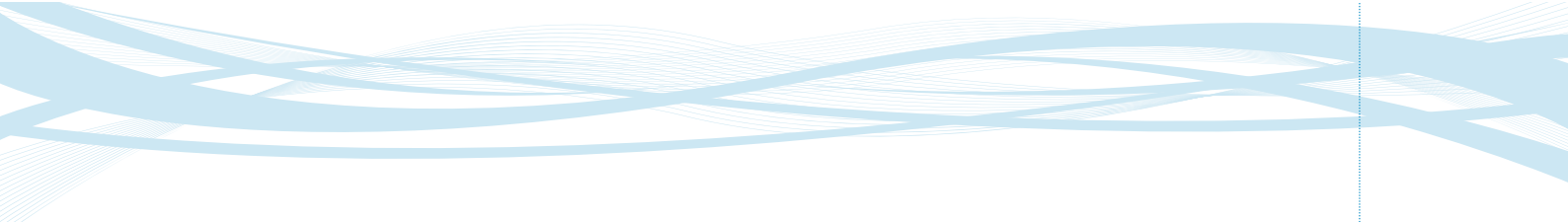


Challenges of Nationhood: Identities, citizenship and belonging under Kenya's new Constitution



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Abstract

The agitation for a new constitutional dispensation in Kenya stretches over two decades. These efforts were informed by expectations that a new constitution would emancipate Kenya from its years of authoritarian presidency and the attendant consequences, and restore a sense of nationhood to the Kenyan peoples. Through the concepts of identity, citizenship and belonging, this paper explores the attempts in Kenya's constitution-making process to confer unitary citizenship to all Kenyans in a context of competing pluralities. The paper argues that the political determinist project of constructing unitary citizenship, which was informed by the post-colonial period, was grounded in the desire to create a balance among the various identities that influence how diverse individuals and groups experience and exercise citizenship in Kenya. Most outstanding of these social identities are religious, gender, cultural and civic.

Whereas the Bill of Rights in Chapter Four of the new Constitution can be viewed as an attempt to generate some sort of perpetual peace, it is the attempt to balance 'civic citizenship' against 'cultural citizenship' that stands out as providing an avenue for further contestations. Drawing examples from everyday life in Kenya, opinion reviews and the new Constitution, this paper proposes a more critical and interpretative approach to the concepts of vertical and horizontal pluralism. The questions posed at the end of the paper invite reflection on politics beyond the sovereignty of the various cultural formations and mis-governance, both of which have ailed Kenya for 20 years at the expense of statecraft. The perspectives proposed in this paper present a different reading on portrayals of culture from the determinist and/or fixed concepts often seen in mainstream legal and political thinking.

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The SID Constitution Working Paper Series

In 2010, on the cusp of Kenya's new constitutional dispensation, the Society for International Development (SID) embarked on a project called *'Thinking, Talking and Informing Kenya's Democratic Change Framework'*. Broadly stated, the objective of the project was both historical and contemporary: that is, to reflect on Kenyans struggles for a democratic order through a book project, and to examine the significance of a new constitutional order and its legal and policy imperatives, through a Working Paper Series.

Consequently, SID commissioned research on some of the chapters or aspects of the new constitution that require further policy and legislative intervention, culminating in ten Working Papers. These papers, mostly by Kenyan academics, are intended to help shape public discussions on the constitution and to build a stock of scholarly work on this subject.

These papers seek to contextualize some of the key changes brought about by the new constitutional order, if only to underscore the significance of the promulgation of the new constitution on August 27, 2010. The papers also seek to explore some policy, legislative and institutional reforms that may be necessary for Kenya's transition to a democratic order.

The Working Papers explore the extent to which the new constitution deconstructs the Kenyan post-colonial state: how it re-calibrates the balance of power amongst branches of government and reforms government's bureaucracy; redraws the nature of state-individual relations, state-economy relations, and state-society relations; and deconstructs the use of coercive arms of the government. Lastly, the papers examine some of the limitations of the new constitution and the challenges of constitutionalism.

In the first set of papers, **Dr Joshua Kivuva**, **Prof. Ben Sihanya** and **Dr. Obuya Bagaka**, separately examines how the new constitution has re-ordered nature of Kenya's post-colonial state, especially how it has deconstructed the logic of state power and rule, deconstructed the 'Imperial Presidency', and how it may re-constitute the notorious arm of post-independent Kenya's authoritarian rule: the provincial administration.

The next set of papers in this series, by **Dr. Othieno Nyanjom** and **Mr. Njeru Kirira**, separately looks at the administrative and fiscal consequences of Kenya's shift from a unitary-state to a quasi-federal state system. Whereas Dr. Nyanjom examines the anticipated administrative and development planning imperatives of devolving power; Mr. Kirira examines the anticipated revenue and expenditure concerns, which may arise in a state with two-tier levels of government. Both discussions take place within the context of a presidential system of government that the new constitution embraces.

The paper by **Dr. Musambayi Katumanga** examines the logic of security service provision in post-colonial Kenya. Dr. Katumanga argues that Kenya needs to shift the logic of security from regime-centred to citizen-centred security service provision. However, despite several attempts in the recent past, there are still several challenges and limitations which Kenya must redress. The new constitution offers some room for instituting a citizen-centric security reforms.

The paper by **Prof. Paul Syagga** examines the vexed question of public land and historical land injustices. It explores what public land is, its significance and how to redress the contention around its ownership or use. Similarly, the paper examines what constitutes historical land injustices and how to redress these injustices, drawing lessons from the experiences of

other states in Africa that have attempted to redress similar historical land and justice questions.

The papers by **Dr. Adams Oloo**, **Mr. Kipkemai arap Kirui** and **Mr. Kipchumba Murkomen**, separately examines how the new constitution has reconfigured representation and legislative processes. Whereas Dr. Oloo examines the nature of the Kenya's electoral systems, new provisions on representations and its limitations; arap Kirui and Murkomen look at the re-emergence of a bicameral house system and the challenges of legislation and superintending the executive.

If the other nine papers examine the structural changes wrought by the new constitution; the tenth paper, by **Mr. Steve Ouma**, examines the challenges and limitations of liberal constitutional order, especially the tensions between civic citizenship and cultural citizenship from an individual stand point. Perhaps Mr Ouma's paper underscores the possibility of a self-defined identity, the dangers of re-creating ethno-political identities based on old colonial border of the Native Reserves - the current 47 counties and the challenges of redressing social exclusion and the contemporary legacies of Kenya's ethno-centric politics.

The interpretation of the constitution is contested; so will be its implementation. We hope that this Working Paper Series will illuminate and inform

the public and academic discussions on Kenya's new social contract in a manner that secures the aspiration of the Kenyan people.

SID would like to sincerely thank all those who have made the publication of these papers possible, especially those who participated in the research conceptualization meeting and peer-reviewed the papers such as: **Dr. Godwin Murunga**, **Prof. Korwa Adar**, **Ms. Wanjiru Gikonyo**, **Dr. Joshua Kivuva**, **Dr. Richard Bosire**, **Dr. Tom Odhiambo**, **Ms. Miriam Omolo** and **Dr. Mutuma Ruteere**, for their invaluable input.

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Working Papers Series Coordinators

Jacob Akech
Duncan Okello

Contents

Acronyms.....	viii
1.0 Introduction.....	1
2.0 Experiences of Belonging, Identity and Citizenship.....	2
2.1 About a 'Muhindi Jalu'o'.....	3
2.2 The 2010 World Cup: Citizenship and globalization	4
2.3 Kenya's National Dress.....	4
3.0 Historical Institution of Difference in Kenya.....	5
4.0 The Making of the New Constitution	8
5.0 So, Are We on the Way to Achieving 'Perpetual Peace'?	12
6.0 Between Freedom and Sovereignty.....	14
7.0 Conclusion.....	15
Annex.....	17
References	18

Acronyms

FIFA	Fédération Internationale de Football Associations
GEMA	Gikuyu, Embu, Meru Association
KADU	Kenya Africa Development Union
KAF	Kenyan Asian Forum
KANU	Kenya Africa National Union
MP	Member of Parliament
PCK	Proposed Constitution of Kenya
USA	United States of America

1.0 Introduction

According to the *World Fact Book 2008* (CIA, 2009), roughly 109 constitutions have been written (or rewritten) in the world since 1989. The vast majority of these have been done in post colonies like Kenya. In addition, there are now some 44 constitutional courts functioning across the planet (Comaroff and Comaroff, 2009). This quest for constitutions and their accompanying institutions has on many occasions been based on a belief in the salvational abilities of new constitutions, i.e., that constitutions in and of themselves they are able to deliver equitable, just, ethically-founded, pacificated polities. Yet constitution making projects are not just about salvation missions. That is to say that a constitution making project, more so in the post-colonial¹ state, is also the place where wreckage of failed ideas of state-making and new experiments are evidenced.

Daniel arap Moi, Kenya's president between 1978 and 2002, and William Ruto, his ideological soul mate and political progeny, who is also the current Member of Parliament (MP) for Eldoret North constituency, were the de-facto leaders of those opposed to the new Constitution Kenya adopted in August 2010. They contested the then Proposed Constitution of Kenya (PCK), claiming that it was 'too experimental'. Ruto was quoted in a leading local daily, *The East Africa Standard*, as challenging the United States of America (USA), to incorporate some of the ideas in the PCK into their own constitution if they thought that the ideas contained in it were that good (*The East Africa Standard*, 2010) There is little question that Moi and Ruto were correct in their argument against experimentation in the 'South'. But their motives and politics, as evidenced in their falsehoods, fear-mongering and distortions of certain provisions of the PCK, were wrong.

Indeed, the quest for a new constitution in Kenya

partly lay in the desire for a new moral code that would elevate the country from the pale shadow of the promise of nationhood, assumed at the time of its independence but never fully realized. Many Kenyans have a belief in the salvational capacity of the new Constitution to define a better future. Such constitutional patriotism – which rarely translates to commitment to constitutionalism – is necessary, worthwhile and urgent, but it must also be understood that the Constitution cannot be the panacea to all ills and challenges facing Kenya today.

Perhaps the better way to discuss the 2010 Constitution would be to regard it as an attempt to merge the 'old order' with a possible 'new order'. Although there may be some objection to such an approach generally, it is difficult to read the Constitution without the dual lens of old and new. Such a perspective would also be helpful in reviewing the notions of identity, belonging and citizenship in Kenya. These three terms capture both convergence and divergence, and most importantly a relationship that at one point can be oppositional and at another non-oppositional. The three concepts can speak to the same practices and are often experienced concurrently. At the same time, as will be evident in the situations highlighted in this paper, these concepts can also operate as reflections and refractions of each other. In Kenya, the forms these concepts have taken have been moulded in an era characterized by intercultural communications and human encounters making scripts on personhoods even more dynamic.

For the purposes of this paper, the three concepts are discussed as categories of practice rather than of analysis (Brubaker and Cooper, 2000). Using this framework, the paper will demonstrate how everyday practices construct, reconstruct and sometimes reify citizenship, identity and belonging. The paper argues that identity, belonging and citizenship are not complete either as notions or

¹ The term 'post-colony' or 'post-colonial' in this text does not refer to the period after the end of colonialism. Rather, it refers to forms of critical practice that spoke to the significance of colonial mindsets in the formation and traditions of social theory and governance.

as experienced phenomena. Rather, they either are continuously produced or reproducing themselves. This proposition is an invitation to take a dialectical approach to reading the 2010 Constitution, an approach that emphasizes the processes, relationships and contradictions at work among the concepts of identity, belonging and citizenship (Kymlicka, 2007).

The constitution-making process as a political engagement and legal instrument becomes an important framework for the processes of 'identity production'. Still, the 2010 Constitution faces the challenge of standardizing and committing to text what are otherwise fluid concepts. Of course this act of standardization is the challenge of law: that it tends to reify and 'skeleton-ize' social issues. Fortunately, the law also attempts to offer a solution through its seemingly endless legal circulations and practices. Judicial dialectics, for instance, are based on ongoing conversations and negotiations of the law, a strategy that appreciates the limits of the law. This is a strategy that has been referred to by Cass Sunstein as based on an understanding of law as an incompletely theorized agreement (cited in Langlois 2001). Sunstein's approach is to rupture the reified legal model and understand the law as a space of ongoing contestations stable enough to manage contemporary relationships, but also with the 'listening skills' needed to look ahead (Langlois, 2001). This discussion therefore does engage the 2010 constitution as a space for ongoing production and reproduction of identities, belonging and citizenship.

First, however, the paper relates three experiences of belonging, identity and citizenship in Kenya. The experiences illustrate the pluralistic nature of Kenya and how difference has been established within societies. It is a useful background in discussing state formation and the processes of identity politics in Kenya. To aid in the analysis, the paper refers to the works of political theorist M.G. Smith on 'pluralism'. Alongside Smith (1969), the paper also looks at the record of the post-colonial era,

as recounted by Mamdani (1996), to illustrate the historical and contemporary footprints leading to the 2010 Constitution.

The discussion provides the background for a focused analysis of three specific questions that the 2010 Constitution of Kenya attempts to address. This gives way to a critical, interpretative discussion on the limits to the solutions the Constitution offers. The paper argues that the constitution-making efforts in Kenya were fraught with danger as they were caught up in an extremely restrictive framework of Kenya as a cultural state, as well as responses to historical mis-governance. The retention of the footprints of a cultural state as evidenced in the design of counties, alongside understandings of culture, limits the inscription of a cosmopolitan type of citizenship. As a result, opportunities for strategic interventions aimed at transforming society were arguably wasted, potentially playing into the hands of those seeking to perpetuate and solidify identity politics.

2.0 Experiences of Belonging, Identity and Citizenship

There are numerous moments when Kenyans do express what one may call collective 'Kenyan-ness'. Indeed, national holidays like Madaraka Day or when national football or rugby teams are playing can be moments when the image of 'one Kenya' and a 'Kenyan people' gets replayed. Kenyans living in the Diaspora, through a loose coalition of The Kenya Diaspora Movement, is another initiative (<http://www.kenyadiaspora.org>, accessed on 11 June 2011). As I have discussed elsewhere (Akoth, 2010), the election of Barack Obama as the 44th President of the United States also triggered spontaneous celebrations of what come to be known as Obama mania. In this craze, the idea of both 'Luo-ness' and 'Kenyan-ness' become re-enacted in

public of K'Ogello and other parts the country. The celebrations of Obama and other performances of being Kenyan are not distant from the now common state rhetoric of *Najivunia kuwa Mkenya* (I am proud to be Kenyan). In this rhetoric and various performances, being Kenyan is often naturalized and presented as a homogeneous category. But the main reason why these moments of homogeneous Kenyan identity and idea of belonging stand out is the tension that often envelops such assertions.

It seems to me that the drafters of the 2010 Constitution were interested in both managing these differences and enhancing values that would foster 'Kenyan-ness'. Three examples of everyday life in Kenya are highlighted here to provide ironies, imageries and evidence for the discussion on identity, citizenship and belonging in a post colony. They illustrate the changing nature of these concepts.

2.1 About a 'Muhindi Jalu'

On 30 June 2010, the author attended a gathering convened by the Kenyan Asian Forum (KAF).² This was at a time when numerous interest groups were convening public and private forums to canvass and take positions on the then PCK, beyond what was called in the public parlance the 'Yes' and 'No' campaigns, either in support of or opposition to the PCK. The KAF was one such interest group. The session was convened as a civic education event on the PCK. Its emphasis, going by those present, was a call for Kenyans of Asian origin to support the PCK because, according to the event's organizers, 'We [Kenyans of Asian descent] have a better document than the current Constitution'. The key speakers for the evening, among them Pheroze Norwojee, Zarina Patel and Yash Pal Ghai, were renowned Kenyans of Asian origin who have long been active participants in Kenya's struggle for social justice and resistance

to political authoritarianism. Most of those present at the forum were individuals of Asian descent and other Kenyans of 'native' ethnic or indigenous groupings. It became evident during the subsequent open debate that almost all those from native ethnic groupings seemed to know each other, prompting the chair of the session, Davinder Lamba, to refer them collectively as 'the usual suspects'.

As is common practice in Kenya, the chair of the session invited a Member of Parliament to 'greet the people', in this case Hon. Shakeel Shabir, MP for Kisumu East constituency and the only elected MP of Asian origin. Kisumu East constituency is in Nyanza Province, a region dominated by Dholuo speakers. When he stood to speak, Shabir narrated a recent conversation between him and his son, who had just turned 18. He stated:

You see I am a MP commonly referred to as 'a Muhindi Jalu' (an Indian-Luo). So in your form record your tribe as Kenyan-Asian-Luo.

Three days ago my son went to seek a Kenyan identity card. In the application form there is space for a question: 'What is your tribe?' He was unable to complete this section and decided to seek my guidance that evening. So my son asked me what he should record as his tribe. With a little thought I told him, that is easy. You see I am a MP commonly referred to as 'a Muhindi Jalu' (an Indian-Luo). So in your form record your tribe as Kenyan-Asian-Luo.

Shabir's narration was greeted by a long laughter and applause, yet it is typical of dilemmas of citizenship and notions of identity in Kenya. It is these pluralities and malleability of identity that engage with the vision of a unitary notion of citizenship. Kenyans espouse multiple identities, at both individual and group levels, yet these multiple expressions of 'Kenyan-ness' are in constant competition with the idea of creating and expressing some sort of uniform

² The forum was established in June 2010 with a mission to advance social justice, reform, cohesion and nationhood by working as an integral part of the community of activist participants in the Kenyan social process. The members of the steering group are: Zarina Patel, Yash Pal Ghai, Pheroze Nowwojee, Sudhir Vidyarthi, Zahid Rajan, Aurelio Rebelo, Abdul Hamid Slatch, Mohinder Dhillon, Rustam Hira, Mohez Karmali, Madhukant Shah and Davinder Lamba.

Kenyan-ness. As is evident in Shabir's experience, the Kenyan project of building a nation-state is entangled and imbued with an ethno-centred logic of identity and belonging. This is why when applying for a national identity card –one of the legal certificates providing evidence of Kenyan citizenship – an individual has to state their 'tribe'. It is such logic that enfolds citizenship, belonging and identity, so that the governed find it difficult to see themselves as part of the broader entity of Kenyans rather than as members of a specific tribe. And it was for this reason that the 2010 Constitution

was scrutinized – to ensure that the 'peculiar interest(s)' of diverse groupings were catered for.

Yet those who want to express or get proof of their citizenship are often presented with little choice besides the common official narratives and bureaucratic categories

The KAF function was convened to serve this very purpose. The mythology of 'peculiar interest' citizenship and belonging is about 'the group' that one belongs to. It is corporate. That is, an individual belongs to Kenya if the interests of their group (most often read to refer to a given ethnic, religious and/or racial group) are catered

for. Shabir's case and the campaigns around the 2010 Constitution also illustrate how the state conditions an individual's subjectivities and identities. The state through its officials does have a common narrative of representing Kenyans and Kenyan-ness. Yet those who want to express or get proof of their citizenship are often presented with little choice besides the common official narratives and bureaucratic categories, which invariably pigeon people according to their origins. Shabir is of South Asian ancestry and his son is Kenyan by birth, socialization and choice. Yet the state requires that his son belong to a particular indigene or ethnic group in order to be Kenyan. The question raised in Shabir's case echoes Mamdani's (1996) question: 'When does a settler become a native?'

The constitution-making process, therefore, was not just about the relationship between the governors and the governed. It was as much about defining the

governed. Shabir's and his son's experiences provide one index for reading the 2010 Constitution.

2.2 The 2010 World Cup: Citizenship and globalization

The Fédération Internationale de Football Association (FIFA) World Cup has become a global event during which concepts of identity, belonging and citizenship may be reaffirmed or reproduced. The 2010 FIFA World Cup brought together 32 teams, representing an equal number of countries, from four global regions (Europe, South America, Africa, North America and Asia).³ Although Kenya was absent from this particular World Cup – which was held in South Africa, the first time ever in the continent – it was apparent that many Kenyans had made decisions about the teams they would support. Kenyans' choices of whom to support, where to belong and whom to identify with during the 2010 FIFA World Cup represented contestations of social identity that most Kenyans deal with around the World Cup series and other global phenomena. Football is not the only site of these contestations in the global arena; they include religion, politics and other areas of competition that reproduce a sense of either inclusion or exclusion. The rationale for one's choices seems to be anchored on as many fronts as are presented by everyday life. At one level they may be based on primordial assumptions about the ethnic or racial identities of others. Other times the choices are influenced by opportunities, circumstances, histories, etc.

2.3 Kenya's National Dress

The last scenario is that of a quest for a national dress. The quest reached Parliament in April 2004, after two former MPs, Gor Sunguh and Koigi wa Wamwere, along with the current Prime Minister of Kenya, Raila Odinga, were barred from attending a parliamentary session because they were dressed in 'African wear', in violation of the parliamentary

³ Membership to FIFA is based on state affiliation. In total, FIFA's membership numbers 208 associations. FIFA has more members than either the United Nations or the World Trade Organization.

dress code (British Broadcasting Corporation, 17 July 2003). Wamwere protested, stating that suits and ties were 'colonial' as they were based on 'European culture'. The idea of developing a Kenyan national dress was advanced to find a distinctive costume that would uniquely represent Kenya both locally and internationally.

In a bid to realize this, the government (through the Ministry of Home Affairs and National Heritage) teamed up with the private sector (specifically Unilever Kenya), and together they set up a "national dress design team" that included various top Kenyan fashion designers. This was not the first time for debate on Kenyan dress. It had been discussed by Kenyan women conference goers for some time, perhaps informed by ideas such as Ngugi wa Thiong'o's call for decolonizing of the mind (1986) and the outstanding *aso ebi* dresses that tend to give a strong statement of identity associated with people from Western Africa (see Okechukwu, 2011).

The team was tasked with coming up with a design for the national dress, a key criterion being to design something that embodied as much as possible the dressing styles of dominant ethnic groups in the country. After various trials, the most popular designs were chosen by popular vote and in September 2004, Kenya's national dress (for both males and females) was unveiled in a ceremony attended by senior Kenyan politicians led by the then Vice-President, Moody Awori.

Kenya unveils First National Dress

Some years down the line these designs have had minimal impact. There was in fact a marked lack of enthusiasm among Kenyans, as some argued from the onset that the designs lacked originality and appeal. One of the designers involved in creating the outfit, Ojay Hakim, attributed the lack of success to the fact that the publicity after the launch was not adequate. Moreover, it was regarded as too costly for ordinary Kenyans.

This and the other ethnographic scenarios illustrate different experiences of belonging, identity and

citizenship in Kenya. The two distinctions (between primodality and social construction) are not exclusive in any case. Rather, individuals import these notions and appropriate them in different circumstances as was illustrated in the case of Shabir. It is, perhaps, the absence of consensus on a 'Kenyan National Dress' that pinpoints the dilemma of what is Kenyan-ness.

These are the kinds of contestations that the constitution-making process attempted to deal with. Beyond everyday life, the concepts of identity, belonging and citizenship remain ideas that have been fostered by the Kenya state over time. They were held by the colonial state as much as by post-colonial Kenya, the common node in both states being that difference was institutionalized in the creation of the Kenyan nation-state. That is, Kenya is presented as a multiethnic state in which the various ethnic nations need to be managed, if the state is to survive. Although there are ethnic groups that display remarkable distinctions, the paradigm of Kenya's post-colonial state seems to have sustained the colonial illusion that the distinctions between the various ethnic nations are pure, primordial and unchanging. An understanding of the historical roots of difference therefore becomes yet another important index of reading the 2010 Constitution.

3.0 Historical Institution of Difference in Kenya

Notions of what it means to be a Kenyan are intricately connected with the state's project of building a unitary nation-state and uniform citizens, in a context of co-existing yet antagonistic pluralities.⁴ This project stretches back to 1920, when the first boundaries of the country were drawn, and it has played out in various forms as the Kenyan state took

⁴ Some of these pluralities like gender, ethnic, religion, and migration status are widely acceptable. Others, however, such as those related to economic inequalities, notions of hierarchical relationships between various language groups and social positioning, are regarded as enablers of discriminatory practices and as pathological to the project of state and nation building.

shape. The colonial establishment aimed to create Kenya as a constellation of diverse cultural nations, with the following outcomes: First, there was an attempt to parallel territoriality with ethnic identity (see Figure 1). Second, the chaotic colonial cultural state generated a fluid, abstract ethnicity (Ake, 1981). On this latter point, although the various pre-colonial structures were by and large left intact, and despite the attempts by colonial administrators to establish a unitary state, the country was always understood to be a collection of different cultural nations. This is a construct that was anchored and legitimated by the works of colonial sociologists like Gordon Wilson (1935)⁵ and legal scholar Eugene Conran (1969).

The Kenya cultural state was organized into 'countries' defined by a group's ethnicity, and this ended up being the basis for the provinces in post-colonial Kenya. Wilson and Conran imagined and mystified the cultural boundaries, conceptualizing them as homogenous cultural groups. To facilitate law and administration, Conran and Wilson developed a legal index based on what they identified as 'customary laws'. Language groups that were considered 'small' were classified according to their points of closest proximity. Kisii people in western Kenya, for instance, were expected to use the customary laws of the neighbouring Luo, who, numerically, had a larger population.

Mamdani's (1996)⁶ analysis provides a clear ontological construction of how the British colonialists designed and administered the colonies with the aid of the likes of Conran and Gordon. Although a reading of Kenyan's colonial history does show other formations – such as the Kavirondo Tax Payers Association from western Kenya – playing an equally key role in the production of the native colonial subject in Kenya, it is the ethno-citizen portrayed by Mamdani (1996) as the 'subject' that

was mostly used in instituting difference in Kenya's pre- and post-colonial state. Native Kenyans could therefore only belong to their 'homelands'; their identity was emphatically attributed to some 'natural' and 'biological' belonging, and a unitary citizenship was imposed against this background.

The architectural structure of the colonial state was such an important subject within the colony that as early as 1930 the then secretary of state for colonies, prepared and submitted to the Parliament a *Memorandum on Native Policy in East Africa* (HMSO, 1930; hereafter cited as the 1930 Memorandum) with the purpose of articulating the attitude, field of operation and targets of colonial power, and the means and instrumentalities to be used in governing the Kenya colony. It was indeed an attempt to implement the 1920's *Devonshire White Paper* in which Kenya was declared to be 'a black man's country'. The ideas in this *White Paper* came to present contradictions and dilemmas on citizenship, belonging and identity in post-colonial Kenya. The *White Paper* shattered the hopes of a Rhodesian model in Kenya, i.e., one in which the white settlers declared the country independent and went on to implement an apartheid structure. It also doomed the hopes of other immigrants – more so Indians – of claiming 'native-ness', restricting the basis for asserting one's 'native-ness' to indigenous black Africans.

But as Mamdani has demonstrated, the model of governance used by the colonial administration represented the 'natives' as those of a lesser race and unfit to be governed using civil law. Customary law (as produced and documented by colonial administrators and their converts) was used to govern Africans, while the immigrants were governed using bureaucratic civil law. Excluding the African natives from civil law achieved two results: The various places allocated for occupation by various African groups were presented as perpetually different, thus dividing the Africans, and the terms of integrating Africans into the bureaucratic state were premised on the concept of different people of a lower rung.

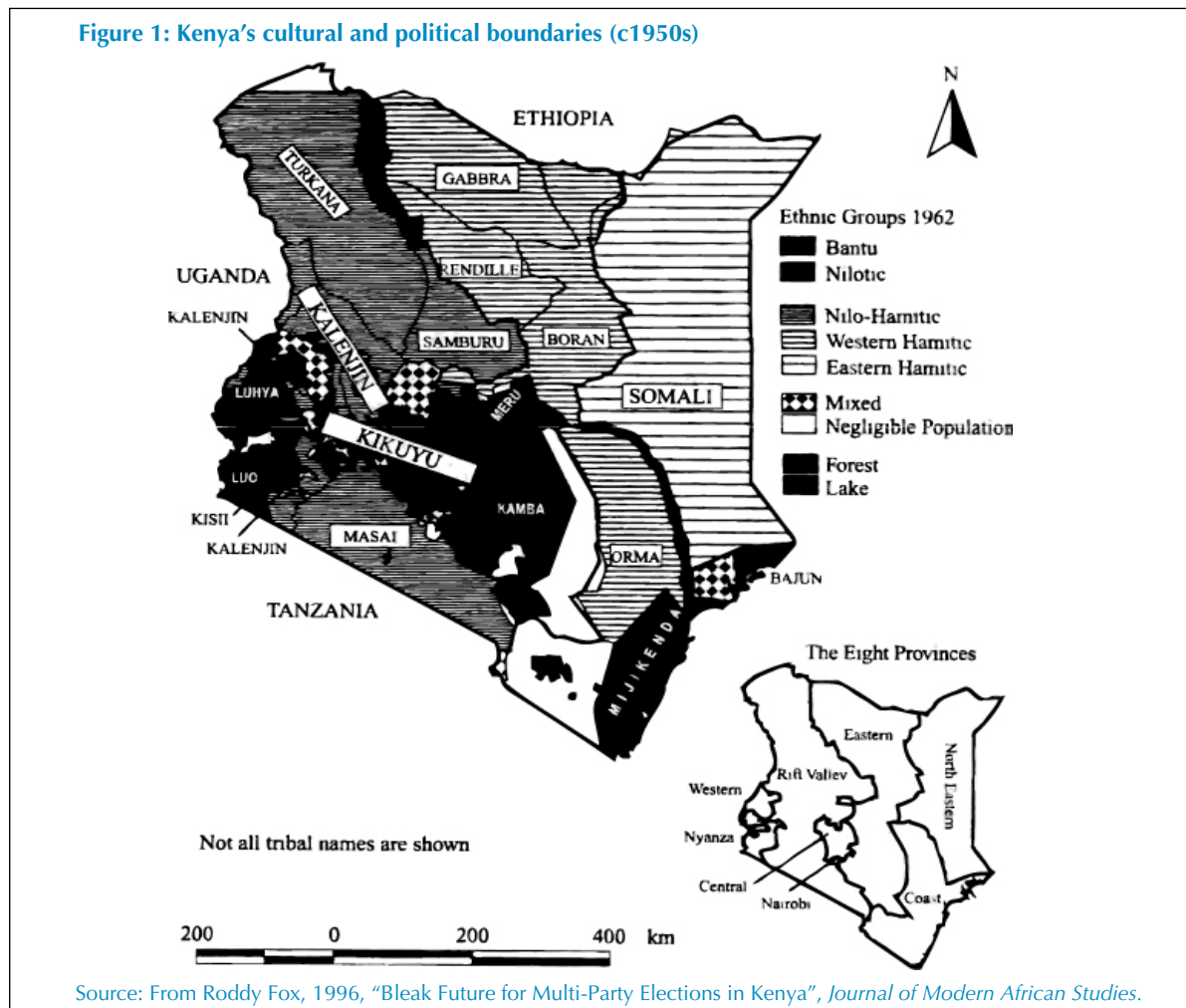
5 Sociologist Gordon Wilson was employed by the colonial government to work amongst the Luo in the 1950s.

6 Mamdani (1996) seems to have expanded on Mudimbe's (1988) epistemology of colonialism in his book, *The Invention of Africa: Gnosis, philosophy, and the order of knowledge*, in which Mudimbe states that 'Colonialism and colonialization basically mean organization and arrangement' (p. 2).

The result of this project of instituting difference can be illustrated in the map of Kenya shown in Figure 1 (and reproduced by Fox, 1996), which was first put together in the 1950s. Imagined cultural boundaries were aligned to administrative boundaries. Indigenes were perceived to constitute a single category of people, even though they retained their distinct characters.

This very notion of a collective identity for indigenes and their right to belong to Kenya 'naturally', as stated in the *White Paper*, would be mobilized in the call for political independence by nationalists like Jomo Kenyatta and Oginga Odinga, who argued that the leadership of Kenya should return to the 'black man'. Yet even this meta-nationalist movement was undermined by the imagined (Anderson, 2006)

'cultural state'. The manner in which various ethnic associations congregated as institutions for contesting state power is well documented by Ajulu (2002), who provides an exhaustive catalogue of the ethnic formations and constellations that were formed in the 1960s to press for the interests of various ethnic groups. These included the Luo Union and the Gikuyu, Embu and Meru Association (GEMA), among others. That these ethnic associations sought to pursue their communities' interests, later become one fault line within and between the Kenya Africa National Union (KANU) and the Kenya Africa Development Union (KADU). In addition to this, the differences instituted by the colonial project would also become useful to the 'new Africa elite'. The idea of nationalism was frozen and enveloped by the more important (to those who espoused it) mission



of class formation, which saw the appropriation of the state and its apparatuses by the emerging ethnic-based comprador bourgeoisie (Leys, 1975).

After independence, the sense of instituted differences in the understanding of 'belonging' became an important instrument for governance. It provided a clarion call for uniform citizenship. President Jomo Kenyatta's rhetoric of *Harambee* (meaning 'pulling together') was used to mobilize the embryonic nation into forging ahead and, as such, was an attempt to create convergence within situations of 'difference'. But *Harambee* was not the all-inclusive movement portrayed by its official narratives. Rather, it was a means through which Kenyatta's handlers (an ethnically organized group) accumulated capital and surged forward the patron-client political economy. At the time of Kenyatta's death *Kenyanization* and *Harambee* had produced a nascent middle class with an ethnic image.

By the time Kenya had been transformed by President Daniel arap Moi and KANU from a multi-party to a single party state in the mid 1980s, being Kenyan was more an issue of political identity than any other (Widner, 1992). Moi's authoritarian government configured new forms of representation. A 'true' Kenyan citizen had to be a member of KANU. Anyone who was not in possession of a KANU membership card, or who acted in opposition to KANU, was marked (and in certain instances incarcerated).⁷ Moi was fond of stating, *Siasa mbaya, maisha mbaya*, a Kiswahili expression that translates to 'bad politics, bad life'. If any leader(s) questioned Moi's and KANU's misrule, then their entire language group would be punished. This was made easy by the fact that the cultural and administrative boundaries created under the colonial administration – and left intact after Kenya's independence – mirrored each other. Moi went further, however, and created additional cultural boundaries in the form of administrative districts.

⁷ For more on this new 'form' of Kenyan, see the documented experiences of Jaramogi Oginga Odinga captured in a memoir by Odinge Odera (2010) titled, *My Journey with Jaramogi: Memoirs of a close confidant*, published by Africa Research Resource Forum.

These 'new' districts were mainly about earning loyalty to ethnic chiefs under the guise of bringing services closer to the people. Michela Wrong (2009) eloquently captures this phenomenon of the Moi and KANU ethno-economic model in her book, *It's Our Turn to Eat*. Wrong demonstrates how political class and economic patronage work hand in hand to sustain corruption and mis-governance in Kenya. Moi, like Kenyatta before him, demonstrated how tribal apartheid can work in a state characterized by ethnic plurality.

4.0 The Making of the New Constitution

It should be clear that questions of belonging, identity and Kenyan citizenship are as old as the building of Kenya and its political leadership. Thus, even though this paper looks at these concepts in the 2010 Constitution, the issues are not limited to that charter. They are embedded in the very construction of Kenya and experiences of Kenyan-ness. A reading of these issues within the 2010 Constitution is important, however, as it deals with these concepts in a fairly state-centric space.

Coming on the back of Kenya's historical mis-governance coupled with increasing levels of human insecurity (including episodes of politically instigated ethnic violence), the 2010 Constitution is indeed an instrument for creating 'perpetual peace'. 'Perpetual peace' refers to a state of affairs in which peace is permanently established in a certain area. The 2010 Constitution attempts to deal with the right to be different in an inclusive Kenya, i.e., how to tolerate difference whilst at the same time guaranteeing citizens' rights. In this regard, philosopher Immanuel Kant argues that it is the 'principles of human rights that allow states to protect each other against external aggression, while at the same time refraining from interfering with each other's internal disagreements' (cited in

Cavallar, 2001: 235). Smith (1969) spoke to the same notion in his ideas of 'differential incorporation' in a 'common political society'. In other words, as a country Kenya is not some sort of 'melting pot' of difference. Rather, it is a common political society that aspires to accommodate the different formations expressed in terms of ethnic groups, religious affiliations and other identities. A reading of the ideas of both Kant (Cavallar, 2001) and Smith (1969) arguably affirms the idea of the constitution-making process in Kenya, as having been informed by the desire to establish principles of human rights and governance that would accommodate different groups, while at the same time enabling a common political society.

On the subject of citizenship, the idea of perpetual peace raises three major questions: How do we ensure cultural diversity that is tolerant and co-existent? How do we accord dignity and human rights to all Kenyans? How do we inculcate 'Kenyan-ness' in an era of globalization⁸? These are all questions that come into play in attempting to create a uniform mould of citizenship – Kenyan-ness – in an era of pluralities. The three ethnographic scenarios described earlier are useful in responding to these questions. First, however, it is important to understand the concept of 'pluralities' in order to understand its implications within the 2010 Constitution. Martin Legassick's (1977) *Concept of Pluralism: A critique*, provides a framework that may be useful in gaining an understanding of the question of pluralities. He builds on an analysis by M.G. Smith (1969), distinguishing between vertical and horizontal pluralities. Here horizontal pluralism refers to a situation in which people are different by choice (e.g., as a function of religious beliefs, different interests, etc.) or primordially (i.e., as a function of innate differences in skin pigmentation, blood group, language, etc.). Vertical pluralisms, on

the other hand, arise when social distinctions imply differences in access to socially valuable or even livelihood material resources. They are evidenced in cases of domination by one group over another, resulting in hierarchies. The result is that criteria of humanness are perceived not to be the same. In fact, such pluralities imply that human sameness is achieved and not innate.

The 2010 Constitution recognizes that Kenya is a plural society and cites gender, cultural, generational and regional (horizontal) pluralisms as such categories. This is manifest in the three scenarios that were raised at the beginning of this paper. But as is illustrated in the Constitution, there are differences that the country has chosen to retain and others – more so those associated with economic inequality and differential dignity (vertical pluralisms) – that the Constitution aims at reversing. In any case, by mentioning the various categories of identity, the central motif of the 2010 Constitution is to ensure that these otherwise horizontal pluralisms do not translate to vertical pluralisms.

Smith (cited in Legassick, 1977) expresses the consequence of a process of creating a common political society as follows:

The collective character of the system of differential incorporation and the scope of its substantive differentiation must be sufficiently rigorous and pervasive to establish an effective order of corporate inequalities and subordination by the differential distribution of civil and political rights and the economic, social and other opportunities that these permit or enjoin (Legassick, 1977: 27–28)

How do we ensure cultural diversity that is tolerant and co-existent? How do we accord dignity and human rights to all Kenyans? How do we inculcate 'Kenyan-ness' in an era of globalization

8 As Arjun Appandurai (1999) has demonstrated, globalization and identities of local belonging, such as Kenyan-ness, do not necessarily form alternatives to each other. Rather, what has been most manifest as attested by calls for dual citizenship in Kenya is that globalization seems to have created an upsurge in quests for a local belonging that goes hand in hand with belonging to some transnational community. Also see Appandurai's notion of 'globallocality' (ibid.)

Although Smith (in Legassick, 1977) comes out in this argument as a political determinist by not assigning adequate place to citizens' sovereign will or agency, his position is perhaps the most solid theory on pluralisms. His notions on the transition from differential incorporation to a common political society provide a framework for understanding the challenge facing Kenya. That is: How to deal with a cultural diversity that interacts with other diversities such as class, gender, etc.?

Historians and anthropologists have identified two dominant models in responding to the dialectics of vertical and horizontal pluralisms. The first level of pluralism has been solved by societal separation (as evidenced for instance in the creation of a Jewish state) and provides an argument for a two-

state solution to the Middle East crisis. The same thinking was also used to implement the apartheid system in South Africa between 1948 and 1994 (Mamdani, 1996). The idea of integration can be unpacked in two ways. One way is the direction of eliminating presumed difference in culture, religion, language and so on. This is what is often meant by the phrase 'melting pot'. In such an option the political society that is

created emphasizes the elimination of images and practices of differences that are otherwise considered primordial, e.g., ethnic groupings. This first solution has been advocated by philosophers like John Rawls and Immanuel Kant, both of whom argue that integration delivers justice. This perspective is also very common in modern state formation (Sen, 2009).

The second strategy of integration presumes that primordial differences are first organized into political units, e.g., districts and counties. The unit of integration can take the form of an administrative boundary within which people having the same 'distinctions' are also presumed to reside. It can

also be imaginary, with distinctions manifest in some sort of 'virtual community'. These political units then consolidate into a single political society. This second model represents a common form of difference multiculturalism⁹ (Turner, 1993: 413). As mentioned earlier, Smith's framework is useful to the extent that it provides us with a model for analysis. Smith does not give an explicit recommendation on whether to pursue integration or separation. Kenya has taken a model that in the words of Smith, would likely be called 'differential integration'. It is a strategy of difference multiculturalism fraught with numerous limitations, most notably its assumption that so-called horizontal difference is primordial and pure.

To respond to the question of coexistence in the context of cultural diversity, the 2010 Constitution seems to borrow from Smith's (Legassick, 1977) politically determinist model and difference multiculturalism. The Constitution explicitly appreciates the maximal elements of distinction, most of which are seen through 'culture' – which is unfortunately treated as being synonymous with customs and traditions. The provisions related to this can be found in Article 11, which begins by declaring that:

This Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

Article 11 focuses on the notion of 'culture', but subsection 3(a) goes further to introduce a curious item that Comaroff and Comaroff (2009) referred to as 'the economy of identity'. This section states:

That parliament shall enact legislation to ensure that communities receive compensation or royalties for use of their cultures and cultural heritage.

9 Terence Turner (1993: 413) isolated 'critical' and 'difference' multiculturalism as possible schools of thought. He argues that critical multiculturalism seeks to use cultural diversity as a basis to challenge, revise and put into use basic notions and principles common to dominant and minority cultures. Difference multiculturalism, on the other hand, tags culture to ethnic identity and makes it (culture) a license for political and intellectual separatism.

One way is the direction of eliminating presumed difference in culture, religion, language and so on. This is what is often meant by the phrase 'melting pot'.

These provisions essentially acknowledge differential presence in a unitary Kenya. They also treat culture as an attribute that is natural and owned by certain communities. This means that Kenyans are allowed to belong to their various cultural formations and express their identities in these formations. Notably, however, the differences are allowed only to the extent that they do not undermine the political project of creating a common political society, which is Kenya. Article 10 lists the “national values and principles of government” as including:

- Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- Human dignity, equality, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- Good governance, integrity, transparency and accountability; and
- Sustainable development.

These values run through the rest of the document with an idea of creating a sense of belonging and collective identity – a notion that is not found in Kenya's 1963 Constitution. These identified values also provide a definition of the expectations of being Kenyan. But it is not the values that are used as the sole adhesive force in the 2010 Constitution. Rather, ideas of dignity and rights with international acclaim are used both to eliminate barriers to accessing equity and to enable the final realization of justice for all. The Bill of Rights in the new Constitution has moved the country beyond the boundaries of civil and economic rights and declared that Kenyans are entitled to all human rights. The economic, cultural and human rights are more specifically seen as useful in mitigating vertical pluralism.

Under the previous Constitution ‘citizenship’, as defined in both legal and political terms, was experienced through identity and belonging (amongst others) in everyday life. Such citizenship was also experienced in temporality and as a function of various identities, e.g., religious, generational,

gender, economic class, place of birth. The new Constitution, however, made some significant changes to this situation in that it is about what it is to be a Kenyan, and the relationship between the governors and the governed. The new charter explicitly outlaws discrimination on any basis and in so doing has allowed for the existence of horizontal pluralisms without making their existence a basis for domination or exclusion.

The Constitution's provisions dealing with citizenship include:

- Both men and women can pass citizenship to their children (Article 14(1)).
- Both men and women married to Kenyan citizens have a right to become citizens (Article 15 (1)).
- A person born outside Kenya is a citizen, provided that at least one parent is a citizen (although this could be limited by law to prevent citizenship from passing from generation to generation through people who have no active connection with the country) (Article 14).
- A citizen who becomes, or has become in the past, a citizen of another country is entitled to be a citizen of Kenya as well (Articles 14(5), 15(4) and 16).¹⁰
- A child adopted by a Kenyan is entitled to take Kenyan citizenship (Article 15(3)).
- A child who is in Kenya and who seems to be less than 8 years old, but whose parents are unknown, will be assumed to be Kenyan (Article 14(4)).
- All citizens are entitled to identity cards and passports (Article 12(b)).

The new charter explicitly outlaws discrimination on any basis and in so doing has allowed for the existence of horizontal pluralisms

The idea of a cosmopolitan Kenya is captured in the provisions allowing for dual citizenship, i.e.,

¹⁰ It seems that the intention of the new Constitution is that the reverse is to be true, namely that a person who becomes a Kenyan may retain a previous nationality, but this will require a new law.

Articles 14(5), 15(4) and 16. These provisions are fundamental in removing the previous notions that being a Kenyan meant being linked only to a locality and culture in Kenya. It is also an acknowledgement of the fluidity of state borders and multiple ideas of belonging. The possibilities of such a provision were seen during the 2010 FIFA World Cup where two siblings, Kevin-Prince Boateng and Jerome Agyenim Boateng, played as citizens of two different countries, i.e., Ghana and Germany, respectively. The provision on dual citizenship will serve as a constraint to the otherwise overzealous aboriginal movement that has been taking root in Kenya.

5.0 So, Are We on the Way to Achieving 'Perpetual Peace'?

The 2010 Constitution is an attempt to steer Kenya towards a common political society. It has protected differences (some of which are considered as natural such as culture, while others are considered to be social constructs such as gender differences) and invites collective belonging. It states that in incorporating these groups into Kenya, no one should be discriminated against or deprived of their dignities and rights. It therefore legitimizes collective belonging among groups and individuals of different characteristics. Certain issues need to be critically understood, however, before the hopes of many are realized: that this Constitution will bring about perpetual peace for Kenya and Kenyans. What we realize is, in fact, tensions at two levels of pluralism. On the one hand, the Constitution is interested in eliminating vertical pluralisms. Human right is presented as a major instrument of realizing this goal. Yet from another perspective, the Constitution is interested in retaining the 'natural' differences that exist in a multicultural Kenya.

The Kenyan situation is similar to the South African experience of constitution making at the end of apartheid. At the 1994 Constitutional Conference in South Africa, the key question in the mind of the drafters and those engaged in the conference was the invitation to reconstruct the apartheid state from its racial logic. This logic was seen in structure, ideologies, policies and the way politics was organized in the apartheid state. Seventeen years later, the circulation of racial ideas in institutions of the state and everyday life in South Africa is as present as it has always been. The only difference is that it is not as explicit as in its apartheid form. But as pointed out by Owen Sichone (2003), who has undertaken extensive study on xenophobia, the spate of violence labelled xenophobic attacks seemed to be based on the same racial logic that seeks to create an authentic and puritan citizenry. The project of deracialization therefore doesn't seem to have animated the emergence of a new political subject and model of politics that can dismantle racial identity politics in South Africa. This is one other reason why the project of a human rights state proposed by Makau Mutua (2002) has collapsed in South Africa.

Certain assumptions that are enveloped or assumed by Kenya's 2010 Constitution may affect the agenda and idea of perpetual peace. The assumptions that culture is 'natural', 'pure' and even available for sale are some examples, and they can automatically be put to use in creating governance units. It is the dominance of the politics of ethnic identity that will need to be treated with the greatest care under the new Constitution. The logic of Kenyan-ness in the Constitution has been weakened by the underlying idea of difference multiculturalism that, like Smith, does not question the origin of the difference. In implementing this idea, there is the notion that for Kenya to remain as one country – a common political society – the interests of various ethnic groups must be considered. A natural conclusion to this notion is the assumption that individual Kenyans will automatically belong to a certain county. This logic assumes that a constitution should cater for

the interests of each community, an approach that supports regionalism linked to certain ethnic groups. In this design, the Constitution retains ethnic interests as if they are inherent and irrevocable and aims to ensure minimal interruption to the current imagined and real cultural formations. Arendt (2000) has argued that such an approach, referred to as 'automatism' although sometimes inherent in processes, generates a system or product that is 'no less ruinous than the natural life process that drives our organism and which in its own terms, that is biologically, leads from being to non-being, from birth to death' (Arendt, 2000: 151)

The presentation of cultural formations as if they are primordial, natural, permanent and synonymous with communities is a major limitation in the quest for a uniform identity in the 2010 Constitution. These understandings of culture can be seen in the general public parlance in Kenya. Yet a formulation based on automatism seems to ignore the rigorous public debate questioning the understanding of purely cultural categories and the people of Kenya. Journalist Philip Ochieng' captured this contestation in *History will drive tribalists to extinction*. He argued that although a number of Kenyan writers of diverse backgrounds¹¹ concentrate their writing on genealogies of particular communities, all reveal that each community is a mind-boggling mixture of blood, cultures and languages (Ochieng', 2010). He demonstrates how through marriage, simulation, and acculturation, the so-called communities are such mixtures that it is not possible to get a 'pure Luo' or 'pure Bantu'. Ochieng' (2010) considers this to be good because whether politicians like it or not, all the communities that the fortuity of history called colonialism once brought together into a commonwealth called Kenya are inching closer and closer towards one another.

Ochieng's position has had support from Makau Mutua (2010). Although the two writers hold rather polemic social and political positions in Kenya's past

and present, they offer a convergence that is useful in reflecting on the idea of pluralisms underlying the 2010 Constitution. Mutua proposed in one of his regular *Sunday Nation* commentaries that "Kenya should ban tribal associations". He singled out GEMA as desperate to use the new Constitution to entrench their hegemony. Mutua was taking exception to reports that GEMA, which brought together the Kikuyu, Meru and Embu elite, had allegedly convened a meeting at which they asked the Deputy Prime Minister and Minister for Finance, Uhuru Kenyatta, to take leadership in mobilizing Central Kenya to vote for the new Constitution.

Mutua's suggestion is a belated articulation of a caution for which implementation cannot be delayed. He calls for a stop to the current vernacularization¹² of democracy. It is a bold suggestion for dealing with the dominant ethno-consciences – most of which are constructed on false consciousness. This author is reminded of his struggle as a young man at Moi University when he declined to join the Siaya Students Association. His reasons were many, but he refers to two here.

First, he had never lived in Siaya; rather he had spent his entire childhood and pre-university education life in Korogocho in the east of Nairobi. Second, he was never convinced of belonging to Siaya, which was the district headquarters of his ancestral Ugenya constituency in Nyanza Province of western Kenya. The leadership of the Siaya Students Association had presented Siaya as the 'beginning' of being a Luo. The other argument offered by the leadership was that through belonging to Siaya, the author could access bursaries as the local MP would mobilize resources for those from his 'home area'. Thus an individual needed to belong to Siaya in order to get national resources like bursaries. Far from this,

The presentation of cultural formations as if they are primordial, natural, permanent and synonymous with communities is a major limitation in the quest for a uniform identity in the 2010 Constitution.

11 Ochieng' specifically mentioned Bethwell Ogot, Gideon Were, Ben Kipkorir, William Ochieng, Godfrey Muriuki, Henry Mwanzi, Theodora Ayot, Henry Ayot and Kipkoech arap Sambu.

12 This is by no means the same as the 'vernacularization' of human rights, which may also mean their domestication. Rather, it is the kind of conceptual reconstruction that created 'insiders' and 'outsiders'.

most of the author's university fees were paid with grants from the Ratansi Education Trust, which had nothing to do with belonging to Siaya. In the years that followed at the University and in the civil society, it became clear how 'tribal associations' are used to promote both political parochialism and divisive politics.

The histories of how members of various language groups got to be dominant residents of certain parts of the country demonstrate that no language group can claim to have been there at the 'beginning'. To the contrary, we are informed by Ayse Caglar's (2001: 182) assertion that 'all cultures are creole', as through history there has been ongoing interaction between and within cultures, including those that we

now label 'Luo', 'Luhya', 'Embu' and so on. Mutua and Ochieng' are therefore convincing in their separate contentions that Kenya's so-called cultural and ethnic boundaries are fictitious and their futures perilous. Ochieng' concludes by saying that:

Such gradual conflation of ethnic energy was what produced such great nations as China, France, Germany, Japan and Russia. It is what will one day produce a truly

homogenous ethnic entity called Kenya. This is the wheel of history that those now igniting the fire of tribalism are trying to turn back. But time is inexorable. It will remove all those who stand in its way as remorselessly as a bulldozer (Ochieng', 2010: 13)

Ochieng's (2010) and Mutua's (2010) perspectives are helpful in the pursuit of perpetual peace. Their ideas suggest that the abstract ethnic consciousness created as part of colonial and post-colonial statecraft has no place in the kind of values and objectives of the new Constitution.

But the Constitution itself should have been more explicit in disabusing Kenyans of the idea that we are historically and irreversibly different. Indeed, it seems to this author that the idea of culture and commoditized heritage as envisaged in the Constitution will undermine the project of creating Kenyan-ness. Treating culture as some natural thing around which people can mobilize, organize and even own tends to create convergence around false consciousness. Anthropologist Mafeje (1997) has argued that it is this kind of false conscience that generates ethnicity. Mafeje (1997) rejected ethnicity as an ideologically-loaded concept, arguing that it is not a natural outcome of ethnic existence but rather a class interest-driven phenomenon. On this basis, it is not the member of an ethnic group that is the problem, but the practice of ethnicity, which is loaded with prejudice and false consciousness; as such there can never be such a thing as 'positive ethnicity', as has been suggested by Koigi Wamwere (2002).

6.0 Between Freedom and Sovereignty

What Ochieng' (2010), Mutua (2010) and indeed Mafeje (1997) have suggested is the notion that ethnic freedom (centred in the idea of respecting difference) cannot be achieved through a project of ethnic sovereignty (where each ethnic group treats itself and pure and independent) and ethnicity (where ideology of inclusion and exclusion is developed). There are two major arguments here with bearing on the new Constitution. First is the idea that 'freedom' (at least as defined in political theory) is relational and can best be defined through political instruments, i.e., the state should not interfere and should at the same time bar third parties from interfering with individuals' and groups' enjoyments of this right. Ochieng' (2010), however, contends that in everyday life and social processes such as marriage and socialization there are constant 'interferences' to

Assertion that 'all cultures are creole', as through history there has been ongoing interaction between and within cultures, including those that we now label 'Luo', 'Luhya', 'Embu' and so on.

ethnic freedoms, and therefore Kenya has no such clear and pure cultural boundaries.

By ethnic sovereignty this author is referring to a situation in which a territory is defined as synonymous with certain people, e.g., the Embu live in Embu land, etc., a notion that Mutua (2010) has stated as problematic. Ethnic sovereignty is a myth and fiction, yet the new Constitution has retained this fiction by awarding sovereignty to communities based on understandings of culture. This assertion was recently given credence in a case where the Maa community in Narok stopped attempts by the government to settle internally displaced persons in what they consider "Maasai County". The new Constitution goes further to award sovereignty to ethnic groups through administrative boundaries to be under county governments. This formula highlights differences at the expense of the pursuit of perpetual peace. It is not just the boundaries that are problematic. Rather, there is also the idea that cultural laws can be applied within these cultural zones. Couched under the notion of devolution, the suggested 47 counties are not much different from the Maasai country, Akamba country, etc., design under the colonial administration. Annex 1 provides an illustration of the issue, giving the list of counties and their corresponding dominant¹³ ethnic groups.

7.0 Conclusion

The Constitution promulgated in August 2010 offers Kenyans a singular opportunity to distance themselves from a past characterized by various forms of human-made barriers. I have suggested that most of these barriers were expressed through

¹³ These ethnic groups are referred to as dominant because the actual number of ethnic groups in Kenya remains unknown. Even within the so called ethnic groups like Luo or Embu, recent public debate and everyday life have attested that they are neither homogeneous nor bonded. Rather, there are significant internal variations in language and practices.

the politicization of what are otherwise horizontal differences. The horizontal differences have been described as non-hierarchical distinctions like language, religion, sex among others. The Bill of Rights and the values articulated in the August 2010 Constitution prohibit the use of these differences in influencing or determining how Kenyans enjoy their citizenship and rights.

In undertaking its project of unification, the Constitution is liberal in accepting differences in culture, heritage and other areas considered 'natural'. Nevertheless, it is in this liberal notion that we find a new fault line, more so in the notion of culture. That is, the Constitution treats cultural difference as natural, irreversible and mappable. What are otherwise horizontal differences get mapped within political boundaries as counties. Concurrently, these political and cultural boundaries tend to influence identification and selfhood in a hierarchical manner, thus posing a threat of 'insiders' versus 'outsiders'. This threat has most recently manifested itself in protests against resettlement of internally displaced persons in regions considered to be zones of particular ethnic groups. This paper has argued for a reorientation of the strategy of associating ethnic groups with places: To attain the vision of the 2010 Constitution, it is necessary to abandon the practice through which mappable difference informs the demarcation of county boundaries. Such a strategy would be useful in animating the country towards a framework for the de-identification or de-ethnicization of politics.

The process of de-(ethno) identification could be set in two ways. One would be to disallow or better still discourage the logic of ethnic associations by depriving them of space in the public polity (Mutua, 2010). Ethnic groups should be insulated from degenerating into ethnicity-based ideologies. Such an effort was seen in the drafting of the

To attain the vision of the 2010 Constitution, it is necessary to abandon the practice through which mappable difference informs the demarcation of county boundaries.

Political Parties Act of 2007 (Cap. 7A of the Laws of Kenya), which prohibits registration of ethnocentric political parties. De-identification can also be done through the naming of spaces and sites of political representations. Taking this approach, the names of most of the counties would have to change. The current model of naming counties, and indeed their demarcation, is embedded in the falsehood that cultural boundaries must coincide with political boundaries because cultures are natural and present – and permanent – in specific places. Making changes of this kind would not present anything new as such. In the 1990s, Moi changed the name of Kikuyu constituency (the name corresponds with the Agikuyu ethnic group) located in the western Nairobi suburbs, to Kabete constituency. In making this move, Moi aimed to scatter what he saw as the support of then MP Paul Muite (who was Agikuyu). The name 'Kabete' is considered more cosmopolitan to the extent that it does not embody any single group to the exclusion of others.

In mapping difference as natural and primordial, the Constitution assumes the creole and malleable nature of ethnicity. Hon. Shabir's experience, however, demonstrated that ethnic groupings are ever-changing, contested and fluid. I suggest that if Kenyans desire a uniform citizenship, they have to move beyond the fiction that everybody in Kenya must have an ethnicized identity that is natural and unchanging. This is the point that joins the arguments by Ochieng' (2010), Mutua (2010), Mamdani (1996) and Smith (in Leggassick, 1977). What these arguments suggest is that for Kenyans to build a 'new' Kenya with an idea of uniform citizenship aided by the Bill of Rights, their sense of belonging must shift away from its proximity to some primordial identity, more so ethno-identity, to the encompassing notion of 'Kenyan'. As the paper suggests, Kenyan-ness in everyday life is not experienced in the kind of bifurcations that are envisaged in the new Constitution. The new constitutional dispensation will not deliver perpetual peace unless it becomes a project to purge tribal consciousness from our state and society.

Annex 1

Annex 1: List of counties under the 2010 Constitution

Province	County	Corresponding dominant ethnic group(s)
Central	Nyandarua Nyeri Kirinyaga Murang'a Kiambu	Kikuyu Kikuyu Kikuyu Kikuyu Kikuyu
Coast	Mombasa Kwale Kilifi Tana River Lamu Taita/Taveta	Waswahili, Duruma, Giriama, Rabai, Boni, Digo Mijikenda Mijikenda Mijikenda Mijikenda Taita,
North Eastern	Garissa Wajir Mandera	Somali Somali Somali
Eastern	Marsabit Isiolo Meru Tharaka-Nithi Embu Kitui Machakos Makueni	Borana Turkana Meru Ameru Embu, Ameru Akamba Akamba Akamba
Rift Valley	Turkana West Pokot Samburu Trans Nzoia Uasin Gishu Elgeyo Marakwet Nandi Baringo Laikipia Nakuru Narok Kajiado Kericho Bomet	Turkana Pokot Maasai Sabaot Bagisu, Kalenjin Marakwet Nandi Gabra, Kipsigis, Kalenjin Kikuyu, Maasai, Pokot, Samburu Turkana, Meru Kikuyu, Kalenjin Maasai Maasai Kalenjin Kalenjin
Western	Kakamega Vihiga Bungoma Busia	Luhya Luhya Bukusu Luhya, Luo, Teso
Nairobi	Nairobi City	Mixed
Nyanza	Siaya	Luo

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