territories 'choose to remain British we will respect and welcome that choice',[16] the UK has made clear its willingness, according to a Working Paper prepared for the UNGA, to 'maintain and deepen its special relationship with them.'[17]

As archaeologists unearth and other scholars discover the long history of human movements in and across the Pacific, the issue arises at what point people can be described as 'indigenous' to a particular place. The rights of people of mixed descent have been issues of bitter, sometimes offensive contention in a number of countries, particularly during the transition to independence (and recently in Australia). The claim that there are people who really belong and should be accorded certain rights that should be denied others has been the ostensible reason for military coups (in Fiji, in particular) and other, sometimes violent political exchanges in Pacific island territories and elsewhere.

Among the current non-self-governing territories in the Pacific islands, the populations of American Samoa, Tokelau, and the latest addition to the UN list, French Polynesia, are classified as largely indigenous. In American Samoa, this population is separated from their fellow-Samoans in the neighbouring independent

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and colony, see Edward P Wolfers, 'Defining a nation: The citizenship debates in the Papua New Guinea Parliament', in EP Wolfers and FS Stevens (eds), 'Colonialism and after', *Racism: The Australian experience. A study of race prejudice in Australia*, Australia and New Zealand Book Co, Sydney, 1977, Volume 3 (2nd edition), 301-397.

[16] Foreign and Commonwealth Office, *The overseas territories: Security, success and sustainability*, Parliament of the United Kingdom, London, 2012, 5.

[17] A/AC.109/2014/4: 11

state of Samoa. Under United States law, American Samoans are classified as 'non-citizen nationals'.[18] In Tokelau, the local indigenous population is outnumbered almost 5:1 by Tokelauans who live and work abroad. Most of the Tokelauans who live overseas did not meet the residential requirements to vote in the 2006 and 2007 Tokelau referenda on Tokelau's political future.[19]

Fewer than half of the residents of Guam and New Caledonia are indigenous – just over 37% in Guam, and 40% in New Caledonia. It is, therefore, scarcely surprising that there has been widespread and protracted public debate in both territories as to who should be eligible to vote on self-determination. In Guam, the answer seems to be persons who can trace their resident ancestry back to 1950 – mainly, indigenous Chamorro.[20] In French Polynesia, the question whether the territory should become independent is an important source of division among political leaders and parties.[21]

In New Caledonia, the late 1980s saw four years of violent confrontations between pro- and anti-independence movements in which 80 or so people were killed. The 1988 Matignon Accords provided for residents who had lived there for at least 10 years to be eligible to vote in the referendum on independence to be held 10 years later.

The Noumea Accord (Paragraph 4), which deferred the referendum when it took over from the previous Accords in 1998, describes decolonisation as

> the way to rebuild a lasting social bond between the communities living in New Caledonia today, by enabling the Kanak people to establish new relations with France, reflecting the realities of our time.[22]

The right of migrants from metropolitan France to vote in the referendum was, for some time, unclear. Did they need to have been eligible to vote in 1998 (when 10 years residence was required), or was 10 years residence enough on its own, even if achieved subsequently? It was high on the agenda of the UN Special Committee on Decolonisation's Visiting Mission to New Caledonia in 2014, and prominent among the issues raised by those from whom it received oral and written submissions. They

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18 *Guam Pacific Daily News,* 5 July 2013.

19 N Maclellan, 'The modern House of Tokelau: Self-determination in a Pacific Atoll Nation', *APSNet Policy Forum*, 23 February 2006; online http://nautilus.org/apanetl/0603a-maclellan-html/ on 5 December 2016.

20 'Commission on decolonization', *Guampedia,* online http://www.guampedia.com/commission-on-decolonization on 5 December 2016.

21 N Maclellan, 'The battle for French Polynesia's future', *Islands Business*, February 2014, 16-23.

22 Translation from *Australian Indigenous Law Reporter*, 2002. 'Noumea Accord-Digest', 7(1).

included advocates of the particular rights of indigenous Kanaks, as well as settlers who have come from metropolitan France or elsewhere and believe that they and others like them are entitled to vote on the political future of the place which they now regard as their home.

Ongoing immigration of settlers from France, other parts of the Pacific and Asia means that the issue continues to be contentious.

When the first referendum on New Caledonia's political future was held in November 2018, 43.3% of votes cast were in favour of independence while a majority of 56.753.6% of voters said 'no'. When the second referendum was held in 2020, the result was 53.26% against and 46.7% in favour of independence.[23]

Meanwhile, another source of contention in New Caledonia is the commitment, also part of the agreements reached in the context of the Noumea Accord, that such key expressions and symbols of national identity as the name, flag, anthem, motto and banknote designs for New Caledonia would be 'jointly devised' in order both to express Kanak identity as well as the shared future.[24] Though the anthem, motto, and banknote designs were agreed in 2010, and have been gradually put into effect, the name and flag have remained in contention. A compromise was subsequently reached that the Kanak and French flags would both be flown when the Prime Minister of France visited later in the same year, though the question of which flag(s) to fly continues to be a divisive issue for Kanaks and French residents alike.

Thus do issues concerning definition of the 'self' play a part in decolonisation. Historically, this has been witnessed in former settler colonies such as Australia and New Zealand. The illegal seizure of power in Southern Rhodesia by Ian Smith and his supporters in 1965 in fact seemed to inspire some expatriates in the Pacific. More recently, the diversity of Fiji's population, which includes a significant proportion of citizens of Indian descent, has led the leaders of military and other coups to claim that their interventions have been prompted by indigenous concern at the roles and influence of persons of Indian descent in Fiji. Their claims have impacted on indigenous and other residents in non-self-governing territories in the Pacific islands. Thus does experience in the Pacific show that, while acceptance of difference(s) may help to bring people together, attempts to promote unity may

[23] D Fisher, ''No' vote in New Caledonia independence referendum a pyrrhic victory for loyalists", *The Strategist*, The Australian Strategic Policy Institute Blog, 6 October 2020.

[24] UNGA Working Paper A/AC.109/2014/16:21.

divide. Questions regarding the 'self' in non-self-governing territories are key to the processes and prospects for self-determination – and to the possibility and eventual outcome(s) of peaceful and orderly decolonisation.

Determination (or sense of purpose)

The preceding discussion suggests that, among the seven non-self-governing Pacific island territories on the UN's list, issues concerning the self or sense of a shared identity are at the centre of politics in New Caledonia and French Polynesia – and, to a lesser extent, Guam. They divide many of their indigenous people from residents of immigrant origin or descent, though they may, in certain respects, resemble and even facilitate co-operation with others through organisations such as the Melanesian Spearhead Group (MSG) and other sub-regional (Melanesian, Micronesian, and Polynesian), Pacific regional, and even Asia-Pacific groupings of countries and territories, non-governmental organisations, and communities.[25] Such issues have significant influence on the ability and determination with which different players pursue decolonisation.

The US refers to American Samoa as an 'unorganised and unincorporated territory', which seems to mean that the American Congress has not enacted a specific Organic Law for the territory, which is not an integral part of the USA with the benefits that accompany statehood.[26] Guam, as well, is considered an 'unorganized territory' which means that it, too, lacks the benefits of statehood.[27] While the particular interests of the indigenous people of Guam remain important public issues there, the preference of many American Samoans for integration with the USA suggests a shared willingness to dispense with a separate identity – for the sake of the benefits expected to follow.

Informal discussion on the margins of the 2014 Pacific Regional Seminar of the UN Special Committee on Decolonisation suggests that for, at least, some Tokelauans, personal, political rivalries outweigh the case for focusing on the issues at stake in self-determination – hence the failure of both the 2006 and 2007 referenda

[25] Edward P Wolfers, 'Pacific regionalism', in C Hawksley, and N Georgeou, (eds), *The globalization of world politics: Case studies from Australia, New Zealand and the Asia Pacific*, Oxford University Press, South Melbourne, 2014, 92-95.

[26] M McCormick, 'American Samoa', in MA Ntumy (ed), *South Pacific islands legal systems*, University of Hawaii Press, Honolulu, 1993, 433-461.

[27] M McCormick, 'Guam', in Ntumy (ed), *South Pacific islands legal systems*, 518-539.

to achieve the two-thirds support required under the Tokelau Constitution for free association with New Zealand.

Pitcairn Islands is unique among the remaining non-self-governing territories – and would be so among decolonised and other independent states – in that it is a place where it seems fair to conclude that everyone knows everyone else, and residents recognise the benefits which come from having foreign officials living there, or, at least, visiting in order to maintain contact and provide certain services. In fact, the *Strategic Development Plan 2012-2016*[28] specifically advocates the attraction of sufficient numbers of immigrants to raise the population by about 60% to 80.

In New Caledonia, calls for an independent Kanaky, which has turned sometimes violent, date back to the 1950s, when the Melanesian population was first allowed to vote[29] – before the people of other Melanesian territories. The 1988 Matignon and 1998 Noumea Accords were the products of efforts to maintain peace pending the holding of a series of referenda on New Caledonia's political future (with a third possible following the outcome of the 2020 referendum – in which the 'no' vote on independence was higher than in 2018). Meanwhile, New Caledonia has moved through a series of arrangements by which France has intended to manage government there – to become a French 'overseas collectivity' with unique features, such as an irreversible transfer of powers and the reservation of certain rights (including the rights to vote and to employment) to persons who meet the residential requirements for citizenship of New Caledonia.[30]

The main Kanak nationalist party, the FLNKS, is a member of an inter-governmental organisation, the Melanesian Spearhead Group (MSG), and, as previously mentioned, hosted the MSG Leaders Summit in 2013. In 2015, MSG members agreed that Indonesia could become an associate member, and the United Liberation Movement for West Papua (ULMWP), which represents Papuans from Indonesian Papua living abroad, would be an observer.

UN General Assembly Resolution 1541(XV), Principle VII, specifically recognised that the relevant colonial power(s) must be consulted in regard to free association. Their interests and resources are likely to have a significant influence in defining both the process and the eventual outcome of a non-self-governing

[28] Pitcairn Islands, Strategic Development ,Plan 2012-2016, 2012; online http: http://www.government.pn/policies/SDP%202014-2018%20-%20Amended%2011-05-2016.pdf on 5 December 2016.

[29] MA Ntumy, 'New Caledonia' in Ntumy (ed), *South Pacific islands legal systems*, 595-621.

[30] S Robertson, 'The politics of identity in New Caledonia: A review' (draft paper), 2014.

territory's decolonisation. This was the case in most of the now-independent and freely-associated Pacific islands, and when it comes to the reluctance of members of the USA Congress to allow American Samoa to become a full – and equal – state of the American federation. It, obviously, applies to the prospects for achieving Kanak and French Polynesian aspirations for independence.

A genuine commitment to national self-reliance and developing a truly 'home-grown' constitution, as in Samoa and subsequently in Papua New Guinea, can make a real difference to a country's governance and independence (though education, experience and existing political arrangements may limit the truly available options). But, even then, there may be people who resent the loss of their previous citizenship and seek to reclaim it,[31] even if such citizenship did not entitle them to entry to the colonising country. This was the case with indigenous inhabitants of the Australian Territory of Papua, who were formally Australian citizens before independence, but not entitled to enter or live in Australia without a special permit.

However, much often depends not only on the sense of self and the determination with which the people of non-self-governing territories attain independence and then proceed to govern themselves but also on the power, resources and will of their colonial rulers. This includes the economic and other forms of support they are able and willing to provide following formal decolonisation.

Self-determination

Colonialism was once a source of pride for colonial countries and their representatives in colonies, and often continues to be so among former colonial officials.[32] The UN's commitment to decolonisation – and the related discrediting of colonialism – has had an arguably decisive impact on decolonisation in the Pacific islands. Nonetheless, a lot still remains to be done in and for the remaining non-self-governing territories.

While there have been local movements which have resisted and even actively opposed colonial rule, the reality has been that decolonisation in the Pacific islands has largely been driven by the former colonial powers. Samoa, where the

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[31] M Nalu, 'Jonathan Baure breaks silence on border crossing to Australia', online http://malumnalu.blogspot.com.au/2010/12/jonathan-baure-breaks silence on border....', 2010.

[32] After much lobbying for an official award, former Australian patrol officers in pre-independence Papua New Guinea were made eligible for the Australian Overseas Police Service Medal in 2012.

Mau played a critical role in pressing for independence, is a notable exception to this generalisation. In other former non-self-governing territories, the realities of dependence on the funds, administrative capacity and other resources available to colonial powers – and, in some cases, a deeply felt, if unfortunate, sense of psychological dependence – help to explain how decolonisation has occurred with only nominal self-determination.[33] This is not to say that similar circumstances are likely to prevail in the remaining non-self-governing territories in the Pacific islands. But experience is, surely, a relevant consideration when it comes to achieving the UN's ongoing commitment to decolonisation.

The commitment to national self-determination on the part of a significant number of Kanak and indigenous French Polynesian leaders, parties and supporters seems clear – with the role of indigenous communities and a preference for independence underlined. But the resistance to independence – and so to following such a course – among members of communities of immigrant descent is strong. In both territories, parties sympathetic to the latter's views continue to be influential.

For the UK and France, a sense of responsibility towards their non-self-governing territories combines with what might be a continuing interest in maintaining a global presence. This may be seen as important in maintaining credibility as a permanent member of the UN Security Council and in other aspects of international relations, particularly at a time when China, India, Indonesia, and Asia in general, Brazil, and South Africa are widely described as on the rise (though China is, of course, already a permanent member). The USA has an obvious interest in retaining access to naval and other defence support facilities in American Samoa and Guam, despite significant Chamorro people campaigning for redress for the impacts of the USA's previous nuclear tests.

In the case of the UK and the USA, the sense of responsibility and national interest in maintaining a continuing presence does not extend to integration of their respective non-self-governing territories into – or with – the UK and the USA themselves. In the USA, both American Samoa and Guam are represented in the House of Representatives by members with limited voting rights, but other members of Congress are reluctant to agree to the equality which admission as a state of the federation would entail.

[33] I can, for example, recall the deep anxiety expressed by – and, evident in the shaking physical demeanour of – a then-prominent political leader from a Pacific islands country, a man who was a genuinely and deeply committed nationalist, when we happened to see a newspaper poster in the street announcing the inevitability of early independence for his country.

The French Government has been – at least, formally – willing to develop closer options.

A key focus of New Zealand's external relations is on the South Pacific. But, even there, a Parliamentary enquiry into New Zealand's relations in the Pacific questioned the continued viability and value of maintaining existing relationships of free association with Niue and Cook Islands, particularly when the financial and other support required by their governments is considered in the light of continued emigration.[34] The numbers of migrants from Cook lslands and, especially, Niue, are, in fact, much larger than the remaining populations (many times so in the case of Niue). As previously mentioned, the majority of people of Tokelau do not live and work there.

In such circumstances, so the argument goes, there is a case for reconsidering existing arrangements. The same might be said of the options open to Tokelau. After all, the self-determination of many individuals and families from islands in the New Zealand Realm has led them to see advantage in departing.

The relationship between self-determination and decolonisation, as demonstrated above, is tenuous at best, at least as far as the Pacific islands region is concerned. The UN lists former trust territories as if they have all actually 'achieved self-determination'[35] – as distinct from yielding to pressure from their colonial rulers, as was surely the case in a number of trusteeships. In practice, much has depended – and continues to depend – on the colonial powers, and the interests they believe they still have in their non-self-governing territories. It is subject to such considerations that the policies of the remaining colonial powers – and, in significant respects, the options available to the seven Pacific island territories currently on the UN's list – are likely to be determined. Combined with the discussion of the self and determination earlier in this paper, the implications for the UN's commitment to the eradication of colonialism seem clear: while it may well lead to further decolonisation, it seems unlikely that it will see a complete end to colonial rule in each and every non-self-governing territory on the UN's list.

What then? Yet another UN Decade for the Eradication of Colonialism (the fourth since the first such Decade began in 1990, following passage of UN General Assembly Resolution 43/47 on 22 November 1988)? Or another approach?

[34] New Zealand House of Representatives, *Inquiry into New Zealand's relationships with South Pacific countries: Report of the Foreign Affairs, Defence and Trade Committee,* 2010.

[35] UN, 'Trust territories that have achieved self-determination'; online http://www.un.org/en/decolonization/selfdet.shtml on 4 December 2016.

Conclusion

The preceding discussion has highlighted key differences – and associated tensions – between self-determination and decolonisation in and affecting the seven non-self-governing Pacific island territories currently on the UN list. In doing so, it has not directed attention to issues which are often of greater and more immediate concern to many residents of these territories. While it has also drawn attention to other islands and groups which seem to meet the criteria specified in UNGA Resolution 1541(XV) discussed above, the paper has deliberately remained silent on whether or not they should be included on the UN list: that is the responsibility of UN members.

However, for the small and ageing population of Pitcairn, which has been ambiguously described as 'declining'[36], one can only hope that the reference applies only to numbers:– the real challenge is to increase population through immigration. In other Pacific island territories, economic opportunity seems key – with cultural and political identity also high on the agenda for the indigenous inhabitants of New Caledonia and French Polynesia. The right to migrate for purposes of obtaining paid employment seems central in a number of territories (and to the fruit and vegetable growing industries in Australia and New Zealand) – though the costs of maintaining the framework of free association within which migration currently occurs has been seriously questioned in New Zealand.

An issue of the greatest relevance – indeed, critical – to the very survival of all seven Pacific island territories (and to the region as a whole) is the impacts that global warming is likely to have on life in the islands. Arrangements to facilitate and provide sustainable livelihoods following evacuation are under active preparation in Kiribati, and must, surely, be high on the public agenda elsewhere.

What, then, becomes of the evacuees? In addition to taking up residence in other countries, will they have, in time, to change their sense of self (or identity) and apply for naturalisation in order to acquire the rights available to citizens of their host countries? What can be done to maintain their languages, cultures and other aspects of their selves?

Following the findings of the Inter-Governmental Panel on Climate Change and other scientific research, these are becoming increasingly pressing – and issues.

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[36] PILON (Pacific Islands Law Officers' Network), *Country report for PILON 2012: Pitcairn, 'Pitcairn, Henderson, Ducie and Oeno Islands*; online http: http://www.paclii.org/pn/pitcairnamended.pdf/ on 5 December 2016.

Yet there are not even agreed terms to describe the situation. People forced to leave their homelands as a result of global warming are not 'refugees' (despite widespread use of terms such as 'climate change refugee'): people are not yet forced to flee (at least not yet) outside their country of nationality – and, even if and when forced to flee because of climate change, they will not have 'a well-founded fear of persecution' – at least, as usually defined, let alone on the grounds prescribed in the Refugee Convention. What rights will they have? Can they migrate and resettle elsewhere not simply as individuals and families, but as communities?

While some of the questions raised in this paper do not fall strictly within the purview of the Special Committee on Decolonisation, they are, nonetheless, of the utmost relevance – and urgency – to decolonisation in the remaining non-self-governing territories in the Pacific islands (and, almost certainly, by extension in other low-lying small island territories on the UN's list of non-self-governing territories). They are accordingly deserving – indeed, in need – of close attention not only by governments, people and parties with a particular interest in the region but by anyone sincerely committed to the principles and values of shared humanity.

However, as Professor Yash Ghai has observed in a different context – namely, changes to the formal status of Hong Kong – influential international actors have a record of treating such changes as matters to be resolved by negotiation and agreement by sovereign states, not the right to self-determination under international law.[37] Thus do issues concerned with the definition of the self, the expression of determination, and the right to self-determination continue to be of importance in the evolving politics – and the future well-being – of people in the Pacific.

[37] Yash Ghai, 'Hong Kong's autonomy: Dialects of powers and institutions', in Yash Ghai and Sophia Woodman (eds), *Practising self-government: A comparative study of autonomous regions*, Cambridge University Press, Cambridge, 2013, 320.

Constitutionalism in Kenya and India in comparative perspective

Mahendra Pal Singh

Upon reading Professor Yash Pal Ghai's paper titled 'Constitutionalism: African perspectives', in a publication I edited a few years ago,[1] I was reminded of my initial introduction to constitutionalism in Ben Nwabueze's book *Constitutionalism in the emergent states*.[2] Since then, of course, I had familiarised myself with the subject from the existing and emerging literature on the subject but had never pursued it seriously. Yash's paper rekindled in me the desire to pursue the subject more seriously and examine the evolving nature of constitutionalism in the advanced countries in the West as well as in developing countries, including India, in comparison to the rest of the world. Therefore, when I was asked to contribute to the festschrift for Yash, I decided to pursue the same theme on which he enlightened me in the context of Africa.

Constitutionalism

Starting as an isolated issue in legal discourse in the late 1930s, constitutionalism has since the last decade of the last millennium become an intensely discussed concept resulting in a number of law review articles, and collections of multiple articles in book form as well as single author books. Like most other social science concepts, it has grown in many directions, some of which not only do not resemble its original understanding – but even contradict it. Consequently, its precise definition is elusive or non-existent. Sometimes, as Nick Barber points out, the ideal of constitutionalism is ornamentally used in the title of books and articles without its definition being considered in their texts.[3] Jeremy Waldron also doubts whether

[1] Yash Ghai, 'Constitutionalism: African perspectives' in Mahendra Pal Singh (ed) *The Indian Yearbook of Comparative Law 2016,* Oxford University Press, New Delhi, 2017, 143-169.

[2] Ben Nwabueze, *Constitutionalism in the emergent states,* Hurst, London, 1973. Yash says (fn. 2 of his chapter) that Nwabueze's book was where he first came across the expression.

[3] Nicholas Barber, *The principles of constitutionalism,* Oxford University Press, Oxford, 2018. The very first sentence of the book at p. 1 states: 'Constitutionalism is a term that is often found in the title of books and articles, but is rarely considered in their texts.'

constitutionalism is any different from constitutional law.[4] But the initial scientific study of constitutionalism in late 1930s identified it as a seminal concept associated with the study and application of any constitution. In that case like any other concept in social sciences, the concept of constitutionalism is also evolutionary. Accordingly, it is appropriate to study, understand and state it in its evolutionary process. That is what I plan to do in the following pages.

Evidently, 'constitutionalism' is a derivative of 'constitution' – a much older notion whose concrete examples may be found and in ancient times, including in the comparative study of Greek city constitutions by Aristotle.[5] The history of modern written constitutions is, however, traced to the making of the United States Constitution in 1789-1791. As is well known, the US Constitution emerged out of a revolt by thirteen colonies of United Kingdom in North America against, among others, the imposition of tax without the participation or representation of the people of those colonies, and their later union into one state. Accordingly, after the successful revolt they took all care to ensure that, while the government conceived under the common constitution of these colonies would be sufficiently strong to defend the new state against foreign aggression as well as internal disruption, it would not be so strong that it could ignore or take away the legitimate rights and liberties of the people at will. Therefore, besides incorporating the principles of separation of powers and checks and balances in the Constitution thus ensuring non-concentration of sovereign power in one person or institution, they also introduced specific guarantees of rights of the people. Thus, the origin and use of the expression constitutionalism is also associated with this Revolution.[6]

Even though the separation of powers worked effectively and the supremacy of the US Constitution was established by the beginning of 19th century, the rights of the people did not acquire full prominence – in spite of the Civil War and consequent amendments in the Constitution – until several years after the Russian Revolution of 1917 which discarded the concepts of both separation of powers and civil and political rights, yet had a growing influence and expansion in several countries within Europe as well as in other parts of the world.

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[4] Jeremy Waldron, 'Constitutionalism: A skeptical view' in T Christiano and J Christman (eds) *Contemporary debates in political philosophy,* Wiley-Blackwell, Malden, 2009, 267 and 279.

[5] *Politics*, ca. 330 B.C., III.

[6] András Sajó, *Limiting government: An introduction to constitutionalism,* Central European University Press, Budapest, 1999, 12.

It was in the late 1930s that two Harvard Law School professors explored the idea of constitutionalism. While one of them – Carl Friedrich – made it part of a broader study of *Constitutional government and democracy*, the other – Charles Howard McIlwain – confined himself to *Constitutionalism: Ancient and modern*. The latter acquired greater prominence, in view of the time frame and societies he covered. As a result of his greater prominence, the latter professor's theory will be explored in greater depth below.

McIlwain devoted his six lectures at Cornell University in 1938-39 exclusively to the concept and evolution of the notion of constitutionalism which he defined in the following words:

> [C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.[7]

Admitting the exercise of some discretion in the government in policy matters, he reiterated:

> [B]ut the most ancient and most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.[8]

A little bit earlier Friedrich defined constitutionalism on similar lines as follows:

> Constitutionalism is built on the simple proposition that the government is a set of activities organised by and operated on behalf of the people, but subject to a series of restraints which attempt to ensure that the power which is needed for such governance is not abused by those who are called upon to do the governing.[9]

McIlwain engaged himself exclusively in tracing the growth of constitutionalism in the West from ancient Greece to the Roman Empire, England, United States and France, arriving at the conclusion that England took the lead in establishing constitutionalism within its territory by 1669 and that it continued to be the best example of it.

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[7] Charles McIlwain, *Constitutionalism: Ancient and modern*, Revised edition, Liberty Fund, Indianapolis, 2007, 21-22 (originally published 1940).

[8] McIlwain, *Constitutionalism: Ancient and modern,* 22.

[9] Carl J Friedrich, *Constitutional government and democracy,* 2 Indian reprint edition, Oxford and IBH Publishing Co, Calcutta, 1974, 36. The first US edition of the book was published in 1937.

The commonality between the statements of McIlwain and Friedrich was, however, not a coincidence. They were both deliberately distinguishing a 'rule of law state' from a 'rule by law' or an 'absolute state' which the 1917 Revolution had established in the then USSR, and which was fast acquiring legitimacy in a number of states throughout the world. These two kinds of states were based on two different ideologies which conceived different roles for the state and law. This ideological difference has impacted the concept of constitutionalism inasmuch as it is still defined and understood as stated above, subject of course to a number of new developments to be noted below.

In defence of that kind of state, the United States (US) also restricted the liberties of those who were critical of the kind of state the US was and who sympathised with the ideology on which USSR was based – most strikingly in the late 19402 and early 1950s, during the 'Second Red Scare' when Senator John McCarthy led the purge, indeed the persecution, of people with left-wing sympathies.[10]

More and more states and societies in Europe also started establishing social states in the light of the social and economic changes that had taken place in their societies. A 'social state' is a translation from the German *socialstaat* which was indeed an inspiration for Socialist thinkers in the late nineteenth century. But 'welfare state' is the closest modern English expression. The US too, relaxed its attitude towards that ideology but without ever abandoning its stand on the understanding of constitutionalism as restraint on the powers of the state in order to protect the civil and political rights of the individual against the state. For example, this was highlighted in Michel Rosenfeld's statement that there is

> [n]o accepted definition of constitutionalism but, in the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.[11]

In the same collection of essays, admitting that constitutionalism is not defined anywhere, Louis Henkin explains it in terms of its demands which include: its basis in popular sovereignty, supremacy of the constitution, political democracy and representative limited government; separation of powers or other checks and balances; civilian control of the military; police governed by law and judicial control; and an independent judiciary which requires that government respects and ensures

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[10] See for example Brian Fitzgerald, *McCarthyism: The Red Scare* (Capstone, 2006).

[11] Michel Rosenfeld, 'Modern constitutionalism as interplay between identity and diversity' in M Rosenfeld (ed) *Constitutionalism, identity, difference and legitimacy,* Duke University Press, Durham, 1994, 3.

individual rights, which generally are the same as recognised by the Universal Declaration of Human Rights; … any derogation of rights must be determined by constitutional bodies; existence of institutions to monitor and assure respect for the constitutional blueprint, for limitations on government, and for individual rights; and respect for self-determination of peoples.[12]

Russell Hardin, a political scientist, also explains constitutionalism on the same lines:

> Arguably the most important aspect of constitutionalism for modern nations, especially those that have had histories of autocracy, is in the placing of limits on the power of government. In the view of many this is the central point of constitutionalism: the limited government.[13]

Following the decline and final break-up of the Soviet Union and its control over the East European countries which discarded communism, and led [14]to establishing new constitutions, a process starting 1989, András Sajó, a Hungarian scholar, wrote his book titled *Limiting government: An introduction to constitutionalism;* initially in Hungarian in 1995 – and later in English in 1999 – for the guidance of the new regimes in East Europe. As Sajó's primary concern was to limit the powers of the governments to be created after the dissolution of communism, he deals with constitutionalism in a scattered, and ununified form. After noting that 'Constitutionalism is the restriction of State power in the preservation of public peace'[15] he admits that '[t]here is no satisfactory definition of constitutionalism, but one does not only *feel* when it has been violated, one *can prove it*.'[16] Admitting that the reasons for this antipathy towards the government and its acts differ from country to country and age to age, he adds:

> The doctrine of constitutionalism was the answer given to oppression during and after the French Revolution, and it was related to concrete forms of abuse and usurpation. Constitutional ideas and constitutionalism in all ages refer to abuses of power because they exist in collective memory.[17]

[12] L Henkin, 'A new birth of constitutionalism: genetic influences and genetic defects' in M Rosenfeld (ed) *Constitutionalism, identity, difference and legitimacy,* Duke University Press, Durham, 1994, 41-42.

[13] Russel Hardin, 'Constitutionalism' in D Wittman and B Weingast (eds) *The Oxford handbook of political economy*, Oxford University Press, Oxford, 2008, 289.

[14] Central European University Press.

[15] Sajó, *Limiting government,* 12.

[16] Sajó, *Limiting government,* 9.

[17] Sajó, *Limiting government,* 12.

This, according to him, is the general, traditional understanding of constitutionalism. It is not clear when exactly the term 'constitutionalism' was initially coined or used, but in his view its origin is generally attributed to the French Revolution that led to its use by the beginning of the nineteenth century.[18] With these introductory remarks he lays down the detailed outlines for the formation of a constitution and what it must contain. Primarily, Sajó was addressing the new regimes in Europe, warning them to be careful not to fall in the same trap of authoritarianism which they had just replaced.

Coinciding with Sajó's English version, Scott Gordon also wrote that, though 'the term "constitutionalism" is fairly recent in origin, the idea could be traced back to classical antiquity.' Briefly, he takes 'constitutionalism' to denote that the coercive power of the state is constrained.[19] Expressing agreement with McIlwain's definition of constitutionalism, he questions the use of the word 'legal' in his definition because a constitution like that of Britain may be unwritten and yet may satisfy the requirement of constitutionalism, indeed McIlwain himself regarded it as the best example of constitutionalism. Analysing all the major constitutional systems from ancient Athens until the end of the last millennium in the West, he concludes 'that the continuous development of constitutionalism is a comparatively recent phenomenon, traceable no further than to seventeenth-century England.'[20] But also admits that 'efficient government and constrained government are not incompatible and … that both objectives have been realized, in practice, in numerous states dating back as far as ancient Athens.' Finally, he also admits that:

> Constitutional democracies have not succeeded in constructing a perfect system for controlling the state, and like other dimensions of social perfection, such an ideal is unlikely to come within our grasp. But while perfection is impossible, improvement is not, and the next step in the journey that I have pursued in this book would seem to be an investigation of 'constitutional failure' – the lacunae that are evident in the systems of power control of constitutional democracies.[21]

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[18] Sajó, *Limiting government,* 9. According to the *Oxford English Dictionary* the word 'constitutionalism' was first used in 1832. Berman (1983, 9) asserts that the word was coined in America during the Revolution. Chrimes (1949, 475f.) notes that the adjective 'constitutional' was a novelty even in the mid-eighteenth century, but the noun 'constitution,' with a political meaning, came into use during the English debates that led to the outbreak of Civil War in 1642. The *OED* reports uses of that word as early as the twelfth century, but it was the only after the English debates of the Civil War period, and after the 'Glorious Revolution' of 1688, that firmly established 'constitution' as a term and its cognates as elements of the modern political vocabulary S Gordon, *Controlling the state: constitutionalism from ancient Athens to today*, Harvard University Press, Cambridge, 1999, see fn 3 at p. 5.

[19] Gordon, *Controlling the state*, 5.

[20] Gordon, *Controlling the state,* 358.

[21] Gordon, *Controlling the state,* 361.

Though the foregoing descriptions of constitutionalism since the political change in East Europe have not moved far beyond earlier formulations, the change has led to the rethinking of the concept of constitutionalism. A beginning in this regard seems to have been made by Jeremy Waldron at the beginning of the present millennium by expressing doubts on the negative connotation of constitutionalism prevalent until then. He says:

> [S]ometimes 'constitutionalism' is a pompous word for various aspects of con law or the study of the constitutions. Still the last two syllables – the "-ism" – should alert us to an additional meaning that seems to denote a theory or set of theoretical claims. Constitutionalism is like liberalism or socialism or scientism. It is perhaps worth asking what that theory is and, whether the claims it comprises are true or valid.[22]

Invoking the second meaning of constitutionalism in *Oxford English Dictionary* '[a]dherence to constitutional principles', he adds that a constitutionalist must take the Constitution seriously and not allow any deviation even in the face of other values. Therefore, 'constitutionalism', according to him 'refers to the sort of ideology that makes this attitude seem sensible. So, he supposes 'this includes the claim that a society's constitution matters, that it is not just decoration, that it has an importance that may justify making sacrifices of other important values for its sake.'[23] Following this approach and discussing various existing views on constitutionalism, he concludes:

> I have argued that constitutionalism is not just an interest in constitutions, nor is it simply a recommendation that a country's constitutional arrangements should be put in written form. I have argued that it comprises a commitment to fundamental self-determination (in some versions a commitment to popular sovereignty) along with an ideology of restrained and limited government which in many ways is quite uneasy with and hostile to the idea of popular government and quite willing to neglect and sideline important tasks such as democratic empowerment.[24]

It seems that in this version of constitutionalism, Waldron has slightly watered down his previous perception of an antipathy between constitutionalism and

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[22] Waldron has at least three versions of this title. J Waldron, 'Constitutionalism: A skeptical view' in T Christiano & J Christman (eds), *Contemporary debates in political philosophy,* Blackwell Publishing, 2009, 267. The second is 'Constitutionalism: A skeptical view' 2010. https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1002&context=hartlecture. The third is New York University School of Law, Public Law and Legal Theory Research Paper Series Working Paper No. 10-87 (2011) cited in Lisa Lynn Miller, *The myth of mob rule: Violent crime and democratic politics,* Oxford University Press, 2016 This quotation is from the second (p. 3).

[23] Waldron, 'Constitutionalism' 2010, 3-4.

[24] Waldron, 'Constitutionalism' 2010, 45.

democracy where he noted 'the ideological antipathy between constitutionalism and many of democracy's characteristic aims' and ended by stating that

> I think it is worth setting a stark version of antipathy between constitutionalism and democracy 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 constitutional burden of ensuring that the people are not disenfranchised by the very document that is supposed to give them their power.[25]

Thus, he seems to be stating that constitutionalism should not completely ignore democratic decisions.

Following Waldron's democratic argument regarding constitutionalism, Richard Bellamy draws a distinction between legal and political constitutionalism, which he also finds is supported by Joseph Raz and Jurgen Habermas, and sums up that 'a democratic society in the inclusive, rights and equality respecting sense desired by legal constitutionalists comes from the political constitution embodied in democracy itself.'[26] Similarly, Colon-Rios develops a concept of weak constitutionalism to reconcile it with democracy, which he considers as a more fundamental and pervasive value with which constitutionalism must be reconciled and in case of impossibility of such reconcilement democracy must supersede constitutionalism, which is obvious from the exercise of constituent power, which lies ingrained in every constitution to engage in future episodes of democratic reconstruction.[27]

In line with the foregoing scholars, especially Waldron, Nick Barber gives a fresh, if not new, account of constitutionalism. Designating the existing account of constitutionalism 'negative', based on Max Weber's description of the state as 'a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory', Barber says that constitutionalism has so far been understood in terms of regulating or controlling the use of force by recognising certain negative rights of the individual against the state. Drawing on Waldron's view that 'maybe we are better off without the term' constitutionalism, he propounds the idea of positive constitutionalism according to which the state is expected to have the capacity to advance the well-being of its members. Such a state must be based on certain principles such as state sovereignty, the separation of powers, the rule of law,

[25] Jeremy Waldron, in Christiano & Christman, 279.

[26] Richard Bellamy, *Political constitutionalism: A republican defence of the constitutionality of democracy,* Cambridge University Press, Cambridge, 2007, 7.

[27] Joel I Colon-Rios, *Weak constitutionalism: Democratic legitimacy and the question of constituent power*, Routledge, London, 2012.

civil society, democracy and subsidiarity. Only such a state may fulfil its obligation of ensuring the well-being of its citizens, which is the primary justification for the existence of the state. The principles of constitutionalism are obtainable ideals based not in authority but in political theory which may also be found within the law of the state. 'All the principles of constitutionalism', says Barber 'ultimately find their origins in the characteristic purpose of the state: the advancement of the people's well-being' and '[a] good state, a state that is successful, will possess an institutional structure that is characterised by constitutionalism.'[28]

Describing the existing models of constitutionalism as negative models having their origins in an impoverished understanding of the state, he advances a richer account of the state 'that recognises its role in advancing the well-being of its people, generates a richer account of constitutionalism.'[29] Discussing in detail all the principles on which a state ensures the well-being of its citizens, mentioned above, Barber admits that exceptions may be made to them in their implementation and in fact '[a]ll real-world states fall short of the demands of constitutionalism' and in the process of making changes in the constitution to meet such demands, care must be taken of the costs and risks involved in such change.[30]

As is evident from the preceding discussion, the constantly increasing global engagement of scholars with constitutionalism is leading to its constant refinement and reinforcement. The background of early realisation and application of social liberalism in theory as well as practice, led to nations claiming and declaring the social state as one of the basic features of their constitutions as, for example, in the cases of Germany and France. Dieter Grimm, a widely known German scholar and former judge of the Federal Constitutional Court of Germany, explains this phenomenon by tracing the evolution of constitutionalism in the United Kingdom and the United States on the one hand and on the continent of Europe on the other hand. According to him, while the model of constitutionalism in the United States strictly developed on the basis of the concept of individual rights vis-a-vis the powers of the State, and the concept of representation in and control by Parliament in the United Kingdom as protector of the rights of the individual, on the continent it developed through the drawing of a distinction or creating a separation between the State and the society which:

[28] Barber, *The principles of constitutionalism*, Oxford University Press, 2018, 18.

[29] Barber, *The principles of constitutionalism*, 19.

[30] Barber, *The principles of constitutionalism,* 237.

> [S]tripped society of all means of political power and set [it] free while the State was equipped with the monopoly of power and then restricted. It is this difference that enabled rational binding of state power by law. Although it regulated the relationship between state and society, the latter held the entitled position as a matter of principle and the former the obligated position.[31]

However, he finds this position to be ever-changing for two reasons. One, because the state functions on the basis of adult franchise while the political parties remain unregulated by the constitution, and two, because of the vast economic power in private hands. While the former enters into all organs of the state and controls it according to its policies, the latter compels the state to act in line with its (society's) interests.[32]

That may be one of the reasons for social states being one of the basic features of most of the constitutions on the continent of Europe, which is also reflected in the Lisbon Treaty of 2007, which has a somewhat similar status as a constitution for the member States. The Treaty also assigns to social and economic rights incorporated in it the same status as the civil and political rights. This understanding of constitutionalism among the European countries seems to have percolated to many countries in Africa, Asia, and Latin America. Without in any way derogating from the concept of constitutionalism as propounded by the US or British scholars, it has given an additional dimension to it by also requiring the state to fulfil certain positive obligations towards its people. The Constitution of India and many other constitutions since the Second World War, including the most recent ones like the Constitution of Kenya, also incorporate similar understandings of constitutionalism.

Further, drawing attention to the historical, modern diversity and plurality of race, religion, language, culture and several other factors in all societies around the globe, James Tully has argued and justified, on philosophical and political grounds, for the accommodation of these diversities as an aspect of constitutionalism with a view towards learning to respect one another and to honour differences.[33] A constitution that ignores such accommodation and respect for diversity and plurality in a society fails to meet the requirement of constitutionalism. Several old constitutions that had ignored this aspect of constitutionalism have introduced it through either appropriate amendments, judicial interpretation or appropriate legislation and constitutional application. But the ones which have failed to do so are lacking in an

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[31] D Grimm, *Constitutionalism: past, present and future,* Oxford University Press, Oxford, 2016, 63.

[32] Grimm, *Constitutionalism*, 63.

[33] J Tully, *Strange multiplicity: constitutionalism in an age of diversity,* Cambridge University Press, Cambridge, 1995.

important aspect of constitutionalism even if they guarantee equality of treatment to all individuals. Instances of such failure may be found even in the constitutions of very advanced societies while attention must be drawn to increasing diversity in modern times through globalisation.[34]

In this way we find constitutionalism acquiring a prominent place in constitutional discourse. This is as shown, for example, in the Indian context, by Michael Kirby (the distinguished Australian former High Court Judge) & Ramesh Thakur who, in an article in the *Hindu*, commending a decision of the Supreme Court of India, decriminalising homosexuality among consenting adults, called constitutionalism the modern political equivalent of Rajdharma, the ancient Hindu concept that integrates religion, duty, responsibility and law.[35]

Along with these positive developments in constitutionalism, Günther Frankenberg has drawn our attention towards counter developments in constitutionalism which he designates "authoritarian constitutionalism" and describes 'an important phenomenon in its own right' and 'not merely a deficient or deviant version of liberal constitutionalism.'[36] It is the opposite of liberal or democratic constitutionalism that we have discussed so far. To quote him:

> In clinical terms, it can be described as a syndrome – a pattern of governance resulting from the co-occurrence of diverse, distinctive symptoms. Common symptoms are rigged elections or votes with highly implausible outcomes; detention without trial; little if any protection for minorities and little if any tolerance of opposition; gender inequality that suggests an intimate connection with patriarchy; extensions of constitutional tenure of office thinly legitimating sclerotic regimes' clinging to power; recourse to a quasi-dynastic principle by leaders grooming family members or cronies for succession; top-down administration of public arenas, and manipulation of rules of accountability virtually excluding political authorities from significant popular or judicial control, which is frequently replaced by ap-

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[34] Tully, *Strange multiplicity*, Chapter 6 in general and its conclusion in particular.

[35] 'Navtej Johar, a verdict for all times' *The Hindu* December 31 2018 at https://www.thehindu.com/opinion/op-ed/navtej-johar-a-verdict-for-all-times/article25866598.ece. The case is *Navtej Singh Johar and others v Union of India* (2018) 10 SCC 1.

[36] Günther Frankenberg, 'Authoritarian constitutionalism: Coming to terms with modernity's dreams and demons' Research Paper of the Faculty of Law of the Goethe University Frankfurt Number 3/2018, https://d-nb.info/1156326621/34 on 1 January 2020. Frankenberg has now published that paper in: H Gracia and G Frankenberg, *Authoritarian constitutionalism: Comparative analysis and critique*, Edward Elgar Publishing, Cheltenham, 2019. I have avoided making any cosmetic changes that appear in the latter version such as 'syndrome' in the original has been replaced by 'pathology' and at the end of the para a short sentence has been added which reads: 'And, almost always, xenophobia'. p. 4. The book consists of fifteen chapters and covers examples from almost all over the world including countries like France and Japan. Brief reference to authoritarian constitutionalism may also be found in M Tushnet, (ed), *Comparative constitutional law*, Edward Elgar Publishing, Cheltenham, 2017, 129.

peals to symbolic support; as well as promulgation of emergency law implemented by an exorbitant security apparatus of secret services, police, military.[37]

Frankenberg gives multiple examples of such regimes manifesting this syndrome, such as fascist regimes in Germany, Italy and Spain and statist regimes in Brazil and Portugal. He cites as well numerous examples of recent or current authoritarian regimes such as emergency measures in India, the Jim Crow laws in some of the southern states of US, Trump's presidency, Xi Ping's life-term presidency, multiple past and present regimes in Latin America and the Apartheid regime in South Africa and several autocratic regimes in East and South East Asia.

Such regimes have found justifications in constitutional theories such as those of Locke, Hobbes and Machiavelli for support for the idea that states have the power to act according to discretion for the public good without the support of law or sometimes even against it in case of Locke.[38] They have turned to Hobbesian logic for acquisition by the rulers of power for public good including for the implementation of neo-liberal policies[39] and to the Machiavellian maxim: Always do what circumstances demand for the procurement, maintenance and protection of your assets and utilise all strategic options and tactical skills you deem opportune.[40] Power is used as property to be perpetuated in generations of the same family, urgency is utilised as justification for authoritarian measures and several other tactics are employed to justify authoritarian constitutionalism. Thus, Frankenberg concludes:

> While one may very well criticize AC's [authoritarian constitutionalism's] main features – power as (private) property, participation as complicity, and the cult of immediacy – they should not be dismissed as theatrics because they may very well account for the appeal of the authoritarian temptation.[41]

Even though, when going back to the initial notion of constitutionalism summarised above, it appears that authoritarianism and constitutionalism are a negation of one other, looking at the frequency with which constitutional texts relying on constitutionalism are being used in practice to justify authoritarian exercise of power convinces us not to ignore the reality of that phenomenon.

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[37] Frankenberg, 'Authoritarian constitutionalism', para 5.

[38] Frankenberg, 'Authoritarian constitutionalism', para 11.

[39] Frankenberg, 'Authoritarian constitutionalism', para 19 and 25.

[40] Frankenberg, 'Authoritarian constitutionalism', para 19.

[41] Frankenberg, 'Authoritarian constitutionalism', para. 61.

Ghai on constitutionalism

As noted at the beginning of this paper, Ghai's engagement with constitutions and constitutionalism has been quite long and enormous. In the article cited earlier, dealing generally with constitutionalism with reference to McIlwain and SA de Smith,[42] he initially concentrates on three African scholars including himself – the other two being Okoth-Ogendo and Issa Shivji. In his essay he primarily discussed constitutionalism with reference to the nature of the state which required a change in the post-colonial states to a new process in state building and concluded that '[T]o understand the dynamics and functions of constitutionalism one has to uncover its social and economic bases, and thus transcend the formal boundaries of the law'.[43] Discussing further with reference to a few other African scholars who seem to have mixed constitutionalism with constitution, he says:

> The constitution is a set of rules and institutions that regulate the governing of the country. Constitutionalism is an ideology based on certain values, procedures and practices. … [T]he concept of constitutionalism at first focused on the supremacy of the constitution, as a means to control the people. Later it was used to limit the power of the state but in due course some powers had to be returned to the state. In paradoxical way, constitutionalism now requires an activist rather than a passive state. But the "activism" is not unregulated; the state is no longer distanced from the people – instead the people are the state.[44]

In referring to some of the African constitutions as being 'transformative constitutions' such as that of South Africa and Kenya requiring the state to desist from certain actions and measures and requiring it to take certain positive steps for such transformation, he again draws attention to the difference in the evolution of the state as well as the relationship between the state and the society in the West, while this is not the case with states in Africa. Therefore, in African countries, he concludes:

> The real task of establishing constitutionalism lies in other spheres: politics, the judiciary, the rise of professionalism, civic associations, and enlightened leadership. Perhaps the emphasis on constitutions (to the point that a new constitution is called for not only in cases of regime change, but also government change) has in that sense done Africa a disservice, distracting attention from the real task of building constitutionalism.[45]

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[42] *The New Commonwealth and its Constitutions*, Stevens and Sons, London, 1964, 106.

[43] Ghai, 'Constitutionalism: African perspectives', above fn 1 at 156.

[44] Ghai, 'Constitutionalism', 165.

[45] Ghai, 'Constitutionalism', 166.

Expressing similar views at another place, Yash and Jill Cottrell Ghai say:

> Constitutionalism is a complex concept, being both (a) source and limiter of power. It transcends the text and the supremacy of the constitution. The origins of what we call constitutionalism today lie outside the legal text. Constitutions were largely about the allocation of public power and the structure of the state, rather than values and principles. The ideas that we now associate with constitutionalism emerged in society, not the state, and reflected to a great extent the changing economic and class structures. These ideas served to mould the working of the constitution; they became the basis of 'conventions'. Conventions were the understandings in society on how state powers and constitutional procedures would be exercised or applied. Conventions reflected public morality and values, legitimacy of the political order, and relations of citizens to the state and with each other. The values underlying conventions became in a sense more important than the text; these values were internalized and became the rules of the political game.[46]

And again:

> Constitutionalism was originally largely directed towards what the state could not do. In the course of time, the desirability of democracy and judicial review was acknowledged and they were added to the understanding of constitutionalism. Gradually, new features, including human rights, protection of minorities, justice for marginalized groups and gender equality, were incorporated.[47]

The obligations of the state towards society have been constitutionalised especially since the making of the South African Constitution in 1996 which while retaining clear civil and political rights on the one hand gained justiciable economic and social rights on the other hand.[48] This has become an almost universal in recent constitutions, including the Constitution of Kenya,

The Constitution of Kenya

To return to Yash Ghai, or the constitution he was instrumental in developing. Detailing the history and summarising the provisions of the 2010 Constitution, Waruguru Kaguongo concludes that '[t]he 2010 Constitution of Kenya addresses the major issues that Kenyans have grappled with since independence, including

[46] Yash Ghai and Jill Cottrell, 'The state and constitutionalism in postcolonial societies in Africa' in U Baxi, C McCrudden and A Paliwala (eds) *Law's ethical, global and theoretical contexts: Essays in honour of William Twining,* Cambridge University Press, Cambridge, 2015, 180.

[47] Ghai and Cottrell, 'The state and constitutionalism in postcolonial societies in Africa,' 182.

[48] See sections 26 (housing), 27 (health care, food, water and social security) and 29 (education) of that Constitution.

corruption, ethnicity, marginalisation, violations of rights and fundamental freedoms, perennial land disputes and more.'[49] The Supreme Court of Kenya has also called it a transformative constitution.[50]

From the perspective of a well-disposed foreign observer, from a country that like Kenya was colonised by the British, the 2010 Constitution, uunderstandably, satisfies all the formal requirements of a constitution and constitutionalism. Fombad suggests that among the core elements of constitutional provisions required – if not sufficient – for constitutionalism are included: recognition and protection of fundamental rights and freedoms, the separation of powers, an independent judiciary, the review of the constitutionality of laws, the control of the amendment of the constitution and institutions that support democracy. To these, a good election system, people's understanding of politics by not putting too much confidence in the leaders as well as their consciousness about the dictatorial tendencies of the leaders may be added.[51] Some of these features and more may also be noted in the discussion of positive constitutionalism by Barber discussed above.[52]

The Constitution of Kenya vests the sovereignty of the nation in the people, makes itself the supreme law of the land and the country a Republic, provides for devolution of powers between the national and county governments, commits Kenya to the rule of law and asserts social justice and inclusiveness as national values. It incorporates a judicially enforceable and comprehensive Bill of Rights including civil and political as well as social and economic rights besides rights such as the right to clean environment, fair administrative action, access to justice and consumer rights, and it recognises in some detail the rights of minorities.

Detailed provisions are also made on affirmative action programmes remedying some of the pitfalls that exist in some other constitutions or their implementation as, for example, in case of India. All these rights have been designed in the international perspective taking advantage of similar provisions elsewhere, but they are also imbedded in the history and special context of Kenya.

For an Indian lawyer it is fascinating, and gratifying, to trace the ancestry of Kenyan manifestations of the new constitutionalism, in the form of economic social

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[49] Waruguru Kaguongo, Introductory Note on Kenya. http://www.katibainstitute.org/Archives/images/banners/further/Kaguongo-Introductory%20Note%20Kenya_FINAL.pdf Last accessed 08 June 2020.

[50] *The Speaker of the Senate & Another v Hon Attorney General & five others* (2013) eKLR.

[51] Charles Manga Fombad, 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' 59 *Buffalo Law Review* 4, 2011, 1007, 1014 and 1022.

[52] Ghai, 'Constitutionalism: African perspectives,' 143-169.

and cultural rights, which set a framework not just for how government conducts itself, but for what its purpose of governing should be.

When the Indian Constituent Assembly was debating the extent of rights that should be included, the issue of these rights was very important. India looked to the Republic of Ireland for some important ideas, and that country included, still includes, in its Constitution, directives as to social policy – but not as rights. India wonder whether it should go further and include social and economic matters as rights. In the end it decided against, fearing to raise unreasonable expectations in the people.[53]

By the late 1970s there was a sense in India that this was not enough, despite the Constitution insisting that these were 'fundamental in the governance of the country' and 'it shall be the duty of the State to apply these principles in making laws' (Article 37). Indians had waited long enough for this to be taken seriously. The courts, especially the Supreme Court, took matters into their own hands, and used the directive principles to give whole new dimensions to the right to life. Crucially it did not stop there but developed a new approach to remedies and procedure. Through public interest litigation (sometimes called social action litigation) it allowed individuals and organisations with no direct stake in the issue to bring cases on behalf of the 'weaker sections'. It allowed for less formality in starting such cases. And it took a far more active role in ensuring that the facts came before the courts, and in crafting appropriate remedies that were to be carried out over time and under court supervision.[54]

When South Africa came to make its own Constitution it faced the same dilemma, but reached the opposite conclusion: it should make socio-economic rights justiciable.[55] And to make this more practical it took from the Indian experience and expanded scope of standing, and a broad concept of remedies. The South African courts built on this by using the constitutional notion of 'appropriate relief' to develop the 'structural interdict' rather similar to the Indian 'continuing mandamus'.

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[53] See Uday Shankar, Divya Tyagi, 'Socio-economic rights in India: Democracy taking root.' *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 42, no. 4 (2009), 529-30 Accessed 6 December 2020. http://www.jstor.org/stable/43239539

[54] There are many accounts of these developments. A famous example is Upendra Baxi, 'Taking suffering seriously: Social action litigation in the Supreme Court of India' 1985 *Third World Legal Studies* 107. See also Sandra Fredman, 'Restructuring the courts: Public interest litigation in the Indian courts,' in her *Human rights transformed: Positive rights and positive duties,* Oxford University Press, 2008, 124-149.

[55] See Mirja Trilsch, 'What's the use of socio-economic rights in a constitution? - Taking a look at the South African experience.' *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 42, no. 4 (2009): 552-75. Accessed December 6, 2020. http://www.jstor.org/stable/43239540.

A few years later, Kenya did not agonise. The Constitution of Kenya Review Commission, chaired by Yash Ghai, was clear that social-economic rights were and must be recognised as rights. As the Commission says in its final report: 'The objects of review and the people's recommendations place great emphasis on social justice and the basic human needs. The Commission is convinced that these can only be achieved if economic and social rights are made justifiable [sc justiciable]'[56] and they remained so in all the various drafts of the constitution. In turn it drew on the South African language about expanded standing and appropriate relief. It went further to include the Indian idea about 'epistolary jurisprudence' – it called it informal documentation.[57] To my knowledge it has never been used – and in India is only allowed for petitioners not represented by lawyers.

Concluding remarks

Reports suggest that implementation of the Constitution has faced many challenges, including in terms of behaviour of the executive, and interference with the independence of the judiciary.

However, the tale of the determination of Kenyans in pursuing constitutional change may give some indications of the future. It is a tale of the astonishing persistence and commitment of democrats in Kenya and the energy with which Kenyans have monitored the implementation of the 2010 Constitution suggests that that determination has not been abated and that many Kenyans will use the 2010 Constitution as a basis on which to build a strong democratic order.[58]

As democracy is the best guarantee for the success of constitutionalism, let us hope that Kenya is on her way to strong constitutionalism as its democratic system progresses in the course of time, including by building on the experience of other countries with common elements in their backgrounds.

[56] page 104. Available online at http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf.

[57] Constitution of Kenya Article 22(3)(b).

[58] For a discussion on history and politics around the constitution in Kenya, see, Anders Sjögren, Onyango Oloo, and Shailja Patel, 'State, civil society and democracy in Kenya: Kenyans for Peace with Truth and Justice (KPTJ) and the political crisis of 2007-2008' in E Sahle (ed) *Democracy, constitutionalism and politics in Africa,* Palgrave MacMillan US, New York, 2017, 265.

Constitutions and constitutionalism in Melanesia

Anthony J Regan

Yash Ghai has written extensively about constitutionalism, with a particular focus on experience and lessons from Africa. Despite his generally pessimistic assessment of the extent to which constitutionalism has had a significant impact in Africa, he retains some optimism that constitutions that embody features directed to supporting constitutionalism might 'begin the process of progressive change'.[1] That would involve weakening the degree of control exercised by the narrow elite 'political-cum-business class',[2] and strengthening the capacity of the wide range of interest groups with a stake in the operation of constitutional limits on the state and the restructuring and re-orienting of the state to provide fair and effective administration and protect human rights.

While he has not made the same evaluation of constitutionalism in the four states of Melanesia, in the southwest Pacific – Papua New Guinea (PNG), Fiji, Solomon Islands and Vanuatu – Ghai has nevertheless had deep involvement in constitution-making processes in all four. In three of them (PNG, Solomon Islands and Vanuatu) he was a key adviser in the independence constitution-making processes, mostly in the 1970s. In all three cases the independence constitutions remain in place in 2021, a very different experience from Africa where most of the 1960s independence constitutions were replaced by much more repressive constitutions within a few years of independence. In some ways the Melanesian independence constitutions were similar, in aims and contents, to the much later 'democratising' constitutions developed in Africa from the early 1990s, PNG being the example with the strongest resonance here.

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1 Yash Ghai, 'Chimera of constitutionalism: State, economy and society in Africa', 2010, 14. https://www.up.ac.za/media/shared/Legacy/sitefiles/file/47/15338/chimera_of_constitutionalism_yg1.pdf, also in S. Dewa (ed). *Law and (in)equalities: Contemporary perspectives*, Eastern Book Company, Lucknow, 313-332.

2 Ghai, 'Chimera of constitutionalism'.

In the fourth Melanesian country, Fiji, where there have been three 'main' military coups[3] and four constitutions since independence in 1970, Ghai was involved as an adviser to key actors in the making of the third constitution (enacted in 1997), and in 2012 was chair of the Constitution Commission of Fiji, tasked with developing proposals for a new constitution intended to end six years of military rule following the 2006 coup. The Commission's draft constitution was rejected by the regime, which in late 2013 enacted Fiji's fourth constitution, one that in many ways entrenched key aspects of the military regime.

This chapter engages with Ghai's examination of African constitutionalism in relation to the 'democratising' constitutions, taking particular account of his insights about the role of the three factors he regards as determining the outcomes there, namely state, economy and society. The chapter briefly examines the longevity of the Melanesian independence constitutions before considering the content and the record of the actual operation of the constitutions in terms of: conduct of national government elections; adherence to rules about succession of governments; acceptance of judicial decisions on constitutional issues; accountability arrangements (inclusive of provision for independent accountability institutions); and respect for human rights.

In the first few years after the Melanesian independence constitutions came into operation, adherence to constitutional provisions on succession of government was seen as evidence of support for constitutionalism in the region.[4] Can the same claim still be made today? In considering factors relevant to understanding the outcomes in Melanesia, this chapter pays particular attention to the extent of the role of society, through examination of popular participation in constitution-making processes, participation in government, and the role of civil society. Does Melanesia's experience offer support for Ghai's hope that constitutions can themselves generate support for constitutionalism?

Melanesia

Strong criticisms have been levelled on the use of 'Melanesia' as the name of the southwest Pacific region where PNG, Fiji, Solomon Islands and Vanuatu are

[3] Some commentators claim there have been more than three coups, but this chapter uses the term 'coup' in the same way as J Fraenkel, 'The origins of military autonomy in Fiji: A tale of three coups' *Australian Journal of International Affairs*, 67(3), 2013, 327-341, note 1 on page 340.

[4] G Fry, 'Succession of government in the post-colonial states of the South Pacific: New support for constitutionalism?' *Politics* 18, 1983, 48-60.

located.[5] The main issues concern the colonial origins of the name and associated pejorative views of the relatively dark-skinned Melanesians (compared with their neighbouring fairer-skinned Polynesians).[6] For a number of reasons, however, people from the Melanesian region 'have appropriated a colonial concept and deployed it as an instrument of empowerment', and as a result the name is in general use.[7]

The approximate populations of the four countries in 2021 are: PNG, 9 million; Fiji, 900,000; Solomon Islands 700,000; and Vanuatu 300,000. Other than Fiji (where all but 5 per cent of the population speak either Fijian or Hindi as a first language[8]) linguistic and cultural diversity in Melanesia is unparalleled internationally: PNG has 830 languages; Solomon Islands 71 languages; and Vanuatu 108 languages.[9] For the most part, these languages are spoken by very small communities – in 2012 the median numbers of speakers per language was cited as 4,624 in PNG, 5,268 in Solomon Islands, and 1,683 in Vanuatu.[10] Creole languages are used for wider communication in PNG, Solomon Islands and Vanuatu. The picture in Fiji is dramatically different. There the population is divided into two main ethnic groups, I Taukei (indigenous Fijians), and Indo-Fijians who are the descendants of indentured labourers brought to Fiji under British colonialism in the late 19th century. This divide has been central to the emergence of ethnicity in politics in Fiji.

As for the reason for the small size of so many language and cultural communities: 'The single largest local factor contributing – has been isolation, caused by seas, challenging topography and intergroup strife'.[11] Language groups in most cases are not clearly defined political units, and small localised landowning clan and/or family groups within language groups generally constitute the main social group.

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[5] See S Lawson, '"Melanesia": The history and politics of an idea' *The Journal of Pacific History*, 48(1), 2013, 1-22, and the sources cited therein.

[6] There are also two main territories in Melanesia that are not independent, namely Papua (the western half of the main island of New Guinea) which since the 1960s has been a reluctant part of Indonesia, and New Caledonia, a French territory since the 19th century. Not operating under their own constitutions, their experience is not considered in this chapter.

[7] T Kabutaulaka, 'Re-presenting Melanesia: Ignoble savages and Melanesian alter-natives', *The Contemporary Pacific*, 27(1), 2015, 110-145 at 134.

[8] F Mangubhai, and F Mugler, 'The language situation in Fiji', *Current Issues in Language Planning,* 4(3&4), 2003, 367-459, at 378-381.

[9] M Landweer, and P Unseth, 'An introduction to language use in Melanesia', *International Journal of the Sociology of Language*, No.124, 2012, 1-3, at 2. Those authors note that together with the 37 languages in New Caledonia and the 273 languages in Papua (Indonesia), Melanesia has over 1,300 of the world's more than 6,900 'living languages' (at p.1).

[10] Landweer and Unseth, 'An introduction to language use in Melanasia', 2.

[11] Landweer and Unseth, 'An introduction to language use in Melanasia', 3.

Colonialism came late to Melanesia, beginning in the late 19th century, and took time to assert what was ever only a limited degree of control over the majority of the population. As Christian churches, modern transportation, communication, and education, as well as economic and government activities, all increasingly impact on resilient but adaptable pre-colonial social groups, changes are occurring in language and culture patterns, and new social groupings are emerging. Nevertheless, the small core social groups in most of Melanesia means that the role of ethnicity in electoral and wider politics is minimal, compared to African experience, the notable exception in that regard being Fiji. There is quite limited aggregation of economic, political and other interests through such bodies as trade unions, political parties, associations, NGOs, and so on.

Constitutionalism

Constitutionalism is generally understood as involving the imposition of effective limits on state action through the rule of law under constitutional government.[12] Writing about Kenya in 2014, Ghai puts forward a more complex and nuanced concept of constitutionalism, as reflected in the experience of many more 'modern' and liberal constitutions since 1990:

> Today, constitutionalism, though focused principally on the exercise of state power, encompasses a wider set of values and principles that must regulate the governance of the country. These concern not only limits on state power, but may require that state power be exercised positively to promote objectives such as equality and human rights, social justice and fair procedures. The granting of wider powers to the government so that it may fulfil this mandate also makes the control of power harder. This is the dilemma of modern constitutionalism, which brings in the sovereignty and participation of the people, and independent institutions to reinforce the protection of constitutional values and procedures. [13]

There are basic standards that a constitution needs to meet if, as De Smith put it as early as 1964, a 'contemporary liberal democrat' could 'concede that constitutionalism is practised in a country'.[14] De Smith's list involves: regular, free,

[12] Yash Ghai, 'The theory of the state in the Third World and the problematics of constitutionalism', in D Greenberg, SN Katz & MB Oliviero (eds) *Constitutionalism and democracy: Transitions in the contemporary world*, Oxford University Press, New York, 1993, 186-196 at 188.

[13] Yash Ghai, 'Constitutions and constitutionalism: The fate of the 2010 Constitution', in G Murunga, D Okello and A Sjogren (eds), *Kenya: The struggle for a new constitutional order*, Zed Books, London, 2014, 119-143, at 120.

[14] SA De Smith, *The new Commonwealth and its constitutions*, Stevens and Sons, London, 1964, 106.

elections on a wide franchise at regular intervals; freedom for a political opposition to operate; and effective legal guarantees of fundamental liberties enforced by an independent judiciary. Ghai adds to the list things a non-English, and I might add, more recent, remove "and I might add, more recent" analyst would regard as critical to constitutionalism being a reality. They are: a written constitution; entrenchment of the constitution itself; and a judicial duty to declare invalid laws that are inconsistent with the constitution.[15] More recently still, Ghai identifies the key aspects of what he calls the 'traditional understanding of constitutionalism associated with liberalism' as involving: 'limits on power, separation of powers, checks and balances, human rights, democracy, and the rule of law (including judicial review)'.[16] Elsewhere, Ghai adds additional key 'components of constitutionalism in Africa', namely: guarantees of economic and social development; decentralisation; freedom of religion; parity between communities; an electoral system 'congenial to a multi-ethnic people'; and 'time or term limits on control over power'.[17] Other observers add other elements, Fombad for example adding control of amendment of the constitution.[18]

De Smith emphasised the distinction between the 'formal sense' of constitutionalism – the various categories of constitutional rules just discussed – and its operation as a 'living reality'.[19] Constitutionalism really lives only when 'these rules curb the arbitrariness of discretion and are in fact observed by the wielders of power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty'.[20]

Critics of the poor record of constitutionalism in so many post-colonial states often forget that constitutionalism became a 'living reality' in Europe comparatively recently. Ghai explains in brief:

> Historically, the contemporary notion of constitutionalism is associated with the rise of capitalism in Europe in the seventeenth century. Nascent capitalism required a degree of

[15] Yash Ghai, 'Constitutionalism: African perspectives' in MP Singh (ed), *The Indian Yearbook of Comparative Law 2016*, 2017, 143-169, at 148.

[16] Yash Ghai, 'Ethnicity, decentralisation and constitutionalism: A comparative perspective', in CM Fombad and N Steytler (eds), *Decentralization and constitutionalism in Africa*, Oxford University Press, Oxford, 2019, 53-69, at 65.

[17] Ghai, 'Ethnicity, decentralisation and constitutionalism: A comparative perspective', 65. For other summaries by Ghai of the key elements of formal constitutionalism, see 'Chimera of constitutionalism', 3; and Ghai, 'Constitutions and constitutionalism', 2.

[18] CM Fombad, 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' *Buffalo Law Review*, 59(4), 2011, 1007-1108, at 1014.

[19] SA De Smith, 'Constitutionalism in the Commonwealth today' *Malaya Law Review,* 4(2), 1962, 205-20, at 205.

[20] Ghai, 'The theory of the state in the Third World', 188.

> autonomy for those engaged in the market economy, but at the same time it necessitated the enforcement of contracts that were promised in the private sector. This required the assistance of the state and in particular the judiciary to sustain the institution of private property and generate a degree of predictability in terms of the enforcement of an agreed set of rules and regulations. The law and its enforcement by the judiciary thus became a key basis of market economies. Such an arrangement came to be referred to as "constitutionalism".[21]

Hence constitutionalism did not emerge as part of a grand design, but rather as a slowly developing product of complex political and economic forces. In post-colonial states where state, economy and society all operate in very different ways than in Europe, it can be expected that the experience of constitutionalism is likely to also be different, and to vary amongst groupings of colonial state, depending on commonalities in terms of state, economy and society.

Constitutionalism is basically a description of a desirable outcome. The description alone does not help us understand how the outcome is achieved. So this chapter examines the extent to which constitutionalism is a 'living reality' in Melanesia, and if the record in that regard is better than in Africa, what it is that has contributed to that outcome.

Constitutionalism in Melanesia in practice: Key constitutional rules and their operation

In the space available, it is not possible to consider the provisions for and the operation of all of those aspects of the Melanesian constitutions regarded as critical to constitutionalism. Rather, the discussion concentrates on a few aspects generally seen as of importance to constitutionalism. It is also important to consider the longevity of the independence constitutions, which, in three of the four Melanesian states, involves an experience dramatically different to that of Africa (and much of Asia).

Longevity of independence constitutions

The PNG Constitution has been in effect continuously since 1975, and while more than 40 amendments have been made to it, some quite extensive, they have not altered the basic features of the constitution. The Solomon Islands Constitution

[21] Ghai, 'Constitutions and constitutionalism', 1.

has been in effect from 1978, though it effectively ceased to operate for a period following coup in 2000. Further, since 2000, processes to develop a new and highly federal constitution have been pursued, though not without controversy and so far without success.[22] The Vanuatu Constitution has been in operation since 1980. All three constitutions reflect many of the 'values and principles' of constitutionalism outlined above, the PNG constitution doing so more emphatically than do the Solomon Islands and Vanuatu documents.

As with so much else in relation to constitutions and constitutionalism in Melanesia, Fiji is the major exception, both in relation to the longevity of the independence constitution, and the extent to which the current, 2013 Constitution reflects the 'values and principles' of constitutionalism.

In terms of longevity, dissatisfaction with various approaches to sharing power between the two main ethnic communities (indigenous Fijians and Indo-Fijians) has been at the heart of political and constitutional instability since independence in 1970. Reactions against the operation of varying arrangements for communal electoral arrangements and power-sharing under the first three constitutions have generated three main coups.[23] Fiji's 1970 independence Constitution, which dealt with ethnic division through communal voting and power-sharing, operated until 1987, when a military coup abrogated the Constitution. The military regime enacted a new constitution in 1990, which gave the military immunity from prosecution, and vested it with 'overall responsibility' for the 'security and well-being of Fiji and its peoples'.[24] Strong internal and international pressure saw a constitutional commission established to generate proposals, subsequently modified to some extent by a parliamentary committee,[25] providing the basis for the 1997 Constitution, which maintained communal voting and power-sharing.

In December 2006, another military coup occurred. The '1997 Constitution was put into cold storage, though the government declared its resolve to return to constitutional rule, albeit after some fundamental reforms, particularly towards

[22] J Corrin, 'Breaking the mould: Constitutional review in Solomon Islands' *Revue Juridique Polynesienne*, 13, 2007, 143-168; Ian Scales, 'The coup nobody noticed: The Solomon Islands western state movement in 2000'. *Journal of Pacific History* 42(2), 2007, 187-209; and A Rodd, 'Adapting post-colonial island societies: Fiji and Solomon Islands in the Pacific' *Islands Studies Journal,* 11(2), 2016, 505-520, at 511-514.

[23] For discussion of the making and main features of the first three Fiji constitutions, see Yash Ghai, 'Ethnicity, politics and constitutions in Fiji', in D Munro and J Corbett (eds), *Bearing witness: Essays in honour of Brij V. Lal,* ANU Press, Canberra, 2017, 177-206; and J Fraenkel, 'The origins of military autonomy in Fiji'.

[24] *Constitution of the Sovereign Democratic Republic of Fiji (Promulgation Decree) 1990*, s. 94(3).

[25] Ghai, 'Ethnicity, politics and constitutions in Fiji', 190-192.

a non-racial Fiji'.[26] When a 2009 judicial decision declared the 2006 coup to be unconstitutional and pronounced the 1997 Constitution as still being in effect, the regime abrogated the Constitution, and dismissed the judges, replacing them with its own appointees. In 2012, the regime established the Constitutional Commission of Fiji, chaired by Yash Ghai, but its draft constitution was rejected by the regime, which enacted its own non-racial constitution late in 2013, and it continues in operation in 2021.

In terms of the 2013 Fiji Constitution not reflecting the 'values and principles of constitutionalism', the point can be highlighted by reference to just a few of its significant features. First, like the post-coup 1990 Constitution, the 2013 Constitution reflects the position of the Republic of Fiji Military Forces (RFMF) about having a central role in governance and in keeping governments accountable, and ultimately not being 'subordinated to constitutional rule'.[27] The strength of military views in that regard were underlined by the RFMF submission to the Ghai Commission in 2012 in which 'the military saw itself as "the last bastion for law and order in Fiji" and with an extra-constitutional responsibility for "the governance of this country, ensuring that peace, prosperity and good governance is practiced and adhered to"'.[28] The 2013 Constitution provides that: 'It shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence and well-being of Fiji and all Fijians'.[29] That provision has been cited by a military officer as justifying involvement of military personnel in conducting mass arrests of people alleged to have been engaging in military style training to prepare to oppose the regime.[30]

Second, the 2013 Constitution is clearly designed to concentrate power in the positions of prime minister and attorney-general and to maintain key military regime figures in those positions. In relation to the prime minister, Kirkby summaries:

> The prime minister has extensive new powers to appoint, directly or indirectly, the top appellate judges and a majority of members in each of the 'independent' constitutional bodies entrusted with protecting the constitution (as well as remove and set remuneration for these office-holders). Thus the prime minister has become a super-office without mean-

[26] Ghai, 'Ethnicity, politics and constitutions in Fiji', 193.

[27] C Kirkby, 'Analysis: Constitution of Fiji'. The University of Melbourne, Melbourne Law School, 2015, https://blog-iacl-aidc.org/new-blog/2018/5/27/analysis-constitution-of-fiji.

[28] Cited in Kirkby, 'Analysis'.

[29] S.131(2).

[30] Kirkby, 'Analysis'.

> ingful checks. Even future elections will be controlled by appointees of the prime minister. Ultimately, the only check on the prime minister is an extra-constitutional one: the military.[31]

Third, the Constitution continues in force over 400 legislative decrees, made by the post-2006 coup military regime, many of them quite repressive, that are not subject to judicial review and even if they are inconsistent with the Constitution remain in force until repeal or amended.[32] Fourth, the Constitution reflects both a sense of impunity for military involvement in Fiji coups and perhaps some insecurity about possible accountability should a more liberal constitution be adopted the future. It continues in place the immunity under the 1990 Constitution for coup-related actions granted to those involved in the 1987 coup. More significantly, it grants a general immunity to members of the military and others involved in the military regime installed by the 2006 coup,[33] and provides that the immunity provisions 'shall not be reviewed, amended, altered, repealed or revoked'.[34] Fifth, the provisions on amendment of the constitution reflect the same insecurity evident in the immunity provisions. An amendment is virtually impossible, as it will require two separate three quarters majority votes in the legislature and a three-quarters majority in a referendum.[35] Two elections have been held under the 2013 Constitution, in 2014 and 2018, under electoral arrangements tightly controlled by the prime minister and the attorney-general and the repressive decrees.

Selection of political leaders in regular elections

In relation to popular participation in selection of political leadership through elections for the national government, regular elections have been held at the prescribed times in all save Fiji, where the abrogation of constitutions has caused interruptions to the previously prescribed electoral arrangements. Fiji has used various electoral systems (including the alternative vote system under the 1997 Constitution) to achieve communal voting by the two main ethnic communities until the 2013 Constitution abolished both communal voting and ethnic power sharing, and introduced the non-racial open list proportional representation voting system.

[31] Kirkby, 'Analysis'.

[32] S.173.

[33] Ss.155-157.

[34] S. 158

[35] S. 159.

Different electoral systems operate in the other three countries. PNG used the first-past-the-post system until 2002, and thereafter has used the limited preferential system. Solomon Islands uses the first-past-the-post electoral system. In Vanuatu, elections involve two electoral systems, the first-past-the-post system in eight single-seat constituencies (in the 2020 elections) and the single non-transferable vote (intended to be proportional) in ten multi-member (from two to seven members each) constituencies.[36]

In these three countries political parties are extremely weak.[37] Although this was once thought to be partly related to the use in PNG (to 2002) and Solomon Islands of the first-past-the-post system,[38] the move from 2002 in PNG to the limited preferential system has seen little or no strengthening of parties, nor reduction in the very large number of candidates standing for elections, a large proportion as 'independents' – indeed numbers are increasing.[39] The generally small size of language and pre-colonial social groups in the three countries, and the very limited development of aggregating social and economic structures together with the lack of anti-colonial protest generating national political parties means persons intending to vie for political office seek their support at the very local level, often on a narrow ethnic basis. Politicians do not gain support through political party membership or policy positions, but through 'clientelism, sustained by regular favours to … followers'.[40]

In these three states, low levels of economic 'development' mean that aspiring or sitting politicians 'have little independent economic base, either as individuals or as a class',[41] and the rapid turnover of elected members in each election (usually over 60 per cent in PNG) contributes to a strong tendency for those who gain office to

[36] H Van Trease, 'The operation of the single non-transferable vote system in Vanuatu' *Commonwealth & Comparative Politics*, 43(3), 2005, 296-332.

[37] Though that was not the case for the first few years after independence in Vanuatu, where two parties – one anglophone the other francophone – dominated until the late 1980s see M Morgan, 2008, 'The origins and effects of party fragmentation in Vanuatu', in R Rich et al (eds), *Political parties in the Pacific Islands*, Australian National University Press, Canberra.

[38] E.g. see Yash Ghai, 'Establishing a liberal political order through a constitution: The Papua New Guinea experience' *Development and Change*, 28, 1997, 303-330, at 315-6.

[39] N Haley, 'Assessing the shift to limited preferential voting in Papua New Guinea: Electoral outcomes' *In Brief* 2015/30a, Australian National University, Department of Pacific Affairs, Canberra; and P Brent, 'Review of limited preferential voting in Papua New Guinea', 2017, 13. http://mumble.com.au/misc/Brent%20review%20of%20LPV%20in%20PNG%20upload%202020.pdf.

[40] Ghai, 'Establishing a liberal political order', 314. See also T Wood, 'The clientelism trap in Solomon Islands and Papua New Guinea and its impact on aid policy' *Asia Pacific Policy Studies*, 2018, 1-14.

[41] Ghai, 'Establishing a liberal political order,' 314.

use access to the state as the primary instrument of accumulation. These factors contribute to systemic corruption, including in the form of political control by sitting members of parliament of significant constituency development funds,[42] a critical factor contributing to clientelism.

While for the first 15 to 20 years after independence, elections in PNG were generally seen as free and fair, in the past 20 years mismanagement and possibly some corruption have undermined their legitimacy.[43] Elections in Solomon Islands[44] and Vanuatu[45] are generally seen as better run, though both candidate and voter behaviour are undoubtedly heavily influenced by clientelistic practices there, as well as in PNG.[46]

Rules on succession of leadership

The PNG, Solomon Islands and Vanuatu constitutions provide for variants of the Westminster system, with prime ministers taking office as a result of election by the legislature, while in Fiji the prime minister is the leader of the political party that has won (winning) more than 50 per cent of the vote in a general election, or is otherwise elected by Parliament.[47] Prime ministers and governments can only be removed following a general election or through votes of no confidence.[48]

[42] Ghai, 'Establishing a liberal political order,' 314. In relation to constituency development funds and their operation and impacts: in Solomon Islands, see C Wiltshire et al. 'Constituency Development Funds and electoral politics in Solomon Islands', part one and part two, DPA *In Briefs 2020/18* and *2020/19*, Australian National University, Canberra, 2020; K Baker, 'The surprising sameness of the Solomons elections', Lowy Institute, *The Interpreter,* 23 April 2019, https://www.lowyinstitute.org/the-interpreter/surprising-sameness-solomons-elections; and J Batley, 'Constituency development funds in Solomon Islands: State of play', DPA *In Brief* 2015/67, Australian National University, Canberra, 2015. In relation to PNG, see M Laveil, 'PNG's MP funding: volatile and unaccountable'. DevPolicy Blog. Crawford School, Australian National University, Canberra, 2021, https://devpolicy.org/pngs-mp-funding-20210708/. In relation to Vanuatu, see W Veenendaal, 'How instability creates stability: The survival of democracy in Vanuatu' *Third World Quarterly*, 42(6), 2021, 1310-1346.

[43] N Haley, and K Zubrinich, *2017 Papua New Guinea General Elections: Election Observation Report*. DPA, The Australian National University, Canberra, 2018. http://dpa.bellschool.anu.edu.au/sites/default/files/uploads/2019-04/png_report_hi_res.pdf.

[44] N Haley and K Zubrinich, 'Election observation in Solomon Islands' *In Brief 2015/6*, Australian National University, Canberra, 2015.

[45] Freedom House, 'Freedom in the world, 2020: Vanuatu', https://freedomhouse.org/country/vanuatu/freedom-world/2020; see also A Jowitt, 'Free and fair elections: Societal challenges to Vanuatu's electoral system', *Kasarinlan: Philippine Journal of Third World Studies,* 13(2), 1997, 79-90.

[46] Wood, 'The clientelism trap'.

[47] *Constitution of the Independent State of Papua New Guinea* s 142; *Constitution of the Republic of Fiji* s.93, *Constitution of Solomon Islands* s 33 and Sch 2; and *Constitution of Vanuatu* s 39 and Sch 2; (hereafter *PNG*, *Fiji, Solomon Islands*, and *Vanuatu*).

[48] *PNG* s.145; *Fiji* s.94; *Solomon Islands* s 34; *Vanuatu* s 41.

Unlike post-colonial Africa, there has been no instance of one party rule, though there has been one case of significant autocratic concentration of power. In Fiji the former Fiji military commander and current prime minister (Bainimarama) was a post-coup military ruler from 2002-2001 and from 2006 to 2014. He became prime minister after the 2014 and 2018 elections, which were conducted under a constitution written by the military regime that he headed. Of the more than 400 decrees made by that regime, some 'are draconian, [and] place … limits on the checks and balances within its arena of political contestation'.[49] The Constitution and the decrees include 'tight regulation on the registration of political parties and their funding … and the wide ranging powers conferred on the Registrar of Political Parties who is also the Supervisor of Elections', and who is a political appointee.[50]

Succession rules have been challenged in various ways since the late 1980s, most notably in Fiji and Solomon Islands, where coups have removed elected government in 1987, 2000 and 2006 in Fiji, and in 2000 in Solomon Islands. In both countries ethnic divisions have been at the heart of conflicts or tensions contributing to the coups. (In Solomon Islands, ethnicity was among factors involved in violence from 1998 to 2002 and a coup in 2000, mainly related to tensions arising from uneven economic development between the large islands of Guadalcanal and Malaita and associated internal migration from Malaita to Guadalcanal.[51])

What has been termed a 'political coup'[52] in PNG removed Prime Minister Somare from office in mid-2011 when he was absent from the country for an extended period due to treatment of serious illness. He was removed by a vote of the Parliament without constitutional basis, and despite two judgments of the Supreme Court (December 2011 and May 2012) finding Somare's removal to be unconstitutional, Prime Minister O'Neill, in office without constitutional basis, refused to accept the judgments. The complex consequential constitutional and

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[49] P Carnegie, V Naidu and S Tarte, 'Elections and the chain of democratic choice' *The Journal of Pacific Studies,* 40(2), 2020, 6-14, at 10.

[50] Carnegie, Naidu and Tarte, 'Elections and the chain of democratic choice', 10.

[51] For a discussion of the complex manifestations and roles of ethnicity in the Solomon Islands 'tensions', see J Braithwaite, et al, *Pillars and shadows: Statebuilding as peacebuilding in Solomon Islands.* Canberra: ANU Press, 2010, 95-108.

[52] R May, 'Papua New Guinea's "political coup": The ousting of Sir Michael Somare'. *SSGM Briefing Note No.1/2011,* Australian National University, Canberra, 2011, http://dpa.bellschool.anu.edu.au/experts-publications/publications/1426/papua-new-guineas-%E2%80%9Cpolitical-coup%E2%80%9D-ousting-sir-michael-somare.

political confrontation lasted 1299 months, until resolved by a mid-2012 national election (below).[53]

In PNG there has been: two main inept coup attempts, one by the Police Commissioner in 1990 and one by an army officer early in 2012, which was part of the extended crisis following the unconstitutional removal from office of Somare in mid-2011; the attempted manipulation of constitutional provisions by a prime minister in 1993 in order to gain 18 months in office free from motions of no confidence;[54] the adjournment of Parliament for periods of many months in order to escape motions of no confidence (and though the Supreme Court has made rulings on the operation of constitutional provisions about the amount of time Parliament must sit in any 12 month period, the rulings have been ignored on several occasions); and the standing aside of the Prime Minister in April 1997 forced by pressure from the Defence Force commander and associated urban unrest following the Sandline affair, in which PNG Defence Force elements ousted mainly African mercenaries engaged by a British firm for the PNG government with the aim of defeating the Bougainville rebels and reopening the very large copper and gold mine shut down in 1989 by the violent conflict in Bougainville.[55] In Vanuatu the constitutional rules on succession have been bent or ignored by members of Parliament until court decisions have resolved the problems.[56]

Judicial decisions on significant constitutional issues

In all four countries many important constitutional rulings have been accepted by governments, including a major 1994 PNG Supreme Court decision finding the

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[53] For an overview of the events of 2011-12 and their aftermath, see: May, 'Papua New Guinea's "political coup"'; R May, 'Papua New Guinea under the O'Neill Government: Has there been a shift in political style?'. *SSGM Discussion Paper 2017/6*, Australian National University, Canberra, 2017; and A Regan, 'Samoa's constitutional crisis and the dangers that have gone before' *The Interpreter,* Lowy Institute, Sydney, 2021, https://www.lowyinstitute.org/the-interpreter/samoa-s-constitutional-crisis-and-dangers-have-gone.

[54] The manner in which the then Prime Minister sought to remain in office was the subject of strong criticism by the Supreme Court in the decision which overruled the vote of the Parliament which installed the Prime Minister for the eighteen-month period – see *Haiveta v Wingti and Ors (no.3)* [1994] PNGLR 197.

[55] For the Sandline affair and its aftermath, see: S Dinnen, R May and A Regan (eds) *Challenging the state: The Sandline Affair in Papua New Guinea,* Research School of Pacific and Asian Studies, Australian National University, Canberra, 1997; S Dorney, *The Sandline affair: Politics and mercenaries and the Bougainville crisis,* ABC Books, Sydney, 1998; ML O'Callaghan, *Enemies within: Papua New Guinea, Australia, and the Sandline Crisis: The inside story,* Doubleday, Sydney, 1999.

[56] D Ambrose, 'A coup that failed? Recent political events in Vanuatu', *The Journal of Pacific History*, 31(3), 53-66 ; and B Bohane, 'New Vanuatu Government hanging by a thread', *Sydney Morning Herald* 18 April 2001, 8.

resignation and immediate re-election of a prime minister intended to evade impacts of constitutional no-confidence motion rules to be unconstitutional, subsequently resulting in the replacement of the errant prime minister (*In re Haiveta v Wingti and ors (No.3)* [1994] PNGLR 197).

On the other hand, in both Fiji and PNG, major constitutional decisions in relation to challenges to actions of those in power have been rejected, and in both cases retaliatory action has been taken against the judiciary by the government. In Fiji, the most significant example concerns the 2009 rejection by the military regime of the Fiji Court of Appeal judgment in *Qarase v Bainimarama* (unreported decision, Court of Appeal, Fiji, 9 April 2009).[57] Of course, the undermining of the role of the judiciary by the rejection of that decision was severely exacerbated by the almost immediate removal from office of the judges, and there has been little evidence of judicial activism of any kind since then. The PNG Supreme Court decisions of 2011 and 2012 rejected by Prime Minister O'Neill have already been mentioned. In response to the late 2011 judgment, the O'Neill government initiated a series of actions against the Supreme Court:

> In February 2012, an unsuccessful attempt was made to suspend the Chief Justice from office. In March, he was arrested by police on a charge of perverting the course of justice (the national court quickly putting a permanent stay on the criminal charges). Later in March, a statute was passed giving parliament power to suspend and refer a judge for investigation and possible dismissal on various grounds, mainly related to bias. In April, Parliament legislated (contrary to the PNG Constitution) to prevent judgments in constitutional references – such as the December 2011 judgment – from having binding effect.[58]

The 2011-12 constitutional and political crisis was resolved when O'Neill was returned as prime minister in the mid-2012 national elections. The Chief Justice then presided at the opening of Parliament, and the government subsequently, and quietly, discontinued all executive and statutory action against the judiciary. Rejection of the two Supreme Court decisions was largely justified by the O'Neill government in terms of arguments about the supremacy of parliament over the judiciary, and the clash of that view with the constitutional analysis by the Supreme Court has never been resolved. On the other hand, the 2011-12 precedent set by O'Neill has not been followed since, there having been no subsequent overt rejection of judicial decisions by the executive government or parliament.

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[57] The judgment is discussed by A Twomey, 'The Fijian Coup cases: The Constitution, reserve powers and the doctrine of necessity', *Australian Law Journal* 83, 2009, 319-330.

[58] Regan, 'Samoa's constitutional crisis'.

In both Solomon Islands and Vanuatu, there has been more general acceptance by politicians of judgments on constitutional issues, some with significant political consequences. In Solomon Islands, it has been common for politicians to use legal proceedings to resolve disputes involving the constitutional procedures for no confidence motions.[59] On the other hand, there is evidence of a problem in Solomon Islands, particularly under some prime ministers, of ignoring constitutional and legal requirements, for example about appointments to and removal from significant offices, with no action being taken to mount judicial challenges to such prime ministerial actions.[60]

In 2015 in Vanuatu, 14 members of Parliament (MPs) – almost 30% of parliament – were convicted of bribery and corruption, but shortly after the convictions were recorded, when the Vanuatu president was overseas, the speaker, then acting president, pardoned himself and the 13 other convicted MPs. The Supreme Court then ruled the pardons to unconstitutional, and the MPs received substantial prison sentences.[61] Further, they were all convicted, in separate proceedings, of breaches of the Leadership Code (under the Vanuatu Constitution) and penalised by dismissal from office and disqualification from holding elected or appointed office for ten years.[62] The acceptance by those in power of the rulings in the remarkable succession of challenges and appeals involved here is not unique. More than one study of Vanuatu has found that politicians have sought and accepted rulings from the Supreme Court in a number of constitutional and political crises.[63]

In all four Melanesian countries, there are significant problems with access to the court, both in pursuit of accountability and enforcement of human rights

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[59] See, for example, R Barltrop, 'Constitutional crisis in the Solomon Islands' *The Round Table*, 84 (Issue 335), 1995, 343-351; J Fraenkel, 'Governors-General during Pacific Island constitutional crises and the role of the Crown' *Commonwealth & Comparative Politics*, 54(1), 2016, 1-22; J Molea, '*Wale v Governor-General*: The bounds of judicial review in Solomon Islands' *Small States*, 2020, 127-139. https://www.wgtn.ac.nz/__data/assets/pdf_file/0006/1762701/Molea.pdf; and J Foukona, 'Solomon Islands' *The Contemporary Pacific,* 32(2), 2020, 595-605.

[60] See, for example, C Moore, 'Uncharted Pacific waters: The Solomon Islands Constitution and the Government of Prime Minister Manasseh Sogovare, 2006-2007', *History Compass*, 6(2), 2008, 488-509.

[61] M Forsyth and J Batley, 'What the political corruption scandal of 2015 reveals about checks and balances in Vanuatu governance' *The Journal of Pacific History*, 51(3), 2016, 255-277; D Paterson, 'Chronicle of the months of political and constitutional crisis in Vanuatu, 2014, 2015' *Journal of South Pacific Law*, Volume: 2015, no.02. https://www.usp.ac.fj/index.php?id=19562; H Van Trease, 'Vanuatu', *The Contemporary Pacific*, 28(2), 2016, 473-488; and H Van Trease, 'Vanuatu', *The Contemporary Pacific*, 29(2), 2017, 361-373.

[62] Forsyth and Batley, 'What the politicial scandal of 2015 reveals', 262-265.

[63] Forsyth and Batley, 'What the political corruption scandal reveals', 271-273; M Forsyth, 'Understanding judicial independence in Vanuatu', *SSGM Discussion Paper 2015/9,* Australian National University, Canberra, 2015, 2; and Veenendaal, 'How instability creates stability', 2021, 10.

(below). In part because of anticipation of such problems, the PNG Constitution seeks to enhance its extensive system of constitutional checks and balances by giving a wide range of government bodies the right to initiate constitutional review proceedings.[64] To the early 2000s, such actions were frequent, especially those initiated by the Ombudsman Commission, but subsequently the frequency of such actions reduced. The right to standing to seek constitutional review by individual citizens is much narrower.[65] In 2014, the Supreme Court ruled on an application for standing by such a citizen (a former Chief Ombudsman) to challenge two constitutional amendments that extended the periods following an election in which a government was free from the threat of motions of no confidence (one from six to 18 months, the other from 18 to 40 months). The citizen gave evidence of failed efforts to persuade constitutional officeholders to initiate the necessary constitutional action, and in taking note of those efforts the Court observed:

> It is a reflection of a certain degree of 'constitutional apathy' that has been developing for some time. The authorities that would be expected to take a great deal of interest in constitutional issues appear to be sleeping at the wheel.[66]

Accountability

All four constitutions place strong emphasis on accountability in that they:

- codify variants of the principles of parliamentary control of the executive, including provision for collective responsibility of the political executive (often called the 'Cabinet'),[67] removal through votes of no confidence, scrutiny of public finance,[68] and provision for committee systems;[69]
- all save Fiji provide for independent ombudsman institutions,[70] and all four contain codes of conduct for leaders,[71] the Leadership Code being a

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[64] *PNG* s.19.

[65] *PNG* s.18.

[66] *Application by Ila Geno* [2014] PGSC 2; SC1313 (28 February), para.40.

[67] *PNG* s.141; *Fiji* s.91(2); *Solomon Islands* s.34; *Vanuatu* s.41.

[68] *PNG* ss.209-216; *Fiji* ss.139-148; *Solomon Islands* ss.100-109; *Vanuatu* s.23.

[69] *PNG* ss.118-123; *Fiji* s.70; *Vanuatu* s.21.

[70] *PNG* ss.217-220; *Solomon Islands* ss.96-99; and *Vanuatu* ss.61-65. *Fiji* provides for an as yet to be established Accountability and Transparency Commission (s.121), as well as an Independent Commission against Corruption (s.115).

[71] *PNG* ss.26-28; *Fiji* s.149; *Solomon Islands* ss.93-95; *Vanuatu* ss.66-68.

particularly significant part of the PNG Constitution;[72]

- all provide for independent offices of auditor general[73] and of public prosecutor or director of public prosecutions,[74] each free from direction and control;
- all provide for independent judicial arms,[75] with extensive judicial powers to interpret and apply the constitutions;[76]
- all provide for independent constitutional offices, either with roles concerning accountability of the main arms of government (especially of the executive) or other politically sensitive roles (such as electoral commissions).

The PNG and Fiji constitutions contain especially elaborate arrangements in regard to independence of accountability institutions (and other 'constitutional office-holders' such as members of the Electoral Commission).[77] The Fiji arrangements, though elaborate, provide limited real independence, for the Constitutional Offices Commission that appoints people to the supposedly independent bodies is firmly under control of the executive government, with four of the six positions being the prime minister and the attorney-general and two others appointed by the head of state on the advice of the prime minister.[78]

The evidence indicates that the impact of the various accountability arrangements seems to be reducing: corruption in government and bureaucracy appears to be a significant problem, and the responses of accountability institutions to be ineffective. In the country rankings in Transparency International's 2020 Corruption Perceptions Index which assesses community perceptions of public sector corruption in 180 countries, PNG ranked 142, Solomon Islands 78 and

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72 See G Toop, 'The Leadership Code', in A Regan, O Jessep and E Kwa (eds), *Twenty years of the Papua New Guinea Constitution*, Law Book Co, Sydney, 2001, 213-232.

73 *PNG* ss.213-4; *Fiji* ss.151-152; *Solomon Islands* s.108; *Vanuatu* s.23.

74 *PNG* ss.176-7; *Fiji* s.117; *Solomon Islands* s.91; *Vanuatu* s.53.

75 *PNG* ss.168-183; *Fiji* ss.97-114; *Solomon Islands* ss.77-88; *Vanuatu* ss.45-7.

76 *PNG* ss.18-24; *Fiji* s.98(3)(c); *Solomon Islands* s.83; *Vanuatu* s.51.

77 *PNG* ss.221-225 and *Fiji* ss.132-138. For a discussion of the PNG provisions, see A Regan, 'Accountability of government as a constitutional imperative: Protection of the independence of constitutional office-holders', in B Lal and T Vakatora (eds) *Fiji and the world – Research papers of the Fiji Constitution Review Commission,* Vol.2. USP, School of Social and Economic Development, Suva, 1997.

78 *Fiji* s.132(2).

Vanuatu 75.[79] Fiji was not included in the 2020 rankings, the last year in which it was ranked being 2005, when it was 55 out of 180.[80]

On the basis of these assessments of perceptions, the corruption situation in PNG would appear to be much worse than in the other three countries. This has been confirmed by various studies. For example, a 2021 analysis of a survey of perceptions of public servants in several parts of the country found that 98 per cent believed that corruption amongst public servants was 'common or very common', most believing that 'corruption helped grease the wheels of government: two-thirds believed that it is hard to get things done without paying a bribe'.[81] A 2016 study by the same author stated that outside assessments indicated that 'PNG has a serious problem with corruption' and that internally there was 'a great deal of consternation about perceived growing levels of corruption'.[82] People in PNG believed that the state was 'central to causing corruption', with politicians 'at the centre of claims of corruption' in relation to 'corruption in the forestry sector', 'misuse of their growing constituency funds', 'cooperating with business people to defraud the state', and 'other nefarious acts.'[83]

The array of internal 'anti-corruption responses', including the Ombudsman Commission, the Leadership Code, an anti-corruption task force (established in 2011), the Auditor General, the police, and the Public Prosecutor, were all criticised as ineffective, as were a range of international anti-corruption efforts. Collectively they failed 'to substantively engage with three key issues': the first was 'silence' around politics, and in particular money-laundering by PNG elites in Australia; second, was 'silence' around private sector actors in perpetuating corruption; and third was 'silence' around 'structural constraints', so that 'people support corrupt activities [by politicians and bureaucrats] because they are poor and beholden to cultural obligations'.[84]

In Fiji, the need for a clean-up of allegedly systemic corruption was a justification given for the 2006 military coup, and though the public perception of

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[79] Transparency International, *Corruption Perceptions Index, 2020,* 2021 https://www.transparency.org/en/cpi/2020/index/nzl.

[80] https://tradingeconomics.com/fiji/corruption-rank.

[81] G Walton, 'Good governance, corruption, and Papua New Guinea's public service', in H Sullivan et al. (eds), *The Palgrave Handbook of the Public Servant*, Proquest Ebook Central, Switzerland, 2021.

[82] G Walton, 'Silent screams and muffled cries: The ineffectiveness of anti-corruption measures in Papua New Guinea' *Asian Education and Development Studies*, 5(2), 2016, 211-236, at 211.

[83] Walton, 'Silent screams and muffled cries, 214.

[84] Walton, 'Silent screams and muffled cries, 219-221.

corruption was reported as less there than in some other Pacific countries, there was undoubtedly considerable corruption.[85] The situation since 2006 is less clear.

In relation to Solomon Islands, a UNDP officer commented in 2019: 'Corruption is rampant'.[86] A 2013 global corruption perceptions report by Transparency International cited Solomon Islanders as reporting paying bribes for government services, to the police, and to the judiciary, regarding the police as the most corrupt institution in the country, and as believing corruption was increasing.[87] Corrupt payments associated with an extensive logging industry contributed to social cleavages that precipitated the 2000 coup and the violence associated with it.[88] Corruption continues in this industry, which accounts for 16 per cent of GDP and is 'tightly imbricated with domestic politics'.[89] A 2017 Transparency International report summarised the situation thus: 'Corruption manifest (sic) itself in a variety of forms, ranging from petty corruption, embezzlement, grand and political corruption, and various forms of nepotism and patronage networks. Corrupt practices in the management of natural resource are specific areas of concern'.[90]

In Vanuatu, there is little doubt that the 2015 corruption crisis in which almost 30 per cent of the members of Parliament were gaoled for bribery and corruption (above) is part of a much wider pattern of systemic corruption in government, as was assessed in a detailed 2014 study.[91]

Clientelism is embedded in politics in Melanesia, especially in PNG and Solomon Islands,[92] but also in Vanuatu, and is a significant cause of 'poor governance' because

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[85] P Larmour, 'Guarding the guardians: Accountability and anticorruption in Fiji's cleanup campaign'. PIDP *Pacific Islands Policy 4,* University of Hawai'i, Honolulu, 2008, 5-10.

[86] M Destrez, 'What fighting corruption looks like in Solomon Islands', 2019 https://www.pacific.undp.org/content/pacific/en/home/blog/2019/what-fighting-corruption-looks-like-in-solomon-islands.html.

[87] Transparency International, *Global Corruption Barometer 2013,* Berlin, 2013, 9, 11, 12, 17.

[88] J Braithwaite, et al, *Pillars and shadows*, 18.

[89] M Chene, 'Solomon Islands: Overview of corruption and anti-corruption' Transparency International, London, 2017, 5. file:///C:/Users/u9008475/Downloads/Country_profile_Solomon_Islands_2017%20(1).pdf; and see D Porter and M Allen, 'The politicial economy of the transition from logging to mining in Solomon Islands'. *SSGM Discussion Paper 2015/12.* Australian National University, Department of Pacific Affairs, Canberra, 2015.

[90] Chene, 'Solomon Islands', 1.

[91] A Jowitt, and T Newton Cain, *National integrity system assessment: Vanuatu 2014,* Transparency International, London, 2014, 29-32, https://images.transparencycdn.org/images/2014_NISVanuatu_EN.pdf. See also Forsyth, 'Understanding judicial independence in Vanuatu', 2015, 5; and Veenendaal, 2021, 'How instability creates stability', 8-10.

[92] Wood, 'The clientelism trap'.

> … voters choose who to vote for on the basis of who they think most likely to provide them with direct localized or personalized assistance. This has an impact on governance because it selects and incentivises members of parliament to focus on delivering goods or similar assistance to their supporters, rather than concentrating on legislation or bureaucratic performance or national policy.[93]

The virtual absence of political parties in all three countries drives clientelism, and the large constituency development funds in all three countries help fuel the problem.

Provisions of the Melanesian constitutions intended to discourage corruption by politicians, and in particular leadership codes, appear to be having little impact on behaviour. Reports of the Vanuatu Ombudsman and the PNG Ombudsman Commission and the decisions of leadership tribunals in PNG dealing with prosecutions for misconduct in office by leaders (there had been 41 successful prosecutions of politicians under the Code by 2007 but a significant decline after that[94]) provide powerful support for the proposition that state powers and resources are increasingly being used almost routinely for the personal enrichment of those with access to state power.[95] There seems little doubt that only a fraction of those involved in such activities are ever dealt with under the criminal law and the leadership codes. Those cases that do get dealt with suggest generalised patterns of abuse of office, from misappropriation of government funds to the soliciting of bribes and favours from interests seeking to extract natural resources.

Despite the reducing effectiveness of leadership codes, there is evidence of resentment by many politicians of the restrictions involved in the codes, seen in increasing pressure on the ombudsman institutions that administer the codes in PNG and Vanuatu. For example, during the Vanuatu bribery crisis in 2015 (mentioned above), while the Speaker of Parliament (one of the 14 MPs convicted of bribery and corruption) was acting President, he purported to suspend the Vanuatu Ombudsman, who was then investigating the 14 members for breach of the Leadership Code.[96] In PNG there is constant public criticism of the Ombudsman Commission, suggesting it is too harsh in dealing with political leaders under the PNG Leadership Code. In 2008 an amendment was made to the PNG Constitution

[93] Wood, 'The clientelism trap', 5.

[94] Walton, 'Silent screams and muffled cries', 217.

[95] KJ Crossland, 'The Ombudsman role: Vanuatu's experiment' *SSGM Discussion Paper 2000/5*, Australian National University, Canberra, 2000. See also Toop, 'The Leadership Code'.

[96] Paterson, 'Chronicle of the months', 6-7.

reducing Ombudsman Commission powers under the Code. In a manifestation of the significance of the role of the PNG judiciary, that amendment was ruled unconstitutional by a 2013 Supreme Court decision (see *Reference by the Ombudsman Commission of Papua New Guinea* (2013) SC 1302).

Respect for human rights

All four constitutions contain detailed bills of rights that guarantee protection of the standard political rights,[97] and enforcement in case of breach of rights.[98] The rights in the Fiji constitution have been described as 'hollow rights', because most provisions contain specific exceptions, and because the constitution continues in effect the many military regime decrees (above) that cannot be challenged for inconsistency with the Constitution or breach of rights. The PNG and Fiji constitutions also seek to secure some aspects of economic, social and cultural rights, although those provisions are of little impact in Fiji,[99] and are largely unenforceable in PNG.[100]

Colonial Melanesia had a generally poor human rights record, and there was much interest in changing this situation at the time of the decolonising constitution-making exercises. In the early post-independence period Melanesian countries had a reasonable record of respect for most civil and political rights. Since the late 1980s, however, there has been increasing evidence of a reduction in standards. The post-coup situations in Fiji in 1987, 2000 and 2006 gave rise to many abuses of rights.[101] The situation under the 2013 Fiji Constitution, which to a large degree constitutionalised the military regime installed by the 2006 coup, is little improved, with the Fiji military implicated in serious patterns of abuse.[102] The US State

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[97] *PNG* ss.32-56; *Fiji* ss.6-45; *Solomon Islands* ss.3-15; *Vanuatu* s.5.

[98] *PNG* ss.57-8; *Fiji* ss.44-45; *Solomon Islands* ss.17-18; *Vanuatu* s.6.

[99] Kirkby, 'Analysis'.

[100] *PNG,* National goals and directive principles, and s.25; *Fiji* ss.31-42.

[101] Information on the human rights situation following the 2000 coup see 'US Department of State country report on human rights practices 2000 – Fiji', 2001 https://www.refworld.org/docid/3ae6aa95a.html. For the situation following the December 2006 coup, see United States Department of State, 'Fiji 2007 Human rights report' Washington, 2008, https://2009-2017.state.gov/j/drl/rls/hrrpt/2007/100520.htm.

[102] Amnesty International, 'Beating justice: How Fiji's security forces get away with torture' Amnesty International, London, 2016 https://www.amnesty.org/download/Documents/ASA1851492016ENGLISH.PDF; *Amnesty International report 2020/21: The state of the world's human rights* London, 2021, 161-162; and B Hill, 'Fiji's Bainimarama still dogged by rights issues 10 years on from his coup' Australian Broadcasting Commission, Pacific Beat, 2016, https://www.abc.net.au/news/2016-12-05/fijis-bainimarama-still-dogged-by-rights-issues/8087246.

Department summarised the situation in 2020: 'Significant human rights issues included: cases of cruel, inhuman or degrading treatment, in some cases leading to death; restrictions on free expression … impunity was a problem in cases with political implications'.[103]

In the Bougainville conflict in PNG, from 1988 to 1997, terrible abuses occurred on all sides, including hundreds of extra-judicial killings, torture, rape and destruction of property.[104] The ethnic conflict occurring in Solomon Islands from late 1998 to 2002 included appalling breaches of rights.[105]

The problems with respect for human rights in PNG go well beyond those associated with the Bougainville conflict. A few examples drawn from a July 1995 report for the United Nations Centre for Human Rights (UNCHR) illustrate the nature and scope of the problems. Police beatings and rapes of persons held in connection with investigation of criminal offences and their violent raids on villages in search of suspects, evidence and retribution were noted. Common violations of rights of prisoners by personnel of the Correctional Institutions Service included severe overcrowding, and routine rough treatment and confiscation of belongings.[106] The institutions that could have been expected to redress human rights abuses (the legal profession, the Public Solicitor, the Public Prosecutor, the Ombudsman Commission and the courts) had had a limited impact on human rights problems. Not a single case relating to breaches of human rights arising from the Bougainville conflict was conducted to completion.[107]

Additionally, seldom highlighted but yet important facets of the human rights picture in PNG were identified by the same report. First, it suggested that PNG's severe law and order problems involved violations of 'the most fundamental rights of people – to life, to liberty and to security of the person'.[108] Secondly, the right of citizens to equality was seen as 'far from being a living reality, and there is no real

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[103] United States State Department, 'Fiji 2020 human rights report' US State Department, Washington, 2021, https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/fiji/.

[104] Amnesty International, *Bougainville: The forgotten human rights tragedy,* 1997 https://www.refworld.org/docid/3ae6a9874.html; D De Gedare, 'Human rights violations in Papua New Guinea and Bougainville, 1989-1997', in MA Rynkiewich and R Seib (eds) *Politics in Papua New Guinea: Continuities, changes and challenges*, Point No.24. The Melanesian Institute, Goroka, 2000; and Braithwaite et al, *Reconciliation and architectures of commitment: Sequencing peace in Bougainville,* ANU Press, Canberra, 2010, 23-34, and sources cited therein.

[105] Baithwaite et al., *Pillars and shadows*, 20-26, and sources cited therein.

[106] United Nations Centre for Human Rights Technical Cooperation Programme, 'Report of a needs assessment mission to Papua New Guinea 28 May-6 June 1995', mimeo: Geneva, 1995, at 12-16.

[107] UN Centre for Human Rights, 'Report of a needs assessment mission to Papua New Guinea' 18-20.

[108] UN Centre for Human Rights, 'Report of a needs assessment mission to Papua New Guinea' 14.

evidence of, or apparent support for affirmative action', despite 'severe and growing disparities among various social groups, and between various areas of the country'. The 'social, economic and political disadvantages' of women and the 'widespread evidence of violence' against them suggested they suffered particular problems in this regard.[109] Thirdly, there was a 'general failure to secure economic, social and cultural rights', suggesting 'a failure of policies or of management or both'.[110] Although they are intended to be to some degree enforceable through the *National Goals and Directive Principles* in the Preamble to the PNG Constitution, there was little evidence of post-independence progress towards making those rights effective.[111]

The situation with rights in PNG in 2020/2021 is much as was described in that 1995 report. The Human Rights Watch 2020 report summarised the position: 'Lack of accountability for police violence persisted in PNG. And weak enforcement of laws criminalizing corruption and violence against women and children continue to foster a culture of impunity and lawlessness.'[112] In fact the report asserted that PNG is 'one of the most dangerous places to be a woman or girl'.[113] The US State Department country report on PNG for 2020 added: 'The government frequently failed to prosecute or punish officials who committed abuses, whether in the security services or elsewhere in the government. Impunity was pervasive.'[114]

Two aspects of the contemporary PNG situation are of particular concern. One involves sorcery accusation-related violence, which over the past 10 to 20 years has become 'a sustained and recurrent problem' in relation to which there is little government response[115] The second concerns the role of the police in human rights abuses (including in relation to sorcery accusation-related violence where police often share the beliefs of those implicated in the violence[116]). There are significant problems with the orientation and capacity of the police, as underlined by the 2020

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[109] UN Centre for Human Rights, 'Report of a needs assessment mission to Papua New Guinea'.

[110] UN Centre for Human Rights, 'Report of a needs assessment mission to Papua New Guinea'.

[111] UN Centre for Human Rights, 'Report of a needs assessment mission to Papua New Guinea'.

[112] Human Rights Watch, 'Papua New Guinea: Events of 2020', 2021 https://www.hrw.org/world-report/2021/country-chapters/papua-new-guinea.

[113] Human Rights Watch, 'Papua New Guinea'.

[114] United States State Department of State, 'Papua New Guinea 2020 human rights report', Washington DC, 2021 https://www.state.gov/wp-content/uploads/2021/03/PAPUA-NEW-GUINEA-2020-HUMAN-RIGHTS-REPORT.pdf.

[115] M Forsyth et al, 'Ten preliminary findings concerning sorcery accusation-related violence in Papua New Guinea', *Development Policy Centre Discussion Paper #80*. Australian National University, Crawford School of Public Policy, Canberra, 2019.

[116] Forsyth et al, 'Ten preliminary findings', 14-16.

comments by the PNG Police Minister, Bryan Kramer, describing a PNG 'police force in complete disarray and riddled with corruption', with 'a rampant culture of police ill-discipline and brutality', and 'implicated in organised crime, drug syndicates, smuggling firearms, stealing fuel, insurance scams, and even misusing police allowances.'[117]

Assessment: Rules versus 'living reality'

While it is clear that De Smith's 'formal sense' of constitutionalism is well established in Melanesia, there are clearly questions about the extent to which is a 'living reality'. On the other hand, despite the undoubtedly growing problems, the post-independence record of adherence to constitutional limits by the Melanesian states contrasts favourably with the situation under Africa's post-colonial constitutions, in all of their three main manifestations – independence constitutions, the authoritarian and often single party state constitutions that soon replaced the independence constitutions, and the post-1990, more liberal, constitutions.

Of course, a starting point for contrasting the situation in the Melanesian states with experience in Africa is that all save Fiji retain their independence constitutions. The picture with regard to holding of elections and the maintaining of democratic rule has generally been positive, again in contrast to the post-independence situation in Africa. In relation to rules on succession of government, until the 1987 Fiji coup, the record was remarkable compared to most other post-colonial states (and hence the early 1980s suggestion of new hope for constitutionalism on the basis of experience in the then ten post-colonial states of the Pacific).[118] Provisions for accountability generally operated reasonably well, especially in PNG, where the Ombudsman Commission and the Leadership Code were generally regarded as having achieved much at least until the late 1990s.[119] The position concerning human rights was reasonably well regarded in all states until the late 1980s.

It would appear, however, that if there ever was a ready acceptance of constitutional limits in Melanesia it has been reducing since at least the late 1980s.

[117] B Doherty, 'Papua New Guinea police accused of gun running and drug smuggling by own minister', *The Guardian*, 18 September 2020, https://www.theguardian.com/world/2020/sep/18/papua-new-guinea-police-accused-of-gun-running-and-drug-smuggling-by-own-minister.

[118] Fry, 'Succession of government'.

[119] D Canning,'The Ombudsman Commission', in A Regan, O Jessep and E Kwa (eds), *Twenty years of the Papua New Guinea Constitution*, Law Book Co, Sydney, 2001, 196-212; and Toop 'The Leadership Code'.

The most obvious evidence concerns the overthrow of successive Fiji constitutions since 1987, and the overthrow of the Solomon Islands Constitution in the 2000 coup, all involving unconstitutional efforts to take control of the state in large part related to ethnic conflict. Beyond those extreme acts, we have the apparently reducing effectiveness of constitutional rules outlined in the above discussions of operation of the rules about government succession, accountability, judicial review of constitutionality of executive and legislative acts, and human rights.

Even adherence to rules on succession of government prior to 1987 may not tell us much about the effectiveness of constitutional limits generally. Indeed, as discussed later, the more likely explanation is that managed competition for power within the constitutional framework suits the political and economic interests of the elite competing for political power and the associated opportunities for rapid wealth accumulation.

The record of acceptance of constitutional limits since the late 1980s is, however, mixed. For example, even in the post-coup situations in Fiji (after both the 1987 and 2000 coups), and in Solomon Islands there were serious attempts to restore constitutional rule. After the 2000 coup in Fiji, court rulings late in 2000 and early in 2001, on the continued applicability of the 1997 Constitution, were accepted by the interim government installed after the coup of May 2000, and instead of continuing to develop a new constitution, fresh elections were conducted under the 1997 Constitution as a result of the rulings.[120] On the other hand, the 2009 Fiji Court of Appeal decision on the 2006 coup was rejected by the military regime, and the apparent support for a return to democratic and constitutional rule involved in the establishing of the 2012 Constitutional Commission of Fiji evaporated when the regime could not accept the constitutional proposals made by the Commission.

Courts have resolved crises or conflicts on the leadership succession rules in PNG, Solomon Islands,[121] and Vanuatu. Ombudsman institutions, public prosecutors and courts continue to take some (though reducing since the late 1980s and 1990s) action in support of accountability, still offering some hope to many concerned about the overall trends. Despite growing human rights problems, abuses

[120] See *Republic of Fiji v Prasad* (Court of Appeal of Fiji, 1 March 2001) and *Prasad v Republic of Fiji* [2001] NZAR 21. These decisions are analysed in G Williams, 'The case that stopped a coup? The rule of law and constitutionalism in Fiji', *Oxford University Commonwealth Law Journal,* 73-93, 2001; and A Twomey, 'The Fijian coup cases'.

[121] In PNG, see, for example, *Haiveta v Wingti (No.1)* [1994] PNGLR 160, and *Haiveta v Wingti (No.3)* [1994] PNGLR 197. In Solomon Islands, see, for example, *Ulufa'alu v Attorney-General and ors* (unreported, High Court of Solomon Islands, HC-CC No.195 of 2000).

by the state probably continue to be less serious and fewer in number than in many other post-colonial states, and are still capable of being dealt with under the law by independent courts, at least in PNG, Vanuatu and Solomon Islands (although severe public access problems exist in all Melanesian countries).

Two major questions arise from this summary assessment of the record of constitutionalism in Melanesia. First, why has the record of constitutionalism in Melanesia apparently been relatively better than that of so many other post-colonial states? Secondly, why has the effectiveness of restraints on state action apparently reduced since the late 1980s?

State, economy and society

At the time of independence in most post-colonial states, there was a tendency to assume that the enactment of constitutions broadly on the model of those of the colonial powers would produce outcomes similar to those generally assumed to flow from the constitutions of the metropolitan powers.[122] In other words, it tended to be assumed that the 'living reality' of constitutionalism would automatically flow from the formal rules set out in a constitution. Such assumptions have been proved false for Africa, and clearly the same can now be said for Melanesia.

State and economy

Concerning the roles of the state and the economy, Ghai argues that it is the coinciding of economic and political power in the 'West' that makes the rule of law possible there. The constitution supports the forces that dominate in civil society, especially those with economic power. Because they can achieve their economic and other interests through a wide range of means, they do not have to rely openly on political or state power; the coercive power of the state seldom needs to be deployed on their behalf. Hence the outward forms of state neutrality and impartiality in accordance with constitutional and legal norms (for example, in the shape of an apparently neutral and impartial judicial system) can be preserved.[123]

[122] This tendency continues. While working as a constitutional adviser to the Government of Uganda in the early 1990s, I listened to a succession of visiting experts extol the virtues of the United States Constitution. The clear implication was that a presidential executive, a short constitution, federal arrangements and so on would all produce results in Uganda similar to those the US Constitution was believed to have produced for the US.

[123] See Fry, 'Succession of government', at 189. For a discussion of such issues in the Pacific context, see Ghai, 'Establishing a liberal political order', 314.

By contrast, where economic and political power do not coincide in the same way as in the West, and especially in countries where the private sector is relatively 'undeveloped', as has been the situation in most former colonies, including those in Melanesia, both at and after independence, politicians have little in the way of an independent economic base. They instead tend to use their access to the state to accumulate both wealth and the further power associated with it. Corruption flows from both personal interests of politicians and 'the imperatives of political survival, since the primary basis of a politician's support is generally not the party or another political platform, but clientelism, sustained by regular favours to one's followers'.[124] Popular control and accountability tend to be contrary to the fundamental interests of those in control of the state, and opposition can only be dealt with by coercion, the state tending to become authoritarian, though in Melanesia certainly not on the scale evident in many African states.

This analysis tells us much about the factors underlying the different roles of law in industrial and post-colonial states. It also provides us with insights into the reasons for the declining adherence to rules about accountability and human rights in Melanesia, suggesting that there are some important similarities between the forces at work in the Pacific and other post-colonial states. The analysis does not address, however, the reasons for the apparently better record of constitutionalism in Melanesia than, for example, in much of Africa.

There are parallels between the situations in Melanesia and Africa, especially concerning the prevalence of the weak state and strong localised society based on resilient pre-state social structures. In Melanesia, however, the state is perhaps even weaker than in Africa, due to factors such as the limited sustainable state capacity developed during the colonial era, as well as others, discussed below, which inhibit co-ordination of both policy and agencies of the state.

As discussed above, linguistic, cultural and ethnic groups in Melanesia, other than Fiji, tend to be both small and multiple, a very different situation from that in Africa, which as Ghai argues, has seen ethnicity become a key factor in relation to constitutionalism.[125] These factors help to explain the absence in Melanesia of attempts on behalf of any ethnic group to control the state in the post-independence period prior to the 1987 coups in Fiji. Of course, the large Indo-Fijian population in

[124] Ghai, 'Establishing a liberal political order', 314.

[125] Yash Ghai, 'Constitutionalism and the challenge of ethnic diversity', in J Heckmon, R Nelson and L Cabatingan (eds), *Global perspectives on the rule of law*, Routledge-Cavendish, London, 2010, 279-302; and Ghai, 'Ethnicity, decentralisation, and constitutionalism'.

Fiji has enabled observers to treat that situation as an exceptional case in the Pacific. However, the increasing complexity and intensity of divisions among indigenous Fijians, the ethnic element in the conflict in Bougainville from 1988,[126] and the significant ethnic conflict in Solomon Islands from 1998 to 2002 all point to the potential for ethnic tensions to become central to struggles for control of the state in Melanesia in a manner similar to Africa. Nevertheless, nowhere else in Melanesia is there so far an ethnic divide of the significance of that in Fiji.

It is largely the fact of the very small social groups and limited aggregations of cross-cutting groupings that explain the relatively good record of Melanesia – other than Fiji – in relation to adherence to rules on succession of government. Where significant ethnic divides do not exist, there is room for political competition between a wide range of sections of the elite. None is either subject to strong pressure to take exclusive control of the state or capable of doing so if it wishes to. (They are all too small and weak to be able to capture control of the repressive apparatus by ethnic stacking of positions, as in Africa.) Without a cohesive force controlling the state, needing always to fend off or destabilise competing claims on power, the stakes of political competition are not nearly as high in Melanesia as in many cases in Africa.

In the absence of class and other interests which cut across the multiple and fractured clan groupings, no political party or ideology promotes cohesive interests at the national level. Electoral engineering attempts in PNG and Solomon Islands (constitutionally based in PNG) intended to strengthen political parties have failed to develop such interests, and political parties remain stubbornly small and numerous.[127] As a result, the state is controlled by ever-changing bands of sections of the elite, most gaining elected office through clientelistic practices. Unable to control the whole state, each element of the band in government for the time being tends to attempt to extract what it can from whatever part of the state apparatus

[126] See Yash Ghai and Anthony Regan, 'Bougainville and the dialectics of ethnicity, autonomy and separation' in Yash Ghai (ed) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states*, Cambridge University Press, 2000, and the sources cited therein.

[127] As to the PNG electoral engineering measures and their operation, see H Okole, 'A critical review of Papua New Guinea's Organic Law on the Integrity of Political Parties and Candidates: 2001-2010', *SSGM Discussion Paper 2012/5,* 2012*;* and J Fraenkel, 'Party-hopping laws in the southern hemisphere', *Political Science*, 64(2), 2012, 106-120. As to Solomon Islands experience, see L Pendeverana and G Nanau, 'Independent MPs, political party legislation and electoral politics in Solomon Islands' *The Journal of Pacific Studies*, 40(2), 2020, 23-45, and as to the need for such 'engineering', see T Kabutaulaka, 'Parties, constitutional engineering and governance in the Solomons Islands', in *Political parties in the Pacific Islands*, Australian National University Press, Canberra, 2008, 103-116; and as to issues concerning the post 1980s move away from an anglophone/francophone two party system in Vanuatu, see M Morgan, 'The origins and effects of party fragmentation in Vanuatu', 117-142.

and resources it can get access to, always under pressure by the likelihood that their term in office will be short. Clientelism sees the societies from which the politicians (and even senior officials) originate apply pressure to them to extract state resources on their behalf. In the process, both the weakness of the state and poor governance state are reinforced, but a kind of equilibrium is maintained.

There is little state capacity to develop coherent policy or to integrate the operations of state agencies. Indeed, coherent policy or integrated operations could limit the ability of those in power to extract resources from the state. Accordingly, each agency tends to operate with a great deal of independence. Prime ministers might like to assert control over all parts of the state apparatus, but having no means of enforcing discipline over their party members or coalition partners, they have little capacity to control the state agencies under particular ministers.

As a result of such factors, all factions tend to accept the constitutional framework for managing political competition and succession. More correctly, the constitution is accepted as the arena for management of elite competition. But acceptance of the arena does not reflect strong acceptance of all constitutional limits. As already discussed, there is evidence that the constitutional norms concerning accountability and human rights have reducing acceptance. They tend to stand in the way of accumulation of wealth by those in power. Further, the limited cohesion and co-ordination of state agencies encourages, or at least puts few obstacles in the way of, breach of such norms.

Without co-ordination and constructive policy, the pressures of rapid social and economic change tend to produce crises that the state has little capacity to analyse or manage. Semi-autonomous state agencies have little capacity to analyse and deal with such crises, and their responses tend to be poorly judged, often exacerbating the original problems. Abuses of human rights tend to occur in such circumstances, not because the state desires them, but precisely because there is ineffective co-ordination and control of weak and under-resourced state agencies. The way in which the Bougainville conflict in PNG escalated from late 1988 is the most obvious example of this pattern of state response. Early poorly judged, indiscriminate and undisciplined responses by police riot squads helped transform a localised landowner conflict to a province-wide rebellion. Harsh and indiscriminate responses by the initially better disciplined Defence Force to Bougainville Revolutionary Army action only added to the problem.[128]

[128] Anthony Regan, 'Current developments in the Pacific: Causes and course of the Bougainville conflict', *The Journal of Pacific History,* 33(3), 1998, 269-85.

It is also true, however, that the absence of pressure to take exclusive control of the state on behalf of any ethnic or other interest means there is little focused effort to use the coercive power of the state against particular opponents. Hence, with the possible exception of Fiji, human rights abuses by security forces have in most cases been less systematic and less severe than has often been the case in Africa. They are most often products of the random and uncoordinated actions by disjointed and poorly trained elements of the state apparatus, rather than of organised state action.

Consequently, we can say that some constitutional limits are accepted by those in power whereas constitutional protection is largely an irrelevance for the vast majority of the population – the rural dwellers and the urban poor.

This is not to say that constitutions have not played, and do not continue to play, a significant role in limiting state action and encouraging constitutionalism in Melanesia (other than Fiji). In part this is because of the acceptance by all parts of the elite of the constitution as the arena within which competition and activity is managed. Further, independence mythology (the debate and stories about independence that have given special meaning and status to events of the time) combined with longevity have given constitutions legitimacy and status that have enabled them to have a degree of autonomy and therefore to have some significant impacts. Thus, for example, independent institutions created by constitutions with accountability functions benefit in terms of legitimacy and authority from the protection of the constitution (even if, in some cases, their positions have tended to be weakened as more elements of the elite find it in their interests to evade the restrictions of constitutional limits).

Society

Ghai has asked how the provisions of liberal constitutions such as those in both Africa since the 1990s and Melanesia might be given more full effect, and concludes that 'this will only happen if sufficient pressure can be applied to ensure that they are implemented'.[129] He argues that 'the people have to be the guardians of the Constitution', which they can do if they understand the Constitution and know their rights, and in addition know how to use the constitutional arrangements to hold the government to account; are involved in public affairs; and act as 'agents

[129] Ghai, 'Constitutions and consitutionalism', 12.

of accountability'.[130] People will only become involved in such activities: if there is a 'degree of popular mobilization'.[131] Possibilities for such mobilisation include: popular participation in constitution-making processes; popular participation in political matters and government, including through political parties, and through various forms of subnational government; and participation through civil society.

Participation in constitution-making

There is considerable interest in (and some controversy about) the question of the impacts on constitutionalism from popular participation in constitution-making processes as part of political and constitutional transition processes in many parts of the world.[132] Brandt et al discuss use of 'broad participatory mechanisms to avoid a constitution that simply divides the spoils among competing factions, and to improve the chance of the new constitution enjoying a high degree of popular legitimacy.'[133] Saati summarises the case for participation advanced by a number of other analysts as including: education of the populace in democracy and about their rights; contributing to popular support for and the legitimacy of the constitution; and support for the growth of a democratic political culture, which strengthens state institutions.[134]

In relation to the making of the independence Melanesia constitutions, there was no public participation in Fiji where the Constitution was essentially the product of negotiations between indigenous Fijian and Indo-Fijian political parties.[135] There was very little participation in Vanuatu,[136] but some in Solomon Islands, where a

[130] Ghai, 'Constitutions and consitutionalism', 13. As 'agents of accountability', people can become involved in 'social accountability initiatives', such as participatory budgeting, public expenditure tracking, etc – see C Malena, R Forster and J Singh, 'The role of civil society in holding government accountable: A perspective from the World Bank on the concept and emerging practice of "social accountabilty"', *World Bank Social Development Paper No.76*. World Bank, Washington DC, 2004.

[131] Ghai, 'Constitutions and consitutionalism', 12.

[132] See, for example: M Brandt, J Cottrell, Y Ghai and A Regan, *Constitution-making and reform: Options for the process*, Interpeace, Geneva, 2011; A Saati, *The participation myth: Outcomes of participatory constitution building processes on democracy*, Umea University, Umea, 2015; L Miller and L Aucoin (eds), *Framing the state in times of transition: Case studies in constitution-making*, United States Institute of Peace Press, Washington DC, 2010; and D Moehler, *Distrusting democrats: Outcomes of participatory constitution-making*, University of Michigan Press, Ann Arbor, 2008.

[133] Brandt et al, *Constitution-making and reform*, 9.

[134] Saati, *The participation myth,* 20-21.

[135] Yash Ghai, 'Constitution making and decolonisation', in Yash Ghai (ed), *Law, politics and government in the Pacific Island states*, IPS, University of the South Pacific, Suva, 1988, 1-53, at 8.

[136] Ghai, 'Constitution making and decolonisation', 16-17.

committee of the colonial legislature 'undertook wide consultation with the people, including a tour of the country'.[137] The consultation process lasted three years.[138] Final decision-making and drafting occurred in London for Fiji, and for Solomon Islands (despite the earlier popular participation there), while in Vanuatu a large part of the constitution-making process involved negotiations between the joint colonial powers, France and the United Kingdom.[139]

The constitution-making process in PNG, however, involved extensive public consultations over two years (1972-74), conducted by the colonial legislature's Constitutional Planning Committee (CPC),.The consultation process involved hundreds of public meetings, scores of discussion groups and thousands of written submissions.[140] More than 45 years later, it is difficult to assess the impacts of the public participation on the content of the Constitution, and on its legitimacy, and the public support for it. However, the CPC's Final Report[141] continues to be cited by the Supreme Court in its quite frequent constitutional rulings (indeed, s.24 of the constitution makes the CPC Report and certain other 'originating' document available as aids to interpretation 'where any question relating to the interpretation or application of any provision of a Constitutional Law arises'.[142] It is also referred to in public debates on politics and on the Constitution. Then Chief Justice, Sir Salamo Injia, told a 2015 conference in Canberra, Australia, that amendments to change fundamental features of the Constitution (for example to move from a parliamentary to a presidential executive) would probably be ruled as unconstitutional by the Supreme Court unless before enactment they were the subject of extensive public consultation (similar to that undertaken by the CPC) or a referendum.[143]

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[137] Ghai, 'Constitution making and decolonisation', 14.

[138] C Moore, 'Indigenous participation in constitutional development: Case study of the Solomon Islands constitutional review committees of the 1960s and 1970s', *The Journal of Pacific History*, 48(2), 2013, 162-176, at 173.

[139] Ghai, 'Constitution-making and decolonisation'.

[140] JW Ritchie, *Making their own law: Popular participation in the development of Papua New Guinea's constitution*, (PhD thesis), University of Melbourne, 2003; J Ritchie, '"Now is the time to make their own law": The development of Papua New Guinea's independence constitution, 1972-1975', in I Maddocks and E Wolfers (eds) *Living history and evolving democracy*, University of Papua New Guinea Press, Port Moresby, 32-50; and J Ritchie, ' From the grassroots: Bernard Narokobi and the making of Papua New Guinea's constitution', *Journal of Pacific History*, 55(2), 2020, 235-254, at 241-250.

[141] CPC 1974. *Final report of the Constitutional Planning Committee 1974: Part I*, PNG Government Printer, Port Moresby.

[142] See AJ Regan and EP Wolfers, 'Aids to interpretation of the Constitution: Some preliminary thoughts'. *Melanesian Law Journal*, 14, 1996, 153-172.

[143] An audio file containing this address can be found at http://dpa.bellschool.anu.edu.au/news-events/podcasts/audio/4569/sotp2015-hon-chief-sir-salamo-injia-kt-gcl-keynote-address.

In terms of popular participation in the three post-independence constitution-making processes in Fiji, there was no participation in the constitution-making by the military regime in 1990, and limited participation in the process that generated the 1997 Constitution,[144] but much more in the 2012 post-coup process headed by Yash Ghai.[145] In neither case can it be said that participation clearly had an impact on content of the subsequent constitution. That would have been unlikely in the case of the 2012 process, given that the draft constitution that was the subject of the consultation was rejected by the military regime which replaced it with its own constitution adopted late in 2013.At the time, the leader of the regime claimed, however, that 'the positive elements of the Ghai draft' were being incorporated in to the regime's draft.[146] There is little evidence of that in the text of the 2013 Constitution. Nor can it be readily asserted that the public participation in the processes educated the people about the subsequent constitutions or their legitimacy. After all the 1997 Constitution was the subject of a coup and suspension 2000-2001, suspension following the 2006 coup, and abrogation in 2009, while the regime rejected the 2012 draft, and deliberately replacing it with quite a different constitution.

Participation in government

Turning now to popular participation in political matters and government – through such things as the ballot box, political parties, and decentralisation (especially devolution) – that is almost universally accepted as essential to the accountability of government. Regular elections are seen to contribute to the legitimacy of constitutional government and to keeping it accountable (as policies of rulers subject to the real threat of replacement in elections need to exhibit some sensitivity to the needs of the society). Popular participation in sub-national governments – both directly and through elections – under both decentralisation and autonomy arrangements is claimed to create centres of power able to check dictatorial tendencies of the central state and make the local state responsive and accountable.

[144] A Saati, 'Participatory constitution-building in Fiji: A comparison of the 1993-1997 and the 2012-2013 processes' *International Journal of Constitutional Law,* 18(1), 2020, 260-276, at 265-270.

[145] R Kant, and E Rakuita, 'Public participation & constitution-making in Fiji: A critique of the 2012 constitution-making process', *SSGM Discussion Paper 2014/6,* 2014*;* Saati, 'Participatory constitution-building in Fiji', 270-274.

[146] Kant and Rukuita, 14.

There is limited evidence that the operation of parliamentary democracy at the national level in Melanesia counters the pressures towards abuse of rules on accountability and human rights. Regular national elections in Westminster system variants have produced national legislative and executive institutions that tend to be unaccountable to the electors. Contributing to the outcomes have been the lack of effective political parties, the extensive operation of clientelism, and the continued existence and significance of small traditional societies (clans and sub-clans) and the associated lack of significant aggregating interests (such as class) which cut across them.[147]

In relation to decentralisation, Ghai argues[148] that only in rare cases in Africa (he suggests Kenya and to a lesser extent, South Africa) has decentralisation been intended to strengthen constitutionalism. It can do so by promoting the values of constitutionalism mentioned earlier in this chapter, by reducing power at the centre, sub-national governments contributing to checks and balances, and through judicial resolution of constitutional disputes between the levels of government enhancing the status of the constitution and strengthening the rule of law.[149] Ghai also notes that where decentralisation is adopted in response to ethnicity, it may undermine constitutionalism. Even autonomy arrangements, so often a response to ethnic conflict, can promote constitutionalism 'because they divide power also contribute to constitutionalism'.[150] They can do so because constitutional foundations for autonomy and their enforcement through constitutional interpretation 'emphasize the rule of law and the role of independent institutions'.[151]

Popular participation in political processes and government was a goal of Melanesian constitution-makers, especially (but not only) PNG's CPC, whose 1974 *Final Report*[152] provided the basis for much of the PNG independence constitution. With a jaundiced view of the state based on experience of highly centralised and non-participatory colonial rule, the CPC was concerned that constitutional law alone

[147] For analysis of the issues in the PNG context, see, Ghai, 'Establishing a liberal political order'; and A Regan, 'The Papua New Guinea policy-making environment as a window on the Sandline controversy', in S Dinnen, R May and A Regan (eds) *Challenging the state*: *The Sandline affair in Papua New Guinea*, Research School of Pacific and Asian Studies, Australian National University, Canberra, 1997, at 82-93.

[148] Ghai, 'Ethnicity, decentralisation and constitutionalism', 65-68.

[149] Ghai, 'Ethnicity, decentraliastion and constitutionalism', 66.

[150] Yash Ghai, 'Introduction: Nature and origins of autonomy', in Yash Ghai and Sophia Woodman (eds) *Practising self-government: A comparative study of autonomous regions*, Cambridge University Press, 2013, 1-31, at 11.

[151] Ghai, 'Introduction: Nature and origins of autonomy'.

[152] CPC, *Final report*, chapter 10.

might not be sufficient restraint on the state, and envisaged popular participation making the state more accountable. Its recommendations on a constitutionally entrenched system of provincial governments were intended to encourage political forces that could act as checks on authoritarian tendencies at the centre.[153]

In two of the three Melanesian states where significant ethnicity is not a serious issue – PNG and Solomon Islands – decentralisation through systems of sub-national provincial governments has been pursued. In PNG, constitutional amendments made in 2002 provide for asymmetrical autonomy for Bougainville, as part of a constitutionally implemented comprehensive peace agreement that helped resolve the Bougainville conflict.[154] There was some evidence that the elected provincial government system operating in PNG until 1995 did have an impact in terms of acting as a check on power at the centre.[155] However, the reforms of the system in 1995 provided for in amendments to the Constitution and in the *Organic law on provincial governments and local-level governments 1995* has given members of the national Parliament control of provincial governments, and the governments have since been a much reduced factor in holding the national government accountable. There is little evidence of sub-national governments in Solomon Islands being effective checks on national governments.[156]

Civil society

In the 'developed' industrial states, civil society is seen as the range of interests in society distinct from government, which in various ways combine and apply pressures to and place limits on government. Interest in civil society in the context of debate on limits on the post-colonial state originates mainly with the role of

[153] See analysis of the views expressed in the CPC's *Final report*, see Yash Ghai, and Anthony Regan, *The law, politics and administration of decentralisation in Papua New Guinea*, Monograph No.30, PNG National Research Institute, Port Moresby, 1992, 11, and 49-53. For a discussion of decentralisation as an issue during constitution making in other Melanesian states, see Ghai, 'Constitution making and decolonisation', at 30-32.

[154] A Regan, 'Autonomy and conflict resolution in Bougainville, Papua New Guinea', in Y Ghai and S Woodman (eds) *Practising self-government: A comparative study of autonomous regions*, Cambridge University Press, 2013, 412-448.

[155] See Ghai & Regan, *The law, politics and administration of decentralisation*, chs 8 and 9.

[156] P Larmour, 'Solomon Islands', in P Larmour and R Qalo, *Decentralisation in the South Pacific,* University of the South Pacific, Suva, 1985, 74-104; G Nanau, 'Decentralisation reform in Solomon Islands', in P Larmour (ed), *Governance and reform in the South Pacific,* Australian National University, NCDS, Canberra, 1998, 183-199; and D McDougall, 'Sub-national governance in post-RAMSI Solomon Islands' *SSGM Working Paper Series Number 2014/3,* Australian National University, Canberra, 2014, https://openresearch-repository.anu.edu.au/bitstream/1885/142146/1/WP_2014_3_McDougall_0.pdf.

popular protest in the post-1989 fall of the Eastern European 'Marxist' regimes. This was widely seen as evidence of the emergence of a potentially powerful civil society in those states, and the move to a free market economy in such states was seen as likely to strengthen civil society as an effective limit on the state.

The lack of clarity in debate on the composition, operation and impacts of civil society in industrialised countries has not prevented many assuming that emergence in post-colonial countries of a 'developed' civil society on the model of the West and former communist countries must necessarily emerge in post-colonial states and will result in support for constitutional limits on the state. Yet the evidence for the emergence of such a civil society in post-colonial countries is far from clear, and the role of civil society in such countries remains problematic.

There is, of course, civil society in Melanesia. With the exception of Fiji, however, the vast majority of the population in Melanesia lives in rural areas (more than 85 per cent in PNG) and operate mainly in evolving pre-state social structures, most still with limited engagement with the modern state. As a result, there is little in society to make it meet the criteria of 'civil' society. Society has limited cohesion, little which aggregates multifarious local interests in a way that can influence the state. Even in the few large urban centres, there is limited aggregation of interests. There are media organisations, weak trade unions, NGOs and – especially – churches, all of which seek to influence the state, but each on their own has a limited impact, and their concerns seldom coincide.

The emergence of a 'developed' civil society in Melanesia may occur at the expense of traditional society, for it would be likely to involve development of such things as class and other interests which would cut across clan loyalties. On the other hand, growing social pressures arising from overlapping factors such as economic change associated with globalisation, increasing social stratification, land shortages, and law and order problems are already generating popular dissatisfaction with government. This may in course result in growing pressures for constitutionalism.

There are, however, many possible alternative futures. For example, the struggles for power and control of resources likely to be involved could contribute to emergence of more significant ethnic divides. As in Fiji, and in Solomon Islands, 1998-2002, these may be manipulated in the course of such struggles and ultimately contribute to undermining of constitutional rule (as in both of those countries) or at least undermine the ability of the state to reconcile conflicting interests in society.

Conclusions

First, the situation with continuity of independence constitutions in Melanesia (other than Fiji) is dramatically different to that in Africa. Amongst other things, this situation suggests a very different situation in Melanesia in terms of pressure on leadership to capture the state. The big difference in the three Melanesian states other than Fiji involves the continued operation of adapting pre-colonial social groups and the associated near absence of ethnicity as a significant factor impacting the states and their constitutions.

Second, the Melanesian constitutions are in general good examples of the 'formal sense' of constitutionalism. While not all of them encompass the full range of 'values and principles' highlighted by De Smith, Ghai and Fombad, most of the values and principles can be found there, as always with the, at least partial, exception of Fiji.

Third, the record of the 'living reality' of constitutionalism in Melanesia is certainly less remarkable than the record with regards the 'formal sense'. It nevertheless compares favourably with that of much of the rest of the post-colonial world. While there may be some evidence of state commitment to constitutionalism in Melanesia in the immediate post-colonial era, the analysis in this chapter would suggest that such commitment was always limited. In particular, the apparent commitment to constitutional rules of succession suited the interests of sections of the elite. Moreover, such rules have been readily jettisoned, particularly where ethnic conflict has become a significant factor in national politics, as has occurred since at least 1987 in Fiji and in the 2000-2002 period in Solomon Islands. The effectiveness of rules on accountability and human rights also appears to have been waning in all four states since the late 1980s and the 1990s.

The reasonably positive record of acceptance of constitutional limits in Melanesia up until the late 1980s and 1990 can be related to particular factors in the post-independence situations, and especially the limited competition for control of the state by large ethnic and other interests. On the other hand, the same factors have contributed to the longevity of independence constitutions in three Melanesian states, thereby to some extent increasing their legitimacy and autonomy.

Fourth, there is little evidence, if any, that the inclusion in the Melanesian constitutions of the 'values and principles' of constitutionalism is itself helping to generate broad support for constitutionalism. There is no evidence that society,

through participation in constitution making, participation in government, or action of civil society, has a record of mobilising support for constitutionalism.

None of this is to say that constitutionalism is a totally dead issue in Melanesia. Nor should it be concluded that there is no room at all for society to mobilise support for enhanced constitutionalism. Despite the absence of the same economic conditions and the associated mode of operation of the state that generated constitutionalism in the West, people in Melanesia can nevertheless be expected to gradually find their own paths to constitutionalism. After all, they, like people everywhere, have a deep interest in ensuring that there are limits on those with access to state power.

Finally, not only can it be expected that the paths to constitutionalism will take account of the particular situation of the state, the economy and society in each Melanesian country, but the process of progress along those paths could also be slow and gradual. If constitutionalism in Europe was a slowly developing product of complex economic and political forces over some hundreds of years, it can be expected it will take time for constitutionalism to become more of a 'living reality' in the Melanesian states.

Furthering Constitutions, Birthing Peace: liber amicorum Yash Pal Ghai
Humphrey Sipalla, J Osogo Ambani (eds)

Professor Yash Pal Ghai is Kenya's most accomplished legal scholar. His work, spanning close to six decades, in legal education, constitution-making, human rights, self-government systems and peace mediation, has left an indelible mark on legal thought, law making and governance systems across the world.

Most Kenyans know Ghai as our 'constitutional architect'. Many would remember him from the tense times at the turn of the century when he inspired the merger of the then parallel constitution review initiatives and led the Constitution of Kenya Review Commission (CKRC) to the 'Zero Draft' and the National Constitutional Conference in 2003-4. To Kenyan lawyers of several generations, he is also remembered for the seminal 1970 text Public law and political change in Kenya, co-authored by JPWB McAuslan, which remains the foremost text on the question to date.

In addition to teaching from 1963 to 2008 across all continents, engaging in peace mediation from Papua New Guinea to the South African ANC-National Party negotiations that ended apartheid, to contributing to the constitutions of over two dozen countries, Ghai's published works are staggering. Including books, editorships, chapters in edited collections, journal articles, reports and occasional papers, co-authored or sole authorship, these number at least 215!

In his retirement, Yash Pal Ghai and his wife Jill Cottrell Ghai have remained indefatigable. His defence of the constitution and promotion of social justice work, through litigation, judicial training and civil society advocacy continues to date.

It is a worthy tradition that an accomplished scholar is honoured with a *liber amicorum*, a book of friends – or festschrift, a collection of celebratory writing – in which former students and colleagues pay tribute to the scholar's body of work. Such publication is the academy's form of a lifetime achievement award.

The cover portrait by Dr Peter Larmour, Professor Ghai's former colleague, captures Ghai sitting back, characteristically clasping his hands. It pays tribute to Ghai's ability to listen carefully to people, and sit through days of jaw-boning negotiation, his willingness to work together with and bring conflicting parties together. The portrait depicts that skill of Ghai's without which his life's work, of mediating difficult transitional moments and midwifying transformative visions of societies, would not have been.

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