Furthering constitutions, birthing peace

liber amicorum

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A human rights consistent apartheid: Constitutional design of the African state, indigenous peoples' self-determination and the 'other native' question

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> Rights regulate the relationship of individuals and corporations to the state. ... the reality is that the State has effectively displaced the community, and increasingly the family, as the framework within which an individual or group's life chances and expectations are decided. *The survival of community itself now depends on rights of association and assembly*. Yash Pal Ghai[1]

> …the point of democratization cannot be just a simple reform of civil society. It also has to be a *dismantling* of the mode of rule organized on the basis of fused power, administrative justice and extra-economic coercion, all legitimized as the customary. Mahmood Mamdani[2]

Introduction

I was first introduced to the art and craft of festschriften by Jesse Mugambi when he invited me to copy-edit the liber amicorum in his honour in 2010.[3] Professor Mugambi later then invited me to again copy-edit the festschrift in honour of the great Tanzanian Africanist theologian-philosopher, Laurenti Magesa.[4] Soon after, my master's thesis supervisor Juan Carlos Sainz-Borgo, invited former students of my law of the sea professor Amb. Gudmundur Eiriksson, to contribute to his festschrift.[5] This time I got drawn in even more, not only as chapter contributor and copy editor but also as editor. Through these three experiences, and particularly the

[1] Yash Ghai, 'Rights, duties, responsibilities' in J Caughelin, P Lim, B Mayer-Konig (eds), *Asian values: Encounter with diversity*, Curzon Press, London, 1998, 169. [emphasis mine]

[2] Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism,* Fountain/David Phillip/James Currey, Kampala/Cape Town/London, 1996, 296. [emphasis mine]

[3] Isaac T Mwase, Eunice Kamaara (eds) *Theologies of liberation and reconstruction: Essays in honour of Professor JNK Mugambi,* Acton, Nairobi, 2012.

[4] Jesse NK Mugambi, Evaristi Mogoti Cornelli (eds) *Endless quest: The vocation of an African Christian theologian, Essays in honour of Laurenti Magesa,* Acton, Nairobi, 2014.

[5] Juan Carlos Sainz-Borgo et al (eds), *Liber amicorum in honour of a modern Renaissance man, HE Gudmundur Eiriksson,* University for Peace, Universal Law, OP Jindal, San Jose, Sonipat, 2017.

tutelage of Professor Mugambi, I fell in love with two aspects of festschriften for a young scholar. First, the opportunity to sit at the feet of one's elders and learn, in a special and intimate way, the thinking of the people who have so greatly inspired our own incipient scholarship, and especially through listening to *their peers, their 'amici'*. Second, I got a chance to experience the cultural place of festschriften, as a time honoured way of paying tribute to a scholar. It feels like the cultural role of the young man, preparing the *nyamachoma* for the elders in return for the implicit permission to keep their company, hover within earshot, listen to their stories. Apprenticeship.

To honour our elder, Yash Pal Ghai, the reflection in this paper seeks an answer in his scholarship and practice, to a question that has troubled me since my indigenous peoples' rights class at the UN University for Peace (UPeace) in 2013. In this class, our teacher Mihir Kanade, with more questions than answers, had us interrogate how best to respect the rights of indigenous peoples to self-determination. Do we leave them alone, that is, not 'discover' them? Do we allow them semi-autonomy? Be so generous as to allow them Bantustans? Under what terms of government? Do we *make them* register 'municipal corporations' like in Australia? Or beguilingly recognise 'sovereign'[6] reservations like the US? Do we deny their existence like certain African nations that insist all Africans are indigenous? Why 'we'? Who is 'we' and why 'they'? Why this otherness? Amongst black Africans, whose is the dominant culture? In Africa, are we not all indigenous – meant black – on the continent after all?[7] How can we define African indigeneity[8] without defining

[6] *Worcester v Georgia*, 31 US (6 Pet.) 515 (1832).

[7] For the avoidance of doubt, this line of questioning in no way indicates a rejection of the multi-racial character of African societies. Such would be a contemporary blindness and a weak reading of history. Presently, black dominant culture is simply the locus of our contentions.

[8] Indigeneity as a function of self-identification is central to the African conundrum. Here, I mean the horror and instinctive revulsion of the dominant black African culture at self-identification, which obviously excludes them. For defining discussion on indigeneity, see S James Anaya, 'The evolution of the concept of indigenous peoples and its contemporary dimensions,' in Solomon Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa,* PULP, 2010, 23-42. For a discussion on the importance of self-identification as resistance against being defined from the outside, see S James Anaya, 'International human rights and indigenous peoples: The move toward the multicultural state' 21 *Arizona Journal of International & Comparative Law*, 1, 2004, 13-61.

Africa's dominant cultures[9] and recognising their imperial conduct,[10] if not nature?

Almost contemporaneously, the Inter-American Court on Human Rights was laying down the full meaning of free prior informed consent (FPIC).[11] The irony was sweet to contemplate. A supranational institution, created by 2-century old, largely neo-colonial states, was schooling those same states on how to be more devolved. It was almost mythical, like that mythological demi-god figure borne of the wretched race who comes to teach humans to be more humane. In a class of brilliant fiery opinionated students from all continents as was our UPeace class, no answer was possible. Only excruciating thought, especially after we watched Aaron Huey's TEDTalk.[12]

In 2017, while attending a course on the right to development at the Centre for Human Rights, University of Pretoria, an unexpected – ha! there goes my naiveté – push back exploded in the class about respecting the rights of indigenous peoples to make their own choices about 'development'. 'Why should we let them live in backward ignorance?' 'We must force them out of the forests and grass-thatched mud huts and into organised villages!' Such were the calls from the floor, greeted with deep hums of approval, like a call-response routine in a negro church in the Jim

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[9] These that become dominant cultures are also the ones most impacted – and we contend, disfigured – by the brutal nature of colonialism, mainly those communities who practiced sedentary agriculture at the advent of the European disruption, who almost invariably occupied rich arable lands that Aaron Huey reminds us is 'the best part of the meat'. See 'America's native prisoners of war: Aaron Huey at TEDxDU' https://www.youtube.com/watch?v=Nv7n5jhrHGQ Accessed 10 October 2018; also, Joel Ngugi, 'The decolonisation-modernisation interface and the plight of indigenous peoples in post-colonial development discourses in Africa' *Wisconsin International Law Journal,* Vol 20, (2002), 279, 324; Solomon Dersso, 'Introduction' in Solomon Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa,* PULP, 2010, 7.

[10] Dersso, 'Introduction' in *Perspectives on the rights of minorities and indigenous peoples in Africa,* 9; also Obiora Chinedu Okafor, *Redefining legitimate statehood: International law and state formation in Africa,* Brill, 2000, 95.

[11] The Court held that "consultation does not constitute a mere formality," but instead should be a "true instrument of participation... responding to the ultimate goal of establishing a dialogue between the parties based on principles of mutual trust and respect, and with the view to reaching consensus between them." IACtHR, *Kichwa indigenous people of Sarayaku v Ecuador*, Judgment of 27 June 2012 (Merits and reparations), para. 186. This was at the time the apex of an increasing assertiveness of the rights of indigenous peoples along the following jurisprudential path: IACtHR, *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, IACtHR (Nov. 28, 2007); IACmHR, *Maya indigenous community of the Toledo District v Belize*, Case 12.053, Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004); IACmHR, *Mary and Carrie Dann v United States*, Case 11.140, Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5. Rev, ¶ 1 (2002); IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgement of 31 August 2001. Since then, *Kaliña and Lokono Peoples v Suriname, Judgment of 25 November 2015, (Merits, Reparations and Costs)* has been even more groundbreaking, asserting as a matter of law, that indigenous people's cultural practices are not incompatible with nature conservation, thus rejecting a long held statist view that indigenous people need to be displaced to protect the environment.

[12] Huey, 'America's native prisoners of war'.

Crow Deep South! Or so Hollywood says. The proverbial back breaking straw came, and I had to sneak out of class for a smoke, when one participant stood up and exercised his free speech rights in full *Handyside*[13] glory: 'we should even take their children to boarding schools, so that they come back and educate their [backward] parents!' I may be paraphrasing a word or two, but I doubt not the general thrust of my recollection. I especially recall the example given of how the Karamoja in Uganda should be, and *are*, being dragged, kicking and screaming, into 'modernity'!

This was a surreal scene. We were rejecting education because we had been educated! School was interfering with our education![14] Africans seeking 'separate but equal'[15] development for Africans! *Apartheid.* The setting was even more surreal. Africans flew across the continent, *to Pretoria*, to hail in populist Nuremberg-esque approval the cultural alienation of *other* – clearly not fellow – Africans. Truly, human rights and human dignity are 'neither popular nor democratic'.[16] This was classic 'neo-liberal turn'.[17] We had come to the [erstwhile] intellectual and political capital of apartheid to reject teaching that disabuses us of apartheid.[18]

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[13] In *Handyside v United Kingdom*, Merits, App No 5493/72, Judgement of 4th November 1976, para. 49, the European Court of Human Rights asserted the right to free speech that can 'offend, shock or disturb the State or any sector of the population'. If ever there were a Maslowian hierarchy of evils, this classroom scene must have been a glimpse. But to be fair to the Court, they were referring to pornography, not genocide.

[14] I must acknowledge that an old Jesuit philosopher friend, who lived his formative years in the tumultuous Central America of the 1980s, bequeathed me this line. Its ability to stun me never withers, nor does my gratitude to him.

[15] *Plessy v Ferguson*, 163 U.S. 537 (1896), upholding the constitutionality of racial segregation. This begins a line of partial and still unfinished constitutionality exceptions that *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) supposedly comes to reverse, to minimal avail. See below, our reference to *Milliken v Bradley* and the constitutionality of *de facto* segregation. See also, Trevor Noah – US and South Africa have the same racial past' essentially, that US racism was apartheid. 'Eight Times America Surprised Trevor - Between the Scenes | The Daily Show' [Minute 7.50ff] https://www.youtube.com/watch?v=LoBJOkhtDQQ Accessed 14 June 2020. For, refreshingly delivered poignant insights on the core nature of apartheid, see Trevor Noah, *Born a crime and other stories,* Pan MacMillan, Johhannesburg, 2016.

[16] Humphrey Sipalla, Karest Lewela 'Policed perceptions, masked realities: Human rights and law enforcement in Kenyan popular art' in Frans Viljoen, (ed) *Beyond the law: Multi-disciplinary perspectives on human rights.,* PULP, 2012, 215. In this instance, we gave the following list:' Fair trial for suspects, absolute prohibition of torture, abolition of capital punishment, women's and lesbian, gay, bisexual, transsexual and inter-sexual persons (LGBTI)'s rights' to which I now add the rights of indigenous peoples to self-determine.

[17] In reference to JT Gathii's thesis that we in the Global South are no longer being dragged into neo-liberal policies but we are now, willing, if not, eager participants. See James Thuo Gathii, 'The neo-liberal turn in regional trade agreements,' 86 *Washington University Law Review* 421 (2011).

[18] For the avoidance of doubt, I am not in any way suggesting that what was being taught at the Centre for Human Rights, University of Pretoria was inappropriate, but rather I describe my shock at the active populist rejection of the sound teaching of respect for indigenous peoples' right to development in accordance with their cultures and traditions by *some of* the students who had come to study the right to development in the short course.

Yash Pal Ghai, in theory and praxis, has applied the thesis that constitutional arrangements ought be so designed as to promote pluralistic modes of being within a contested polity. In this way, they can serve as institutional frameworks for devolution, as peace treaties, where rights – as entitlements to human dignity – undergird collaborative rather than competitive co-existence of disparate communities in such contestation.

In this paper, I will explore the proposition that seemingly progressive, mainstream human rights notions of indigenous peoples and their rights to self-determination are troublesome and fundamentally flawed because they *are a form of apartheid*. And that the Ghai approach to constitution-making as pluralistic nation-building within a state may offer some answers to the false choices presented to us by the tragic normativity of the centralised post-colonial African state, a tragedy laid bare by Mahmood Mamdani.

So we start in 'Pretoria'. With Mamdani. But first, an appraisal of the orthodox textbook.

The orthodox self-determination discourse and its two worldviews

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[19]

The right to self-determination is a troublesome one. This is witnessed in its history, its debated definitions and continuing concerns over its exercise. In this section, I will present a brief look at the right itself, its appearance in international legal texts, and the attempts made at reconciling this critical but subversive human right with the expediencies of international and municipal politics.

The right to self-determination is at odds with, and is curiously quite inimical to, the very system of laws that proclaim it – international law. Pejoratively, the right to self-determination can be seen as seeking to splinter states, which are themselves the only true legislators of international law. But to be fair, much of international law

[19] Common Article 1(1), International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

can be counter-intuitive.[20] Andrew Moravcsik[21] indirectly reflects on this question, when opining that states broadly enter into the restrictive regimes of human rights protection systems to lock in certain values and protect them from the vagaries of national political life, in the case of weaker states as a way to assert their legal entitlements, or to maintain their political and economic hegemony in the case of the larger powerful states.

But self-determination itself made its debut through the back door. The Atlantic Charter agreed to among the Allied powers at the dusk of the Great War in 1945 sought, in part, to dismantle empire. It brought in the idea that peoples deserve to determine for themselves their own socio-political and economic destiny, free from imperial power. This treaty was to affect the overt political constitution of the French and British empires in Africa, certainly with their consent as parties to the Atlantic Charter.

The principle of self-determination, once agreed to by the imperial powers themselves, quickly found expression in right-based international legislation. Ghai reminds us that 'the use of autonomy as a species of group rights has changed the character of international law. … groups also have obtained recognition, which has given impetus to the currency of self-determination.'[22] By 1928, India was exercising international personality, being party to the Kellogg-Briand Pact. At the United Nations, India and the Philippines are founding members. The Charter of the United Nations (UN Charter) insists on 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.'[23] Although recognised in some form in the UN Charter, the right to self-determination was left out of the Universal Declaration of Human Rights (UDHR) but is provided for in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR) in their Common Article 1.

From 1945 to the late 60s, the right to self-determination was arguably reserved for existing states and asserted for the colonised peoples, who were expected to

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[20] Humphrey Sipalla, 'The historical irreconcilability of international law and politics and its implications for international criminal justice in Africa' in J Stormes, E Opongo, P Knox, K Wansamo (eds), *Transitional justice in post-conflict societies in Africa*, Paulines Publications Africa, Nairobi, 2016.

[21] Andrew Moravcsik, 'The origins of human rights regimes: Democratic delegation in postwar Europe' 54 *International Organization* 2, Spring 2000, 217-252.

[22] Yash Pal Ghai 'Ethnicity and autonomy: A framework for analysis' in Yash Pal Ghai (ed) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states*, Cambridge University Press, 2000, 2.

[23] Article 1(2), *Charter of the United Nations*, 1 UNTS XVI.

'develop into states'. To be clear, Eurocentric Westphalian states are here considered to be the apex of civilisation towards which backward peoples ought aspire, and advanced peoples ought so educate them. This worldview leads to the creation of the Mandate and Trusteeship systems of the League of Nations and the United Nations. To wit, existing states are legally obligated to this paternalism:

> The States Parties to the present Covenant, *including those having responsibility for the administration of Non-Self-Governing and Trust Territories,* shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[24]

One can discern two core and concurrent worldviews driving the standard setting of this age. The first is addressed to sufficiently advanced backward peoples who have achieved acceptable development as to be allowed self-determination including to form their own states recognisable[25] to the West. These can then be welcomed into the world of friendly relations among equal sovereigns. This worldview we will call, for our present purposes, the UN system worldview.

The crafty language of Common Article 1 of the ICCPR and ICESCR, adopted in 1966, was double-faced and forked-tongued. It allowed two oppositional views to co-exist. Colonial powers, then responsible for non-self-governing – a fancy term for colonised – peoples, saw in that language flexibility to either 'grant' independence or 'allow' internal self-determination. Meanwhile, the formerly colonised Global South peoples, including the tens of newly independent African states saw in the very same common Article 1 language, the full decolonisation rights asserted in their already existing Charter of the Organisation of African Unity of 1963 (OAU Charter).[26] Ghai seems to highlight the tension playing out here, diplomatically terming the minority rights provisions in Article 27 of the ICCPR as parsimonious.[27] Remember, at this time, large swathes of Africa's southern cone was still under full-fledged South African, Portuguese and British colonialism. Paternalistic as it

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[24] Common Article 1(3), International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. [emphasis mine]

[25] For a *useful* interrogation on how the doctrine of recognition as the operative principle in the creation of states navigates the creation of acceptable 'others' thus maintaining the colonial logic, see Anthony Anghie, *Imperialism, sovereignty and the making of international law,* Cambridge UP, 2005.

[26] 'Determined to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neo-colonialism in all its forms,' and, as purpose of the OAU, 'to eradicate *all forms* of colonialism from Africa' [emphasis mine], Preamble 6 and Article II(d), *Charter of the Organisation of African Unity*, 479 UNTS 39, 25 May 1963.

[27] Ghai 'Ethnicity and autonomy', 3.

sounds, this UN system worldview may, for the purposes of our discussion, be the better of the two concurrent attitudes. Here, the aim of decolonisation was explicit and unequivocal, even though arrogant.

It is at the International Labour Organisation (ILO),[28] before the 1960s, that we see the second worldview of self-determination rights for those indigenous or tribal peoples who, one can only surmise, were not expected to 'develop into states' so are best protected by *integration into the existing state*. And one thinks here mostly but not exclusively of the American continent.[29] ILO Convention 107 of 1957 is very state-centric, limiting participation rights of these indigenous and other tribal and semi-tribal populations in independent countries to concordance with national laws.[30] This ILO system worldview is equally paternalistic but probably the more sinister of the two worldviews,[31] from a self-determination point of view. It clearly does not expect these peoples to grow into the 'maturity' acceptable to have a state and as such must perpetually be cared for.[32] We will revisit this Hegelian paternalism below.

Only in 1989, in ILO Convention 169, does the notion that these indigenous – the terms semi-tribal and tribal are now dropped – peoples ought not simply be cared for but surely also be *listened to*, comes into play. Although still state-centric, state parties are now required to consult these peoples, who cannot be allowed to develop their own state, 'in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'.[33]

The 1963 OAU Charter, the 2002 Constitutive Act of the African Union, and later, the 1989 ILO Convention 169 on Indigenous Peoples and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), reveal a change of heart, well-

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[28] For a fuller treatment, see S James Anaya, 'The evolution of the concept of indigenous peoples and its contemporary dimensions,' in Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa*, 23-42, especially 31-4.

[29] See ILO, 'Ratifications of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107)' https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312252 Curiously, the states that automatically denounce ILO Convention 107 by ratifying ILO Convention 169 are exclusively American states.

[30] *ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO Convention No. 107) 1957, 328 UNTS 247.

[31] Ghai 'Ethnicity and autonomy', 3.

[32] For a recap of this 'honourable Western tradition' of seeing the 'native' as a perpetual child who is best protected by 'not forcing her institutions into an alien European mould', See Mamdani, *Citizen and subject,* 4ff.

[33] Article 6(2), *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)* 1989, 28 ILM 1382.

meaning I might add, as it became clearer that non-Eurocentric cultures will not simply wither away 'with development' but are here to stay and to assert their own terms. Political changes have been and continue to be made to allow these peoples to determine for themselves their governments. But as we note below, with overt and covert expectations to nevertheless not challenge the status quo or devise and practise their own worldviews.

And thus we can see the two equally paternalistic and subliminally bigoted but divergent attitudes to the rights of indigenous peoples to self-determination: *let* them develop into their own states, or integrate them by good faith consultation. Frankly, these two attitudes are not illogical. International law cannot reasonably be asked to be nihilistic – it cannot realistically be expected to provide for the dismemberment of its very constituents, especially the existing ones, *Kosovo*[34] notwithstanding. In fact, the relevant jurisprudential line of the International Court of Justice over the time period has been at best inconsistent and tortured.[35]

'My interest, [however] is in the method that guides these contending perspectives'.[36] It is important for our introspective discussion, especially for the black African dominant cultures, to remember that the states that were invested in this standard setting, particularly the ILO worldview, were actually the progressives,[37]

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[34] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, p. 403.

[35] *South West Africa cases (Ethiopia and Liberia v South Africa), Preliminary objections*, Judgment of 21 December 1962, ICJ Report 1962, p. 319; *South West Africa, Second Phase*, Judgment, ICJ Reports 1966, p. 6; *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12; *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, ICJ Reports 2019, p. 95. See also, Rashmi Raman, 'Changing of the guard: A geopolitical shift in the grammar of international law' in Humphrey Sipalla, Foluso Adegalu, Frans Viljoen (eds) *African approaches to international law: Exploratory perspectives*, PULP, Pretoria, 2021.

[36] Mamdani, *Citizen and subject,* 13.

[37] Noam Chomsky delivers a sobering reminder of the evolution of what he terms liberalism, our progressives, from its anti-authoritarian foundations: 'If we go back to the classics … Humboldt's *Limits of state action*, ….the world that Humboldt was considering … was a post feudal but precapitalist world… it was the task of the liberalism that was concerned with human rights and the equality of individuals … to dissolve the enormous power of the state, which was such an authoritarian threat to individual liberties … Humboldt being pre-capitalist couldn't conceive of an era in which a corporation would be regarded as an individual… [Today] liberalism is essentially the theory of state capitalism, of state intervention, in a capitalist economy….This new view … accepts a number of centres of authority and control: the state on the one hand, aglomerations of private power on the other hand, all interacting with individuals as malleable cogs in this highly constrained machine which may be called democratic but given the actual distribution of power is very far from being meaningfully democratic … to achieve the classical liberal ideals for the reasons that led to them being put forward, in a society so different, we must be led in a very different direction. … it leads me to be a kind of anarchist, *an anarchist socialist*. [Emphasis added] Noam Chomsky interview with Bryan Magee on Limits of Language and Mind, https://www.youtube.com/watch?v=A1RrbexZ5LY Accessed 10 December 2020.

the ones seeking to bind themselves *in legislation*, to some form of just treatment of the indigenous peoples who find themselves in their territories. This is evident when one simply considers all the countries with aboriginal, first nation, 'non-self-governing' populations who, to date, have never bothered to engage in a system of international peer accountability. Curiously such a list would mirror the non-geographical selections of the UN WEOG group.

Despite divergent opinions by Global North and South peoples and their states during this period of standard-setting, the common pitfall of the period is in its fundamentally imperial/colonial logic that does not even contemplate the possibility that the tribal, semi-tribal now indigenous peoples may have their own worldviews and aspirations. This is manifested in the state-centricity of the standard setting.[38] The need to preserve the state's legitimacy is shared by both old Global North and new South states, despite its want of moral ground for colonial legacy and desperate need for recognition as equal because of colonial legacy, respectively. Robert Goldman[39] notes that in Latin America, there was an overriding focus on non-intervention proceeding from the Latin experience of US interventionism. The young states of the OAU too were for most of the 20th century, focused on non-interference and securing their then weak foundations.[40] Nonetheless, as the 20th century came to a close, it was increasingly indisputable that 'in both industrial and less-developed countries in which indigenous people live, the indigenous sectors almost invariably are in the lowest rung of the socio-economic ladder, and they exist at the margins of power.'[41] The history of systemic discrimination is not simply in the past, but continue as current inequities.[42]

[38] Article 2.7 of the UN Charter which prohibits interference in matters in the 'domestic jurisdiction' of the state and *ius ad bellum* – Articles 2.4 and 51 of the UN Charter that at once prohibit second party states from using force against others and give authority for states to use force to protect themselves, including against secessionists, testify to this centrality.

[39] Robert Goldman, 'History and action: The Inter-American Human Rights System and the role of the Inter-American Commission on Human Rights' *Human Rights Quarterly* 31 (2009), 856-887.

[40] Ben Kioko, 'The right to intervention under the African Union's Constitutive Act: From non-interference to non-intervention' 852 *International Review of the Red Cross,* 31 December 2003.

[41] Anaya, 'The evolution of the concept of indigenous peoples', 38.

[42] Anaya, 'The evolution of the concept of indigenous peoples', 38.

Indigenous peoples' self-determination is preeminently a state reform/ constitutional design question

> Rights are not necessarily deeply held values, but rather a mode of discourse for advancing and justifying claims. Yash Pal Ghai[43]

James Anaya introduces the finely balanced challenge that indigenous peoples' self-determination claims bring to the design of constitutions, which constitutes an imperative for state reform.

> Indigenous peoples have helped build a political theory that sees freedom and equality not just in terms of individuals and states, but also in terms of diverse cultural identities and co-existing political and social orders. Under this political theory, self-determination does not imply an independent state for every people, nor are people without states left with only the individual rights of the group members. Rather, peoples as such, including indigenous peoples with their own organic social and political fabrics, are to be full and equal participants in the construction and functioning of governing institutions under which they live at all levels.[44]

Erica-Irene Daes, former chair of the UN Working Group on Indigenous Populations, envisions a renewed process of 'belated state-building' where indigenous peoples negotiate with other peoples within their states not for individual citizenship inclusion but 'recognition and incorporation of distinct peoples *in the fabric of the state*.'[45]

The thrust of this paper is to add to the points raised by Daes. Group recognition and integration into the fabric of the state, of necessity, requires frank introspection to understand what are the warps and wefts and *how* they weave themselves to constitute the states we live in,[46] while rejecting universalising forces and unilinear evolutionism.

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[43] Yash Ghai, 'Universalism and relativism: human rights as a framework for negotiating interethnic claims' *Cardozo Law Review* 21 (2000), 1137.

[44] Anaya, 'The evolution of the concept of indigenous peoples', 38.

[45] Erica-Irene Daes, 'Some considerations on the right of indigenous peoples to self-determination' *Transnational Law and Contemporary Problems,* Vol 3, 1993, 9, cited in Anaya, 'The evolution of the concept of indigenous peoples', 39. [emphasis added]

[46] One authoritative analysis not treated of in the present discussion for want of scope, but forms an integral part of the corpus of understanding the contemporary African state is Peter P Ekeh, 'Colonialism and the Two Publics in Africa: A theoretical statement' *Comparative Studies in Society and History*, Vol. 17, No. 1. (Jan., 1975), 91-112.

Ghai's reflection in 2000 suggests the double-edged nature of autonomy systems:

> Autonomy has been used to separate as well as bring people together. …it has been seen as a panacea for cultural diversity, and as, under the influence of identity politics, the realization of extreme heterogeneity of states dawns on us, autonomy seems to provide the path to maintaining unity of a kind while conceding claims to self-government. But autonomy can also be used to marginalize communities, as in apartheid Bantustans; and in contemporary times can constitute subtle forms of control or isolation….[47]

'Even if autonomy is not granted, the very agitation for it is of considerable interest to constitutional scholars. … Autonomy has become an integral part of contemporary constitutions.'[48] In considering the constitutional design implications of indigenous peoples' self-rule systems, the question of participation in the centre or exercise of regional power is central to their typology and is a consequence of particular historical contexts. The Australian Indigenous Governance Toolkit is exemplary in demonstrating how, although indigenous peoples are said to be self-governing, their governance is required to abide by existing legal and social constructs of mainstream society. More importantly, their self-government demands no introspection of dominant culture, no reform of mainstream self-government.

Ghai presents a most exhaustive typological overview of these systems, with analysis of their distinctions and similarities.[49] What is of import for our discussion is the trend of unequal treatment of self-rule systems for indigenous peoples as opposed to other minorities and non-ruling majorities. Below we will discuss some of the political and cultural prejudices that stand as obstacles to the dangerous path to apartheid that current models present, not least of which are tenacious notions from 'a time when state-building through central management and homogenisation was the dominant paradigm [and consequently] concessions to ethnicity were reluctant and grudging'.[50] That even localised self-rule is considered a 'concession' from the centre rather than a constituent right from which the centre's existence is derived is central to the unfortunate paradigm.

'The right to self-determination has increasingly been reinterpreted in terms of internal constitutional arrangements for the political and autonomy rights of

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[47] Ghai, 'Ethnicity and autonomy', 1.

[48] Ghai, 'Introduction' in Yash Pal Ghai, Sophia Woodman (eds) *Practising self-government: A comparative study of autonomous regions*, Cambridge University Press, 2013, 8.

[49] Ghai, 'Ethnicity and autonomy', 1-25.

[50] Ghai, 'Ethnicity and autonomy', 11.

minorities.'[51] The imperative in the language of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), especially Articles 3 - 5, to constitutional design and state reform is actually explicit in the plain reading. Most important is that this self-determination is expressed from the indigenous minority's point of view. 'We have always been our own peoples, living by our governance systems. We are simply reminding you of this fact and your obligation to let it be so.' It does not seek separation but asserts its existence. This must surely unnerve state centrists who cannot contemplate anything other than what Ghai calls 'singular nationalism'.[52] Ghai is explicit in asserting that 'autonomy is beginning to transform our notions of the organisation of the state, the rationalisation of public power and *the homogenising mission of the state*.'[53] The exhortation of *Re: Secession of Quebec* to enter negotiations once emphatic secession claims are made is advice well worth taking.[54]

From the indigenous minority vantage point as expressed in UNDRIP, extant constitutional structures are in urgent need of updating. This in turn means recognising existing variant power structures in our constitutional designs.

> The antidote to a mode of rule that accentuates difference, ethnic in this case, cannot be to deny difference but to historicize it. Faced with a power that fragments an oppressed majority into so many self-enclosed culturally defined minorities, the burden of resistance must be both to recognize and to transcend the points of difference.[55]

Ethnic, religious or linguistic minorities inarguably suffer much oppression across all five continents within the existing nation states. Proceeding from the overwhelming weight of an intolerant majority, ostensibly practicing 'democracy', minorities are denied use of their language – sometimes even in criminal trials – their cultures, shrines and worship centers in their areas of ancestral living, as well as access to the public life of the modern state. And with disadvantageous beginnings, children of indigenous minorities consistently find it hard to fight through and succeed in the normal education and social systems, conditions that breed ethnic consciousness and… resentment.[56] The European Court of Human Rights opined in *Sorensen and Rasmussen v Denmark* that 'democracy does not simply

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[51] Ghai 'Ethnicity and autonomy', 3.

[52] Yash Pal Ghai, 'Preface to the 2001 Issue' in Yash Pal Ghai, JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, 2001.

[53] Ghai 'Ethnicity and autonomy', 2. [emphasis added] See also, Ghai, 'Introduction' in *Practising self-government*, 3.

[54] See generally, Ghai 'Ethnicity and autonomy', 3.

[55] Mamdani, *Citizen and subject,* 296.

[56] Ghai 'Ethnicity and autonomy', 5.

mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of dominant position'.[57] This point is critical for the purposes of our discussion into how the progressives of the respective dominant cultures, in willful ignorance, may promote a national apartheid against their 'other' cultures in the name of asserting self-determination of indigenous peoples.

Ghai is welcoming of asymmetries that make autonomy systems function. To our minds, it is an important deconstructive factor to the homogenising central state. In other words, the paradigmatic insistence that the centre must be all is inextricably linked to the insistence that any devolved powers must be equally done so across the entire polity, which, by operation, completely disenfranchises politically insignificant minorities, including indigenous peoples. Ghai notes in 2000 that few autonomy systems, negotiated at independence and driven by colonial demands, survived for very long,[58] although in 1970 Ghai and Patrick McAuslan noted that colonial disregard for the sanctity of constitutional arrangements, changing them even up to three times a year in Kenya in the 1950s, and expecting immutability after independence was rather disingenuous of colonial authorities.[59]

Self-determination offers a spectrum of political possibilities, from quota-ed representation in the state centre, politically autonomous regions, federations to full secession.[60] It battles for space with the right to nationality. Latin America adopted several conventions on nationality as a way of avoiding conflicts over the constitution of their nation states.[61] Conversely, Africa's Charter on Human and Peoples' Rights (African Charter) affirmed the right to self-determination but ignored the right to nationality, given the focus then on decolonising the southern cone from 'foreign domination'.[62] Europe's Convention on Human Rights and Fundamental Freedoms, though focused on civil and political rights, protects the right to participation in political life, and ignored its grandest form, that of self-determination, yet Europe is the continent that has witnessed the most frequent of violent internal rearrangements of self-determinative units – states – in the last 2 centuries!

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[57] Although in relation to right to association on an individual v state plane. *Sorensen and Rasmussen v Denmark,* applications nos. 52562/99 and 52620/99, Judgement of 11 January 2006, 58.

[58] Ghai 'Ethnicity and autonomy', 15.

[59] Ghai and McAuslan, *Public law and political change in Kenya,* 510.

[60] Using the term 'autonomy' see Ghai, 'Introduction' in *Practising self-government*, 1-31; Yash Ghai and Anthony J Regan, 'Unitary state, devolution, autonomy, secession: state building and nation building in Bougainville, Papua New Guinea' 95 *The Commonwealth Journal of International Affairs*, 386 (2006), 101-119.

[61] Goldman, 'History and action' 856-887.

[62] Article 20 (3), *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217.

The African Commission on Human and Peoples' Rights (ACmHPR) asserted in *Congrès du peuple katangais* that secession was not the meaning the framers of the African Charter had in mind when guaranteeing self-determination, and that secessionist self-determination can be resorted to only in the case of systemic oppression and as a last resort.[63] In *Kevin Gumne (on behalf of people of Southern Cameroons)*[64] the ACmHPR laid out specific remedies requiring redress for the marginalised Anglophones of Southern Cameroon in economic and political life as well as judicial process, but also required the secessionist groups to convert into political parties and claim their peoples' rights within the existing political systems of the state. Again, redress is sought *within* the state.

Therefore, it can be concluded that the right to self-determination is really only exercised in political agreement as opposed to judicial enforcement, and geared towards finding greater respect for human rights within existing states, again, *Kosovo* notwithstanding.[65] That is true of indigenous majorities at the dusk of colonialism, for whom the right to self-determination was first addressed, as it is today for minority indigenous peoples, for whom the right to self-determination is being tortured to redress.

> The [African Commission on Human and Peoples' Rights] has interpreted the protection of the rights of indigenous populations *within the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of State Parties,* in conformity with the principles and values enshrined in the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights (the African Charter) and the UN Charter.[66]

We can hardly tolerate the idea that the Ogiek just wants to be left alone to hunt, gather, and farm in *his* forest or that the Kichwa Sarayaku values *her* ancestral shrine more than petrodollars, new houses and roads, or that the Australian aboriginal would rather not have had *her* children taken to boarding school. Ghai

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[63] *Congrès du peuple katangais v Zaire,* Communication 72/92, 8th ACHPR Annual Activity Report, Decision of 22 March 1995, http://caselaw.ihrda.org/doc/75.92/ Accessed 10 October 2019.

[64] *Kevin Gumne (on behalf of people of Southern Cameroons) v Cameroon,* Communication 266/03, 26th Activity Report, Decision of 27 May 2009, http://caselaw.ihrda.org/doc/266.03/ Accessed 10 October 2019.

[65] See Goldman, 'History and action' 856-887, on the concerns of the Inter-American Commission on Human Rights that poor democracy and respect for human rights in American countries lead to state instability. See also, Ghai 'Ethnicity and autonomy', 15-16.

[66] *Advisory opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples,* adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana, para. 6. [emphasis *in original*].

notes that we struggle with that concept 'of tolerance and compromise, … unable to accommodate communities with *very* different ideals, beliefs and practices'.[67]

And for that reason, *at best*, the human rights regime for indigenous peoples that we, dominant culture Global South peoples, are constructing, cannot even paternalistically allow *them* to develop into their own states, but is only altruistically willing to integrate *them* into *our* state, in good faith consultation so that they find advancement in our ways. This is nothing more than a human rights affirming apartheid. A 'just' separate but equal development.[68]

States and the dominant cultures that run them are instinctively suspicious of the right to self-determination, especially if state unity is challenged.[69] Therefore, it seems that regardless of who runs the Westphalian nation-state,[70] or where it is located on the globe, *this* state and the dominant culture that runs it, skin colour notwithstanding, cannot compute that indigenous peoples may not want, may even be repulsed, by the things the dominant culture craves, and that it is okay to not want 'to develop'.

In its 2007 report *Progress can kill: How imposed development destroys the health of tribal peoples*, Survival International details with an abundance of data, how forcing indigenous communities into mainstream lifestyles destroys their overall health. Through loss of communal knowledge, self-pride, sedentarisation and introduction of pathogens unknown to their immune systems, this reports shows how and why mainstream lifestyle is precisely what destroys indigenous communities.

Contemporary African constitutional/state design and the 'other native question'

> On one hand, decentralized despotism exacerbates ethnic divisions, and so the solution appears as a centralization. On the other hand, centralized despotism exacerbates the urban-rural division, and the solution appears as decentralization. But as variants both continue to revolve around a shared axis – despotism. Mahmood Mamdani[71]

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[67] Citing the examples of the US civil war, the rejections of a federal solution to the Jewish-Arab problem, the Muslim League's view in colonial India, Ethiopia-Eritrea and Quebec. See, Ghai, 'Introduction' in *Practising self-government*, 15.

[68] As late as 1974, and in a move that neutered *Brown v Board,* in *Milliken v. Bradley*, 418 US 717 (1974), the US Supreme Court affirmed that de facto segregation is not unconstitutional.

[69] 'The success of autonomy negotiations may therefore depend on diffusing, fragmenting or fudging sovereignty.' Ghai, 'Ethnicity and autonomy', 16-7.

[70] For definition relevant to our discussion, see Ghai, 'Introduction' in *Practising self-government*, 3.

[71] Mamdani, *Citizen and subject,* 291.

Mamdani forcefully reminds us that colonial state power relations and their legacy must be read as

> how the subject population was incorporated into – and not excluded from – the arena of colonial power. … [by this emphasis], no reform of contemporary civil society institutions can by itself unravel this decentralized despotism. To do so will require nothing less than dismantling *that form of power*.[72]

While accepting the historical place of the colonial state, Mamdani sees important similarities across time and space of the various entities, bounded by the 'native question': that is, 'how can a tiny and foreign minority rule over an indigenous majority'.[73] The clamour of indigenous peoples for clearer self-determination rights exercised in FPIC is a corollary and legacy of this colonial political posture, manifested in the bifurcated post-independence state.[74] To date, the direct/indirect rule bifurcation remains: 'urban power [speaks] the language of civil society and civil right, rural power of community and culture … each signif[ying] one face of the same bifurcated state'.[75]

Redistribution of the post-independence national cake maintained the same direct/indirect divisions, but was only deracialised as a consequence of the 1960s Africanisation programmes.[76] This preservation of colonial divides kept racial undertones in some African countries and was certainly manifested in dubiously acquired indigenous wealth and privilege in many others across Africa.[77] This further complicates the task of contemporary designers of constitutional rights. It is also at this nexus that the extent of FPIC rights fully reveal themselves as self-determination contestations.

Whereas for Mamdani's discussion in *Citizen and subject*, a tiny foreign minority seeks to dominate a homogenised indigenous majority, for the constitutional designer today, while burdened with that very colonial legacy, the question *rather* is how to balance the vested interests of the indigenous dominant majority with the various, possibly divergent claims of self-aware indigenous minorities. Or to put it more analogously to the Mamdani example, the contemporary question for the

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[72] Mamdani, *Citizen and subject,* 15-16.

[73] Mamdani, *Citizen and subject,* 16.

[74] Mamdani, *Citizen and subject,* 17-8.

[75] Mamdani, *Citizen and subject,* 18.

[76] Mamdani, *Citizen and subject,* 20.

[77] Mamdani, *Citizen and subject,* 20-1. Mamdani refers to this as the fourth moment in the history of indigenous civil society in post-independence Africa.

indigenous majority ruling the barely post-colonial but mostly neo-colonial state is how to dominate other, not fellow, indigenous minorities *and non-ruling majorities*. We will call this, the 'other native question'. The ebbs and flows of constitutional design and redesign, progress towards and retreat from democracy and rule of law and instinctive dismantling of decentralisation efforts during the wave of constitutional reforms of the 1990s and 2000s, testify to the force of Mamdani's reflections.

Along with Mamdani, we reiterate that the 'other native question' is central to constitutional design upheavals and retreats from rule of law regimes. This retreat is not new. Ghai and McAuslan documented this retreat with exceptional clarity, contemporaneous to those events in the 1960s, in *Public law and political change in Kenya*. In the 1990s, Ghai and many others, in Africa and across the Global South, attempted to 'dismantle that form of power' in constitutional revisions and overhauls. These progresses in 2021 are almost universally under attack across the continent.

Consideration of minority rights in state reform and therefore constitutional design is central to achieving any deep rooted democratisation, or rather, to uprooting deep seated power structures that snap society back to colonially-inspired despotism. The case of Kenya is illustrative:

> The independence constitution established a regional system of parliamentary government, with a divided executive, an independent judiciary with security of tenure; an independent electoral commission; a multiparty political system of government; a bill of fundamental rights and freedoms; and safeguards for minority rights, including *majimbo.*[78]

The striking point here is the connection in this Kenyan Independence Constitution between the safeguard of minority rights and decentralisation, which was the core of state reform towards a post-colony. And just in case the importance of state centralisation is doubted, Ghai describes:

> …the first casualty after independence was *majimbo*…most of the powers of the regions, which were not specifically entrenched, were repealed on the first anniversary of independence (1964). Powers over the police and public services were restored to the Central Government. Soon after, provisions guaranteeing fixed revenue for the regions were removed. *Thus the* majimbo *system was effectively destroyed in little more than a year after independence.*[79]

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[78] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*. '*Majimbo,* is a Swahili word which means an "administrative unit" or "region", and is generally used to refer to those provisions of the Constitution which established the regional structure.' Ghai and McAuslan, *Public law and political change in Kenya,* 178, note 6. It is noteworthy that the federated *majimbo* system was first laid out in the Self Government Constitution, Statutory Instrument 791/1963. See Ghai and McAuslan, *Public law and political change in Kenya,* 176, note 8.

[79] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*. See, in almost identical terms, the

The rest of the institutional safeguards of minority rights, the Senate, prohibition on altering of regional and district boundaries and the regions themselves were abolished in 1966 and 1968 respectively. The Kenyan example is one where state reform at independence took on a radical constitutional design centred on minority rights protection. It reinforces the view that respect for minority rights is antithetical to despotism, decentralised during colonialism and centralised in post-independence.

Such argument certainly also demands that we disabuse ourselves of the view, that lures us away from proper focus, that the state – or its government – is essentially tri-armed in structure. These structures, while extant, are not the true conduits of power relations as a Mamdanian analysis betrays, nor the target of despotic counter-revolution as Ghai's and McAuslan's historiography suggest.

The structure of Ghai and McAuslan's *Public law* is instructive. While they, as lawyers would, place some emphasis on the old three-arm government structure, it is the chapters on 'Agrarian administration' and 'Administration of justice' in the colonial era – rather than 'The Judiciary' that demonstrate the authors were alive to the true locus of power in *this* African state. In their treatment of the post-independence era, chapters on 'The administrative process', 'The administration of justice 2 – the legal profession' in addition to 'The administration of justice 1 – courts and law', rather than a bland 'Judiciary' chapter also indicate a similarly insightful appreciation of true power structures in that post-independence state that usually eludes lawyers. Here I would also stress the importance of a professional civil service insulated from political and executive control as part of this analysis outside the outdated and inaccurate tri-armed state/government structure.

The Kenyan example underlines that protecting the rights to self-determine of minority and indigenous peoples is necessary to protect the democratisation of the state, and the rights to self-determination of the non-ruling majorities.

Citizen and subject opens with Jan Smuts' 'progressive' views on 'the African'. While paternalistic and bigoted, one cannot help but recognise similarities with the human rights discourse on indigenous peoples.

> What Smuts called institutional segregation, the Broederbond called apartheid. … But neither institutional segregation nor apartheid was a South African invention. If anything,

post-independence dismantling of devolution in Papua New Guinea by 'consolidation of central state apparatus' given that 'political and bureaucratic access to the state was the main accumulation of wealth'. Ghai and Regan, 'Unitary state, devolution, autonomy, secession', 106.

> both idealized a form of rule that the British Colonial Office dubbed 'indirect rule' and the French 'association'. … the institutions so defined and enforced were not racial as much as ethnic, not 'native' as much as 'tribal'. Racial dualism was thereby anchored in a politically enforced ethnic pluralism.[80]

In creating a duality of legal regimes and ensuring an all-consuming control of the African by the 'native authority', the colonial legacy not only accentuated tribe as identity, but even more insidiously took institutional control over the reproduction of African custom itself![81] Colonial authorities systematically replaced traditional authorities with all-powerful chieftaincies beholden to colonial power.[82] Of the myriad of African traditions available in the 19th Century, 'the tradition that colonial powers privileged as the customary was the one with the least historical depth … monarchical, authoritarian, and patriarchal [that] most accurately mirrored colonial practices'.[83]

An important corollary of this universal colonial practice for the contemporary constitutional designer is to accentuate the intolerance of the indigenous majority, who are the material beneficiaries of colonialism, to indigenous minority claims. This results in a hardening of positions, making the possibility of accommodating each other as equals even more remote. After over a century of the reproduction of initially colonially selected, inherently intolerant, indigenous governance variants, these monarchical, authoritarian and patriarchal strands are today asserted as irrevocably African customs as can be affirmed in living memory! Given the possible range of African customs practiced pre-colonially, that this intolerant variant of African custom has reigned supreme for a century is probably the greatest cultural impediment to rule of law constitutional orders in Africa. 'Where the source of law was the very authority that administered the law, there could be no rule-bound authority. In such an arrangement, there could be no rule of law.'[84]

This continuity of the colonial power logic is only possible by cloaking its power reproduction in disingenuous affirmation of cultural self-determination, thereby

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[80] Mamdani, *Citizen and subject,* 7.

[81] Mamdani, *Citizen and subject,* 22.

[82] 'The functionary of the local state apparatus was everywhere called the chief. One should not be misled by the nomenclature into thinking of this as a holdover from the precolonial era. … The authority of the chief thus fused in a single person all moments of power: judicial, legislative, executive, and administrative. This authority was like a clenched fist, necessary because the chief stood at the intersection of the market economy and the nonmarket one.' Mamdani, *Citizen and subject,* 23.

[83] Mamdani, *Citizen and subject,* 22.

[84] Mamdani, *Citizen and subject,* 33.

achieving the dual scoop of winning naïve allies from among the colonised and progressives, while disarming any critique of its intentions. In fact, it weaponises the conviction of the progressive against analytic critique that can expose its underbelly. Mamdani has recognised the value, to despotic power, of 'tapping authoritarian possibilities in [African] culture.'[85] As Ghai and McAuslan remind us, 'the colonial past of the law cannot be neglected.'[86]

The state as imperial and international *inter se*… plurinational?

> such notions as modernity, enlightenment, and democracy are by no means simple and agreed-upon concepts. Edward Said[87]

The internally imperial nature of the state is manifested in the practice of two concepts: the linear view of development, what Mamdani calls 'unilinear evolutionism',[88] and the primacy of homogeneity. The linear view of development, the delusion that that which came before is necessarily less advanced than that which is done today is fiercely oppositional to the John Mbiti view of the cyclic nature of time.[89] The manifestations of these oppositional worldviews in colonial and post-independence human rights conduct of states is stark.[90] The linear view[91] is exemplified by unabashedly repeated opinions of French presidents on Africa that follow the delusional views of HWF Hegel[92] and francophone Africa's bewildered

[85] Mamdani, *Citizen and subject,* 25.

[86] *Public law and political change in Kenya,* 506.

[87] Preface to the Twenty-fifth Anniversary Edition' *Orientalism,* Vintage Books, 2004.

[88] Mamdani, *Citizen and subject,* 9.

[89] John S Mbiti, *African religions and philosophy,* Second Edition, Heinemann, 1990, 15-28. See correspondingly, Samir Amin, 'Underdevelopment and dependency in Black Africa: Origins and contemporary forms,' *Journal of Modern African Studies* 10 (1970).

[90] Bloch uses this very opposition of world views to explain the anguish of the communities of Northeastern Kenya in the forced sedentarisation or 'manyattazation' policy of the Shifta War '*gaf Daba'* of 1963-8, all in the name of '*maendeleo',* development. See generally Sean Bloch, 'Stasis and slums: The changing temporal, spatial, and gendered meaning of 'home' in Northeastern Kenya' *Journal of African History*, 58.3 (2017), pp. 403-23.

[91] The problems, in Africa but also by extension of all indigenous peoples across the globe, of human organisation – politics – lies in traditions and customs which are necessarily backward and their resolution comes in modernising – westerning – them, what Mamdani calls 'the politics of advanced capitalism'. See Mahmood Mamdani, *Politics and class formation in Uganda,* Monthly Review Press, 1976, 1-2. *This* traditional-modern dualism serves to sanitise colonialism.

[92] Discours de Nicolas Sarkozy à l'Université Cheikh Anta Diop de Dakar, prononcé le 26 juillet 2007. In classic '*plus ça change',* ten years later, Emmanuel Macron publicly asserted that Africa has a 'civilisational problem'. See Eliza Anyangwe, 'Brand new Macron, same old colonialism' *The Guardian,* 11 July 2017. Compare with Jan Smuts' Rhodes Memorial Lecture at Oxford in 1929 in Mamdani, *Citizen and subject,* 4-7.

responses to such unabashed bigotry.[93] Among its greatest dangers is not only that it is extractive in nature, that is, that today appears better precisely because it exploits and extracts from the past,[94] but that its glorifies such extractive tendency.

And this recalls our surreal scene in the Pretoria classroom described above. This moment forcefully reminds us that deluded notions of linear development from our Global South cultures to Eurocentric ones are imbedded in the dominant indigenous cultures. And these notions are of no mean significance.

The primacy of politico-cultural homogeneity as a necessary constituent of state stability is another unfortunate notion that conversely only ensures the instability and retardation of the state.[95] If the primacy of this notion prevents us from contemplating more progressive and truly human rights affirming constitutional designs, then its origins and validity are worthy of inquiry.

Ghai is clear on its Westphalian origins, noting that 'the state in Africa and Asia did not follow this trajectory' until 'the imposition and centrality of the state, with the logic of the nation-state, changed relationships between the diverse communities … becoming a straitjacket.'[96] Mamdani sees the tendency to homogeneity as a consequence of the colonial state form that created artificial jurisdictions of customary law, each exclusive to its neighbours and whose enactments were arbitrarily administratively produced by imposed chieftainships. This worked to eliminate the inherent heterogeneity of local communities, increase social tensions,

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[93] Adame Ba Konaré (ed), *Petit précis de remise à niveau sur l'histoire africaine à l'usage du président Sarkozy,* Essais solidaires, Dakar, 2008; Makhily Gassama (ed), *L'Afrique répond à Sarkozy: contre le discours de Dakar,* Editions Philippe Rey, 2008. See also, Babacar Camara, 'The falsity of Hegel's theses on Africa' *Journal of Black Studies,* Vol 36, No 1, September 2005, 82-96. While I am unaware of any book or journal length responses to Macron's remarks, it would seem, at this point, unbecoming of African intellectuals to keep responding to bigotry. As our ancestor Toni Morrison taught,

> 'The very serious function of racism … is distraction. It keeps you from doing your work. It keeps you explaining, over and over again, your reason for being. Somebody says you have no language and so you spend 20 years proving that you do. Somebody says your head isn't shaped properly so you have scientists working on the fact that it is. Somebody says that you have no art so you dredge that up. Somebody says that you have no kingdoms and so you dredge that up. None of that is necessary. There will always be one more thing.'

'12 of Toni Morrison's most memorable quotes: The author's thoughts on writing, freedom, identity and more' *The New York Times,* 6 August 2019.

[94] '… the "modern" plantation is productive precisely because it appropriates labor from the "traditional" village, that the "stagnation" of the village is a condition for the "dynamism" of the plantation'. Mamdani, *politics and class formation in Uganda,* 5.

[95] '… some constitutions prohibit or restrict the scope of autonomy by requiring some states be 'unitary' or some similar expression; such a provision has retarded the acceptance or implementation of meaningful devolution, in for example, Sri Lanka, Papua New Guinea and China'. Ghai, 'Ethnicity and autonomy'.

[96] Ghai, 'Introduction' in *Practising self-government*, 4.

and in turn accentuate the need to further enforce a top-down uniformity.[97] Ghai reminds us that 'economic and social developments can disrupt traditional patters and cause dislocations, on which ethnic resentment can feed. *Modernity is a potent cause of ethnicity*.'[98] Post-independence state reform only hastened this tendency. But history bears witness as to its fundamental error. 'Many of these impositions [of identity] are intended to replace class politics with ethnic politics'[99] unfortunately continuing along a clearly ineffective and 'explosive' democratisation.[100]

Osogo Ambani refers to the contemporary African state as 'inter*national*',[101] that is, made up of various nations. Jacob J Akol, speaks of the plurinationality of African states, and the desirability of the formal recognition of such plurinationality.[102] But this plurinationality is itself a product of colonial power reproduction. Indirect colonial rule required despotic force to be decentralised, and required a divisive multiplicity of native/customary laws. 'Europe did not bring to Africa a tropical version of the late nineteenth century European nation state. Instead it created a multicultural and multiethnic state.'[103]

Since the constitutional change of 7 February 2009, and 184 years since independence, Bolivia changed its official name to Plurinational State of Bolivia. Coincidentally, this was during the term of its first indigenous President, Evo Morales, in a country where indigenous peoples have *always* had a *numerical majority*.

> Following his election in December [2005], Mr Morales promised to undo centuries of dominance by descendants of Europeans. He told delegates at the ceremony in the city of Sucre: 'I really feel that right here starts a new Bolivian history, a history where there is equity, a history where there is no discrimination.'[104]

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[97] Mamdani, *Citizen and subject,* 289.

[98] Ghai defines ethnicity thus: 'When [language, race, religion and colour] cease to be means of social distinctions and, and become the basis of political identity and claims to a specific role in the political process or power, ethnic distinctions are transformed into ethnicity.' Ghai, 'Ethnicity and autonomy', 4-5. [emphasis mine]

[99] Ghai, 'Ethnicity and autonomy', 5.

[100] Mamdani, *Citizen and subject,* 289.

[101] Intervention by JO Ambani at the Promise of Constitutions Conference, held at Strathmore University Law School, 12 March 2019.

[102] Jacob Akol, *Burden of nationality,* Paulines Publications Africa, Nairobi, 2005. It is in this context that he welcomes the Ethiopian constitutional right to secede. See also the later scepticism of Mahmood Mamdani, 'The trouble with Ethiopia's ethnic federalism' *New York Times,* 3 January 2019 and Yonatan Tesfaye Fessha 'The original sin of Ethiopian federalism, *Ethnopolitics*, 16:3, 2017, 232-245, DOI: 10.1080/17449057.2016.1254410.

[103] Mamdani, *Citizen and subject,* 287. Mamdani in fact makes this claim explicitly, *Citizen and subject,* Conclusion, note 1, in reference to Basil Davidson, *The Black Man's burden: Africa and the curse of the nation-state,* 1992.

[104] "Push for a new Bolivia constitution" *BBC News,* 6 August 2006, http://news.bbc.co.uk/2/hi/americas/5251306.stm.

Nick Barber offers one more insight into this phenomenon of plurinational (or international *intra se*) states. Barber argues that it is precisely because of public law checks, of which human rights guarantees form an intrinsic part, that the single nation state is impossible to achieve today. All the repression of undesirable languages and cultures and physical ethnic cleansing that made it possible to forge the mostly single nation states in Europe in the preceding centuries is, hopefully, impossible today.[105]

The strength of recognising plurinationality lies in equally rejecting a top-down artificial uniformity,[106] what Ghai calls 'the homogenising mission of the state'.[107] With a post-modern lens that 'celebrated difference, urging the authenticity of ethnic, linguistic or religious groups,' Ghai criticises the liberal state for stifling diversity due its principled tendency to homogeneity and uniformity, instead of 'a pluralistic state of diverse cultural and national groups.'[108]

A Ghai-Mamdani nexus?

> 'the most important institutional legacy of colonial rule … may lie in the inherited impediments to democratization.[109] Mamdani

It is sobering to interrogate the convergence of politico-legal theory and praxis in understanding the nature of the African state, and the duality of 'philosophy and style of law [as] applied to [Africans and non-Africans]'[110] as well as its post-independence preservation. Colonial and post-independence attitudes to constitutional law and its sanctity as fundamental and immutable law took an 'old pattern of a contrast between rhetoric and practice'.[111] In fact, the obvious starting point of a Ghai-Mamdani nexus is the recognition that the tradition of law

[105] Personal communication with Nicholas Barber, at the 'Promise of the Constitutions Conference' held on Tuesday, 12 March 2019, at Strathmore Law School. And even there it did not work or took a very long time. Look at the Scots and Welsh, Corsicans, Basque, Catalans, Roma, etc. See also, Ghai's view of the centralising and exclusionary nature of the Westphalian nation-state 'which produce a degree of rigidity and inflexibility and are unable to accommodate diversity'. Ghai, 'Introduction' in *Practising self-government*, 3-4.

[106] Ghai calls this 'singular nationalism'. 'Preface to the 2001 Issue' in *Public law and political change in Kenya.*

[107] Ghai 'Ethnicity and autonomy', 2.

[108] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya.*

[109] Mamdani, *Citizen and subject,* 25.

[110] The English settlers to live under common law and the Africans under an Austinian philosophy. Ghai and McAuslan, *Public law and political change in Kenya,* 507; 'The colonial state was a two-tiered structure: peasants governed by a constellation of ethnically defined Native Authorities in the local state, and these authorities … in turn supervised by white officials deployed from a racial pinnacle at the center.' Mamdani, *Citizen and subject,* 287.

[111] Ghai and McAuslan, *Public law and political change in Kenya,* 510.

and politics in much of the formerly colonised polities is hardly one of justice and fairness but is rather deeply rooted in hypocritical double-play.

As Leopold Sedar Senghor put it, 'Let us admit our weakness. It is the best method of getting over it.'[112] Knowing that we cannot simply rely on 'good traditions' concentrates our minds on why good constitutions are 'sad reminders of earlier hopes'[113] and to the need to freshly invent our polities, away from long-standing traditions of state and legal organisation.

> … the impact of multiparty elections – in the absence of a reform of rural power – turns out to be no just shallow and short-lived, but also *explosive*. Too many presume that despotic power on this continent was always or even mainly a centralized affair, in the process forgetting the decentralized despotism that was the colonial state … *in the absence of alliance-building mechanisms*, all decentralized systems of rule fragment the ruled and stabilize their rulers.[114]

In the absence of alliance-building mechanisms… explosion. The Lwanda Magere shadow,[115] the weakness of state/constitutional reform towards democratisation lies in not imagining innovative local level alliances. To our minds, indigenous peoples' self-determination in true equal autonomy to our dominant culture local states provides the elusive mental/conceptual framework and political real world project to surmount the seemingly intractable challenge of state reform and constitutional design.

Ghai provides both inspiration and caution:

> Because autonomy arrangements divide power, *they also contribute to constitutionalism.* The guarantees of autonomy and the modalities for their enforcement show the reliance on rule of law and the role of independent institutions.[116]

Yet,

> autonomy can be fragmenting, pigeonholing and divisive to societies. Sometimes… autonomy is so structured that it is difficult to find common ground … *and may itself become the cause of conflict*.[117]

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[112] Speaking to the Drafting Committee of the African Charter on Human and Peoples' Rights in 1979. Hassan B Jallow *Journey for justice,* AuthorHouse, Bloomington, 2012, 62.

[113] Ghai and McAuslan, *Public law and political change in Kenya,* 512.

[114] Mamdani, *Citizen and subject,* 300. [emphasis mine]

[115] Lwanda Magere is a legendary Luo warrior in Kenya, circa 18th Century, whose great power lay in a rock hard body and a weak shadow which bled when cut. His shadow is thus his tragic flaw.

[116] Ghai, 'Introduction' in *Practising self-government*, 11. [emphasis mine]

[117] Ghai, 'Introduction' in *Practising self-government*, 12. [emphasis mine]

Ghai and McAuslan's 1969 reflection of the legal origins of colonial power in Kenya, for the purposes of our present discussion, is worthy of fuller reproduction:

> we have shown … lawyers constantly adjusting the law to the needs of the politicians and administrators who were carrying out the forward policy in Africa. … neither the lawyers nor the politicians saw the function of the law as standing impartially between two sides, or even leaning in favour of the weaker side, *but as making the way smooth for the stronger.* … it may be unrealistic to expect lawyers to have acted any differently, but then it is also unrealistic and not a little hypocritical to suggest that one of the main benefits of British colonialism was the introduction of the rule of law into Africa, for if that concept means anything, it means that the law should help the weak and control the strong and not vice versa. From the African point of view the English law introduced into East Africa was one of the main weapons used for colonial domination, and in several important fields remained so for most of the colonial period, only changing when Africans began to gain political power.[118]

In essence, just like the binaries of power relations described by Mamdani, rule by law 'legality', using the technicalities and minutiae of legal procedures almost laughably to achieve political ends continues uninterrupted to date. Africa, the graveyard of constitutions.[119]

Mamdani's great contribution to the study of the African state is demonstrating that the colonial state persists, and not for want of attempts at reform, but precisely because of want of introspective analysis informing such reform. For instance, it suffices to consider that it is only in late November 2020 that the Constitutional Court of South Africa declared the apartheid era law, Riotous Assemblies Act, 1956, unconstitutional,[120] much to the chagrin of the erstwhile liberation movement that bore the brunt of that law.

The progressive constitutional designer and human rights defender today is well advised of the *inherent* capacity of power to reproduce and therefore preserve itself, through co-option of the hitherto oppressed. And this is important because the discourse of self-determination unites the provinces of the progressive constitutional designer and the human rights defender. In other words, human rights

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[118] Ghai and McAuslan, *Public law and political change in Kenya,* 34. One dares wonder though, if this is true of English law as enforced in East Africa, could it surely have been any differently applied in the greatness of Britain, a wondering best suited for the Welsh, Scots and Irish to contemplate. [emphasis mine]

[119] Wachira Maina, 'Africa's constitutional democracies: The case of a dissolving picture' *The East African* 12 March 2018, https://www.theeastafrican.co.ke/tea/news/rest-of-africa/africa-s-constitutional-democracies-the-case-of-a-dissolving-picture-1385846.

[120] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* (CCT201/19) [2020] ZACC 25 (27 November 2020).

is the framework by which the self-determination claim is expressed and enjoyed.[121] But human rights discourse itself finds worthy caution in the thought of Ghai. 'Self-determination came before rights.'[122]

Ghai warns against interpreting human rights discourse too literally or solely in ideological terms. Rather, he adopts 'a more pragmatic and historical, and less ideological, approach.'[123] In his experience, concerns about 'culture' have in practice been less important than the balance of power and competition for resources. Human rights rhetoric may be used – sometimes cynically manipulated – to further particular interests or, as in the Asian values debate, to give legitimacy to repressive regimes by emphasising the right to self-determination of sovereign states (but not necessarily of peoples or minorities within those states).[124]

Ghai presents the choices for the constitutional designer or state reformist thus:

> A pessimistic constitutional expert might well say that we have reached the age of the end of constitutions, since there is no such thing as autonomous state power. A more optimistic expert might see in this confusion and fluidity a challenge for the state to minimize its vulnerability to external forces by exploiting opportunities opened up by globalization, while at the same time *reexamining the state to accommodate local movements … rather than direct control.*'[125]

Ghai notes that in the independence era state reform, human rights became central to protection of minority rights as in Nigeria. For Kenya, adding a complex structure of minority self-determination, *majimbo,* was necessary.[126] This assertion again lends credence to the contention of the necessary link between state reform and the protection of the rights of minorities and non-ruling majorities in the construction of *the true post colony*. Ghai directly connects the effect of ethnic competition on state centre weakness and eventual dismemberment and the rise of pluralistic forms of unity that have challenged the liberal state model that is merely

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[121] Ghai, 'Introduction' in *Practising self-government*, 20ff.

[122] Ghai, 'Introduction' in *Practising self-government*, 22.

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

[124] William Twining, 'Human rights, southern voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai, Upendra Baxi,' 11 *Review of Constitutional Studies,* 2006, 242, also citing Ghai, 'Universalism and relativism', 1099.

[125] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*. [Emphasis added]. See similarly, 'The core agenda that African states faced at independence was three fold: deracialising civil society, detribalising the Native Authority, and developing the economy in the context of unequal international relations.' Mamdani, *Citizen and subject,* 287.

[126] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*. Nigeria already had a federal structure, and a fourth state (Mid-West) was added around the time of independence precisely to give some self-determination to the assorted communities of that area.

centred on individual rights, towards group rights and the discrediting of 'singular nationalism'.[127]

In simultaneously critiquing globalisation's hostility 'to redistribution and, one might even say, the concerns of the poor'[128] and outdated constitutional disinterest with poverty and corruption, Ghai points to the legal tradition's poor appreciation of the structures of patrimonial networks forged under the decentralised despotism of the colonial era,[129] morphed into centralised despotism of the post-independence era. As Ali Mazrui recounted of a tragic common saying in Ghana in the 1960s, 'Nkrumah has killed an elephant. There is more than enough for us to chop.'[130] It is rather the debilitating effects of corruption and poverty on state stability that should further concentrate the mind of the constitutional designer, and not the false appeal of singular nationalism.

A close reading of a Ghai-Mamdani nexus accentuates the intractability of the colonial state design and its networks that perpetuate poverty while advancing corruption on the one hand, and the post-modern call to pluralistic state formations anchored on rejection of singular nationalism, in order for groups to self-determine 'their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.[131]

Ghai's approach to constitution-making harnesses the social transformative capacity of a constitution-making process, transforming law from a potentate, an oppressor, to agent of resistance and refuge of the poor and downtrodden. This approach is catapulted to its most efficacious when undergirded by historiographical analysis of the power relations that insidiously govern our polities, and our group roles in such power reproduction.

The Ghai-Mamdani nexus also speaks to the tenacity of the local state and its hold of customary power over the majorities of contemporary African states. Through this hold, the local state is able to retard and reverse the construction of

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[127] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya.*

[128] Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya.*

[129] …patrimonialism … was in fact a form of politics that restored an urban-rural link in the context of a bifurcated state, albeit in a top-down fashion that facilitated the quest of bourgeois fractions to strengthen and reproduce their leadership.' Mamdani, *Citizen and subject,* 20.

[130] He sadly concludes: There hasn't been much of a change to African attitudes to government property since those old colonial days." *The Africans: A triple heritage,* 'Programme 7- A Garden of Eden in decay', minute 45.40-47.47, 1986, https://www.youtube.com/watch?v=98DeZLWnkJg&list=PLJ5clxSkEmwNjJlQ5CZjN7VBB6tswuDPN&index=7

[131] Article 22 (1), *African Charter on Human and Peoples' Rights,* 1520 UNTS 217.

stable, pluralistic, truly post-colonial societies. Mamdani highlights that the customary created by colonial fiat was inescapable to the colonised.[132] In circumstances hardly dissimilar to the *Worcester v Georgia*[133] and related cases in the US Supreme Court in the 19th Century, Ghai and McAuslan recount a corresponding account, that of the *Masai case*.[134]

This case hinged on the Maasai claim that British colonial authorities breached the 1904 Anglo-Masai Treaty which was to 'endur[e] so long as the Masai as a race shall exist, and that Europeans or other settlers shall not be allowed to take up land in the Settlements'[135] by signing the 1911 Anglo-Masai Treaty. By arguing it was treaty not contract – and therefore Act of State – colonial authorities conveniently excluded the jurisdiction of the municipal court, while still explicitly rejecting the sovereignty of the Maasai nation[136] because the Maasai were 'subjects of their chiefs or their local government whatever form that government may take'.[137] The Maasai, dispossessed of cattle and rich land, is therefore neither sovereign nor rights-bearer. With neither escape nor remedy,[138] the 'native' acclimatises to the power overwhelming him, and, in the now centralised post-independence era, claims it for his narrow self-interest, cultivated by colonially reproduced 'monarchical, authoritarian, and patriarchal notion of the customary … most accurately mirrored in colonial practices.'[139]

No wonder the contemporary post-independence state is plagued by perennially destabilising tendencies whose life source is the Mamdanian rural. The legal origins of colonial power tainted with discrimination, infect the post-independence legal order, as law flows from power structures. '… Changing the law, any law, partakes of legislation, which is not a purely legal but an *eminently political activity*.'[140] The

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[132] Mamdani, *Citizen and subject,* 22.

[133] 31 US (6 Pet.) 515 (1832).

[134] *Ol le Njogo and others v AG of the EA Protectorate* (1914), 5 EALR 70, cited in Ghai and McAuslan, *Public law and political change in Kenya*, 20-3.

[135] *Ol le Njogo and others*, at p. 92.

[136] *Ol le Njogo and others*, at p. 91-2.

[137] *Ol le Njogo and others*, at p. 93.

[138] '[The removal of the Maasai from their land] may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. [However, t]hese are considerations into which this Court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy.' *Ol le Njogo and others*, cited in James Gathii, 'Imperialism, colonialism and international law' 54 *Buffalo Law Review*, No. 4 (January 2007), 1013.

[139] Mamdani, *Citizen and subject,* 22.

[140] Georges Abi-Saab, 'Membership and voting in the United Nations' in Hazel Fox (ed) *The Changing Constitution of the United Nations*, British Institute of International & Comparative Law, London, 1997, 19 [emphasis mine].

legal order, as the political order, will not simply become liberating simply by its differential staffing.

Ghai's and McAuslan's motivation for historicising Kenya's constitutional order remains germane, and more so, for the constitutional designer and human rights defender of dominant culture extraction in the contemporary state:

> law and attitudes to towards law have hitherto been rather neglected in studies of developing nations, yet are relevant in any attempt to understand how these nations are governed today. … little attempt to examine or investigate the effect of such reception on attitudes towards law, government and power, or to consider the relationship between methods of government in African states, *including breakdowns and revolutions,* and the imported system and concepts of law used in governing.[141]

It is curious that Ghai, framing his analysis on the liberal-communist framework, sees self-rule systems as more likely to work where there is an established tradition of democracy and rule of law.[142] Mamdanian analysis almost entirely excludes the possibility of such established tradition in the post-independent state since the existing 'tradition' is precisely what was the foundation of apartheid, however variably called. This point of divergence is not insignificant for constitutional Afrofutures. However, Ghai further points out that this is because pluralism is more likely to be valued in such traditions. This then becomes a point of pragmatic if not programmatic convergence: the harnessing of traditions of pluralism that were dimmed by colonial and independence despotism is necessary for the construction of contemporary rule of law systems.

Viability of indigenous peoples' equal and interdependent self-determination

> the last chapter in any successful genocide is the one in which the oppressor can remove their hands and say 'My God! What are these people doing to themselves. They are killing each other. They are killing themselves'. Aaron Huey[143]

While the integration of indigenous peoples' governance systems in equal stead to our dominant culture ones has been presented above as a possible remedy to the rule of law blindspots and centralising tendencies witnessed in post-independence

[141] Ghai and McAuslan, *Public law and political change in Kenya,* 505. [emphasis mine]

[142] Ghai, 'Ethnicity and autonomy', 16.

[143] Huey, 'America's native prisoners of war'.

African state/constitutional design, such integration is not without its pitfalls. The peculiar problem of indigenous peoples' self-determination is the extreme power imbalance vis-à-vis dominant cultures, and the very real risk that their integration can only lead to *de facto* apartheid.

Ghai is consistently wary of complex autonomy systems, which he regards as requiring high administrative capacity and fine political skills.[144] Among the worst elements of integrationist self-determination is that dominant culture lacks legal and ontological constructs that can be harmonised with indigenous ones in such areas as individual versus communal benefit, and inter-generational rights and responsibilities. Others include a pervading unspoken requirement for indigenous constructs to satisfy mainstream ideals and therefore not challenge the status quo. Such conditions can only lead to perpetuating inequality, but without socio-political responsibility on the part of the state. In other words, an equal game with unequal players results in unequal scores.

Apartheid is inherently a self-determination model that disposes of socio-political responsibility while maintaining vestiges of integrationism. At its heart is the refusal of the mainstream to accept the intrinsic equality of non-dominant worldviews. Apartheid, separate development, seems self-determinationist and human rights affirming. Each is allowed to enjoy the benefit of culture-sensitive governance. Help by the mainstream is afforded the struggling peoples out of the mainstream's kind heart. Any civil unrest sown by the frustrating structures of injustice is simple criminal conduct that ought, in the interests of justice, to be met with the full force of the law.

But apartheid is intrinsically inimical to human rights. At its basis is inequality in human dignity and non-responsibility for causing such inequality. Like a tree whose nature is evident in its fruit, apartheid disguised as self-determination reinforces community decline, maintains a disdain for all traditional worldviews, from governance to scientific and artistic knowledge, and keeps whole peoples in open air prisons of structural injustice, the frustration from which is inevitably manifested in protest art and recurrent civil unrest.

'Autonomy is seldom granted because it is considered a good thing in itself, so it may come bundled with suspicions and resentments.'[145] Only when destinies are

[144] Repeated in 1970 and 2000. Ghai and McAuslan, *Public law and political change in Kenya,* 505-21; also Ghai, 'Ethnicity and autonomy', 10.

[145] Ghai, 'Introduction' in *Practising self-government*, 25.

inextricably intertwined and the mainstream cannot socio-politically insulate itself from the unenviable fate of indigenous and minority peoples can the plurinational states we live in avoid this beguiling apartheid.

A true self determinationist model would embrace of overt integration of *indigenous forms* of self-governance into dominant mainstream power structures of the state *as equals*. This may mean acceptance of indigenous governance entities into the tri-armed structure of government.

Ghai cautions against opportunistic use of and over-ambitious expectations in the autonomy, urging a sober reflection of its potential and pitfalls.[146] Autonomy, it can be argued, 'is perhaps more fundamentally, a process … connotes attitudes, a spirit of mutual respect and tolerance … [and] cannot be understood a consideration of process and values.'[147]

Mamdani insists that in order for an African democratisation to stand a chance of confronting the legacy of the colonial bifurcated state should entail the deracialisation of civil power and detribalisation of customary power.[148] It requires 'dismantling and reorganizing the local state, the array of Native Authorities organized around the principle of fusion of power, fortified by an administratively driven customary justice and nourished through extra-economic coercion.'[149]

Conclusion

In this paper, we have attempted to use self-determination rights of indigenous peoples as a framework to appraise post-independence state design and the imbedded structure of power relations in our polities while remaining 'in search of some kind of accommodation through the political reorganisation of space'.[150]

We cannot overemphasise the danger, for the progressive human rights defender, the overzealous constitutional designer, in delinking the colonially-inspired governance over indigenous peoples by the central state from the tendencies to despotism inherent in the nature of that inherited state. Such delinking would be tantamount to the view that 'the inmates of a concentration camp are able … to

[146] Ghai, 'Ethnicity and autonomy', 4.

[147] Ghai, 'Ethnicity and autonomy', 10-1.

[148] Mamdani, *Citizen and subject,* 25.

[149] Mamdani, *Citizen and subject,* 25.

[150] Ghai, 'Ethnicity and autonomy', 2.

live by their own cultural logic. But one may be forgiven for doubting that they are therefore "making their own history"'.[151]

We are caught in a miasma of tragic *fait accompli* to which there are no easy answers, from which no quick escapes exist. We can neither undo the past nor continue down a path of repeatedly superficially reforming an inherently unjust state structure.

Legally speaking, among the benefits that could accrue from a more honest self-determination model is offering new political impetus to resolve certain incongruences in the laws governing intellectual property. For instance, as concerns traditional knowledge, the global intellectual property rights under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and regime proposed by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) stand at great odds. Indigenous knowledge, with its lack of single identifiable inventor, communal ownership, very poor documentation, diminished legal status of UNDRIP vis-a-vis TRIPS and almost nonexistent political capital against gargantuan trans-nationals, stands no chance of remaining indigenous. Especially as concerns patenting and bio-resources, the provisions of TRIPS (Article 27) may be used to usurp traditional knowledge of both indigenous and minority peoples. Across the legal framework, in the particular case of patenting varieties through genetic modification, the law is fragmented. Under the TRIPS agreement, the patent holder, usually corporate in legal nature, holds the rights of ownership; under UNDRIP, it is the indigenous communities. Under the Convention on Biological Diversity (Article 3), states have ownership of natural resources in their territories, yet under another provision, there exists a state obligation to 'respect, preserve and maintain indigenous knowledge' but subject to national law (Article 8). The same state-centric ownership of natural resources is repeated in the UN Convention on the Law of the Sea, despite what traditional knowledge indigenous and minority peoples may hold over sea resources.

As long as the Global South state does not consider indigenous people as an intrinsic part of the state, but as an inconvenient appendage, obvious common interests will remain elusive where some non-state actors far exceed the economic, political and even physical presence of whole continents of states.

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[151] Talal Asad, *Genealogies of religion, discipline and reasons of power in Christianity and Islam,* John Hopkins University Press, 1993, 4, cited in Mamdani, *Citizen and subject,* 10.

If indigenous peoples continue to be parallel to the state they live in, then their ability to exercise state protection will remain equally diminished. Without the proactive aid of an instrumentality of their state, indigenous peoples stand little chance to gain, even morally, from their knowledge. Their continued exclusion in separate development will assure their destruction and only destabilise the nation state as a whole.

Ghai insists that self-rule systems do not promote but rather prevent secession,[152] thus making them important peace and stability guarantees in multi-ethnic states. More recently and in the Kenyan context, Ghai was opposed to decentralised/devolved units being strongly ethnic-based. Yes to more control over your lives but no to exclusionary ethnicity. It is safe to surmise that Ghai had recognised that curious irony, that the use of self-rule systems to secure long-term stability is reminiscent of Smuts! Which then bring us back to the main argument of the paper: beware of beguiling apartheid.

In addressing what we argue is a necessary slide to apartheid, we contend that self-rule systems for indigenous peoples need to be inextricably linked to the fate of dominant culture self-rule systems, that is the state in its central and/or federated structure. As long as the other native's fate does not bother 'us', full democratisation of our polities will remain elusive. Ghai notes that federalism emphasises 'shared rule',[153] or 'participation in the centre'[154] while autonomy 'often wants to be left alone'[155] and gives examples of countries with overlays of both systems.[156] Indigenous peoples' self-determination that does not hold apartheid as corollary will need to bear elements of both: shared fate, if not rule, and being left alone. In other words, the non-elite, non-ruling majorities[157] of the dominant African cultures will never be free unless we champion the true independence of our compatriot indigenous.

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[152] Ghai, 'Ethnicity and autonomy', 23. Ghai further points to the need to distinguish secession from termination of a federation, as he does federation by aggregation as opposed to that by disaggregation, which tend to instability and secessionist claims flowing from their creation due to separatist pressures [24, 23].

[153] Ghai, 'Introduction' in *Practising self-government*, 16.

[154] Ghai, 'Ethnicity and autonomy'. …

[155] Ghai, 'Introduction' in *Practising self-government*, 16.

[156] Also using the term 'quasi-federalism' referring to the devolution provisions in the 1975 Papua New Guinea Independence Constitution and the 1976 national government-Bougainville devolution package. See Ghai and Regan, 'Unitary state, devolution, autonomy, secession', 104-5.

[157] See Willy Mutunga, *Constitution-making from the middle,* 2nd edition, Strathmore University Press, 2020, for an incisive reflection on the dilemmas the African middle class face is seeking to find their place in a nation-building model that values the grassroot and struggles against elite Machiavellianism.