

THE FOURTH CONSTITUTION-MAKING WAVE OF AFRICA: CONSTITUTIONS 4.0?

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I. INTRODUCTION

Anyone who follows current affairs in Africa would notice the number of constitution-making processes underway throughout the continent. This paper argues that these processes form part of a new and ongoing wave of constitution-making. This is the fourth wave of constitution-making in Africa, the products of which this article refers to as “constitutions 4.0.” This article seeks to identify and discuss the causes, features, and distinguishing qualities of the fourth wave that set it apart from earlier constitution-making waves in Africa. Tentatively, two such features or solutions can be identified: first, the reduction of power of the executive to prevent abuse of incumbency; and second, the devolvement of government and constitutional decentralization to avoid politicized ethnicity. This paper then argues that the 2010 Kenyan Constitution is the most emblematic of the newest batch of African constitutions. Based on this premise, the Kenyan Constitution will serve as a case study to show the substantive and qualitative differences of constitutions 4.0 from earlier African constitutions. This article also references the constitutions of other African countries, such as Nigeria, Ethiopia, Ghana, and South Africa, whenever appropriate.

Section II of this paper discusses the metaphor of constitution-making waves and its applicability in Sub-Saharan Africa. Discussions of the distinguishing features of constitutions 4.0 and the problems of incumbency abuse and politicized ethnicity in Kenya prior to the adoption of the Kenyan Constitution in 2010 follow. The purpose of these discussions is to show the problems the new Kenyan Constitution had to address and the backdrop against which it was adopted. The final section of the paper discusses the manner in which the new Kenyan Constitution has been used to address these problems. This discussion provides both a case study and an example of how constitutions 4.0 are responding to some of the most common political problems in the continent.

II. THE METAPHOR OF WAVES AND OVERVIEW OF CONSTITUTIONAL DEVELOPMENTS IN SUB-SAHARAN AFRICA

To facilitate this section’s discussion, it is first necessary to discuss briefly the

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notion of “constitution-making waves” as it applies in Africa.¹ Samuel P. Huntington famously introduced the “waves” metaphor in relation to democratization.² Jon Elster later applied this metaphor to constitution-making.³ Elster noted that waves of constitution-making—i.e., the phenomena of constitution-making in different countries within the same period—might be coincidental at times, but in many instances, is the result of a common triggering event that affects many countries and leads to a wave of constitution-making.⁴ In this setting, the term “constitution-making” functions very broadly. It includes not only the adoption of brand new constitutions, but also significant constitutional revisions that result in qualitative changes to a country’s constitutional order. Therefore, this article uses the phrase “constitution-making” rather loosely to refer to the incidence of significant or comprehensive constitutional reforms or the adoption of new constitutions in a considerable number of countries. This article will apply the metaphor of waves to constitution-making in Africa to provide an outline of constitutional developments in Sub-Saharan Africa since those countries gained independence.

The 1950s and 1960s brought about a sea of change in the political landscape of Africa.⁵ Most African countries gained their independence during these decades.⁶ Because many of these countries did not exist before gaining independence, this period shaped the current political map of Africa.⁷ Constitutions were among the various accessories of statehood needed by the new African countries as they made their debut into the society of sovereign nations. It was important both for symbolic and practical purposes that the new states developed new constitutions upon independence.⁸ Almost invariably, the constitutions of their erstwhile colonial rulers served as models for the new constitutions of the independent African states.⁹ One might, in ill humor, say that the new constitutions were more like hand-me-down constitutions.

1. The author wishes to acknowledge Professor Markus Boeckenfoerde, from whom he received the idea to view the ongoing constitutional review processes in Africa using the metaphor of constitution-making waves.

2. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 13–16 (1991) (discussing how modern democracy emerged as a result of waves of democratization).

3. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 368–73 (1995) (describing the tendency of constitution-making to occur in waves).

4. *Id.* at 368, 371–73.

5. See PATRICK MANNING, *FRANCOPHONE SUB-SAHARAN AFRICA 1880–1995*, at 143–47 (2d ed. 1999) (detailing political developments in Ivory Coast, Sudan, Cameroon, Belgian Congo, Algeria, Niger, Guinea, Senegal, and Mali during this period).

6. See *id.*; ROBERT I. ROTBERG, *A POLITICAL HISTORY OF TROPICAL AFRICA* 362–71 (1965) (describing the achievement of independence in various sub-Saharan African nations).

7. See generally *id.*

8. See generally H.W.O. OKOTH-OGENDO, *CONSTITUTIONS WITHOUT CONSTITUTIONALISM: REFLECTIONS ON AN AFRICAN POLITICAL PARADOX* (1988).

9. See Michael Crowder, *Whose Dream Was It Anyway? Twenty-Five Years of African Independence*, 86 AFR. AFF. 7, 19 (1987) (stating that African leaders adopted constitutional models of their British and French rulers as a condition to gaining independence).

Anglophone African countries adopted constitutions with a parliamentary system of government that imitated the Westminster model.¹⁰ These constitutions, however, were not complete imitations of the British constitutional model, since they had incorporated justiciable bills of rights.¹¹ Nevertheless, the judges— influenced by the doctrine of parliamentary sovereignty that technically had been supplanted by supremacy of the written constitution in the newly independent African states—were very deferential towards the political branches and left the bill of rights to atrophy by complying with the whims of the governments of the day.¹² Similarly, in Francophone Africa, the newly independent countries adopted constitutions that were closely modeled after the 1958 De Gaulleist Fifth Republic French Constitution.¹³ These post-independence constitutions can be considered products of the first wave of African constitution-making.

The constitutions of the first wave, however, did not last long. The endemic military coups brought an end to many civilian administrations and resulted in the suspension of constitutions.¹⁴ Even where the armed forces stayed in their barracks, civilian governments morphed into one-party dictatorships.¹⁵ Of course, the resulting dictatorships were supposedly for the sake of national unity or development, which necessitated, according to those in power and their apologists, the concentration of power in one party or a supreme leader.¹⁶ In any case,

10. See Y.P. Ghai, *Constitutions and the Political Order in East Africa*, 21 INT. COMP. L. Q. 403, 411–12 (1972) (identifying the Westminster form of government as a basic characteristic of post-independence constitutions in Kenya and Uganda).

11. See Robert B. Seidman, *Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy*, 1969 WIS. L. REV. 83, 108–10 (1969) (describing judicial review in independence constitutions as going far beyond that of the Westminster model in rendering Parliament no longer supreme).

12. See *id.* at 109–10; see also Robert B. Seidman, *Judicial Review and Fundamental Freedoms in Anglophonic Independent Africa*, 35 OHIO ST. L.J. 820, 827 (1974) (explaining how judicial response has almost always been against fundamental freedoms claims, except where constitutional language was unambiguous).

13. See Victor T. Le Vine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 184 (1997) (explaining that constitutions created in Francophone African countries closely resembled the French Constitution, in some cases following the text word for word in certain sections).

14. THE MILITARY AND POLITICS IN AFRICA: FROM ENGAGEMENT TO DEMOCRATIC AND CONSTITUTIONAL CONTROL 38–39 (George Klay Kieh, Jr. & Pita Ogaba Agbese eds., 2004); see Patrick J. McGowan, *African Military Coups d'État, 1956–2001: Frequency, Trends, and Distribution*, 41 J. MOD. AFR. STUD. 339, 343 (2003) (discussing the scope of change resulting from successful coups d'état, which includes dissolving preexisting constitutional relationships).

15. See generally Naomi Mitchinson, *One Party Rule in Africa*, 73 ROUND TABLE: COMMONWEALTH J. INT'L AFF. 38 (1984) (discussing the tendency of African states, regardless of how they start, to fall into a one-party system of government).

16. Peter Anyang' Nyong'o, *Africa: The Failure of One-Party Rule*, J. DEMOCRACY, Jan. 1992, at 90–91; see also Samuel Decalo, *The Process, Prospects and Constraints of Democratization in Africa*, 91 AFR. AFF. 7, 9–11 (1992) (discussing the necessity of unity and development, among other factors, as justifications for the rejection of multipartyism by African leaders).

constitutions were repealed, suspended, or amended beyond recognition.¹⁷

These events, though maybe not technically acts of constitution-making, brought about significant change with regard to the content, relevance, and at times, the very existence of the constitutions they affected. Therefore, the period during which most of these events took place can be labeled as the second wave of constitution-making in Africa. These amendments, repeals, and suspensions of constitutions were common from the late 1960s through the 1970s and 1980s.¹⁸ The continent was beset by economic turmoil and political instability, especially after the 1974 international oil crisis.¹⁹ These times of crisis did not spare the constitutions adopted during independence.²⁰ Autocratic rule in either military fatigues or tailormade suits became the order of the day.²¹ The first wave constitutions created when many African states gained independence were either modified to serve as the legal basis for one-party rule or discarded in their entirety during the second wave.²²

By the end of the 1980s, however, a new dynamic was already in motion. Due to changes in the international arena and the deep discontent of citizens leading to protests about political stagnation and economic downturns, the autocrats in many African countries had to embrace democracy—at least in rhetoric.²³ Political liberalization and the opening of the political space for multiparty contestation became increasingly necessary to assuage the growing frustration of the people. When the Union of Soviet Socialist Republics bowed out of the Cold War, African states, which had hitherto benefited from being clients of one or the other superpower, suddenly found themselves in a unipolar world where they had to kowtow to the political conditionalities set by the triumphant West of the 1990s.²⁴

17. See generally Decalo, *supra* note 16, at 7–24.

18. See Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 2 n.2 (2007) (“The second constitution-making revolution started soon after independence as African leaders under the pretext of nation-building and development revised and repealed the liberal principles in the inherited constitution . . .”).

19. See NICOLAS VAN DE WALLE, *AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979–1999*, at 3, 14–15 (2001) (discussing the persistence of Africa’s economic crisis and its relation to political reform).

20. See ALEX THOMSON, *AN INTRODUCTION TO AFRICAN POLITICS* 106–08 (2010) (characterizing post-independence African rule as authoritarian and powerful executives’ treatment of laws as arbitrary with respect to bending or overriding them to suit the executives’ interests).

21. *Id.*

22. *Id.*

23. Richard Joseph, *Africa: The Rebirth of Political Freedom*, J. DEMOCRACY, Fall 1991, at 11, 18–20; Stephen P Riley, *Political Adjustment or Domestic Pressure: Democratic Politics and Political Choice in Africa*, 13 THIRD WORLD Q. 539, 542–46 (1992); See also Filip Reyntjens, *The Winds of Change. Political and Constitutional Evolution in Francophone Africa, 1990–1991*, 35 J. AFR. L. 44, 44–55 (1991) (discussing the wave of political reform in Francophone Africa and its role in challenging both single-party rule and socialism).

24. See JOHN A. WISEMAN, *THE NEW STRUGGLE FOR DEMOCRACY IN AFRICA* 72–74 (1996) (explaining how multiple influences, including the collapse of the Soviet Union, exerted pressure for political change on authoritarian African regimes).

Many African countries undertook another round of constitution-making and revisions.²⁵ These countries revived bills of rights and reintroduced multiparty elections.²⁶ Charles Fombad, who considers the 1990s to be the third wave of constitution-making in Africa, notes:

The drafting of new constitutions and the revising of old constitutions by most African countries in the 1990s was a clear recognition of the need for radical changes to the status quo ante. In some cases, it meant a total break with a dreadful past—such as apartheid in Southern Africa—but in most cases it meant recognizing that a constitutional framework built around the one party system that had bred authoritarian and dictatorial rule was a recipe for political instability and economic decline.²⁷

Therefore, it has been said that the 1990s saw a third constitution-making wave in Sub-Saharan Africa.

However, this is not the end of our story. At the moment, Africa is witnessing a fourth wave of constitution-making and reform. In the next section, the discussion will focus on the causes that prompted the fourth wave and the distinguishing features of constitutions 4.0.

III. CONSTITUTIONS 4.0: CAUSES, DISTINGUISHING FEATURES, AND CONTENT

The fourth wave coincides with an ongoing attempt to improve upon the deficiencies of the constitution-making in the third wave. Aside from the northern African states, which have adopted new constitutions in the aftermath of the Arab Spring and which might arguably be considered as forming part of the fourth wave, a number of countries in Sub-Saharan Africa are currently undertaking comprehensive constitutional review.²⁸ Kenya adopted a new constitution as recently as 2010 and is still in the process of implementing it.²⁹ South Sudan is in the midst of a long constitution-making process, poised to have its first permanent constitution as an independent country.³⁰ Zimbabwe also adopted a new

25. See Christopher Clapham, *Democratisation in Africa: Obstacles and Prospects*, 14 *THIRD WORLD Q.* 423, 432–34 (1993) (discussing the influence of external conditionalities imposed by the West following the Cold War on the rapid spread of the democratic movement in Africa).

26. *Id.* at 432, 434.

27. Charles Manga Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 *BUFF. L. REV.* 1007, 1009 (2011).

28. See M. Christian Green, *Religious and Legal Pluralism in Recent African Constitutional Reform*, 28 *J.L. & RELIGION* 401, 402 (2013) (discussing ongoing constitutional review processes in Kenya, Zambia, and Tanzania).

29. MACHARIA NDERITU ET AL., *HISTORY OF CONSTITUTION MAKING IN KENYA* 73–79 (2012), available at http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206114608.

30. Zacharia Diing Akol, *A Nation in Transition: South Sudan's Constitutional Review Process*, 2013 *SUDD INSTITUTE* 3, available at <http://www.suddinstitute.org/assets/Publications/POLICY-BRIEF-3.pdf>.

constitution in 2013.³¹ Constitutional review processes are underway and at different stages of progress in Tanzania,³² Zambia,³³ Liberia,³⁴ Malawi,³⁵ and Ghana.³⁶ Further calls for such review have been very persistent in Nigeria, where a draft of a new national constitution has emerged from an ongoing controversial constitutional reform process.³⁷ Such widespread constitutional reviews support the conclusion that a fourth constitution-making wave in Africa is underway.

A. The Substantive and Qualitative Differences of Constitutions 4.0

At this juncture, therefore, it is worth asking, what, if any, are the substantive and qualitative differences between constitutions 4.0 and predecessor constitutions? Two such differences can be observed immediately.

The first significant, substantive, and distinguishing feature of constitutions 4.0 is the extent to which these constitutions are designed to reduce the power of the executive and limit the abuse of incumbency.³⁸ Previous constitution-making waves saw constitutional designs that were indifferent to the aggrandizement of the executive or were quite deliberately designed to enhance the power of the presidency at the expense of other constitutional organs.³⁹ Unlike previous constitution-making waves, the fourth wave is animated by an underlying consensus about the need to constrain the executive. By entrenching executive

31. *Zimbabwe Approves New Constitution*, BBC NEWS (Mar. 19, 2013), <http://www.bbc.co.uk/news/world-africa-21845444>.

32. Abdulwakil Saiboko, *Tanzania: Constitution Review Exercise on Track*, TANZANIA DAILY NEWS (Jan. 6, 2013), <http://allafrica.com/stories/201301060011.html>.

33. Martin Nyirenda, *Zambia: Muchinga Debates First Draft Constitution*, TIMES OF ZAMBIA (Jan. 28, 2013), <http://allafrica.com/stories/201301281236.html>.

34. D. Wah Hne, *Liberia: Constitution Review Committee Marches On*, THE NEW DAWN (Feb. 28, 2013), <http://allafrica.com/stories/201302280549.html>.

35. *Malawi's New Attorney General Says Govt. Will Act on Constitutional Review Pleas*, NYASA TIMES (Dec. 7, 2012), <http://www.nyasatimes.com/2012/12/07/malawis-new-attorney-general-says-govt-will-act-on-constitutional-review-pleas/>.

36. *Constitution Review Commission Dissolved*, GHANAWEB (Aug. 15, 2012), <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=247683>.

37. Nuruddeen M. Abdallah, *Nigeria: New Constitution Emerges at National Conference*, DAILY TRUST (Aug. 12, 2014), <http://allafrica.com/stories/201408120660.html>.

38. For background information about the abuse of incumbency and the impact of trying to use the powers of the government to try and stay in office, see generally Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 OHIO ST. L.J. 773, 774 (1988–1989) and James A. Gardner, *The Uses and Abuses of Incumbency: People v. Ohrenstein and the Limits of Inherent Legislative Power*, 60 FORDHAM L. REV. 217, 220 (1991–1992). See also Steven Levitsky & Lucan A. Way, *Why Democracy Needs a Level Playing Field*, J. OF DEMOCRACY, Jan. 2010, at 57, 58 (discussing the uneven playing field of democratic competition caused by incumbents' unfair privileges and access to financial and media outlets).

39. See generally H. Kwasi Prempeh, *Presidents Untamed*, J. OF DEMOCRACY, Apr. 2008, at 109 (showing that recent political trends in Africa are moving away from single-party systems that allowed autocrats to enhance their own power while remaining politically unaccountable) [hereinafter Prempeh, *Presidents Untamed*].

term limits⁴⁰ and introducing more explicit, bright line, and targeted proscriptions of various forms of abuse of incumbency,⁴¹ constitutions 4.0 minimize the recurrence of the problems that have plagued multiparty politics in many African countries. Further, constitutions 4.0 strengthen horizontal accountability among the traditional three branches of government, reinforcing it with independent constitutional organs with a mandate to support democracy.⁴²

Drawing from their experience of unrestrained imperial presidencies that cowed the courts and enfeebled legislatures, the drafters of constitutions 4.0 have tried and are still trying to tame the executive branch through constitutional engineering.⁴³ Common features of the new constitutions are: strict and well entrenched presidential term limits, provisions requiring the impartiality and nonpartisanship of various arms of the state, constitutional organs of horizontal accountability, appointment and removal processes, provisions meant to ensure the independence of the judiciary, and democracy supporting state institutions.⁴⁴ These features substantively distinguish constitutions 4.0 from previous constitutions.

The second important departure of constitutions 4.0 is the more nuanced position these constitutions reflect in relation to decentralization and ethnicity.⁴⁵ Previous constitutional waves largely reflected the view that a centralized form of authority is preferable and necessary to guarantee the unity and territorial integrity of states,⁴⁶ while regional autonomy and federalism were viewed with suspicion.⁴⁷

40. See, e.g., CONSTITUTION, art. 142(2), 255(1)(f) (2010) (Kenya) (limiting the President's office to no more than two terms but including the term of office of the president as one of the matters able to be constitutionally amended); CONSTITUTION OF ZIMBABWE Jan. 2013, ch. 5, 18, art. 91(2), 328(7)–(8) (providing conditions that disqualify someone for election as president or vice president).

41. See, e.g., CONSTITUTION, art. 34(4), 232(1)(c) (2010) (Kenya) (establishing that state-owned media shall be impartial and free to determine the content of their broadcasts while also providing a fair opportunity for representation of dissenting views); CONSTITUTION OF ZIMBABWE Jan. 2013, ch. 4, 10, 11, art. 61(4), 200(3)–(5), 208(2)–(3) (establishing an impartial and fair media and requiring members of the civil service and security service to act impartially).

42. See Prempeh, *Presidents Untamed*, *supra* note 39, at 109–10 (noting the political trend in Africa of moving away from single-party systems that allowed autocrats to enhance their own power while remaining politically unaccountable); see also CONSTITUTION OF GHANA 1992, art. 46, 55(11)–(12), 162(3), 163, 167, 191 (Ghana) (establishing laws designed to prevent the abuse of incumbency and foster the transition to a multiparty democratic system).

43. See, e.g., CONSTITUTION, art. 73–92 (2010) (Kenya) (establishing responsibilities and accountability of leaders, as well as establishing voting and electoral standards); CONSTITUTION OF ZIMBABWE Jan. 2013, ch. 5, art. 88–115 (establishing the duties, functions, and accountability of the executive).

44. See, e.g., CONSTITUTION, art. 73–92 (2010) (Kenya) (establishing responsibilities and accountability of leaders, as well as establishing voting and electoral standards); CONSTITUTION OF ZIMBABWE Jan. 2013, ch. 14, art. 264–79 (granting of powers to provincial and local governments).

45. See CONSTITUTION, art. 174–200 (2010) (Kenya) (establishing laws promoting the decentralization of power and shifting more power to individual state and county governments); see also Alemante G. Selassie, *Ethnic Identity and Constitutional Design for Africa*, 29 STAN. J. INT'L L. 1, 55 (1992) (noting the lack of attention given to ethnicity in African constitutions).

46. See Solomon A. Dersso, *Constitutional Accommodation of Ethno-Cultural Diversity in*

Furthermore, ethno-cultural differences were ignored and given little or no constitutional recognition.⁴⁸ With the rhetorical denunciation of “tribalism” by the political class—while in practice engaging in the worst forms of ethnic politics—previous constitutions adopted a hostile attitude towards ethnicity.⁴⁹

In the fourth wave, we see a shift in the constitutional approach to these issues. Devolved government and constitutional decentralization, albeit weak at times, are becoming more and more the norm.⁵⁰ This is being done with an understanding that such developments will facilitate a more participatory and responsive governance at the local level, as well as a fair distribution of national resources.⁵¹ Furthermore, some degree of recognition, although only symbolic at times, is given to ethno-cultural diversity.⁵² This constitutional affirmation of ethnic diversity, however, is largely in cultural terms.⁵³ Political mobilization along ethnic lines is still discouraged and constitutions 4.0, like previous constitutions, are set to combat the politicization of ethnicity.⁵⁴ Furthermore, the constitutional

the Post-Colonial African State, 24 S. AFR. J. ON HUM. RTS. 565, 568 (2008) (discussing the structure of a centralized authority and its relations with the individual states).

47. See Mwangi S. Kimenyi, *Harmonizing Ethnic Claims in Africa: A Proposal for Ethnic-Based Federalism*, 18 CATO J. 43, 61 (1998–1999) (stating that the adoption of federalism has been met with much opposition from incumbent African leaders).

48. See Selassie, *supra* note 45 (stating that even though Africa is ethnically diverse, there is little in the constitutions of African states that reflect this diversity).

49. See also Francis M. Deng, *Ethnicity: An African Predicament*, THE BROOKINGS REV., Summer 1997, at 28, 29–30 (discussing the deprivation of cultural ethnicities by previous constitutions). See generally Marina Ottaway, *Ethnic Politics in Africa: Change and Continuity*, in STATE, CONFLICT, AND DEMOCRACY IN AFRICA 299, 299–319 (Richard Joseph ed., 1999).

50. See, e.g. CONSTITUTION, art. 174–200 (2010) (Kenya) (establishing laws promoting the decentralization of power and shifting more power to individual state and county governments); CONSTITUTION OF ZIMBABWE Jan. 2013, ch. 14, art. 264–79 (granting powers to provincial and local governments); see also Yonatan Tesfaye Fessha, *Federalism, Territorial Autonomy and the Management of Ethnic Diversity in Africa: Reading the Balance Sheet*, L’Europe En Formation, Spring 2012, at 265, 273 (stating that many African states have adopted constitutions that increase subnational autonomy).

51. See CONSTITUTION, art. 34(4), 232(1)(c) (2010) (Kenya) (establishing that state-owned media shall be impartial, be free to determine the content of their broadcasts, and afford fair opportunity for representation of dissenting views); CONSTITUTION OF ZIMBABWE Jan. 2013, ch. 4, 10 & 11, art. 61(4), 200(3)–(5), 208(2)–(3) (establishing an impartial and fair media as well as requiring members of the civil service and security service to act impartially).

52. See, e.g. CONSTITUTION, art. 7(3)(a), 90(2)(c), 130(2), 131(2)(d), 174(b), 197(2)(a) (2010) (Kenya) (establishing that political branches and appointments must reflect the diversity of the citizens of Kenya); CONSTITUTION OF ZIMBABWE Jan. 2013, ch. 1, 5, 8, 11, & 16, art. 3(2)(h), 90(2)(d), 184, 207(3), 296(2)(b) (establishing that political branches and appointments must reflect the diversity of the citizens of Zimbabwe).

53. See Christina Murray & Richard Simeon, *Recognition Without Empowerment: Minorities in a Democratic South Africa*, 5 INT’L J. CONST. L. 699, 717–22 (stating that the South African Constitution, while enshrining protections for culture and diversity in the private sphere through protections such as that allowing education in the language of one’s culture, does not suggest that political power will be accorded to these groups).

54. See Benjamin Reilly, *Political Engineering and Party Politics in Conflict-Prone Societies*, 13 DEMOCRATIZATION 811, 820 (2006), available at <http://dx.doi.org/10.1080/13510340601010719> (discussing the requirement that candidates gain specific levels of support

arrangements put into place during the fourth wave, such as ensuring the fair distribution of public resources, recognize the existence and salience of historical injustices and imbalances in relationships between various ethnic groups and the state.

These developments are not coincidences. A host of factors have contributed to them. The sort of constitutional reforms taking place now were not possible in the 1990s during the third wave of constitution-making in Africa.⁵⁵ When various actors, both internal and external, were putting pressure on autocratic regimes throughout Africa to “democratize,” these demands largely focused on the reintroduction of multiparty democracy.⁵⁶ Not much was expected from countries other than lifting bans on multiparty politics, holding elections, and ratifying major international human rights treaties or reproducing an equivalent in their own constitution.⁵⁷ Multiparty elections and recognition of human rights were issues that internal and external actors stressed as important, pressuring those in power to address them.⁵⁸ As long as those in power made such minimal reforms, they could successfully resist wider and deeper reforms.⁵⁹ The minimal reforms were very often enough to mollify external donors and the nascent opposition parties at home.⁶⁰ As a result, the power of the imperial presidency and the centralization of power, which were important features of post-colonial African states, were retained during the third wave of constitution-making in Africa.⁶¹ Furthermore, given the limited experience many of these countries had with multiparty

across many different regions).

55. See generally Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1239–95 (2006) [hereinafter Prempeh, *Marbury in Africa*].

56. See Renske Doorenspleet, *Critical Citizens, Democratic Support and Satisfaction in African Democracies*, 33 INT’L POL. SCI. REV. 279, 284 (2012) (noting that a majority of Africans define democracy as including multiparty competition). See generally Oda van Cranenburgh, *Democracy Promotion in Africa: The Institutional Context*, 18 DEMOCRATIZATION 443 (Mar. 2011), available at <http://dx.doi.org/10.1080/13510347.2011.553364> (detailing the reduction of concentrated executive power and the expansion and development of a multiparty democracy in Africa).

57. See generally Prempeh, *Marbury in Africa*, *supra* note 55, at 1278–1287 (detailing the commonly pessimistic views regarding Africans’ capability of moving beyond “electoral democracies” into “liberal democracies”).

58. See *id.* at 1291–92 (noting that reforms have been propelled by desire to banish one-party regimes and end human rights abuses).

59. See *id.* at 1275–76 (noting how authoritarian incumbents have capitalized on regime opponents’ calls for democratizing the election process without reforming the power of the state to delay significant reform).

60. See *id.* at 1276 (noting how the incumbent’s minimal reforms neutralized regime opponents).

61. See Kwasi Prempeh, *Africa’s “Constitutional Revival”: False Start or New Dawn?*, 5 INT’L J. CONST. L. 469, 495 (2007); Prempeh, *Presidents Untamed*, *supra* note 39, at 111 (describing African presidents’ unquestionable discretion and disregard for formal rules). See generally Prempeh, *Marbury in Africa*, *supra* note 55 (discussing the failure of constitutionalism in Africa prior to 1990 and the more recent development and future of constitutionalism in Africa).

democracy in the early 1990s, there hardly was a clear understanding of the challenges that arose later.⁶² Even to the extent that problems such as abuse of incumbency and the politicization of ethnicity were foreseen, there was no readily available reservoir of tested and tried constitutional solutions from which to draw upon.⁶³

In the past twenty years, problematic elections, conflicts along ethnic lines, and the shallowness of the purported transition to democracy have underscored the need for a more comprehensive constitutional reform.⁶⁴ The constitutional experiments and innovations in countries like South Africa—as well as in Central and Eastern Europe—have made it clear that the transition to democracy in Africa cannot be successful without constitutionalism, i.e. the widespread adherence to a system of constitutional government. In the early 1990s, the buzzwords of the transition in Africa were “human rights” and “democracy,”⁶⁵ which were understood very narrowly and equated with multiparty elections.⁶⁶ Constitutionalism hardly figured into that story. The pitfall of such an approach seems to be understood now, and the need to build the appropriate constitutional framework to foster democratic government and peaceful ethnic relations has become clear.

Despite the troubles and chaotic scenes created in the experiment with multiparty politics, calls for abandoning multiparty systems and returning to one-party rule were not as prevalent in the early 1990s as they were in the 1960s.⁶⁷ Rather, there seems to be a consensus that to overcome the challenges democracy faces in most African countries—challenges that include less than ideal socio-economic conditions and troubled political histories—there is a need to reform existing constitutions while drawing upon the experience with multiparty politics in the past two decades.⁶⁸ Therefore, that contextualizing constitutionalism—i.e.,

62. See generally Deng, *supra* note 49, at 28.

63. See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 826–29 (2012) (showing that even though South Africa’s constitutional democracy has received much attention, in the early 1990s, it was relatively new, unproven, and therefore provided little help as a guideline to countries developing their own constitutional democracies at that time).

64. See Gedion T. Hessebon, *Some Major Themes in the Study of Constitutionalism and Democracy in Africa*, 7 VIENNA J. ON INT’L L. 28, 29–30 (2013) (discussing countries in which the transition to democracy has not been relatively successful and the change to democracy has meant little).

65. See Prempeh, *Marbury in Africa*, *supra* note 55, at 1291–92 (noting the importance of a multiparty system and improving conditions for human rights).

66. See *id.* at 1291–95 (noting how, in spite of calls for political reform in favor of democracy, political power still rested entirely in the hands of the presidency and that constitutions only regulated assent to power, not how that power was wielded).

67. See Doorenspleet, *supra* note 56, at 289–91 (noting that public surveys in different African countries show that most citizens support democracy from other alternative forms of governance); Claire Schaffner, *AfroBarometer: Democracy Making a Headway in Africa*, Afrik-News (Jun. 2, 2009), <http://www.afrik-news.com/article15762.html> (describing the progress and acceptance of multiparty democracy in Africa between 1999 and 2008).

68. See generally Hessebon, *supra* note 64 (detailing constitutional themes and constitutionalism throughout the recent development of democracy in Africa).

adapting constitutionalism by taking into account the prevalent political matrix in most African countries—is necessary for the consolidation of democracy is becoming more and more evident.

B. Consensus in Constitutional Design: A Look at Ghana and South Africa

So far, the discussion in this section has focused on the fourth wave of constitution-making in Africa and the factors behind this wave. In the remaining part of the section, the discussion shifts to certain constitutional practices and ideas that seem to form part of an emerging consensus about constitutional design options in Africa. This consensus arises from the experiences of countries like Ghana and South Africa, which are relatively successful African democracies. Some particular constitutional designs, practices, and ideas seem to have had a positive contribution on institutionalizing constitutional democracy in these countries.⁶⁹ A list of these ideas and practices would include:⁷⁰

- prohibiting various forms of abuse of incumbency and imposing presidential term limits;
- establishing institutions that reinforce horizontal accountability and that fall outside the traditional division of power between the three branches of government;
- decentralizing or devolving power or federalism;
- regulating political parties;
- establishing electoral systems intended to promote integration; and
- providing positive measures, affirmative action, or ethnic quotas.

These constitutional ideas have helped minimize the tendency of self-perpetuation by incumbents and reduced ethnic exclusion and marginalization. Presidential term limits, rules prohibiting different forms of abuse of incumbency, and independent democracy supporting institutions have helped Ghana foster democracy and minimize the gravity of abuse of incumbency.⁷¹ While pervasive and systematic abuse of incumbency has hindered and even forestalled democratic transition in many African countries like Ethiopia, Nigeria, and Kenya, Ghana has avoided this ill fate partly thanks to its constitutional order that incorporated these ideas.⁷²

69. See Law & Versteeg, *supra* note 63, at 826–29 (discussing South Africa’s rapid transformation from “pariah nation” to constitutional role model).

70. See, e.g., CONSTITUTION, art. 73–92 (2010) (Kenya) (establishing responsibilities and accountability of leaders, as well as voting and electoral standards); CONSTITUTION OF ZIMBABWE Jan. 2013, ch. 5, art. 88–115 (establishing the duties, functions and accountability of the executive); see also Ottaway, *supra* note 49, at 299 (discussing the problems faced by a centralized Africa as well as the measures taken to address these problems and promote constitutional democracy).

71. See CONSTITUTION OF GHANA 1992, art. 46, 55(11)–(12), 162(3), 163, 167, 191 (Ghana) (establishing laws designed to prevent the abuse of incumbency and foster the transition to a multiparty democratic system).

72. See Abdul-Gafaru Abdulai & Gordon Crawford, *Consolidating Democracy in Ghana:*

Other problems that have bedeviled many African countries and have given rise to serious obstacles to democratization are the intense rivalries among the political elites of various ethnic groups.⁷³ Such rivalries had resulted in civil wars, ethnic strife, and the destabilization of many African states.⁷⁴ As shown by the experiences of Nigeria and Ethiopia, who have suffered catastrophic consequences from problems such as these, federalism and positive measures meant to alleviate ethnic marginalization—like affirmative action and quota schemes—have been used with qualified success to manage conflict.⁷⁵ Ghana and Nigeria have used the regulation of political parties to promote the emergence of parties with a national, as opposed to regional or ethnic, appeal.⁷⁶ Nigeria has also used its constitutional electoral requirements to make it imperative for presidential candidates to widen their regional appeal if they want to succeed in their ambition of winning the presidency.⁷⁷

The constitutional ideas listed above have had augmented success due to their inclusion in the South African Constitution, which could be considered a touchstone in contemporary constitutional design.⁷⁸ Particularly, the array of independent democracy supporting institutions as well as allied institutions, of which the South African Constitutional Court is the most prominent, have demonstrated the importance of such institutions in maintaining a democracy in the

Progress and Prospects?, 17 DEMOCRATIZATION 26, 30 (2010) (stating that that the incumbent party handed over power to the opposition after losing by a margin of less than 0.5% shows acceptance of the legitimacy of the democratic process).

73. PAUL COLLIER, WARS, GUNS, AND VOTES: DEMOCRACY IN DANGEROUS PLACES 51–75 (1st ed. 2009) (discussing the rivalries between the leaders of different ethnic groups throughout Africa).

74. See Ottaway, *supra* note 49, at 29, 299–300 (noting how the history of violence in Africa has led to more acute ethnic tensions, destroying mechanisms that are used to regulate ethnic relations).

75. See Abbink, *Ethnic-Based Federalism and Ethnicity in Ethiopia: Reassessing the Experiment After 20 Years*, 5 J. OF E. AFR. STUD. 596, 596–618 (2011) (analyzing the first twenty years of the development of federalism and decentralization in Ethiopia). See generally Rotimi Suberu, *The Nigerian Federal System: Performance, Problems and Prospects*, 28 J. OF CONTEMP. AFR. STUD. 459 (2010) (describing the development of Nigerian decentralization and promotion of constitutionalism and democracy).

76. See Matthijs Bogaards, *Ethnic Party Bans and Institutional Engineering in Nigeria*, 17 DEMOCRATIZATION 730, 732 (2010), available at <http://dx.doi.org/10.1080/13510347.2010.491197> (noting a constitutional provision that prevents formation of political parties where membership is restricted based on ethnicity, gender, place of origin, etc.); see also Anika Moroff, *Party Bans in Africa – An Empirical Overview*, 17 DEMOCRATIZATION 618, 619 (2010), available at <http://dx.doi.org/10.1080/13510347.2010.491184> (discussing where African party bans can be found).

77. CONSTITUTION OF NIGERIA (1979), § 202; see also Donald L. Horowitz, *Electoral Systems: A Primer for Decision Makers*, J. OF DEMOCRACY, Oct. 2003, at 115, 118–19 (2003) (discussing different types of political candidates and how they would find success in the electoral process); Reilly, *supra* note 54, at 817–20 (discussing the requirements that require candidates to gain specific levels of support across many different regions).

78. See Law & Versteeg, *supra* note 63, at 826–29 (discussing how, even though South Africa's constitutional democracy is relatively new, it has already garnered world-wide attention).

context of overwhelming one party dominance.⁷⁹ South Africa's constitution provided recognition of various ethno-cultural communities without politically empowering such groups. It also provided an alternative approach to constitutional decentralization short of federalism.⁸⁰ Furthermore, as will be discussed in greater detail, the new Kenyan Constitution seems to have drawn from the South African and Ghanaian experience and incorporated many of these constitutional ideas.⁸¹ The fact that these ideas are finding their way into the latest and ongoing constitution-making projects also suggests that these ideas and practices are gaining traction.⁸² Some of these ideas, particularly those ideas that help reduce abuse of incumbency, are reflected in the *African Charter on Democracy, Elections and Governance*.⁸³

In subsequent parts of this article, Kenya's experience and constitutional history will be used to flesh out the notion of constitutions 4.0, particularly in relation to abuses of incumbency and ethnicity.

IV. TROUBLED WATERS: ETHNICITY AND ABUSE OF INCUMBENCY IN KENYA

A. *Ethnic Diversity and Constitutionalism: The Kenyan Experience*

As most other African states, Kenya is a creation of a colonial project, which started as a quasi-private enterprise and then was taken over by the British Empire.⁸⁴ Kenya was different to some extent, as it was designated as a settler colony due to the temperate climate of its highlands.⁸⁵ Accordingly, the native

79. See Sujit Choudhry, *'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 34–48 (2009) (explaining the Constitutional Court's role in anti-domination doctrine).

80. See Murray & Simeon, *supra* note 53, at 723 (describing South Africa's system as one of "quasi-federalism," featuring a multi-level government system with specific issues delegated to the lower provincial and local governments, but still recognizing South Africa as one sovereign, democratic state).

81. See Law & Versteeg, *supra* note 63, at 826–29 (discussing how even though South Africa's constitutional democracy is relatively new, it has already garnered world-wide attention and has served to influence the development of newly emerging constitutions).

82. See CONSTITUTION OF ZIMBABWE FINAL DRAFT Jan. 31, 2013, ch. 12, art. 155(2)(c)–(d), 161, 259.

83. See African Charter on Democracy, Elections and Governance, Jan. 30, 2007, art. 15 (expecting state parties to create public institutions in support of democracy and constitutional order that are autonomous, independent and adequately funded), art. 17 (imposing on state parties an obligation to regularly hold transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa, to establish and strengthen independent and impartial electoral management bodies, and to ensure fair and equitable access by contesting parties and candidates to state controlled media during elections).

84. See generally John Lonsdale & Bruce Berman, *Coping With the Contradictions: The Development of the Colonial State in Kenya, 1895–1914*, 20 J. OF AFR. HIST. 487 (1979) (detailing the development of Kenya as a British colonial project).

85. See W.T.W. Morgan, *The "White Highlands" of Kenya*, 129 THE GEOGRAPHICAL J. 140, 140 (June 1963) (describing how the environment of Kenya made it a suitable place for a European settlement and how this led to the current reputation of the local area as "the white

population in the highland that is today called “the white highlands” was evicted to make way for European settlers.⁸⁶ While this is a significant aspect of Kenya’s history that had serious impact post-independence,⁸⁷ British colonial rule in Kenya showed many similarities with colonial rule in other British colonies in Africa.⁸⁸ The British needed to categorize the native population along ethnic and tribal lines to make the system of indirect rule workable.⁸⁹ The combined effect of missionaries and the colonial state helped the crystallization of existing ethnic identities and their politicization.⁹⁰ The interaction of the colonial state and the local population did not always foster ethnic solidarity within one group and, at times, it was also marked with internal divisions.⁹¹ The Mau Mau rebellion by the Kikuyu against the British, which began in the early 1950s and lasted until 1960, pitted the Kikuyu collaborators against the rebels.⁹² The violent struggle of the Mau Mau against the settlers and the colonial government was mainly a Kikuyu uprising. However, the political party leading the movement for independence, Kenya African National Union (KANU), was not so ethnically confined.⁹³ KANU brought most of the large ethnic groups together, particularly the Kikuyu and the Luo, and could be considered a national political party at that point in Kenyan history.⁹⁴

Just before independence, during the constitutional negotiations at Lancaster

highlands”).

86. *See id.* at 141 (explaining the implementation of an exclusion of African right-holders, with compensation, in the “White Plains”).

87. *See* Prisca Mbura Kamungi, *The Politics of Displacement in Multiparty Kenya*, 27 J. OF CONTEMP. AFR. STUD. 345, 346 (July 2009) (discussing the importance of land ownership in Kenya’s socio-economic priorities, as it represents a vital link to wealth, welfare, identity, and status); Karuti Kanyinga, *The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya*, 27 J. OF CONTEMP. AFR. STUD. 325, 327–28 (July 2009) (discussing the impact of Kenya’s colonial history of European settlement in the “White Highlands” and how this shaped the attitude towards land rights).

88. *See* Sara Berry, *Hegemony on a Shoestring: Indirect Rule and Access to Agricultural Land*, 62 AFR.: J. OF THE INT’L AFR. INST. 327, 332, 340 (describing the method through which the British colonized Africa).

89. *Id.* at 332.

90. *See* Rok Ajulu, *Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective*, 61 AFR. STUD. 251, 253 (2002) (noting that politicized ethnicity seems to be the product of specific historical developments, such as the creation of the colonial state); Gabrielle Lynch, *Negotiating Ethnicity: Identity Politics in Contemporary Kenya*, 33 REV. OF AFR. POL. ECON. 49, 58 (2006) (noting how many analyses recognize the role European agents, such as missionaries, played in the creation of “tribes”).

91. *See* Lynch, *supra* note 90, at 53–54 (discussing tensions surrounding the presence of non-Pokot Africans in the West Pokot District and their refusal to become Pokot).

92. *See generally* Daniel Branch, *The Enemy Within: Loyalists and the War Against Mau Mau in Kenya*, 48 J. OF AFR. HIST. 291 (2007) (describing violent conflict between Kenya’s British colonial government and Mau Mau rebels between 1952 and 1960).

93. D. PAL S. AHLUWALIA, *POST-COLONIALISM AND THE POLITICS OF KENYA* 32 (1996) (noting rapid emergence of national consciousness amongst other African peoples in Kenya, which enlarged and changed the scope of the nationalist movement beyond the Kikuyu).

94. *Id.* at 33 (describing the incorporation of the Kikuyu and the Luo into one large political party under KANU leadership).

House, which took place from 1960 to 1963, there were three groups in the alignment of political forces in Kenya.⁹⁵ The largest and most important was the alliance of the biggest ethnic groups in Kenya (the Kikuyu, the Luo, the Kamba, and the Luyha) represented by KANU.⁹⁶ In this party, the alliance of Jomo Kenyatta and Oginga Odinga, who were prominent political figures at that time hailing from the Kikuyu and the Luo ethnic groups respectively, was crucial in enabling KANU to emerge as a party claiming to be a Pan-Kenyan political party.⁹⁷ The smaller ethnic groups were represented by the Kenya African Democratic Union (KADU).⁹⁸ In addition to these parties, the European settlers in Kenya were an important constituency allied with KADU.⁹⁹ Though not of equal significance, the Muslim and Arabized population on the coastal area where the Sultan of Zanzibar had some territorial claim were also represented and took part in the Lancaster House negotiations.¹⁰⁰

During these negotiations, one of the most important and controversial issues was the question of how the Kenyan state would be structured.¹⁰¹ The smaller ethnic groups represented by KADU, fearing domination by the larger ethnic groups and the white settlers, were concerned about the prospect of a majoritarian dominant central government and advocated for structuring Kenya along federal lines and creating regions—or *majimbo*, as regions were popularly called in Swahili.¹⁰² The British supported this proposal, and Kenya gained its independence with a quasi-federal constitution and a parliamentary form of government with the Queen as its head of state.¹⁰³

However, once Kenya gained its independence, the dominant party, KANU, which had an overwhelming victory in the first round of elections, undertook a number of constitutional amendments.¹⁰⁴ The first among these amendments was

95. *Id.* (noting the formation of KANU and KADU from shifting alliances and rivalries after Lancaster House conferences, but failing to mention the Muslim and Arabized population as an African national party).

96. Ajulu, *supra* note 90, at 257–58 (describing the formation of KANU after first Lancaster House Conference).

97. See George Bennett, *Kenya's Frustrated Election*, 17 THE WORLD TODAY 254, 254–57 (1961).

98. *Id.* at 255 (describing formation of KADU from tribes of pastoralist traditions and smaller agricultural tribes).

99. See David M. Anderson, “*Yours in Struggle for Majimbo*” *Nationalism and the Party Politics of Decolonization in Kenya, 1955–64*, 40 J. OF CONTEMP. HIST. 547, 549 (2005) (noting KADU support amongst the British establishment).

100. JOAN RUSSELL, COMMUNICATIVE COMPETENCE IN A MINORITY GROUP: A SOCIOLOGICAL STUDY OF THE SWAHILI-SPEAKING COMMUNITY IN OLD TOWN, MOMBASA 34 (1981).

101. See generally Anderson, *supra* note 99, at 555–57.

102. *Id.* at 552; Robert Maxon, *Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century*, 1 KENYAN STUD. REV. 11, 14–15 (2009) (noting KADU's adamant push for a *majimbo* constitution).

103. M. Tamarkin, *The Roots of Political Stability in Kenya*, 77 AFR. AFF. 297, 301 (1978).

104. See H.W.O. Okoth-Ogendo, *The Politics of Constitutional Change in Kenya since*

the evisceration of regional autonomy and the transformation of Kenya into a unitary state.¹⁰⁵ KANU justified this amendment by arguing for the need for nation-building and the specter of tribalism that regional divisions would entail.¹⁰⁶ *Majimboism* was so thoroughly denounced by KANU that it turned into a pejorative term indistinguishable from tribalism.¹⁰⁷ With the issue of *majimbo* settled through constitutional amendment in favor of a unified state and the leaders of KADU obviously and seemingly permanently excluded from power, leaders of KADU dissolved their party and joined the ruling party.¹⁰⁸ As a result, any parliamentary opposition to KANU ceased, and Kenya became a de facto one-party state.¹⁰⁹ The carrot-and-stick tactic of KANU effectively coopted leaders of KADU, who no longer saw benefit in remaining as an opposition due to their ineffective *majimboism* platform.¹¹⁰ KANU's incorporation of KADU was another step in the efforts to stem the tide of tribalism.¹¹¹ The whole idea of opposition to a governing authority was also projected as inconsistent with African culture and governance ethos.¹¹²

Another important development during this period was the ideological schism between the President and the Vice President.¹¹³ While President Kenyatta had rather conservative political leanings and wanted to maintain stronger economic and political ties with Britain and America, Vice President Oginga Odinga was allied with communist countries and advocated for measures of redistribution to alleviate the condition of the landless and poor Kenyans.¹¹⁴ This schism resulted in a falling out between the two politicians, and Odinga established the Kenya People's Union (KPU) with other left-leaning politicians who had defected from KANU.¹¹⁵ President Kenyatta responded by introducing a constitutional amendment that caused all the members of Parliament who had defected from

Independence, 1963–69, 71 AFR. AFF. 9, 12–17 (1972) (listing a number of constitutional amendments undertaken after Kenya gained independence).

105. *Id.* at 19–20.

106. *Id.*

107. See Anderson, *supra* note 99, at 547 (describing how KANU rhetoric turned *majimbo* into a slur and *majimboists* were derided as tribalists who opposed the broader goals of nationalism).

108. AHLUWALIA, *supra* note 93, at 35; Roger Southall, *Moi's Flawed Mandate: The Crisis Continues in Kenya*, 25 REV. OF AFR. POL. ECON. 101 (1998); see also Tamarkin, *supra* note 103, at 308 (noting the liquidation of KADU and the incorporation of its leaders into KANU and the government).

109. Southall, *supra* note 108, at 101 (“KADU dissolved as its leaders crossed over to KANU and accepted posts in government, rendering Kenya a de facto one-party state. . .”).

110. See Tamarkin, *supra* note 103, at 304–05.

111. *Id.* at 313–14.

112. *Id.* at 305.

113. See DANIEL BRANCH, KENYA: BETWEEN HOPE AND DESPAIR, 1963–2011, at 52–55 (2011) (noting Vice President Odinga's success in the political battle against President Kenyatta amidst people's general frustration with Kenyatta).

114. *Id.*; see also JIM BAILEY AND GARTH BUNDEH, KENYA: THE NATIONAL EPIC 160 (1993).

115. See CHARLES HORNSBY, KENYA: A HISTORY SINCE INDEPENDENCE 158–59 (2012) (detailing the formation of the KPU by Odinga and supporters).

KANU to lose their mandate.¹¹⁶

As a result, elections were held in 1966 in many parliamentary districts to fill the vacant parliamentary seats. In this contest between KANU and KPU—termed the “little general election”—a clear ethnic pattern of voting emerged.¹¹⁷ KPU won in parts of Kenya where the Luos, Odinga’s ethnic group, were the majority and KANU won in the areas where the Kikuyu were the majority.¹¹⁸ This development contributed to the ethnicization of the originally ideological clash between the conservatives in KANU and Odinga.¹¹⁹ In addition to this development, the assassination of Tom Mboya—a leading Luo politician and presidential aspirant in KANU—which many suspected was the doing of either Kenyatta or his close Kikuyu associates, contributed to the rising ethnic tensions in Kenyan politics.¹²⁰ All of this culminated in a dramatic incident in which President Kenyatta encountered a very hostile reception in 1969 in Nyazaland—a predominantly Luo area, where he was present for a commencement of a hospital—and his security detail fired shots at the crowd.¹²¹

The cumulative effect of these occurrences, as well as the centralization of power and its personalization with an increasingly powerful president, was a pattern of ethnic favoritism.¹²² This favoritism was particularly evident in relation to the distribution of land formerly occupied by European settlers and the ethnicization of politics in Kenya.¹²³ The Kikuyu were in the ascendancy and beneficiaries of the booming Kenyan postcolonial economy.¹²⁴ The government’s

116. See George Bennett, *Kenya’s “Little General Election,”* 22 WORLD TODAY 336, 341 (1966) (“Kenyatta retorted by summoning a special parliamentary session to pass a Bill compelling those who resigned from the party for which they had been elected to seek re-election.”).

117. *Id.* at 342.

118. BRANCH, *supra* note 113, at 60–61; Ajulu, *supra* note 90, at 260; Bennett, *supra* note 116, at 336–43.

119. Ajulu, *supra* note 90, at 259–60 (“Mueller suggests that once it was realized that Odinga was unbeatable in his Nyanza Bailwick, the state decided to concede Nyanza to KPU, and to ethnicise the contest . . .”).

120. Stanley Meisler, *Tribal Politics Harass Kenya*, 49 FOREIGN AFF. 111, 113 (1970); see also P. Anyang’ Nyong’o, *State and Society in Kenya: The Disintegration of the Nationalist Coalitions and the Rise of Presidential Authoritarianism 1963–78*, 88 AFR. AFF. 229, 243 (1989) (describing Mboya as a threat, likely to ascend to the presidency and noting documented evidence suggesting the assassination of Myboya was the result of a conspiracy involving people very close to the president).

121. BRANCH, *supra* note 113, at 88; Joseph Karimi, *Witness recalls the 1969 Kisumu massacre that marked Jomo Kenyatta’s visit*, STANDARD DIGITAL (Nov. 11, 2013), http://www.standardmedia.co.ke/mobile/?articleID=2000096439&story_title=witness-recalls-the-1969-kisumu-massacre-that-marked-jomo-kenyatta-s-visit (eyewitness account, detailing the events surrounding the hospital shooting).

122. Kanyinga, *supra* note 87, at 328–33.

123. *Id.*

124. G. B. Lamb, *The Political Crisis in Kenya*, 25 WORLD TODAY 537, 543 (1969); Ken Omolo, *Political Ethnicity in the Democratization Process in Kenya*, 61 AFR. STUD. 209, 214 (2002).

settling of many landless Kikuyu in the Rift Valley province—on land the Massai and Kalenjin considered rightfully theirs—reinforced the ethnic divide in the country.¹²⁵

Determined to maintain their economic advantage and political preeminence, Kikuyu elites and those from their cousin ethnic groups, the Embu and Meru, started a movement to forestall Vice President Daniel Arap Moi, who was a Kalenjin, from succeeding the aging President Kenyatta.¹²⁶ The Kikuyu (also spelled Gikuyu), Embu, and Meru Association (GEMA) campaigned to have the constitution changed so that the vice president would not automatically succeed the president upon the latter's death.¹²⁷ These movements were brought to an end by the powerful Attorney General Charles Njonjo, who himself was Kikuyu and seemed to envision becoming the power behind the throne.¹²⁸ As a result, upon the death of Kenyatta, Arap Moi became president.¹²⁹ The trend of increasing ethnicization of politics continued during Arap Moi's presidency due to his ethnic favoritism of the Kalenjin and the attempted coup against him by a group of predominantly Luo air force men and politicians in 1992.¹³⁰

The resumption of multiparty politics in Kenya also did very little to abate the ethnicization of politics.¹³¹ Various politicians with presidential aspirations formed parties that served primarily as instruments for mobilizing their ethnic base.¹³² A decade after the resumption of multiparty electoral contests, the opposition coalition brought together the biggest names in Kenyan politics who claimed to represent different ethnic groups and successfully contested the 2002 election.¹³³

125. Kanyinga, *supra* note 87, at 330.

126. JENNIFER A. WIDNER, *THE RISE OF A PARTY-STATE IN KENYA: FROM "HARAMBEE" TO "NYAYOI!"* 113–18 (1992).

127. AHLUWALIA, *supra* note 93, at 81–82; Nyong'o, *supra* note 120, at 248–50.

128. Kate Currie & Larry Ray, *State and Class in Kenya - Notes on the Cohesion of the Ruling Class*, 22 J. OF MOD. AFR. STUD. 559, 568–69 (1984) (“The Kenyan Constitution permits the Vice-President to take power for up to three months following the President's demise. For that reason, in the mid-1970s, a group of senior politicians from the majority Kikuyu tribe sought to change the Constitution with a view to barring Arap Moi from succeeding Kenyatta. But the powerful Attorney-General, Charles Njonjo, a Kikuyu, threw his weight behind Arap Moi and prevailed upon Kenyatta to leave things as they were.”); Samuel M. Makinda, *Kenya: Out of the Straitjacket, Slowly*, 48 WORLD TODAY 188, 188 (1992).

129. See M. Tamarkin, *From Kenyatta to Moi: The Anatomy of a Peaceful Transition of Power*, 26 AFR. TODAY 21, 24–30 (1979).

130. See BRANCH, *supra* note 113, at 156; see also Ajulu, *supra* note 90, at 262–63; Jeffrey Steeves, *Presidential succession in Kenya: The transition from Moi to Kibaki*, 44 COMMW. AND COMP. POL. 211, 212–13 (2006); Nancy Drexler, *Kenyan Stability: Is the Situation Deteriorating?* FEDERAL RESEARCH DIVISION LIBRARY OF CONGRESS 12 (February 1985), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA303415>.

131. Omolo, *supra* note 124, at 215–19.

132. David Throup, *Elections and Political Legitimacy in Kenya*, 63 AFR. J OF THE INT'L AFR. INST. 371, 390 (1993); Sebastian Elischer, *Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya*, 68 GIGA WORKING PAPERS 3, 12–16 (Feb. 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114123.

133. Joel D. Barkan, *Kenya after Moi*, 83 FOREIGN AFF. 87, 90–92 (2004); David M. Anderson, *Briefing: Kenya's Elections 2002 — Dawning of a New Era?*, 102 AFR. AFF. 331, 331

But once they won the election and Mwai Kibaki and a close circle of Kikuyu associates captured the office of the president, the coalition started to fall apart.¹³⁴

Kibaki reneged on many aspects of the deal he had reached with Odinga prior to the election.¹³⁵ Kibaki's circle seemed very reluctant to part with the centralized and personalized power enjoyed by the office of the president. They frustrated efforts for constitutional reform, which were part of the deal for the formation of the National Rainbow Coalition (NARC)¹³⁶ prior to the election.¹³⁷ Furthermore, ethnic favoritism and the alleged disproportionate share of the Kikuyu in the economy helped cast the administration of President Kibaki as a Kikuyu government working for the benefit of one ethnic group more than others.¹³⁸ All of this meant that in the 2005 constitutional referendum and leading up to the 2007 election, there was an increasing ethnicization of politics that pitted the Kikuyu and allied ethnic groups against the Luo, Kalenjin, and their allies.¹³⁹ Under these circumstances, the stakes were high during the 2007 General Election and neither party was willing to admit defeat, leading to violence and the death of thousands of Kenyans.¹⁴⁰

B. Abuse of Incumbency and the Kenyan Experience

After independence in 1963, Kenya slowly but surely turned into a de facto one-party state under its first president, Jomo Kenyatta.¹⁴¹ Then with the 1982 amendment of its constitution, Kenya formally became a one-party state under its

(2003).

134. Nic Cheeseman, *The Kenyan Elections of 2007: An Introduction*, 2 J. OF E. AFR. STUD. 166, 174 (2008); Michael Chege, *Kenya: Back From the Brink?*, J. OF DEM., Oct. 2008, at 125, 129–30.

135. Chege, *supra* note 134, at 129–30.

136. See generally Centre for Multiparty Democracy Kenya, *National Rainbow Coalition (NARC)*, CMD-KENYA.ORG, <http://www.cmd-kenya.org/index.php/cmd-members?id=89#sthash.lapyEto4.dpuf> (last visited Sept. 24, 2014) (describing NARC as a coalition of Kenyan political parties in power from 2002 to 2005).

137. BRANCH, *supra* note 113, at 258; Godwin R. Murunga & Shadrack W. Nasong'o, *Bent on Self-Destruction: The Kibaki Regime in Kenya*, 24 J. OF CONTEMP. AFR. STUD. 1, 10 (2006); Jeffrey Steeves, *Beyond democratic consolidation in Kenya: ethnicity, leadership and 'unbounded politics'*, 42 AFR. IDENTITIES 195, 205 (2006).

138. See Jeffrey Steeves, *Presidential Succession in Kenya: The Transition from Moi to Kibaki*, 44 COMMONWEALTH & COMP. POL. 211, 225 (2006) (providing a breakdown of disproportionate voting results in varying Kenyan constituencies and the resulting support for the incumbent party); Joel D. Barkan, *Kenya's Great Rift*, FOREIGNAFFAIRS.ORG (Jan. 9, 2008), <http://www.unc.edu/world/2008Seminars/Kenya%27sGreatRift.pdf> (discussing Kibaki's ties to the Kikuyu ethnic group and the controversy surrounding political favoritism for this group).

139. See Peter Kagwanja & Roger Southall, *Introduction: Kenya—A Democracy in Retreat?*, 27 J. OF CONTEMP. AFR. STUD. 259, 262 (2009) (discussing the divide between the Kikuyu and other ethnic groups prior to the 2007 Kenyan elections).

140. *Id.* at 259–60 (discussing the violence that broke out after the 2007 elections).

141. See Frank Holmquist & Michael Ford, *Kenya: Slouching Toward Democracy*, 39 AFR. TODAY 97, 98 (1992) (discussing the tactics used by President Kenyatta to maintain one-party dominance following Kenyan independence).

second president, Daniel Arap Moi, who succeeded Kenyatta when he passed away.¹⁴² However, due to internal and external pressure for political reform, Arap Moi had to reintroduce multi-party elections in Kenya.¹⁴³ After the 1992 repeal of the 1982 amendment to the constitution that made Kenya a de jure one-party state, Arap Moi, and his party, KANU, entered the first election as incumbents.¹⁴⁴

Since the reintroduction of multi-party politics in Kenya in 1992, Kenya has held four general elections.¹⁴⁵ In the first two elections in 1992 and 1997, abuse of incumbency contributed to the success of the incumbent Arap Moi and KANU.¹⁴⁶ Many commentators have noted that the success of KANU and Arap Moi was largely a result of the fractured nature of the opposition, which enabled the incumbent to win the elections despite securing only a minority of the votes cast.¹⁴⁷ While this is true, abuse of incumbency cannot be overlooked as an important factor that contributed to their electoral victory.¹⁴⁸ The most frequent and significant forms of abuse of incumbency during the Arap Moi era were the use of state funds for electioneering and vote buying, the restriction of freedom of assembly and movement of the opposition candidates, and the mal-apportionment of electoral districts.¹⁴⁹

When KANU won the majority of parliamentary seats in 1992—100 of 188 total seats—the average number of registered voters in constituencies won by KANU was 33,352 while for constituencies in which the opposition parties won was 51,850.¹⁵⁰ This mal-apportionment was evident even prior to the 1992 election. While additional seats were introduced to the National Assembly to adjust for

142. See Makinda, *supra* note 128, at 189 (addressing the creation of the one-party system in Kenya, specifically with the 1982 constitutional amendment).

143. See Holmquist & Ford, *supra* note 141, at 98 (examining Arap Moi's decision to end the one-party system in favor of multi-party elections).

144. See Southall, *supra* note 108, at 102 (discussing Kenya's first elections after the reinstatement of the multiparty system and the subsequent challenges against the incumbent president, Arap Moi).

145. See generally Kagwanja & Southall, *supra* note 139, at 261 (exploring the elections in 1992, 1997, 2002, and 2007).

146. See, e.g., HUMAN RIGHTS WATCH, *Human Rights Developments: Kenya* in HUMAN RIGHTS WATCH WORLD REPORT (1993), <http://www.hrw.org/reports/1993/WR93/Afw-02.htm> (detailing the many methods by which Arap Moi abused his presidential powers to maintain his political position). See generally Southall, *supra* note 108, at 102–03 (providing insight into President Arap Moi's incumbent victory in the 1992 elections).

147. See, e.g., Southall, *supra* note 108, at 102 (“Moi retained power in 1992 only because the forces ranged against him were so dismally fragmented.”).

148. See HUMAN RIGHTS WATCH, *supra* note 146 (addressing Arap Moi's use of his presidential powers to assure his own electoral victory).

149. See generally JOEL D. BARKAN & ROBERT E. HENDERSON, TOWARD CREDIBLE AND LEGITIMATE ELECTIONS IN KENYA: PART II IFES ASSESSMENT REPORT 10–18 (1997) (addressing the many obstacles to opposition parties, including restrictions of freedoms of assembly and movement and mal-apportionment); Joel D. Barkan, *Kenya: Lessons from a Flawed Election*, 4 J. OF DEMOCRACY 85, 94 (1993) (discussing the misuse of public funds to ensure the continuation of KANU political dominance).

150. Roddy Fox, *Bleak Future for Multi-Party Elections in Kenya*, 34 J. OF MODERN AFR. STUD. 597, 604 (1996).

demographic changes since the 1966 constituency delimitation, the major urban areas—considered strongholds of the opposition—were not given any additional seats.¹⁵¹ This omission is especially striking as the populations of these areas had doubled since the original constituency delimitation.¹⁵² Partly as a result of this mal-apportionment, KANU, which only won 29.7% of the total votes cast for parliamentary seats, won 53.2% of the seats in the National Assembly.¹⁵³ This demarcation of the constituencies was revisited in 1996 prior to the second election, but that redrawing also favored the incumbent party.¹⁵⁴ Given that a commission lacking independence and subjected to political interference undertook these revisions, one can say that the mal-apportioned constituencies were not accidents but results of abuse of incumbency.¹⁵⁵

In the 1992 and 1997 elections, restrictions on the freedom of movement and assembly of opposition party candidates were also important instruments used by KANU to enhance its chances of victory.¹⁵⁶ As Joel D. Barkan notes, “[t]he government, acting through the Provincial Administration and the police, also made it hard for the opposition to organize, open branch offices, or address the public in rural areas.”¹⁵⁷ Examples of this included denying, cancelling, or stalling the issuance of permits required for public assemblies.¹⁵⁸ Stephen N. Ndegwa also documents many laws and regulations, some dating from colonial times, which the government enforced to restrict the campaigning activities of the opposition parties.¹⁵⁹ These included using: (1) a colonial era law to deny, withdraw, and cancel permits for public assemblies called by the opposition; (2) the Public Collections Act to deny licenses for the collection of funds for the opposition; and (3) the Preservation of Public Security Act to restrict the movement of opposition candidates.¹⁶⁰

151. *See id.* at 601–02 (providing a quantitative examination of Kenyan constituencies based on ethnic group and tribe and explaining how parliamentary seats were not adjusted to reflect population growth in opposition constituencies).

152. *Id.*

153. BARKAN & HENDERSON, *supra* note 149, at 18.

154. *See id.* (discussing how the 1996 demarcation increased the disparity between constituencies and subsequently continued to aid the incumbent party).

155. *Id.* *See generally Kenya: There Should Be No More Political Gerrymandering*, BUSINESS DAILY (Jan. 10, 2012), <http://mobile.businessdailyafrica.com/Opinion---Analysis/There-should-be-no-more-political-gerrymandering---/1144484/1303374/-/format/xhtml/-/bf6u0iz/-/index.html> (arguing that Kenyan politicians intentionally interfered with elections through gerrymandering).

156. *See* BARKAN & HENDERSON, *supra* note 149, at 8–10 (addressing the restrictions of civil and political rights on opposition party candidates).

157. Barkan, *supra* note 149, at 94.

158. *See id.* (describing the various methods used by the Arap Moi presidency to prevent opposition party candidates from participating in community organization).

159. *See* Stephen N. Ndegwa, *The Incomplete Transition: The Constitutional and Electoral Context in Kenya*, 45 AFR. TODAY 193, 197–202 (1998) (exploring the many tactics used to restrict opposition campaign activities and the resulting reform initiatives).

160. *Id.* at 198–99.

Such abuses of incumbency were possible because there was no comprehensive constitutional and legal reform to break the continuity in the legal and administrative edifice of the autocratic colonial and postcolonial past.¹⁶¹ For instance, there was no political or campaign finance legislation in Kenya until the adoption of the Political Parties Act of 2007.¹⁶² The colonial era Native Authority Ordinance was carried over as the Public Order Act and the Chief's Authority Act.¹⁶³ Diane Ciekawy notes that these laws were "created to enable colonial administrators to limit the number of people who assembled in any one place and to monitor gatherings of people, thereby inhibiting political activity."¹⁶⁴ These acts are currently used to control opposition parties by denying permits for public assemblies.¹⁶⁵

The forms of incumbency abuse present in Nigeria, such as the use of public resources for partisan purposes¹⁶⁶ and disproportionately favorable coverage of the incumbent by state-owned media, were also present in the 1992 and 1997 elections in Kenya.¹⁶⁷ Barkan notes that "[s]o great was the flow of money from the Central Bank of Kenya to the president and KANU nominees that the money supply increased by an estimated 40 percent during the last quarter of 1992"¹⁶⁸

In the 2002 General Election, the problem of mal-apportionment persisted.¹⁶⁹ Despite a decision by the High Court of Kenya at Nairobi that the delimitation of boundaries and the disparity in the number of registered voters among the various constituencies were unconstitutional, the Electoral Commission held the election in spite of the constituency configuration that favored the incumbent.¹⁷⁰ The E.U. Observers Mission noted the disparity among various electoral districts by pointing

161. *See id.* at 197 (analyzing the effect of retaining laws enacted to prevent opposition in elections on Kenya's new democratic society).

162. *See* COAL. FOR ACCOUNTABLE POLITICAL FIN., THE MONEY FACTOR IN POLL RACE: A MONITORING REPORT OF THE 2007 GENERAL ELECTION 9–10 (2008), available at <http://capf.or.ke/document/The%20Money%20factor.pdf> (providing a summary of the significance of the Political Parties Act of 2007).

163. *See* Diane Ciekawy, *Constitutional and Legal Reform in the Postcolony of Kenya*, 25 ISSUE: A J. OF OPINION 16, 16–17 (1997) (providing a background of the Public Order Act and Chief Authority Act and their influence in limiting electoral participation).

164. *Id.*

165. *Id.*

166. *See generally* Jibrin Ibrahim, *Nigeria: The Abuse of Power of Incumbency, Impunity and the Imperative of Securing Democracy*, DAILY TRUST (Jan. 27, 2014), <http://allafrica.com/stories/201401271330.html?viewall=1> (providing an overview of the abuse of incumbency throughout many African nations with a specific focus on Nigeria).

167. *See* Barkan, *supra* note 149, at 94 (referencing the obstacles facing opposition parties in the 1992 and 1997 election, including exclusion from state-owned broadcast media and the misappropriation of public funds by the KANU party).

168. *Id.*

169. *See* EUROPEAN UNION ELECTION OBSERVATION MISSION, KENYA GENERAL ELECTIONS 27 DECEMBER 2002: FINAL REPORT 17–19 (2003) (exploring voter registration in the 2002 election, specifically the deficiencies and inequities of this system).

170. *Id.* (highlighting the judgments of the High Court determining that the system for boundary delimitation was unconstitutional and finding it inconclusive if the ECK has changed its policies based on these decisions).

out that the electoral district with the largest number of registered voters had 152,906 registered voters, while the constituency with the least number of voters had 8,977 registered voters.¹⁷¹ In 2002, the significantly biased coverage by the state media favoring the candidates of the incumbent party continued, especially in electronic media, which was more accessible to most voters.¹⁷² This is illustrated by the Kenyan Broadcasting Corporation dedicating 67% of its political programs to covering the incumbent party.¹⁷³ The problem of the inequitable media coverage of the parties opposing the incumbents was also present in the 2007 election.¹⁷⁴ On a positive note, the restrictions on freedom of movement and assembly characterizing the earlier elections were not seen in the 2002 and 2007 elections.¹⁷⁵

In the 2007 election, the problem of constituency delimitation persisted, and there was still a significant disparity in the number of registered voters in the various constituencies.¹⁷⁶ In an effort to resolve the constituency delimitation, the Electoral Commission attempted to redraw the constituency boundaries.¹⁷⁷ However, due to parliament's interference, the commission only adjusted the borders of fifteen constituencies.¹⁷⁸ The use of state resources for electioneering activities of the incumbent party¹⁷⁹ and the partiality of the state-owned media towards the incumbents were also problems that persisted in the 2007 election.¹⁸⁰ The Coalition for Accountable Political Financing, comprised of various Kenyan civic organizations, extensively documented such abuse of incumbency in its observer's report of the 2007 election.¹⁸¹ In its report, the coalition notes,

Reports from all provinces and 71 constituencies indicated that the misuse of state resources was dominant among incumbent politicians. This involved use of state vehicles In addition, there was the use of officers of the provincial administration to mobilise for campaign rallies . . . use of coercion to extort money from private businesses, use of state media to propagate partisan information, use of government

171. *Id.* at 16–17.

172. *See id.* at 27–28 (outlining political media coverage in the 2002 Kenyan elections, specifically how this coverage was skewed to favor the incumbent president, Arap Moi, and the KANU party).

173. *Id.*

174. *See generally* EUROPEAN UNION ELECTION OBSERVATION MISSION, KENYA FINAL REPORT: GENERAL ELECTIONS 27 DECEMBER 2007 24–26 (2008).

175. *Id.* at 19 (noting that the freedom of assembly and expression were largely unimpeded in the 2007 election campaign).

176. *Id.* at 13 (analyzing the issue of constitutional delimitation in the 2007 election).

177. *Id.*

178. *Id.*

179. *See id.* at 21 (addressing the unfair use of state resources in election activities by public officials and President Kibaki).

180. *See* EUROPEAN UNION ELECTION OBSERVATION MISSION, *supra* note 174, at 24 (noting that while media coverage for opposition candidates has improved somewhat, state-owned media is still biased to support the incumbent party).

181. *See generally* COAL. FOR ACCOUNTABLE POLITICAL FIN., *supra* note 162 (discussing the corrupt use of campaign funds in the 2007 general election).

premises for party meetings, involvement of senior public officers in presidential campaign planning, use of government resources to produce material for campaigns (e.g. Government Printer) and fueling private vehicles using funds from government.¹⁸²

V. THE 2010 KENYAN CONSTITUTION: THE ARCHETYPICAL CONSTITUTION 4.0

This section of the paper will attempt to outline the approach adopted in the 2010 Kenyan Constitution to respond to the problems of abuse of incumbency and ethnicization of politics discussed extensively in the preceding section of the paper. For the sake of convenience, and reflecting the structure of the previous section of the paper, this section is divided into two subsections. The first subsection will focus on the approach the new Kenyan Constitution has adopted towards ethnicity, while the second subsection will deal with the solutions adopted in the new constitution to counter abuse of incumbency.

A. *Constitutional Strategies to Deal with Ethnicity*

Kenya's approach to the issue of ethnicity, starting with the rejection of decentralization and regionalism, or *majimboism*, immediately after independence was a mixture of an official rhetoric that emphasized unity—a highly centralized form of government—and a coalition of politicians from most ethnic groups in the dominant KANU party.¹⁸³ The centralization of power and the brief legal and long factual prohibition of opposition parties were partly strategies meant to bring about ethnic integration.¹⁸⁴ Once multiparty elections were reintroduced in Kenya, a geographic spread rule was introduced for presidential elections as an additional mechanism of integration.¹⁸⁵ However, generally speaking, until the aftermath of the post-election crisis of 2007, Kenya hardly used its constitution as an instrument of either integration or accommodation of ethnic diversity.¹⁸⁶ Unlike other African countries like Ethiopia or Nigeria, where there has been a conscious and systematic effort to design constitutions to address the issue of ethnicity, in Kenya, the old constitution had a rather marginal role in dealing with ethnicity.¹⁸⁷ The federal option, endorsed both in Ethiopia and Nigeria, was rejected by Kenya immediately after independence.¹⁸⁸ Kenya did not adopt something like a “federal character principle” or its equivalent as Nigeria had.¹⁸⁹ Unlike Nigeria, Kenya had not

182. *Id.* at 37–38.

183. Laurence Juma, *Ethnic Politics and the Constitutional Review Process in Kenya*, 9 TULSA J. COMP. & INT'L L. 471, 487–89 (2002) (discussing Kenya's movement towards autochthony and its attempt at harnessing ethnic diversity toward national development).

184. *Id.* at 491.

185. *Id.* at 492–94.

186. Fessha, *supra* note 50, at 279.

187. See Rotimi Suberu, *Federalism in Africa: The Nigerian Experience in Comparative Perspective*, 8 ETHNOPOLITICS 67, 69–70 (2009) (analyzing how other African countries like Nigeria and Ethiopia incorporated ethnic diversity into their constitutions); see also Fessha, *supra* note 50, at 274–75 (examining the role of federalism in addressing ethnic diversity in Africa).

188. Fessha, *supra* note 50, at 269.

189. Suberu, *supra* note 187, at 73–74.

adopted a regulatory framework for political parties with the aim of ensuring their national character.¹⁹⁰ As a result, there was no ban of ethnic parties in Kenya until 2008.¹⁹¹ All in all, one could hardly say Kenya consciously used its constitution as an instrument of either integration or accommodation.

After the resumption of multiparty electoral contests in Kenya in 1992, although there was a strong movement comprising religious leaders, opposition political parties, and civil society organizations, the movement could not succeed because of the intransigencies of both the Arap Moi and Kibaki administrations.¹⁹² Despite the fact that one of Kibaki's main platforms in 2002 was the adoption of a new constitution within 100 days after taking office, Kenyans had to wait until 2010 for a new constitution.¹⁹³ The allure of power was too much for Kibaki and his associates to selflessly change the existing constitution that gave them enormous powers for a new constitution that would have seriously constrained them.¹⁹⁴ Therefore, from independence until the adoption of the new and current constitution of Kenya, Kenya's constitutional strategy for handling the question of ethnicity—though there was not a conscious, articulated strategy to speak of—was the centralization of power and cooption of opponents from different ethnic groups by the all-powerful president.¹⁹⁵

Before proceeding to see the approach adopted in the new Kenyan Constitution, it is necessary to evaluate the consequences of the Kenyan constitutional approach to ethnicity prior to 2010. This approach clearly did not work and was disastrous. The centralization of power in the presidency led to continuous and deadly competition among the political elites to attain that office.¹⁹⁶ The personalization of power created a situation in which, to feel secure and be fairly—one could also say favorably—treated by the state, people felt the need to see their ethnic kin as president.¹⁹⁷ Other than the informal political process, there was no mechanism for ethnic groups that felt marginalized in the distribution of resources and opportunities to find redress.¹⁹⁸

Coming to the new Kenyan Constitution adopted in 2010, we can see its

190. Anika Moroff, *Comparing Ethnic Party Regulation in East Africa*, 17 *DEMOCRATIZATION* 735, 751–52 (2010). See generally Bogaards, *supra* note 76.

191. Moroff, *supra* note 190.

192. See MIGAI AKECH, INT'L CTR. FOR TRANSITIONAL JUSTICE, INSTITUTIONAL REFORM IN THE NEW CONSTITUTION OF KENYA 12 (2010) (observing that both Arap Moi and Kibaki were unwilling to compromise and relinquish some of their governmental control).

193. Godwin R. Murunga & Shadrack W. Nasong'o, *Bent on Self-Destruction: The Kibaki Regime in Kenya*, 24 *J. OF CONTEMP. AFR. STUD.* 1, 16–18 (2006).

194. AKECH, *supra* note 192.

195. See *id.* at 18 (expounding on the unfettered power of the president to appoint or remove any person for any reason).

196. *Id.* at 17.

197. See *id.* at 17–18 (highlighting the disparity of distribution of Kenya's lands and resources between ethnic groups in office and those ethnic groups who were not).

198. See *id.* at 18 (addressing the actions of government officials and the violence and human rights violations resulting from elections).

drafters designed it with a view to address problematic ethnic relations. The constitution attempts to do this through a combination of three strategies.¹⁹⁹ These strategies are: (1) restructuring power relations through devolved government and through enhancing the inclusivity and representativeness of the central government; (2) ensuring more equitable distribution of resources and opportunities; and (3) guaranteeing the right to non-discrimination and equality of citizens.²⁰⁰

With regard to the first strategy, the adoption of a devolved government in Kenya is the most significant constitutional development.²⁰¹ The 2010 Kenyan Constitution creates forty-seven counties with their own executive and legislative councils.²⁰² With the introduction of devolved government, the constitution aims to foster national unity, recognize diversity, recognize the right of communities to manage their own affairs, protect minorities and marginalized groups, and ensure the equitable allocation of resources.²⁰³ At the same time, counties can hardly provide the basis of the ethnic mobilization of centrifugal forces due to their relatively small size and constitutional status as “counties” and not states in a federal arrangement.²⁰⁴ Therefore, to extend the diffusion of power that had hitherto been centralized, directly elected senators now represent the counties, and this arrangement has provided regional interests a voice at the center.²⁰⁵

The constitution requires political parties to have a national character²⁰⁶ and reflect “the regional and ethnic diversity of the people of Kenya” in their party list.²⁰⁷ Furthermore, the constitution requires the cabinet of the central government to reflect the ethnic and regional diversity of Kenya and a successful presidential candidate to win both the majority of the votes cast nationally and at least a quarter of the votes cast in each of more than half of the forty-seven counties.²⁰⁸ Through a combination of these strategies, the constitution tries to avoid a repeat of the days in which one ethnic group dominated the state.²⁰⁹

The second strategy adopted in the new Kenyan Constitution is the way in which the constitution tries to ensure the fair and equitable distribution of resources and opportunities in the form of budgetary allocation for development,

199. *Id.* at 7.

200. AKECH, *supra* note 192, at 7.

201. *See id.* at 23 (promoting the decentralization of government and allowing the people of Kenya to participate in the governmental process).

202. CONST., art. 6(1) (2010) (Kenya) (explaining that territory of Kenya is divided into counties, and referring reader to the First Schedule, where the forty-seven counties are listed).

203. *Id.* art. 174.

204. *See id.* art. 6 (describing the interdependence of Kenya’s county governments in relation to the national government), First Schedule (listing the forty-seven counties in Kenya).

205. *See id.* art. 98 (discussing the makeup of the Senate).

206. *Id.* art. 91(a).

207. *Id.* art. 90(2)(c).

208. CONST., art. 138(4)(a)–(b) (2010) (Kenya).

209. *See id.* art. 41 (discussing the right to fair labor practices), 60 (discussing equitable access to land), 220 (discussing budget and spending allocations).

state sector employment, and access to land.²¹⁰ The constitution provides that the revenue raised nationally shall be allocated between the counties and national government equitably²¹¹ and reserves a minimum of fifteen percent of revenue raised by the national government to be distributed among the counties.²¹² The constitution also establishes an Equalisation Fund, which shall be used “only to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.”²¹³

The constitution also creates the Commission on Revenue Allocation. Its “principle function . . . is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government, between the national and county governments; and among the county governments.”²¹⁴ The constitution also stipulates that the awarding of contracts and procurement of services and goods by public entities should be equitable and fair and that previously disadvantaged groups should be taken into account.²¹⁵

To ensure these constitutional principles are practiced, Parliament now has a duty to enact procurement legislation.²¹⁶ Moreover, all arms of government must reflect the ethnic and regional diversity of Kenya.²¹⁷ As for the changes in Kenyan land policy, the primary element emphasized has been the equitability of access for all citizens.²¹⁸ Therefore, one could say the new Kenyan Constitution was designed with the view to facilitate the equitable distribution of resources and opportunities controlled by the state.²¹⁹

Finally, the new Kenyan Constitution enshrines rights to equality and

210. *See id.* art. 56 (ensuring all members of minority and marginalized groups have fair access to employment), 60 (proscribing equitable distribution of land use and access), 220 (discussing budgetary allocation for development among county and national government), 233 (establishing public service commission), 237 (establishing the public sector Teacher Services Commission), 250 (discussing commission members for office).

211. *Id.* art. 202(1).

212. *Id.* art. 203(2).

213. *Id.* art. 204(1)–(2).

214. CONST., art. 216(1) (2010) (Kenya).

215. *Id.* art. 227.

216. *Id.* art. 227(2).

217. *See id.* art. 10 (stating that all State organs are bound by national values and principles), art. 94(2) (discussing the composition of Kenya’s parliament), art. 130(2) (discussing composition of the national executive), art. 238(2)(d) (discussing the recruitment policy of Kenya’s national security organs), art. 241(4) (discussing composition of the Defense Forces), art. 246(4) (discussing the composition of the National Police Service Commission), art. 250(4) (outlining general composition of appointments to all commissions and independent offices in Kenya).

218. *Id.* art. 60(1).

219. *Id.* art. 60 (discussing equitable land distribution), 216 (discussing equitable sharing of national revenue between the national and county governments), 220 (discussing the budgets of national and county governments), 227 (discussing equitable distribution of contracts).

nondiscrimination, to move freely, and to take residence in and own property in any part of the country.²²⁰ The goal of these provisions is to ensure the equal treatment of Kenyans and to end recurrent forced displacement of Kenyans from the putative ethnic homeland of this or that ethnic group.²²¹ Therefore, in these ways, the new Kenyan Constitution attempts to ensure that the rights of citizens are not abridged on the basis of ethnicity.

B. Constitutional Strategies to Deal with Abuse of Incumbency

Addressing abuse of incumbency, the old Kenyan Constitution provided for an independent electoral commission²²² and public service commission,²²³ for the operational autonomy of the attorney general in making decisions concerning prosecutions,²²⁴ and for equitable apportionment of electoral districts.²²⁵ Aside from these provisions, which are in one way or another related to minimizing abuse of incumbency, no other provisions explicitly or directly proscribed the various kinds of abuses of incumbency discussed in the first part of this section. The forms of abuse not clearly proscribed in the previous Kenyan Constitution, but now mentioned, include abuse of state-owned media,²²⁶ media regulatory organs, and abuse of material and financial state resources.²²⁷

There is an interesting contrast between the prior Kenyan Constitution and the new constitution of Kenya and the constitution of South Africa. The new Kenyan Constitution restricts the state's ability to impose entry restrictions on private media,²²⁸ prohibits political manipulation of licensing procedures,²²⁹ and proscribes abuse of state-owned media by incumbents.²³⁰ It also specifically calls for the editorial autonomy of state-owned media and creates an obligation to be impartial and entertain diversity opinions.²³¹ There are also explicit guidelines regarding

220. See CONST., art. 10(2)(b) (discussing the values of non-discrimination and equality), 39 (discussing the right of Kenyan citizens to freedom of movement and to reside anywhere in Kenya), 40 (discussing the right to own and acquire property) (2010) (Kenya).

221. Kamungi, *supra* note 87, at 349–52.

222. See CONST., art. 41(9) (1963) (Kenya) (stating that the Electoral Commission will not be subject to the direction or control of any other person or authority).

223. See *id.* art. 106(12) (stating that the Public Service Commission will not be subject to the direction or control of any other person or authority).

224. See *id.* art. 26(8) (stating that the attorney general will not be subject to the direction or control of any other person or authority).

225. See *id.* art. 42(3) (stating that all constituencies shall contain as nearly equal numbers of inhabitants as appears to be reasonably practicable to the Commission).

226. *Id.* art. 216.

227. See CONST., art. 34(4), 91(2)(e) (2010) (Kenya) (emphasizing that all state-owned media will be afforded fair opportunity to present divergent views and dissenting opinion and that public parties shall not use public resources to promote their interests or candidates).

228. *Id.* art. 34(3).

229. *Id.* (“Broadcasting and other electronic media have freedom of establishment . . .”).

230. *Id.* art. 34(4)(a) (“All State-owned media shall—(a) be free to determine independently the editorial content of their broadcast or other communications . . .”).

231. *Id.* art. 34(4)(b)–(c) (“All State-owned media shall . . . (b) be impartial; and (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.”).

electoral management,²³² prohibiting mal-apportionment,²³³ and using state resources by political parties for partisan purposes, save in instances which are authorized by an act of Parliament or the constitution.²³⁴ In addition to restricting the use of state-owned resources for partisan purposes, the constitution also enjoins the legislature to enact legislation that will regulate the fair and equitable use of state-owned media.²³⁵ The constitution seeks to prohibit abuse of security services and the Director of Public Prosecutions for partisan purposes.²³⁶ The South African Constitution also has similar provisions that limit prejudicial and discriminatory behavior.²³⁷

VI. CONCLUSION

Currently, there is a wave of constitution-making in Africa that could be considered the fourth wave of constitution-making in the continent. The resulting constitutions 4.0 seem to exhibit certain distinct features and characteristics.

The first significant substantive distinguishing feature of constitutions 4.0 is the extent to which these constitutions are designed to reduce the power of the executive and abuse of incumbency. Previous waves saw constitutional designs indifferent to the aggrandizement of the executive or deliberately designed to enhance the power of the presidency at the expense of other constitutional organs. Constitutions 4.0 differ from prior constitutions because of an underlying agreement regarding the need to constrain the executive.

Another important departure of constitutions 4.0 is the more nuanced position these constitutions reflect in relation to decentralization and ethnicity. Previous constitutional waves were dominated by the view that a centralized form of authority was preferable and necessary to guarantee the unity and territorial integrity of states. Regional autonomy and federalism were viewed with suspicion. Furthermore, ethno-cultural differences were ignored and given little or no constitutional recognition. With the rhetorical denunciation of “tribalism” by the

232. *Id.* art. 81(e) (“The electoral system shall comply with the following principles . . . (e) free and fair elections . . .”).

233. CONST., art. 89(5)–(6) (2010) (Kenya) (prescribing the limitations on constituency boundaries, based on population quotas).

234. *Id.* art. 91(2)(e) (“A political party shall not . . . (e) except as is provided under this Chapter or by an Act of Parliament, accept or use public resources to promote its interests or its candidates in elections.”).

235. *Id.* art. 92 (a)–(b), art. 92(h) (“Parliament shall enact legislation to provide for—(a) the reasonable and equitable allocation of airtime, by State-owned and other mentioned categories of broadcasting media, to political parties either generally or during election campaigns; (b) the regulation of freedom to broadcast in order to ensure fair election campaigning . . . (h) restrictions on the use of public resources to promote the interests of political parties . . .”).

236. *See id.* art. 157 (describing the powers of the Director of Public Prosecutions in investigating criminal matters), art. 239(3) (prohibiting national security organs and members from acting in a partisan manner).

237. *See* S. AFR. CONST., 1996, § 179(4) (limiting prosecuting authority from prejudicial behavior), § 197(3) (declaring that public service authors may not be discriminatory), § 199(7) (limiting security services from acting prejudicial or partisan).

political class, previous constitutions adopted a hostile attitude to ethnicity. In the fourth wave, we see a shift in the approach to these issues.

The 2010 Kenyan Constitution embodies many of these features in the way it tries to address the issue of politicized ethnicity and the problem of abuse of incumbency. The specific constitutional strategies being used to deal with these problems include: (1) prohibiting various forms of abuse of incumbency and imposing presidential term limits; (2) establishing institutions that reinforce horizontal accountability and that fall outside the traditional division of power between the three branches of government; (3) decentralizing or devolving power or federalism; (4) regulating political parties; (5) establishing electoral systems intended to promote integration; and (6) providing positive measures, affirmative action or ethnic quotas.

It is left to be seen how the implementation of constitutions 4.0 will fare and how much difference they will make in consolidating democracy and reducing ethnic conflicts in decades to come.