

Ethnicity, Nationhood  
and Pluralism:  
Kenyan Perspectives

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# Ethnicity, Nationhood and Pluralism: Kenyan Perspectives



Edited by Yash Pal Ghai & Jill Cottrell Ghai

Global Centre for Pluralism, Ottawa  
Katiba Institute, Nairobi



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## FOREWORD

The Global Centre for Pluralism is pleased to support the publication of *Ethnicity, Nationhood, and Pluralism: Kenyan Perspectives* edited by Yash Ghai and Jill Cottrell Ghai and published by the Katiba Institute, a civil society organization in Nairobi dedicated to the implementation of Kenya's 2010 constitution.

The book – which features papers by Zein Abubakar, Karuti Kanyinga, Yash Pal Ghai and Jill Cottrell Ghai emerged from a December 2011 roundtable in Nairobi organized for the Centre by the Katiba Institute and hosted by the Canadian High Commission. The meeting brought together civil society and other leaders who graciously shared their thoughts on the state of pluralism in Kenya and the Centre's potential role in supporting the country's exciting new constitutional commitment to diversity and unity as the twin pillars of nation building.

Kenya is not unique in the challenges it faces. Virtually every society in the world is characterized by some form of diversity, whether ethnic, religious or cultural. History shows us that diversity and difference are essential parts of the human condition. Even so, all too often diversity and division are conflated with tragic results. But violent conflict between people of different backgrounds and beliefs is not inevitable. How we perceive and manage difference is a matter of choice.

A commitment to pluralism requires systematic effort across all sectors of society. Building an ethic of respect – for diversity, for difference, for the achievement and outcomes of compromise – is hard work, but the results are worth it. Respect for diversity enriches every aspect of society by enabling each person – male and female – to realize his or her full potential as a citizen and by ensuring that public resources are equally accessed and shared.

Founded by His Highness the Aga Khan in partnership with the Government of Canada, the Global Centre for Pluralism is headquartered in Ottawa. The decision to locate the Centre in Canada is no accident, for the Canadian experience of pluralism shows us that diversity, when valued and well managed, can be a source of common good.

One of the world's most ethnically diverse societies, Canada is also one of its most peaceful and prosperous. Founded in 1867 as a bi-cultural nation with an Anglo-Celtic majority, a sizable French minority, and a diverse indigenous population, over the last half century Canada has transformed itself – through constitutional reform and deliberate policy choices – into a multicultural and multinational society. Today, although challenges remain, Canadians view their diversity as a fundamental basis of unity and a source of immense national pride.

Although the Canadian experience is compelling, it is not a simple template for other societies to follow. There is no one-size-fits-all approach to pluralism. History matters. Every country must forge its own path, rooted in its own aspirations and starting where it stands.

In the wake of the post-election violence of 2007-08, Kenyans have demonstrated tremendous resiliency, but with a new constitution to implement, the country now stands at a crossroads. The time has come for Kenyans and their political leaders to choose. Will the country continue along the same dead-end road of ethnic competition and ethnic politics, or will Kenyans forge a new path aided by the mechanisms of choice and compromise defined by their new basic law?

The papers included in this volume highlight some of the experiences and choices that have shaped Kenya as a nation to date. They reveal many challenges, but they also show us that change is possible. Choosing pluralism is never easy. Deciding to respect rather than fear difference requires a sea change in thinking and behaviour. Through their adoption of the 2010 constitution, Kenyans have already made a choice. They have already illuminated a different path.

The next step is to start the journey.

As the founder of the Global Centre for Pluralism, His Highness the Aga Khan, has remarked, “The world we seek is not a world where difference is erased, but where difference can be a powerful force for good, helping us to fashion a new sense of cooperation and coherence in our world, and to build together a better life for all.”

*John McNee*

**Secretary General  
Global Centre for Pluralism**



## 1

## INTRODUCTION

*Yash Pal Ghai and Jill Cottrell Ghai*

This volume emerged from a Round Table on Pluralism in Kenya held in Nairobi in December 2011, and includes written versions of presentations made on that occasion, a brief summary of discussion, and two additional papers to update the material. The Round Table was organised by the Canadian High Commission (Kenya) on behalf of the Global Centre for Pluralism, based in Ottawa, and the Katiba Institute. The Centre was established by His Highness the Aga Khan in partnership with the Government of Canada to advance understanding of and global commitment to pluralism – defined simply as an ethic of respect that seeks to recognize and enable diversity as a source of common good. The Institute was set up by Yash Ghai, Jill Cottrell Ghai and Waikwa Wanyoike to promote knowledge of and implementation of Kenya’s new Constitution (adopted in August 2010). A basic objective underlying the Constitution is respect for and promotion of diversity. The complementarity of the Centre’s and the Institute’s aims led to their joint sponsorship of the Round Table.

*Pluralism*

Pluralism refers to a particular kind of policy advocated for adoption in multi-ethnic or multi-cultural states. Due to conquests, decolonisation, and immigration, most countries today consist of groups or communities who are distinguished from others by their language, religion, culture, history, or the region which they inhabit. The mode of co-existence of these communities has posed one of the greatest challenges of contemporary times. Over the last half century or so, more people have been discriminated against, maimed, killed or displaced from their homes due to conflicts between communities than due to inter-state wars. In many countries numerical or social minorities have been marginalised and victimised, and denied participation in the organs of the state and access to its services.

The international community has responded to the oppression of minorities and conflicts between groups in a number of ways. It has promoted the adoption of new norms of group rights, for indigenous peoples and other minorities, supplementing the traditional regime of human (individual oriented) rights. It has intervened to stop internal wars and facilitated resolution of conflicts by facilitating constitutional settlements. Considerable scholarship has developed around the re-organisation of the state to accommodate the competing claims of groups and communities.

In broad terms, it can be said that as a result of these interventions and studies, there has been a major reconsideration of the nature and role of the state, particularly in relation to groups, and not merely individual citizens. In trying to deal with diversity, constitutions increasingly recognise groups, as additional entities to citizens, defining the relationship of the state to groups, and sometimes relations between groups. They represent a move away from the hegemony of one ethnic group to the accommodation of all groups, in an attempt to re-define the concept of the "nation". Within this broad objective, there are variations of approach (discussed in Chapter 4), particularly in the balance between national identity and group identity. Multiculturalism is the term used to define those systems which provide for the constitutional or legal recognition of cultural communities, often as corporate entities, sometimes with a measure of self-government or autonomy in matters closely connected to their culture or religion.

Used in the context of the organisation of relations between cultural, ethnic communities, pluralism is a relatively new term. Its objectives are largely similar to those of multiculturalism (of which Canada is often held up as an outstanding, successful model). It is not easy to detect similarities and differences between multiculturalism and pluralism. For one, there is no one meaning of pluralism. Used in this context, the concept of pluralism is new. Its origins lie in the organisation of politics in homogenous societies (or allegedly so)<sup>1</sup>. In contemporary times, pluralism is often synonymous with multiculturalism. For another, there are several variations of multiculturalism, with significant differences in aim and methods. An excellent account of the varieties is provided by the distinguished Indian scholar, Rajeev Bhargava, who writes, "The term 'multiculturalism' gathers a number of interrelated themes, it

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<sup>1</sup> One of the earliest arguments for pluralism came from James Madison in *The Federalist Papers No. 10*. Madison feared that factionalism would lead to in-fighting in the new American republic and devotes this paper to questioning how best to avoid such an occurrence. He posits that, to avoid factionalism, it is best to allow many competing factions to prevent any one dominating the political system. Major contemporary proponents of pluralism include Charles Lindbloom and Robert Dahl.

underscores the need to have a stable identity, emphasises the contribution of cultural communities to the fulfilment of this need and brings out the link between identity and recognition. It stresses the importance of cultural belonging and legitimises the desire to maintain difference" (1999:1). Differences are manifested, among other factors, in the scale and forms of 'concessions' to culture, and the extent to which culture is treated as pertaining only to civil society and protected largely within civil society, or 'intrudes' on to the public sphere. Variables which determine the basis of multiculturalism include language, religion, region and the responses include measures like autonomy, self-government, representation, personal laws, and affirmative action. So there are different ways and degrees to which the community is recognised.

In terms of political theory, multiculturalism represents a shift from liberalism (with focus on citizenship and rights of the individual) to communitarianism (recognising and conferring rights on communities and groups).<sup>2</sup> Liberalism posits a firm distinction between the private and public domains, complements individual rights with group rights, and limits the exercise of some individual rights to members of a particular community.

Multiculturalism and pluralism both acknowledge the existence of cultural diversity and the need to preserve it. The importance of identity to the self-respect and well-being of an individual is widely accepted. So is the role of culture to the formation and nurturing of identity. Diversity is valued because it adds to the richness of society and enables the critique of a culture by reference to other cultures. But while multiculturalism sees identity as a result of culture, pluralism acknowledges the influence of other factors as well – and the fluidity of identity. Both reject the hegemony of one ethnic group. Both subscribe to affirmative action for the disadvantaged groups. In so far as pluralism differs from communitarianism, it may be that while the acceptance of diversity in multiculturalism is based on a degree of pragmatism, that in pluralism is more enthusiastic. A keen supporter of pluralism, His Highness the Aga Khan says, "The world we seek is not a world where difference is erased, but where difference can be a powerful force for good, helping us to fashion a new sense of cooperation and coherence in our world, and to build together a better life for all" (as quoted by John McNee in the foreword to this volume).

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<sup>2</sup> For a more detailed discussion of the theoretical perspectives on liberalism and communitarianism, see Ghai (Chapter 4) in this volume.

Another possible difference is that pluralism supports integration at the political level, while multiculturalism tends towards consociation, i.e., a system of separate representation and power sharing. The position taken by the Global Centre for Pluralism is that, irrespective of cultural differences, people around the world – male and female – share a common humanity. Pluralism rejects division as a necessary outcome of diversity, seeking instead to identify the qualities and experiences that unite rather than divide us as people, and to forge a shared stake in the public good. Respect for diversity transcends tolerance to embrace difference as an engine of commonwealth.

Of the different forms of multiculturalism discussed by Bhargava (1999: 1), the one which comes closest to pluralism is what he calls “constructive multiculturalism”, which “requires recognition or respect for culture which in turn is possible only after a degree of interaction, familiarity and mutual understanding”. All groups are recognised and respected (p. 19). Bhargava makes another distinction which is interesting – that between liberal multiculturalism and democratic multiculturalism. The second is more flexible and with procedures to resolve differences between individualists and communitarians, and also seems to come close to pluralism.

How does the above discussion apply to Kenya? Is it too western oriented to have relevance for us? Bhargava neatly summarises Shail Mayaram’s (1990) argument in his book: “western models of multiculturalism are anti-syncretic because they are unable to grasp the simultaneity of or mobility within different identities, that the fact that people can be simultaneously X and Y or move easily from X to Y” (1999: 30). It is certainly true that with profound colonial and post-colonial social and economic changes, many Kenyans can move between different sectors of society with some ease.

A distinction made by Anthony Appiah (1997) (discussed by Bhargava 1999: 31-2) between social identities and cultural identities, drawn from the United States may also be relevant. He argues that the US is largely a unified culture, but the key distinctions are social – the distinctiveness of US Italians is social rather than cultural (certainly the US ethos is towards a unified culture). Perhaps Kenyans again under the influence of the profound changes we have mentioned here share a large element of the colonial/post culture. As is widely acknowledged, culture is fluid, and so are the identities associated with it. And they are usually manipulated, often by religious and political leaders. Another factor that is often ignored is that few communities or groups are completely homogenous or united in their outlook or views. Indeed one major problem in adopting a fully

communitarian solution is the unfairness to sub-groups or individuals within the community. Advocates of communitarianism generally underestimate the tensions within each community or the hierarchy within it, or the lack of freedom and choice. They are certainly unwise to mount an attack on human rights.

There is perhaps another major contextual difference between the western approaches to multiculturalism and those in the newer states. The former represent a move from a highly centralised state and the hegemony of one group to accommodate hitherto marginalised groups, unlikely to be politically significant, whether indigenous or immigrant. In the newer states there has seldom been a well established and entrenched ruling group; the politics are essentially about communal competition for the capture of the state—a situation much less conducive to the making of concessions or the sharing of power.

Identity is often discussed in terms of religion or language or some historical bonding. Undoubtedly these are important, but they do not constitute the entire picture, nor are they perhaps even the most important elements. Identity is used to achieve objectives other than culture; recognition is often as material as it is psychological. It becomes the basis of negotiating social, political and economic advantages for the community, and even more markedly, for its leaders to achieve personal goals.

It is also necessary therefore to consider not only psychological elements in resolving ethnic conflicts, but economic and social policies that ensure a proper place for minorities in state and society, and equal access to opportunities, involving if necessary affirmative action. They even require a measure of self-government. These policies sometimes require major investment of money and education and redistribution of state authority, which can cause resentment to the more established communities. Both multiculturalism and pluralism require complex and careful balancing of different communal or group interests.

Our discussion has so far concentrated on recognition of diversity. Since a major problem in new states is lack of political unity, it may be worth looking at the French position on diversity. It is well known that considerable coercion was used to create and consolidate the French state and nation. France was an earlier secular state, with little role for religion in public affairs. French, from being a dialect, was promoted to the national language and enforced as such. Today, faced with significant migrant groups, with their principal language and religion different from that traditional in France, the French response to the

new situation is in terms of the old strategy – the emphasis on political and public spheres as the main, or even the sole, bases for identity and venue for participation. Citizenship and citizen rights are completely divorced from religion or culture. But democracy and participation of this kind cannot function without some sort of social solidarity. Where religious attachments of the immigrants are strong, and economic disparities are gross, that solidarity is hard to achieve.

Framers of a constitution designed to deal with multi-ethnicity have a more complex task than finding space for different cultures and communities. Such a constitution is generally sketched against a background of a great deal of history: historical injustices, memories of injustices, illegal appropriations of land, as well as both recognising and celebrating diversity and building a new common identity, building trust in institutions, reconciling or living with diverse views on matters that are important but also deeply rooted in particular cultures (the place of gender, the reach of the state, etc.), determining what matter is best dealt with in the public and what in the private domain. This was the task that faced the Constitution of Kenya Review Commission, the National Constitutional Conference at Bomas and the Committee of Experts. Accommodating and balancing competing interests makes for a long constitution and complex system of government and institutions.

Before we go to a discussion of the Kenya situation and the 2010 Constitution, we summarise briefly an analysis by the Global Centre for Pluralism of the drivers of pluralism.<sup>3</sup>

### **Drivers of Pluralism**

- Poverty fosters social tensions and promotes political and social exclusion. Economic prosperity supports pluralism, but only if the benefits of development are widely shared. In contrast, the active politicisation of ethnic or religious differences often exacerbates tensions.
- Institutional mechanisms, developed over time, can pre-empt violence by managing conflict through political means, but a multi-ethnic state's institutional arrangements and political culture must intend pluralism as the outcome of good governance. It will not happen by accident.

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<sup>3</sup> Based on a summary by Beverly Boutilier, Director, Strategic Planning of the Centre. For the full document see GCP (2012).

- An exclusive reliance on electoral democracy is an insufficient support for pluralism, unless grounded in institutions that promote political participation, political representation and accountability. Political leaders should foster inclusive civic spaces through public policy – spaces where citizens of all backgrounds can literally and metaphorically gather and exchange views.
- The rule of law and the elimination of impunity prevent the use of the state for corruption and ethnic politics. Ethnic politics are especially corrosive. The exploitation of ethnic competition for partisan ends precludes the possibility of compromise and heightens the risk of violence. Political parties must become more than ethnic associations.
- In respect to civil society, civic identity is an inclusive space that transcends and encompasses differences. Rather than fixed and singular, identities can be multiple and overlapping; national and ethnic identities are not by nature oppositional. Civil society actors can be important engines of change as champions of pluralistic norms. Active citizenship grounded in reciprocity is a vital support to pluralism. Investments in education and in culture and its expression foster confidence and lessen the fear of “the other”. Cultural spaces where individuals and communities can express their cultural identities and aspirations through the arts are critical to openness and tolerance.
- History and memory also play important roles in influencing or determining ethnic relations. Who controls collective remembering wields a tremendous power within the society. History is often used as a weapon to disenfranchise groups by propagandising the past (often through erasure from or distortion of the historical record).
- Grievances arising from the perception of past injustices, if ignored, can fester and grow until they become so firmly entrenched in communal memory or the national psyche, and are almost impossible to resolve. A shared understanding of the past is a necessary platform for national identity and shared citizenship moving forward.

The papers on Kenya prepared for the Round Table and the discussion resonated remarkably with the Centre’s theses, which were developed in part through an examination of the Kenyan experience. Zein Abubakar’s presentation on history and memory, found in Chapter 2,

bore out the Centre's observations on this subject. Karuti Kanyinga's analysis of Kenyan politics and its close and destructive links with ethnicity, presented here in Chapter 3, likewise supports the Centre's analysis. In Chapter 4, Yash Ghai's examination of how the new Kenya Constitution grapples with "the diversity issue" (as Kenyans call it) shows how close the new Constitution comes to the prescriptions of the Centre – in respect to the dilemmas of balancing national and particular identities and aspirations, and in the ways it tries to build the political sphere through equal and fair citizenship, ameliorate social and economic disparities, deal with past injustices, promote democracy, participation and integrity in the public sphere – all under the supremacy of the Constitution and the Rule of Law.

### **The Realities of Kenya**

At the Round Table, John McNee, the Centre's Secretary General, introduced the concept of pluralism followed by presentations by Zein Abubakar on remembrance and memorization, Karuti Kanyangi on ethnicity and politics, and Yash Ghai on the Constitution. These presentations, subsequently elaborated, and supplemented by Yash Ghai's discussion of some jurisprudence on the Constitution and the analysis by Jill and Yash Ghai of the results of the 2013 elections, form the basis of this volume.

All the first three papers trace the roots of the country's ethnic problem to a lack of inclusion in colonial policies and administration and the construction of "ethnicity" through political manipulation. The three authors acknowledge the centrality of capturing the state (and thereby limiting access to it) to the perpetuation of ethnic politics, and agree that the dynamics of ethnicity are governed in substantial measure by the congruence of ethnicity and geography. They all agree that the Constitution has the potential to overcome the present and past obsession with ethnicity and to promote social justice, the reduction of economic disparities, and an overarching sense of common citizenship – as well as address corruption within the state and the ethnicisation of political parties. However, the authors remain critical of the electoral system, which emphasises majoritarian rather than proportional representation principles, and some are critical of the presidential rather than a parliamentary system. Each author foresees significant obstacles to implementing the Constitution.

### ***History***

Zein Abubakar traces contacts between Kenya and other places – especially the Sudan, Egypt, India and China – arguing that in centuries past the region was more pluralistic than it is now. Just

as the construction of identity differed depending on where people came from, so too was their understanding of the past. He argues that written and oral histories often conflict. The different perceptions of the significance and symbolism of Fort Jesus in Mombasa provide vivid illustrations of these points.

Drawing on the work of the distinguished historian Bethwell Ogot, Abubakar explains that ethnic groups (such as the Luhyas, Kalenjin, Mijikenda, and Taveta) are colonial constructs, as is the whole idea that Kenya comprises 42 tribes. Ethnic purity and exclusive identity are new ideas, arising from politics and unequal access to power and resources. There are not so many differences between the Kikuyu and the Maasai, for example; in earlier times they would not have been seen as so distinct from each other as they are now. Similarly, the Swahili and the Digo have inter-married and are not so very different.

And yet, many communities are not recognised as Kenyans. Among these excluded communities are the Badala of Mombasa, who came from India 800 years ago. Also from South Asia, the Baluchis came to Kenya in the sixteenth century<sup>4</sup> and fought against the Portuguese. But they are still not considered Kenyans. Swahilis, who have resided in Kenya for centuries and whose ancestors are central to the history of the Coast are marginalised despite the widespread adoption of their language and culture in the country. On the other hand, groups which were not here 80 years ago are accepted.

Referring to the Badala, Goans and Baluchi, who have suffered discrimination, Abubakar asks, "How do we conceptualize the Kenyan identity? Who is an indigene? Who is a Kenyan? How does one become a Kenyan? Will some communities forever remain 'foreigners' no matter how long they live in the country? These three communities can trace their presence in Kenya for several centuries and can demonstrate their immense contribution to development of the country. When will members of these Kenyan communities be considered 'full' citizens of Kenya?"

There is a host of false tales and myths about communities and languages in Kenya. Peoples are given labels that are derogatory in other languages. The Dasnach community (Lake Turkana) are called "Shangila" (meaning rogue) by the rest of Kenyans. The Kenyan state declared war on the North-East, disregarding the results of a referendum in which Kenyan Somalis had voted to join Somalia. They called the Somali rebels "shifita" – an Oromo word meaning bandits.

<sup>4</sup> On the Baluchis of Mombasa, see. <http://balochilinguist.wordpress.com/author/balochilinguist/>.

Abubakar argues that a transformative approach to remembrance is needed. Old myths and misconceptions must be deconstructed to reconstruct the nation. Artificial memories need to be transformed so we can become one Kenya, with all Kenyans in our diversity contributing to the task of nation building.

### *Politics*

Karuti Kanyinga argues that ethnicity or tribalism is not a problem *per se*, but rather a symptom of deeper troubles. How political power is generated and distributed is the real issue in the country. Unfortunately, the Constitution does not tackle this problem because it leaves the electoral system largely untouched. He points to the work of historian John Lonsdale, whose examination of the “morality of tribalism” demonstrates the virtues of ethnic identity. However, through manipulation the dominant view of tribalism in Kenya is now negative and divisive. Tribal divisions affected the colonial struggle because political parties were formed on ethno-geographical bases. In more recent times, *harambee* – which began as a movement for self-reliance and community solidarity – lost its character of community ownership after politicians hijacked community projects, turning them into resources for patronage and cultivating political capital.

The independence constitution reflected a fear of tribalism, and therefore emphasised ethnic separatism, regional autonomy, joint control of security forces, and limitations on powers. The 2010 constitution has tried to move away from tribalism toward an integrated and inclusive state underpinned by a more diffused form of regional autonomy (as far as its impact on tribalism is concerned).

Kanyinga shows how politics and political parties have served the interests of ethnic elites, who for generations have negotiated deals without regard to principles in order to position themselves politically. This tendency was demonstrated early in the country’s history when the Kenya African Democratic Union (KADU) dissolved in 1964 – ostensibly in the “public interest” – and joined the Kenya African National Union (KANU), its bitter rival in Kenya’s independence era constitution-making process. As a reward, former KADU elites were appointed to senior positions in the KANU government and later awarded large tracts of land in the so-called “white highlands”.

Certain ethnic groups have dominated politics and government, while other groups have been excluded from political advocacy. Ethnicity has thus both enhanced and constrained space for civic engagement. Historically, ethnic identity has facilitated the civic engagement of

individuals and groups who share the same identity as state elites, but functioned as a source of tension between the state and elites from other ethnic groups. For this reason, Kanyinga concludes that the space for political pluralism in Kenya has remained restricted.

Kanyinga contrasts the fortunes of political pluralism under Kenya's different presidents. Although very restrictive politically, they were more pluralistic in the socio-economic fields. Kenyatta relied on the Kikuyu elite, while Moi appointed elites of several tribes. The state and political elites increasingly patronised various initiatives thereby eroding the potential foundations of pluralism. Devoid of principles, the political scene is fluid with alliances made and broken almost daily. The hold of ethnic appeals on the people remains strong despite little evidence of any benefit to them.

Kanyinga argues that increased political pluralism, in the form of multi-party elections, has opened greater space for political engagement. However, although the proliferation of political parties from the early 1990s is an important marker of increased pluralism, the way politics is practiced in Kenya has undermined the values of a plural society. Rather than enhancing democratic ideals and fostering tolerance and respect for others, political practices have exacerbated ethnic divisions and differences and caused social fragmentation. Under majoritarian rule, larger tribes can rely on their numbers to exclude others from the state and from access to state resources.

A sense of belonging, geography and territory are important to identity, but all too often that identity is used to exclude others. In turn, a fear of exclusion sharpens a sense of identity. Similarly, pluralism has been restricted by the concentration of state powers in the executive, an office which has not reflected national diversity. For some, dominance of the executive has guaranteed access to state resources and guaranteed exclusion for others. Perhaps the new Constitution will assist in promoting greater political pluralism.

#### *New constitutional order*

Unfortunately, Kenya's modern history has not been marked by pluralism; instead, it has been marked by ethnic tensions and conflict as a matter of state policy, first during colonialism and then in the post-colonial period. What has been the problem? Kenya has not been an ethnic based state (except for a short period after independence when there was systematic discrimination against Asians and Somalis, which drove them out of the public service and retail trade, and led to their significant emigration). But the state has been effectively

under the domination of one ethnic group (Kikuyu, then Kalenjin, and now Kikuyu again), through the state – bereft of policy other than feathering the nest of the elite from the dominant ethnic group.

During colonial times, group distinctions were based on three major, racial categories: Africans, Europeans and Indians (and occasionally Arabs and Somalis). Shortly after independence, the critical divisions emerged within the African community, and took the form of tribalism (which had already emerged as a political phenomenon in the last stages of negotiations on independence). But in Kenya communalism operates more in the political than social domain, because community is not as strong as one would think, because of colonial and post-colonial policies and development, absence of hierarchy within tribes, unlike parts of Uganda and certainly unlike the chiefly societies of West Africa; ethnicity is therefore more manufactured and manipulated than communities held together by tribal structures. Occasionally “chiefs” and “elders” have tried to provide leadership and guidance within ethnic community, but their efforts have been in vain.

Ghai begins his chapter with a discussion of different paradigms that have influenced the structure of the state and the design of constitutions – principally liberal, communitarian or ethnic-dominated – before proceeding to discuss the design of the new Constitution of Kenya, which he argues is a mix of the first two systems. The Constitution seeks to reverse that perverse policy which has brought so much hardship to the people. Through its preamble the people have expressed their pride in the country’s “ethnic, cultural and religious diversity” and their determination to “live in peace and unity as one indivisible sovereign nation.” This approach mirrors the Centre’s understanding of pluralism – that is, that cultural diversity and political unity can co-exist. Diversity is a major theme of the constitution. Ghai’s paper outlines the many ways in which diversity is to be protected and promoted: through access to and inclusion in the state of groups hitherto excluded, particularly minority communities, as well as through the preservation of the lifestyles of those communities that reject modernity.

Many other provisions are relevant to the issue. Article 10 guarantees “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised”. The constitution includes an expanded notion of citizenship. Women are no longer partially excluded (previously they could not pass citizenship to their children). Efforts have also been made to include both abandoned children and, through the new Immigration and Citizenship Act, various groups that have lived in Kenya for a long

time but have found it hard to become citizens (Chap. 3). Provisions designed to deal with past injustices, whether through affirmative action (which the state is required to adopt under Articles 27 and 56) or through protection of ancestral lands or land occupied by hunter-gatherer communities (Art. 63), are similarly intended to rectify exclusion. So are provisions about the rights of all Kenyans to practice their religion (Art. 32) and their culture and to use their languages (Art. 44). The true thrust of the rights of persons with disability (Art. 54), of youth (Art. 55) and of the elderly (Art. 57) is towards full inclusion. Finally, the detailed provisions for more inclusive electoral laws and practices, such as no one-sex domination of elected or appointed bodies, and for more inclusive political parties are also relevant to the promotion of pluralism.

These issues undoubtedly present a dilemma, or several dilemmas. How do we both preserve and strengthen unity while ensuring proportionality? The Constitution is committed to the view that, in the long run, unity is actually strengthened by ensuring proportionality. The issue of “merit” is also raised by provisions that require “affirmative action” – but the Constitution does not specify the form of affirmative action in many situations. More broadly, the constitution reveals a belief that merit is to be found everywhere, in contrast to the past when it was equated with certain places and people.

Various speakers emphasised the hopes aroused, both in Kenya and overseas, by the country’s adoption of the Constitution in 2010. The record since then has been mixed.

Chapter 5 analyses briefly the 2013 elections, picking up from Karuti’s analysis of electoral politics and ethnicity. In presidential elections it does seem to be true that the dominant consideration for voters is ethnicity. Certainly the manoeuvres of candidates are based on assumptions about ethnic voting behaviour. Voters are influenced to vote by considerations of whether a candidate is “their person”. Precisely who “their person” is, however, may be strongly influenced by political spin, as with the manipulation of the ICC issue, and by prominence in campaigning (those without money to carry out a visible campaign have little chance). In 2013 the “peace” issue may also have played a part, with voters preferring “peace” (no violence) to a fair outcome. Pragmatism is very important: however much a candidate may be “ours”, he or she will get few votes if not a serious contender (especially, perhaps, among the Kikuyu). This seems to influence voting within a community, and probably whether a leader of one community can, through an alliance, carry with him or her that community to vote for a leader from another community.

At other electoral levels, more local leaders are influential. There are many signs that a locally prominent person may carry more weight than a big national leader of the community or of an allied community. In rare cases a person elected may be from a minority ethnic community, though probably only if they have support from an indigenous leader (as evidenced by the election of three Asian MPs, all in areas with few Asian voters). The importance of local leaders is reflected in the variety of parties from which candidates were elected.

Voters are choosing between candidates largely from the same ethnic group (parties try to pick candidates from local communities). Therefore one can assume that what affects their choice of particular individual is either that (i) individual's personal qualities and local "profile", or (ii) that person's association with a national leader, or (iii) that person's association with a more local leader, or (iv) that person's membership of a sub-group of the main ethnic group (a clan etc.) or some combination of these factors. That of course is assuming that the platform of the party is irrelevant!

There are some indications that voters are becoming more demanding, and less inclined to accept what their "big men" tell them. A small number of independent (non-party) candidates were elected to the National Assembly. Sometimes voters reacted to what they seemed to be manipulation by leaders. Previously elected leaders are sometimes thrown out by exasperated voters.

It is hard to "blame" voters for voting for those they view as "theirs" unless and until they are offered something else. "Better the Devil you think you know" is as rational a criterion as most others that are offered to them. The advent of a system of primaries in major parties, although they were hardly a model, promises more involvement of voters and the prospect that there may be more choice for the voters in future.

The final chapter dealing with developments after the adoption of the Constitution by Yash Ghai contains an analysis of three cases decided by the courts interpreting provisions which are closely connected to the diversity of its people, and hence to pluralism—entitlement to and rights of citizenship, wearing dress with religious significance in educational institutions, and the relationship between criminal law and traditional or religious beliefs and practices. In the first case the court decided that it was unconstitutional to require members of some communities to produce documents to prove their citizenship additional to those required from members of other communities—a practice that all governments had followed since independence. Members of the communities discriminated against in this way

(“Muslims”, “Somalis” and “Asians”) suffered many hardships (e.g., in access to education and employment). The court emphasised the importance of equal citizenship in the constitution.

In the second case the court decided that the regulations of a school forbidding the wearing of the veil (“*hijab*”) were lawful. It held that the constitutional protection of the freedom of expression and freedom of religion and the manifestation of one’s religion (both implicated in the wearing of the *hijab*) could be limited under the Constitution. Limitation in this case was justified in the interests of nation building, creating a spirit of toleration, and promoting national unity. The court also justified the wearing of the school uniform on the grounds of establishing among the students of a sense of belonging to the school and its community and trying to achieve excellence in studies. There was little discussion of the importance to the particular student who wished to wear the *hijab* or to her community. Nor did the court explain how it had reached its conclusion in conformity with the article of the Constitution which permits “justified” limitation of rights and freedoms.

In the third case the issue before the court in a criminal case for murder was whether the fact that the accused and his family (belonging to the Somali Muslim community) had given the family of the murdered person camels and other stock sufficient to win forgiveness for the killing in accordance with their religion and tradition justified the termination of the prosecution. The director of public prosecutions supported the joint plea of the two families for the termination of the trial. The court, applying the norms of the Somali Muslim communities, complied. In many ways it was an extraordinary decision, qualifying the criminal law and principles of the country by reference to the practices of a cultural community, with very wide implications for law and order, public security, and the rule of state law. Unlike the *hijab* case, it acknowledged the mores of Kenya’s diverse communities, but it was done without any discussion of the problems of unity and equality.

In his general comments on these cases, Ghai concludes that while prosecutors, lawyers and judges pay regard to specific provisions of the constitution, they do not often display a rounded understanding of the constitution—despite their frequent citation of case law which says that the constitution must be read and understood as a single, integrated document. These, and other cases since 2010, show that for the most part the courts do not try to balance different legitimate interests, between the imperatives of diversity and the necessity of building the nation.

## Round Table Discussion

### *Tolerance and pluralism*

The concept of tolerance surfaced as an issue when one participant asked about sexual diversity. Yash Ghai added that every form of diversity has its own gender dimensions. Commenting more broadly, Nazeer Aziz Ladhani of the Aga Khan Development Network commented that tolerance is a foundation of pluralism. Another participant pointed out that Graça Machel had just been urging Kenyans to go beyond tolerance to embrace others in a positive way. John McNee of the Global Centre for Pluralism added that the Aga Khan also contends that tolerance is not enough. Pluralism involves more than tolerating others.

### *Western dominance*

A participant raised the issue of Western dominance of dialogue and concepts. Are there not different conceptions in African society of philanthropy, for example, and are there not useful lessons to be learned from Africa for other parts of the world? McNee assured the group that the Centre's does not seek to "export" the Canadian experience, which inspired the Centre's foundation. No single experience is universally applicable. Richard Le Bars, of the Canadian High Commission, characterized Canada as a country that has fostered an ongoing dialogue between its various communities. Although the Canadian state provides support for and recognizes difference, these differences do not exclude anyone from embracing a Canadian identity. Most Canadians hold multiple identities (ethnic, religious, national) without pressure to prioritise one identity over another.

Canadian institutions of government and diversity policies are designed to enable people both to retain their community heritage and to share citizenship with the broader Canadian community. The Government of Canada also believes this inclusive approach to citizenship is a key to countering terrorism.

Another participant asked whether there was any intention to look at the experience of other countries that were not – or did not seem to be – diverse in the same sense. In response, McNee mentioned Syria – a country that had not appeared outwardly divided, but has turned out to be so.

### *Kenyan issues*

Participants raised a number of issues about the current state of Kenya and how best to develop a new Kenyan identity. Although not everyone agreed with each point, in general terms the group identified several possible paths. There was a wide measure of agreement that Kenya is worth studying – Kenyans can learn a good deal from looking at and thinking about their own past. Deeper knowledge of Kenyan history would help to illuminate the related experiences of other countries. The idea of a body like the Global Centre for Pluralism focussing on Kenya and its future was welcomed.

### *Understanding better*

Participants agreed that a better grasp of the dynamics of the Kenyan state is needed. Several participants also called for greater attention to issues of class and inequality in Kenya, arguing that ethnicity is manipulated because it serves the interests of certain classes to do so.

### *Deconstructing and reconstructing*

Kenyans would benefit from more anthropological analysis to help in the process of deconstruction and reconstruction. When it comes to forgetting and remembering, who decides? Who decides what time period is relevant? Who decides what is remembered and what is forgotten? And who benefits from the remembering and the forgetting? Participants suggested all communities should share what they remember. Kenyans need to embark on a shared journey to a new remembering.

Several issues (and some scepticism) about the official approach to nation building were raised. For example, is the Brand Kenya Initiative something new or does it perpetuate the status quo based on the same old politics of exclusion?<sup>5</sup>

### *The census*

Another interesting question raised was about the politicisation of the census.<sup>6</sup> How have statistics been used over time to distribute state resources? The introduction of county government will make the allocation of resources a more difficult issue, especially since

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<sup>5</sup> See <http://www.brandkenya.co.ke> and the site of the Government spokesperson. <http://www.communication.go.ke/>.

<sup>6</sup> The most recent census was held in 2009 and the results released in early 2010. For some results see. [http://www.knbs.or.ke/detailed\\_population\\_results.php](http://www.knbs.or.ke/detailed_population_results.php). These do not include ethnicity, though they do religion.

the constitution requires the “equitable” sharing of revenue and distribution based on the “needs” of counties, among other things. “Population” is not specifically mentioned but is clearly relevant to issues of needs – and indeed has been given the greatest value in allocating resources.<sup>7</sup>

#### *Failure of governance*

There was a strong feeling that a failure of governance is the root cause of Kenya’s problems. If the state operated in a way that made Kenyans proud, most citizens would be happy to feel Kenyan. If the state behaves in ways that cause shame, they won’t. Without good governance dialogue is fruitless.

#### *Not starting from scratch*

A lot of Kenyans have been doing amazing work on remembering and promoting unity. For example, Sultan Somjee has set up peace museums,<sup>8</sup> planted peace trees (which his research showed were once a feature of many Kenyan communities), and documented the peace traditions of Kenyan peoples. At the same time, more public education about the issues raised by the Round Table is needed to support implementation of the Constitution. For example, the judiciary needs training on issues of diversity and equity. How can a dialogue be opened with them – and other sectors of the legal system – to free this vital sector from the trap of negative ethnicity?

#### *The role of civil society*

As the meeting comprised largely of civil society actors, participants agreed that civil society has an important role to play in Kenya’s transformation – although civil society itself is often affected by the curse of negative ethnicity.

#### *Comparative experiences*

Participants suggested looking at other African countries to understand how they have dealt with issues of ethnicity. Tanzania has had a very different experience from Kenya – due in large part to the influence of Julius Nyerere. But even there, some communities – for example, the

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<sup>7</sup>The Commission on Revenue Allocation announced its recommendation using population as the major basis - 60% of the allocation between counties being based on this factor, with deviations for counties with very small populations: see <http://www.mwafrika.org/2012/05/01/busia-leaders-reject-cra-proposal-fault-criteria-used/>.

<sup>8</sup> See . <http://www.open.ac.uk/Arts/ferguson-centre/memorialisation/project-partners.shtml>.

Wasafa in the south – have been excluded in the same way Kenyan identity excludes some ethnic communities. Some differences between Kenya and Tanzania, it was suggested, also stem from differences in the ways the two colonial states evolved, as well as from each postcolonial state's approach to ethnicity, including but not limited to the different approaches of Kenyatta and Nyerere. For example, even under the Germans, Tanganyika developed national institutions. In contrast, Kenyans had no real national political parties in pre-independence times; then as now, political associations were essentially ethnic.

Other African experiences are especially relevant to Kenya. South Africa has confronted its past through explicit constitutional recognition of ethnicity and through provisions for addressing the legacy of apartheid such as Black Economic Empowerment and programmes for land reform and redistribution.

### **Conclusion**

Ethnic tensions and conflict have marred Kenya's modern history. But as other national histories, including those of Canada and South Africa, attest, cultural diversity and political unity can co-exist. Ethnic conflict is a *symptom* rather than the root cause of division in Kenya. Differences have been politically constructed and perpetuated for narrow political ends. The new Constitution, with its broad commitments to respect for diversity and recognition of all Kenyans as equal citizens, has the potential to open a dynamic new chapter in Kenya's national development. But, as the papers in this volume argue, more work is needed – to build a shared historical narrative, to reform and strengthen the country's institutions of governance, and to implement the 2010 Constitution – before Kenyans can realize their determination to “live in peace and unity as one indivisible sovereign nation.”



# 2

## MEMORY, IDENTITY AND PLURALISM IN KENYA'S CONSTITUTION BUILDING PROCESS

*Zein Abubakar*

### **Introduction**

The Kenyan constitution of 2010 was developed using a citizen-based participatory process that sought to recognise the diverse backgrounds of Kenyans and the plurality of the Kenyan state. The third paragraph of the preamble establishes a vision of a united nation that values and accommodates diversity, stating that Kenyans are “Proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation”.

This ethos is expounded in various parts of the constitution – for example, by recognizing both individual and group rights as fundamental rights; accepting Kenya as a multilingual society and requiring the state to promote and protect the diversity of language of the Kenyan people; and including ethnic identity in the definition of community land. Further, the constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation (Art. 11).

This marks a dramatic departure from the treatment of identity within the previous constitution dispensation. Yash Ghai and others have argued correctly that the nature of the Kenyan state has remained mainly colonial. One constant imperative has been managing ethnic, cultural, linguistic and religious diversities. This is partly due to the colonial amalgamation of territories, irrespective of indigenous identities and sensibilities (echoing the formulaic Berlin Conference philosophy) and partly to the failure of the post-independent administrations to promote nation building. The 1963 constitution included some mechanisms to recognise diversities and to build a plural state, including the parliamentary system, a quasi-federal

governance structure called *Majimbo*, a bill of rights, separation of powers, and so forth. Unfortunately, these provisions were among the first casualties in the government's quest to consolidate and centralize power.

At the outset, the independence government had two choices. It could implement the new provisions which required completely departing from the colonial state, philosophy and mindset; or it could adopt and adapt the colonial state to suit the personal needs of the country's new "leaders." The first choice required a complete overhaul of the undemocratic colonial legal infrastructure to accommodate the democratic independence constitution. To embrace the second choice, the independence government either amended the 1963 constitution to reinstate aspects of the undemocratic colonial legal regime or simply ignored the constitution where it conflicted with the colonial legal regime.

Given this history, we must approach the implementation of the new constitution differently. Its promulgation marked the end of the constitution review process and the beginning of the constitution-building process. The challenge now is to deconstruct the old constitutional regime and bring into effect the 2010 constitution.. For the first time in the history of our country, we are grappling with the serious agenda of building a nation that recognizes its diversity and its complicated past. An important aspect of this constitution-building project is managing Kenyan diversities, identity, and the social and political aspects of the constitution to ensure greater social and political pluralism.

This paper seeks to identify a number of important issues for understanding and building pluralism in Kenya. In particular, it examines the question of memory and memorialization in the conceptualization of ethnicity and identity and considers the legacy of Kenya's ethnic configuration. It draws lessons from the work of others, including Ngugi wa Thiongo (1983, 1986), Ali Mazrui (1995, 2002a, 2002b), and Bethwell Ogot (1996, 2005, 2010), on deconstructing the past and proposing how to construct the future.

These two processes are intertwined and one cannot be completed without the other. The deconstructing of the past requires coming to terms with the colonial past, the single party excesses including dictatorship, gross human rights abuses, corruption, falsification of history, and so on. Deconstructing the past requires understanding the colonial state and post-independence dictatorship and dismantling these experiences brick by brick. It involves the fundamental alteration of their philosophy, architecture and design. This fundamental change

ought to focus on their motivation, theoretical underpinning, cultural agenda, policies, and ideological, legal and constitutional framework for executive agencies. The first philosophical components are used to imagine the nation and the state and establish the value system and other social binding concepts – the cosmological imperatives that are used to encode and decode social meaning, build social solidarity and form the bases of a people’s world view. The state agencies in turn enforce the social code and extract compliance or, using more coercive modes, dispense sanctions. The second part of this equation deals with what the colonial system and post-independence dictatorship is replaced by and how that is done.

Where the state is based on the supremacy of one identity, the new dispensation will be based on plurality of identity, replacing divisions with shared aspirations, discrimination with equality and inclusion, marginalization with recognition, equity and affirmation, and so on. This paper addresses both the deconstruction and reconstruction of a new Kenya based on the 2010 Constitution by focusing on three thematic areas: memory and memorialization, the conceptualisation of ethnicity and identity, and the constituting of the territory of Kenya.

### **Memory, memorialization and nation building**

The question of memory, memorialization and nation building has two interrelated parts: what our nation remembers, how it remembers and why it remembers; and what has the nation forgotten, how it has forgotten, and more importantly, why it has forgotten. On the level of memorialization it is critical to interrogate historical and social symbols, public monuments and other imagery that covers the past. What story or history do they tell, from whose perspective and interpretation; and what are the consequences of such telling to individual, communal or national remembrance and psyche? Ngugi wa Thiongo (1983, 1986) has examined the importance of memory and the implanting of memory and meaning in the colonial project. For him, decolonizing the mind is a critical step in understanding the nature of the Kenyan state. Given our divisive and contested past, the journey of rediscovering our past is not going to be easy. A good example of this difficulty is how Kenya has dealt with the history of the struggle against British colonialism in general and with the Mau Mau in particular. In the case of the latter, Odhiambo Atieno and John Lonsdale (2003) demonstrate how tortuous this journey can be. Thus, for now, the examples raised here remain below the radar of scholarship or have not received adequate analysis. We interrogate these examples to demonstrate the crisis of memory that exists and the enormity of work that lies ahead.

*Constructing the past: selective amnesia?*

How may Kenyans come to terms with their past? How is Kenya's past imagined and understood? How far should we go back? What theory should we use? Deciding where to start is itself a contentious issue. For my community – the Swahili people – one natural place to start is the moment when, as Chinua Achebe put it, “the rains began to beat them” – that is, with the arrival of the Portuguese colonial forces in 1498, which commenced the long story of imperial domination and dominion in Africa. Long before Kenya became a British colony during the second wave of colonialism, their arrival made the local people believe that the superiority of the European would be superimposed on all other people.

It is recorded that Vasco da Gama landed in the city of Mombasa on the evening of Sunday, 7 April 1498. He was met with boats laden with gifts and a fresh supply of food and drink. On 13 April, only five days after reaching Mombasa, the Portuguese ships bombarded the town, leaving Mombasa in ruins. The devastation of colonialism had begun.

The devastation was wrought with the power and authority of the 1455 Papal Bull issued by Pope Nicholas V. This edict defined and validated the mission of the Portuguese:

to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his and their use and profit -- by having secured the said faculty, the said King Alfonso, or, by his authority, the aforesaid infante, justly and lawfully has acquired and possessed, and doth possess, these islands, lands, harbors, and seas, and they do of right belong and pertain to the said King Alfonso and his successors, nor without special license from King Alfonso and his successors themselves has any other even of the faithful of Christ been entitled hitherto, nor is he by any means now entitled lawfully to meddle therewith. (Papal bull *Romanus Pontifex* issued by Pope Nicholas in 1455 <sup>9</sup> as quoted by Biblo and Tannen, Sidney Z. Ehler and John B. Morral (trans. and eds.) 1967:146.)

<sup>9</sup> For full text, see <http://www.nativeweb.org/pages/legal/indig-romanus-pontifex.html>

This document and others like it gave rise to the “doctrine of discovery” which the Europeans used as the legal basis for expropriating land particularly in the Americas. This doctrine, which informed the laws of the nations, legitimized the robbing of indigenous peoples’ lands. In 1823, the United States Supreme Court used the 1455 Papal instruction to uphold the seizure of indigenous territory in *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823). Many indigenous peoples in America trace their colonial and post-colonial tribulations to this Papal doctrine. Today various efforts are underway to repudiate its force as a first step in deconstructing colonialism.

In Kenya and other parts of the world this connection was less formal but it was still the basis for locating land ownership in the monarchy and/or the state to the detriment of local indigenous communities. In Kenya, the concept of crown lands during British rule was based wholly on this doctrine (Okoth-Ogendo, 1995). At independence, when Kenyans regained their sovereignty, the doctrine was not deconstructed, with the result that the law governing so-called government and trust land continued to be informed by this doctrine.

Thus first contact, characterized by unprovoked attack and slaughter, was motivated by the desire to entrench the doctrine of discovery in Africa – against the resistance of the people. This doctrine also drove the second wave of colonialism in the late nineteenth century, when the quest for domination and dominion was justified by religion. Portuguese domination continued for more than 200 hundred years, until Portugal was finally defeated by a Muslim multinational force led by the Imam of Muscat, which included Swahili forces and other local communities on the East African coast. Nevertheless, according to Chapurukha M. Kusimba (1999), this early interlude of colonial domination fundamentally altered the history of the Swahili city states and led to their downfall.

Outside the Waswahili and other coastal communities how does our nation recall the arrival and presence of the Portuguese? How do we reflect the resistance and struggle of the Waswahili and other coastal communities against that foreign domination? Without such resistance could the Portuguese have continued to occupy the coastal areas and also venture further inland? Would Kenya have come within the Portuguese sphere by the time of the Berlin Conference like Mozambique and Angola?

How did this colonial experience affect the coastal communities? What is the legacy of Portuguese colonial rule for Kenya? To explore these questions we will look at two places of remembrance – physical spaces – that have become sites of memorialization in Kenya: Fort Jesus in

Mombasa and the Vasco da Gama pillar in Malindi. When these two places are mentioned what memories do they conjure? The Kenyan government and people have embraced them as important historical sites. In the early 1960s, Fort Jesus was opened to the public, becoming a national museum. Following application by the Kenyan government, in 2011 UNESCO declared it a world heritage site.

For the local communities both sites remain symbols of oppression while at the same time affirming their spirit of endurance and resistance. To the Waswahili, Ngomeni, the Fort, was the place of no return: once taken there a person would be incarcerated indefinitely, carried into slavery, or tortured to death. Subsequent ruling powers extended this history, using Fort Jesus as a place to demonstrate the coercive powers of administration, punishment and prison. As *Ngome*, Muyaka's verse about Fort Jesus, makes clear (quoted in Abdulaziz 1979), this place of death is now a place of remembrance or *ziarani* in Kiswahili:

Ngome ni Ngome ya mawe na fusi la kufusiza  
 Ngome ni ya matumbwe, na boriti kuikiza  
 Ngome wetwapo sikawe, enda hima na kufuza  
 Ngome imetuumiza, naswi tu mumo Ngomeni!

The Fort is a fort of stone that is reinforced  
 with coral sand.  
 The Fort has ceilings well-laid with boriti beams  
 and light coral stone.  
 The Fort when you are called there, do not  
 tarry, but hurry and go there quickly  
 The Fort has certainly done us a lot of harm,  
 but we are still to be found in it!

The second site, the Vasco da Gama pillar in Malindi, has an equally interesting history that is also linked to the doctrine of discovery. After Vasco da Gama left Mombasa in ruins he was welcomed by the city state of Malindi, which was at war with Mombasa and happily befriended the power that had just devastated its enemy. At Malindi, Vasco da Gama planted a wooden cross, by which act the Portuguese claimed ownership of the city state and its people through "discovery". In this way the business of discovering people and places arrived in this part of the world.

The invading Portuguese forces claimed the land of "infidels" and "pagans" for Christ as well as for their monarch. Today, the original wooden cross has been replaced by the Vasco da Gama pillar, whose meaning remains contested. For the coastal Muslim community, the

pillar is a symbol of the crusade that was unleashed against them by a foreign force bent on enslaving and disinheritting them.

Do Kenyans even know of these events? Does this account test people's memories? Why are memories of this period hazy? This remembrance, from a Waswahili perspective, may establish historical knowledge based on the memories of a particular Kenyan community. On the other hand, this remembrance might challenge other memories, including the European narrative that sometimes holds that Christianity arrived in Kenya peacefully with the noble intention of civilizing "the natives". Could the Waswahili's remembrance give rise to a quest for other lost memories – for example, the histories of enslaved coastal indigenous communities and their transportation to Europe and across the Atlantic? It is no wonder Swahili oral tradition considers the sea beyond Mozambique unsafe. There is abundant evidence to confirm – and refute -- the Christian memory, but to date these other memories remain an unexplored space.

Although both the Fort Jesus and Vasco da Gama pillar are now both under the administration of the National Museum of Kenya (NMK), the Museum has not fully explored the ethnic or spiritual histories of either monument, with the results that the Waswahili's remembrance is excluded from NMK narratives about both sites.

The state institution's refusal to acknowledge this history distorts the past and perpetuates false memory in order to suppress an inconvenient or contested past. Indeed, this selective approach to national memory and history is often justified by the state as necessary to retaining social cohesion and harmony. We shall re-visit this state-sponsored amnesia in respect to the memories of northern Kenya.

#### *The education system*

What about our education system? What does it teach? Why is the coastal history known by so few Kenyans? What does this fact suggest about the government's attitude towards Muslims in modern Kenya? How does this distorted history affect the non-Muslim Kenyan public? If it was widely understood that Islam was rooted for hundreds of years within our local communities by the time Christianity arrived on our shores would their perceptions of Muslims change? Would those who don't believe that Muslims are Kenyans because of their faith change their attitude?

The exploration of the memory of this period raises other fundamental issues about the construction of social meaning and collective

recollection in Kenya. Three other examples illustrate the import of this hidden history.

- First, if asked when Indians came to Kenya, a majority of Kenyans would likely say they came between 1896 and 1902 to help build the Ugandan railway line. Yet, in fact, contacts between the Indian subcontinent and the east African coast existed for centuries before that. The navigator who showed Vasco da Gama the way to India was an Indian. A number of Indians were citizens or expatriates in the various Swahili city states scattered from the Somali gulf all the way south to the Mozambican channel. The Badala community in Mombasa, using oral history, traces its presence in this ancient city to its formative stages. Today the Badala community, just like the Swahili community, is often not considered Kenyan.
- Second, the first Goan community arrived on the Kenyan coast as part of a trusted Christian community to establish the lower cadre of Portuguese governance structures. Even today, the Goan community is still considered alien to Kenya
- Third, the Buluchi community of Mombasa descends from a Baluchistan battalion (representing parts of modern day Iran, Pakistan and Afghanistan) that came to Mombasa to fight the Portuguese under Sayyid Said. Today the Buluchi community is not recognized as a Kenyan community.

These three examples raise the fundamental questions about how we conceptualize Kenyan identity. Who is an indigene? Who is a Kenyan? How does one become a Kenyan? Will some communities forever remain “foreigners” no matter how long they live in the country? The Badala, Goan, and Buluchi communities can each trace their presence in Kenya back several centuries and can demonstrate their immense contributions to the country’s development. When will members of these Kenyan communities be considered “full” citizens of Kenya? The constitution has accorded such communities full citizenship but it will take time and effort to change mindsets.

To most Kenyans, the Badala, Goan and Baluchi community are just lumped together as “Asians” without distinction and they continue to be associated with the Uganda railway period. What gave rise to the practice of calling those from the Indian subcontinent Asians? Why Asians? In the past, even Kenyan national leaders like Martin Shikuku and Kenneth Matiba got away with using pejorative terms designed to create hatred against the Kenyan communities with connections to that sub-continent. Today, the 2010 constitution has outlawed such excesses.

### **Conceptualizing ethnicity and identity and its effect on nationhood**

The second thematic area in this paper is the conceptualization of ethnicity. Bethwell A. Ogot observes that ethnicity is a much more plural and dynamic idea than envisaged by the colonialist regime (Ogot, 2005). He analyses the work of various scholars to demonstrate the elasticity of ethnic identities in Kenya. Based on the work of Professor Gideon S. Were, Ogot identifies the interaction and cross influences between the Kalenjin and Luhya communities. He draws lessons from the Agikuyu relations with their neighbors, based on the work of Godfrey Muriuki on the assimilation of the Gumba and the Athi indigenous peoples into the Agikuyu identity, as well as the close contacts with the Maa speaking people.

This fluidity and interdependence of identities is also demonstrated by the coastal communities, including the relations between the Pokomo and Oromo and the extensive relations between Mijikenda and the Swahili community, as shown by Dr. Justin Willis. Other examples Ogot cites include relations between the Samburu and the Rendile, and the Kamba and the Kikuyu. Ogot affirms Justin Willis's assertion that "ethnic identity is constantly being negotiated and defined, renegotiated and redefined, in everyday discourse" (Ogot, 2005:272).

Moreover, completely new identities were formed as a consequence of social forces. Examples of such social constructs include the Taveta, the Luhya, the Kalenjin and the Mijikenda. There were other attempts to form new identities during the post-colonial period that were not as successful or did not result in complete metamorphosis, including the Gikuyu, Embu, and Meru Association (Gema) and the Kalenjin, Masaai, Turkana and Saburu (Kamatusa) experiments.

The symbiotic relationships between various ethnic communities and mutually constructed patterns have profound lessons for future appreciation of pluralism and efforts in nation building. Ogot summarizes this process of becoming in the following way:

This picture can be multiplied across the territory that was to become Kenya in 1920. It emphasizes the complex nature of African traditional frontiers and human patterns. The frontiers were porous and the ethnic groups were malleable and social constructs. There were no pure ethnic groups. Each group was a dynamic and living unit whose continuity depended less on its purity or single origin than on its ability to accommodate and assimilate diverse elements. Most of the myths, legends, epics and rituals one comes across in the stories of migration and settlement are meant to facilitate the process of integrating people whose origins are diverse. We can thus draw useful

lessons about nation building from the pre-colonial history of Africa (2005:273).

At this level, we are given comfort that the conceptualization of ethnicity could take the form of pluralism, pragmatism, accommodation, mutual respect, dependency and survival. The art of fashioning relations based on harmony and cohesion is not such a foreign idea after all. This realization will not only inform the work of the National Cohesion and Integration Commission (NCIC)<sup>10</sup> established in 2008 but also enable people to build structures that will help people shun purist and supremacist approaches.

On the other hand, we also need to understand those aspects of identity construction that have been divisive in the past and still retain the potential to disrupt the constitution-building process. One of the issues we need to deal with is the territoriality of ethnic identity in Kenya and the demystification of the idea that Kenya is made up of 42 communities. In Ogot's opinion (2005), these two elements are interrelated. As part of the colonial strategy districts were configured based on the establishment of a dominant ethnic identity in each territory. Later these divisions formed part of local government infrastructure. As Ogot observes:

it was not difficult to introduce the 'tribal' concept of local government upon which the colonial power built its subordinate mobilizing agencies. District councils soon became 'tribal' councils where matters pertaining to interests and welfare of particular ethnic groups were discussed and problems resolved. The Samburu, the Turkana, the Nandi, the Giriama, the Embu, Meru and Pokot had to have *their* councils. The trend has continued into the independent period. New districts such as Tharaka-Nithi, Kuria, Elgon, Teso, Suba, have been established to give those ethnic groups who still lack a geographical base, their districts (2005: 290).

Given the need for small, manageable number of administrative units, the outcome of this process was that fewer than half of Kenya's communities could be accommodated territorially. Consequently, only communities with large populations have been identified with certain districts or regions and have come to dominate those parts of the country. The colonial practice was to associate one dominant community with every district and to have no more than two to three dominant communities in a region or province. The relatively smaller communities across the country have had to develop various

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<sup>10</sup> See the NCIC website at <http://www.cohesion.or.ke/>.

mechanisms to cope with this situation, including accepting co-option in larger ethnic arrangements or even assimilation by the numerically dominant community in their neighbourhood. We believe this explanation largely informed the development of the listing of the mythical 41 communities of Kenya. The 42<sup>nd</sup> category was created to accommodate the “other”.

The majority of the communities not linked to a territory found themselves lumped together in this category. A simple analysis of the communities in this category will show that they occupy the lowest levels of any human development index. Many Kenyan communities such as the Munyoyaya, Elwana, Dasnaach, Okiek, Elchumus, Segeju, Sakweri, Elmolo, Sabaot, Terek, Sengwer, Nubi, Boni, Sakuye, Waata and others still await official recognition.

The plight of the Nubian community is especially grim. The Nubians are the only community in Kenya to be categorized as a stateless people.<sup>11</sup> Generation after generation since the time they arrived as a fighting force with the British, the Nubians have struggled to be accepted and recognized as Kenyans. The independence constitution in 1963 conveyed Kenyan citizenship to them, but even then they continued to be considered stateless. The 2010 constitution should assure Nubians of citizenship, but the wrong interpretation of the legislative framework could still allow rogue state officials to perpetuate their long state of limbo. Today, the Nubian community is concentrated in Kibera in Nairobi, in the Rift Valley around the Eldama Ravine, on the coast around Mazaras, and in Kisumu.

All of the communities seeking official recognition fall under the category of minority and/or marginalized communities within the meaning of the new constitution, which defines a “marginalized community” as:

- (a) A community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- (b) A traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

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<sup>11</sup> On the Nubians see <http://www.nubiansinkenya.com> (on the book *Kenya's Nubians: Then and Now*) and [www.fmreview.org/textOnlyContent/FMR/32/Adam.doc](http://www.fmreview.org/textOnlyContent/FMR/32/Adam.doc). The former site opens with a quotation from a Nubian elder, “A community becomes confident when it is recognized by other communities.”

- (c) An indigenous community that has retained and maintained a traditional lifestyle and livelihood based on hunter or gatherer economy; or
- (d) Pastoral persons and communities, whether they are –
  - i) Nomadic; or
  - ii) A settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole. (Art. 260)

The constitution thus recognizes minority communities but in order for them to enjoy the full protection and benefits of the law a reliable way to identify them is needed. The emerging issue, then, is how many such communities exist in Kenya, where are they located, and how shall they be identified? The first state effort to enumerate all Kenyan communities (outside the mythical 42 conceptualization) was undertaken by the Constitution of Kenya Review Commission (CKRC). Although the list developed was extensive, the Commission recommended an open-ended approach that to allow self-identification by the communities themselves. This approach was designed to allow for a framework that would not exclude any community as well as accommodate future development. It also enabled every community to define itself on its own terms.

This last point is important, given that many Kenyan communities have been defined and labelled by others, including colonialists, anthropologists, missionaries and government agents. Their choice of terminology was not always complimentary or accurate. For example, the Kenyan government labelled the Dasnaach community “Shangila”, a corruption of the word *jangili* which in Kiswahili means rebel or highway robber. Colonial forces labelled the Elwana community “Malakote” to imply they were vagabonds. These naming practices underscore the importance of the International Labour Organisation (ILO) approach to self-identification by indigenous peoples.<sup>12</sup> Early expectations that a cultural commission would be included in the 2010 constitution to undertake this important process were not met. The constitutional provisions for culture were watered down between the Bomas constitution conference in 2004 and the consensus building efforts of the more recent Committee of Experts with the result that Kenya now has no institutional framework for implementing the constitution’s culture-related provisions. That such a framework should be developed is vital.

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<sup>12</sup> See Article 1 of ILO Convention No. 169: Indigenous and Tribal People’s Convention, 1989, at: <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>.

One of the common challenges facing all the communities mentioned here, and others like them, is the lack of title to land they call home. This problem is further complicated by the close linking of territory to ethnicity. A number of the so-called large groups bordering these communities have either appropriated their land or created myths about their claim to the land, thus enabling them to encroach on what remains. These communities often face eviction because they are not able to demonstrate title. They may also face eviction before they are able to make their claims using the process outlined in the 2010 constitution. Other interested parties are busy laying facts on the ground that will make reversing the status quo very difficult or almost impossible.

To make matters worse, migration patterns and government allocations do not favour these communities in the competition for limited resources in general and for land-based resources in particular. A case in point is the speculative land grab underway in relation to lands identified for development in the Kenya Vision 2030 blueprint. Communities on both the coast, (particularly Lamu) and in northern Kenya (Isiolo, for example) complain that “well-connected people” are being given title to ancestral land that the Vision has earmarked for development. The communities contend that these lands fall within the meaning of community land as defined by the constitution and fear their rights to them will be undermined.

#### *The constitution and marginalised communities*

How marginalised communities are accommodated in Kenya will depend on the viability of the 2010 constitution and its vision for a pluralistic Kenya. Many marginalised communities supported the new constitution, viewing it as a liberation instrument and as a mechanism for resolving the historical injustices that they have had to endure, including their claims on land. They may use the National Land Commission established by the constitution to seek redress, although in practice the legislation implementing the constitution is unlikely to be sympathetic to their entitlements.

Another major issue is how well marginalised communities will be accommodated in appointive, elective and other representative positions established by the constitution in both national and county governing structures. If the filling of state organs, constitutional offices and other positions already completed under the 2010 constitution is any indication, then the struggles of these communities are just beginning.

The 2010 constitution outlaws group discrimination including on account of “race...ethnic or social origin” (Art. 27) and envisages that the state would take legislative and other measures, including affirmative action to redress such historical circumstances. These constitutional principles require an operational infrastructure in legislation and policy; however, this work has not been prioritized by the implementation process.

One area that offers great potential to transform the lives of marginalised communities is the establishment of the devolved system of government, which gives these communities an opportunity to participate politically at both national and county levels. The county level offers opportunities for enhancing their status. Indeed, how county governance is constructed and performs its functions may determine the future of our nation as the proper implementation of the devolved system of government is a necessary ingredient for building a nation that appreciates diversity and can perpetuate a pluralistic state. This great potential could also become Kenya’s Achilles heel or tragic flaw because of questions of ethnicity and identity.

The continued linking of territory to ethnicity will likely continue to serve as a possible flash point for future conflicts, especially since the 2010 constitution retains the first-past-the-post electoral system and the devolved system of government has divided counties mainly using old colonial arithmetic. More than three-quarters of the counties retain their colonial ethnic makeup. With the exception of towns, the other major transfer of population in post-independence Kenya followed the same ethnic considerations, with the creation of new fault lines and spheres of contestation in such places as Uasin Gishu, Trans Nzoia and Lamu. Thus, one of the key tests of the devolved system will be the extent to which it is able to address historic marginalisation while at the same time building plural communities that do not give rise to further or new forms of marginalization.

### **Constituting the territory of Kenya**

The third thematic area of this paper concerns the manner in which Kenya’s territory was configured or brought together. The process leading to the adoption of the independence constitution allowed for the amalgamation of three distinct entities: the Kenya colony, the Northern Frontier Districts (NFD) and the Kenya protectorate (essentially the coastal strip). These three distinct regions had separate histories and were administered differently by the colonial regime.

The NFD, for the most part, was a closed region that had little contact with the other two regions. The British had a different approach to

the protectorate partly due to its international obligations and partly because of the area's strategic importance. As a result, the protectorate enjoyed a measure of self-rule, including the recognition of local institutions especially in the Muslim community. For example, the British permitted the Muslim community to use Kadhi's courts to resolve matters of personal law and status and the offices of the Liwali, Mudiri and Amiri for administration. Nor did the protectorate suffer the levels of subjugation and oppression witnessed in Kenya colony.

The differences of the three colonial entities were accommodated to some extent in negotiations leading to Kenya's independence. The independence constitution featured various safeguards that, over time, might have served as building blocks to accommodate all three, drawing them into a nation that would have allowed pluralism to flourish. The dismantling of these constitutional safeguards by the Kenyan government created distrust and alienation, making any meaningful nation-building project difficult.

In practice, this reality forms the core of Kenya's crisis of nationhood. The three colonial entities that formed Kenya have each experienced very different fortunes since independence. In general, the colony has fared better than the NFD and the former protectorate. The NFD has remained a closed region assailed by the further complications of the so-called "Shifita" war and the consequent gross human rights violations and insecurity that continue today. The NFD consists of mainly pastoralist communities, with Somalis as the largest community. The divisive legacy of colonialism scattered the larger Somali community into four different countries: Somalia, Djibouti, Kenya, and Ethiopia. The close familial ties, language and common faith obviously gave rise to aspirations of reunion during the decolonization process. Furthermore, fear of marginalisation in Ethiopia and Kenya, where the community has become a minority, gave impetus to the quest for self-determination.

Resistance by the local community led to open warfare. Oral accounts of local communities tell of crimes against humanity perpetrated against the local community such as mass murder, rape, torture, confiscation and/or destruction of property, forcible evictions, poisoning of wells and making towns inhabitable, mass arrests, detention without trials, summary prosecutions, judgments as well as executions, desecration and destruction of places of worship, and the removal or repatriation to Somalia of whole populations forced at gunpoint to cross the Somali border with just the clothes on their back. The government established villages to confine the Somali people. The fact that these confinement villages followed colonial patterns has not been lost on commentators. At the end of the prosecution of the war, the majority of citizens in North Eastern province had been uprooted from their homes. The

internally displaced persons (IDPs) were not confined to that region, but included citizens from the Tana River and Lamu districts. To date, many IDPs from that war have not returned home. Many of them were faced with the choice of starting their lives as refugees in neighbouring districts or even outside of Kenya. The Bajuni IDPs found temporary solace among the Swahili community in Lamu, on the Kenyan coast, while some migrated to Tanzania as political refugees.<sup>13</sup>

In 1969, the government introduced a bill in Parliament to provide government officials, and any other person who thought they were acting on behalf of the government, with impunity from criminal and civil prosecution. Questions about the legality of the bill – that it was being enacted retroactively and that it contravened both the letter and spirit of the independence constitution – were ignored. The rushed bill was enacted in a palpable atmosphere of fear and intimidation. It was insinuated openly that anyone who dared oppose the bill was a traitor. The passage and persistence of the Indemnity Act by the Kenyan Parliament in 1969 raises four important points.

- First, there was general consensus that the emergency periods during the colonial and the independence periods were similar, but now members of the parliament of an independent nation were justifying the use of discredited colonial tactics that offended not only the independence constitution but the aspirations that inspired Kenyans to wage an armed struggle against colonialism.
- Second, a number of members of Parliament reasoned that if those involved in the Mau Mau struggle and those who suffered under the colonial emergency were not compensated then those who suffered in the “shifita” war should also not be entitled to pursue justice.
- Third, a number of members of Parliament made a spirited effort to apply the official government policy of “forgive and forget” to the case of northern Kenya just as it was applied to the colonial government.
- Fourth, only a few members of Parliament were willing to defend the constitution and the rights of Kenyans.

Those who wanted to retain the nature of the colonial state won that day. Despite the warnings given that day, impunity was emboldened

<sup>13</sup> This is based on information gathered during the constitution review process through CKRC and work undertaken by Uraia (national civic education programme) and CEDMAC (Consortia for the Empowerment and Development of Marginalised Communities) as part of the efforts to introduce a bill to repeal the Indemnity Act.

(but the prediction that the chickens will come home to roost did come to pass with the 2007 post-election violence). In 2001, a number of North Eastern Province members of Parliament forged a coalition of likeminded MPs to introduce a repeal bill. This time the debate was held in an expanded democratic space and the atmosphere was less poisoned, allowing MPs to express themselves freely. More details of alleged atrocities were read into the record of Parliament. Some MPs highlighted other crimes and massacres that occurred outside the time frame covered by the Indemnity Act. The mover of the motion, Adnan Keynan, venturing into taboo areas, even named Mzee Jomo Kenyatta as one of the people responsible for the crimes in the North Eastern Province and demanded that he be tried posthumously. His boldness broke new ground in facing difficult memories in public. The 2001 debate signalled that the old approach would not work any more. The memories of survivors and victims would not fade away.<sup>14</sup>

When the NARC government came to power in 2003 and Kiraitu Murungi was appointed Minister of Justice and Constitutional Affairs, he had the opportunity to implement his promise to remove the Indemnity Act from Kenya's statutes. He chose not to act throughout his whole five-year term. In 2010, members of Parliament from North Eastern Province, led by Affey Mohamed and working with civil society members, revived earlier efforts to repeal the Act. Finally, the law that symbolized the culture of impunity in Kenya was struck down by the National Assembly on 14 April 2010. However, on 26 August, the day before the promulgation of the 2010 constitution, President Mwai Kibaki declined to sign the bill. Instead he proposed a minor amendment to allow citizens from the affected districts to testify before the Truth, Justice and Reconciliation Commission (TJRC). Although the Indemnity Act remains part of our laws today, a civil society initiative led by Consortia for the Empowerment and Development of Marginalized Communities (CEDMAC) is now seeking to have it declared unconstitutional.

The issue of the former Northern Frontier Districts and other affected districts such as Lamu and Tana River raises a number of questions critical to building a new Kenya. Can we build the ethos of one indivisible nation without confronting the injustices of the past? What will it take to make this region feel at peace with itself as well as part of Kenya? What is the best way to address the injustices of the past?

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<sup>14</sup> For some more on this topic, particularly from the speech of Kiraitu Murungi, see the Appendix to this Chapter.

Will the work of the current TJRC be adequate to start the healing process?<sup>15</sup>

The answers to some of these questions and the policies developed to deal with them will shape how the 2010 constitution fares in the short and medium term.

The former protectorate region (and the coast region in general) has also faced serious challenges in its relations with Nairobi. Among the local community there is an acute sense of alienation. Local communities feel completely disconnected from the government. They trace their problems to unfair outcomes from the decolonization process. They believe colonial marginalization and injustices were not addressed and these have been exacerbated by post- independence marginalization and injustices. The record of public hearings of the Constitution of Kenya Review Commission, chaired by Yash Pal Ghai, and the subsequent consultative forums of the Committee of Experts on the constitution review chaired by Nzamba Kitonga, lay bare how widespread these sentiments are throughout the coast region.

The establishment of the Mombasa Republican Council (MRC), which has openly campaigned for the secession of the coast region, has upped the ante. The government has responded in the usual fashion by banning the group, characterizing it as a criminal organization – despite MRC's commitment to peaceful and constitutional means. The MRC has indicated its intention to challenge the constitutionality of the independence agreement that fused the former protectorate with Kenya colony. Contending that the original terms of the union were not honoured, the MRC seeks separation. Meanwhile, the government has refused to negotiate with MRC over numerous complaints of discrimination, land grabbing, and other forms of victimisation.

Both the northern and coast regions have engaged with the idea of separation since colonial times when each had, a distinct status. The colonial concept that communities in these two regions are distinct was consolidated after independence. With no policies for their integration the new Kenyan state treated both regions as satellites. The underdevelopment of these regions is explained by stereotypes that paint the inhabitants as lazy and anti-development and by the lack of adequate resources. But until this aspect of Kenya's past is addressed

<sup>15</sup> The TJRC in Kenya has faced various challenges from its inception. Chief among them was the appointment by the president of a chairperson who was alleged to have actively participated in gross human rights violations in the same northern Kenya region. One of its Newsletters relates the submissions of people about the North East during the "Shifta" period: <http://www.tjrkenya.org/images/documents/NEP-pullout-22.pdf>. [Eds.: the Commission has reported, see [http://www.tjrkenya.org/index.php?option=com\\_content&view=article&id=573&Itemid=238](http://www.tjrkenya.org/index.php?option=com_content&view=article&id=573&Itemid=238).

comprehensively, current efforts to build a united nation will continue to face daunting challenges. Any new efforts to integrate these two entities with the former Kenya colony territory must be based on the principles of inclusiveness and pluralism established by the 2010 constitution. Kenya's Vision 2030 could offer such a bridge, but only if the vision reflects the terms of the constitution.<sup>16</sup>

The 2010 constitution may represent Kenya's last opportunity to establish a progressive nation state. Our nation has come full circle since the first search for statehood that culminated in the 1963 constitution. That constitutional framework was circumvented by forces unwilling and perhaps unable to unravel the colonial state. Those entrusted with state power after the first participatory election connived with those individuals and groups who had entrenched interests in perpetuating the status quo. Thus, Kenya has come back to the beginning. Once again we are facing the challenge of implementing another constitution just as we were in 1963. But the stakes are much higher now. If we botch this chance to build a progressive nation state we may not get another. The concluding section below discusses some of the critical actions needed now to secure the wellbeing of the nation.

## The Future

At least three paths – each with real implications for the future – are open to Kenya in the next 24 months. Kenya can continue on a democratic trajectory; it can reverse its recent democratic gains; or it can sink into a state of paralysis.

The path of democratic trajectory would see the constitution implemented with fidelity and foresight. The path of reversals would be marked by the continued dominance of the beneficiaries of the old oppressive system. The state of limbo and paralysis would signify the interaction of opposing forces with no clear winner. Such a situation would be marked by implementation of the constitution through subterfuge, by the resurgence of those responsible for bad governance and corruption, by citizen fatigue and alienation as reform and meaningful change in their lives is delayed, and by a failure to come to terms with the complexity of constitution-building process. The outcome of the second and third paths is most likely a failed state. What can Kenyans do to ensure the country follows the first path? First and foremost, we need to address the three challenges

<sup>16</sup> "The Kenya Vision 2030 is the national long-term development blue-print that aims to transform Kenya into a newly industrialising, middle-income county providing a high standard of life to all its citizens by 2030 in a clean and secure environment" see <http://www.vision2030.go.ke>.

discussed here, namely the impact of memory and memorialization, the conceptualizations of ethnicity and identity, and the legacy of Kenya's historic configuration as a nation-state.

To address these challenges fully the mandate of the Truth, Justice and Reconciliation Commission requires expansion. The experience of other jurisdictions shows that an institutional framework that enables the truth commission to pursue justice for survivors and victims of past injustices is essential. Such a framework would include a regime of reparations, prosecution and accountability of perpetrators; continued care and treatment for survivors and victims and their families; reconciliation and peace-building among and between communities; and research and documentation of experiences and stories of affected individuals and communities.

For memorialization it will be necessary to address five critical issues.

First, how to allow for dialogue and resolution over contested memory, history, and historical sites and/or places of memory.

Second, it will be important to address the question of ownership and/or visitation and the related rights of communities to historical spaces. This point requires a framework for establishing and processing claims, including competing or contested claims. It is also essential to negotiate how those sites, where the state has an interest, are managed. This is particularly vital given that such sites are often not just physical spaces, but can also hold spiritual and psychological meaning (for example, where faith communities face the ruin of an ancient church or mosque), and require sensitive handling. In the case of the Kenyan coastal faith communities, for instance, the Catholic Church might become involved in the management of the Vasco da Gama chapel in Malindi and the Muslim community with the Gede ruins.

Third, the country should have policy guidelines to deal with shared national spaces for collective memorialization. These guidelines would cover already existing national spaces such as Uhuru Park, Kamukunji grounds, and Bomas of Kenya that are associated by the Kenyan nation with various memories. But the challenge of how to nurture, harvest and develop them as our joint heritage remains. The guidelines would also establish objective criteria to identify and develop other places of memory.<sup>17</sup>

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<sup>17</sup> The needs assessment undertaken by the International Coalition of Sites of Conscience would be a good starting point: From Nyayo House to Godown Center: A Needs Assessment of Memorialization Initiatives in Kenya <http://www.sitesofconscience.org/>.

Fourth, it will be important to address the questions of research and education and their relationship to collective memory and memorialization, especially through the teaching and treatment of history in state institutions. Under the new constitution, with its provisions against hate speech and ethnic incitement (Art. 33), it will no longer be easy to peddle false history any more. Official school curriculum will need to be accurate; where there is a contested history, the curriculum will need to acknowledge this contestation.

Five, the state needs to adopt a framework to promote research and research capacity to understand our past. A large amount of evidence about our past resides in documents written in Arabic, Kiswahili or Portuguese. Such records can be found in the Arabian Peninsula as well as in East Africa. The State of Oman, in particular, will hold a treasure of both official and non-official records. Access to the Portuguese records is also essential to fill the gaps of memory in our nation's history.

In conclusion, to address the issue of conceptualizing ethnicity and identity, we need to inculcate the ethos of the constitution – namely respect for and pride in our ethnic, cultural and religious diversity; commitment to the equal protection of the law for all groups and communities; and the promotion of the languages and cultural heritage of all Kenyans.

### **Appendix**

#### **More on the Indemnity Act (see pp. 36-37)**

Contributing in support of the government motion for the Bill in 1969, Mr. Morara said:

Mr. Deputy Speaker, Sir, as I see that this Bill, simple as it looks, if we reject it then we are going to encourage those who fought for independence of this country also to claim compensation. While I sympathize with the Members who are opposing this Bill, I still feel that Mzee's call for it to be considered by-gones should be taken into account. Let us forget the past. If this is the question, since those who fought for independence in 1952 up to 1956 and onwards were asked to forget the past, then I am asking the members in our republic in the northern part and north eastern part also to forget the past.

This mentality was based on Mzee Kenyatta's approach of selective amnesia as the process of coming to terms with the past.

We look at the first efforts to use the parliamentary process to repeal the Indemnity Act after the democratic space had been relatively expanded. A number of North Eastern Province members of parliament built a coalition of likeminded MPs to introduce a repeal bill in 2001. Here we only quote extensively the contribution of Mr. Kiraitu Murungi when some members of parliament tried for the first time to repeal this Act. Mr. Murungi said the following when called upon to second the private member's motion that was proposed by Mr. Keynan Adan on July the 25<sup>th</sup> 2001, as recorded in *Hansard*, -

Thank you, Mr. Temporary Speaker, Sir. It gives me great pleasure to second this Motion. The Motion calls upon the Government to repeal the Indemnity Act, Cap. 44 of the Laws of Kenya, so as to enable the people of northern Kenya, especially the Borana and Somali community, to claim damages and compensation for all crimes committed against humanity by agents of this government. To them, this was between the 25<sup>th</sup> of December, 1963 and December, 1967, or during the so called "Shifta war". The KANU government has treated the people of northern Kenya as permanent enemies. I would like to promise these people that as the shadow Attorney-General, if this government does not repeal this law now, it will be my first task and duty to repeal it when our government comes to power.

(Applause)

This Act came into force on 5<sup>th</sup> June, 1970, immediately after the Arusha Accord. Section 3 of the Act makes quite clear the intentions of the Act to bar any claim for compensation and to protect criminals who committed various atrocities against the people of northern Kenya. It protects any act which was committed or purported to have been committed by the public officers or members of the armed forces in the interest of public safety or order. This law should be repealed now because it offends the police force, morality and justice. Secondly, this law is repugnant to the Constitution. Thirdly, this law violates the basic concept of international humanitarian laws and the laws of war as set out in the Geneva Convention.

As far as the Constitution is concerned, this Act is intended to make it impossible for people whose fundamental human rights have been violated from seeking compensation from our courts. All the soldiers and public officers who killed, tortured, raped women and killed children in northern Kenya are intended to go unpunished. The people whose properties

were destroyed are also supposed to go without compensation. Section 74 of the Constitution provides:

“No person shall be subjected to torture or inhuman or degrading treatment.”

In an interpretation of this article see the case of *Charles Young Okan against the Republic* [1963], in which the court clearly stated that there can be no exception to the protection against torture, inhuman or cruel punishment. It said that even in times of war, excuses of public safety cannot be used to subject people to indignity. So, this law in so far as it seeks to remove the protection against torture, is inconsistent with section 74 of the Constitution. Section 84 of the Constitution also provides that any person whose fundamental rights have been violated has access to the High Court to seek redress for the violation of his or her rights. Cap 41 of the Indemnity Act makes it impossible for people from northern Kenya, whose rights have been violated to exercise their rights under Section 84 of the Constitution.

Mr. Temporary Speaker, Sir, it is obvious that under Section 84 of the Constitution of Kenya, any law that is inconsistent or repugnant with the Constitution of Kenya is void to the extent of the repugnancy or inconsistency. The Indemnity Act, Cap. 41, is now null and void to the extent that it violates Sections 74 and 84 of the Constitution. This law is unconstitutional and cannot stand. Even if this Parliament were to repeal it, the people of northern Kenya can challenge it in court. The court can declare it unconstitutional.

Mr. Temporary Speaker, Sir, we are also saying the law is contrary to the laws of war as set out in the Geneva Conventions Act, which has been made part our law by the Geneva Conventions Act, Cap. 198 of the Laws of Kenya. Section 3 of the Geneva Convention's Act, Cap. 198, provides that any person, whatever his nationality, who, whether within or outside Kenya commits a grave breach of the Geneva Convention Act is guilty of an offence and liable to imprisonment for life. The Convention are set out in the Schedule, and Article 3 of the Schedule states:

In case of an armed conflict not of an international character (and here we are talking about internal wars, like the Shifta war) as a minimum, non-combatants

(that is people who are not taking active part in the war) shall be treated humanely without any distinction founded on race, colour, religion, sex and so forth.

Article 50 of Schedule I always prohibits wanton killings, torture, inhuman treatment or extensive wanton destruction of property not justified by military necessity. We are saying that much of the atrocities committed against the Borana and Somali communities in the shifta war were not justified by military necessity. A case in point is: How is raping a woman justified by military necessity? Instead of the soldier fighting the enemies, he is busy raping women in the villages. So, the Indemnity Act, Cap. 44, in so far as it covers up these criminals who have committed crimes which are not justified by military necessity is contrary to the Geneva Conventions Act, Cap. 198. Because this is part of the international humanitarian law which we have incorporated in the laws, any law which is against it is inconsistent with the basic principles of the laws of war. Those who committed those breaches of the laws of war should be tried by the military tribunals and the ordinary courts of this country.

Finally, Mr. Temporary Deputy Speaker, Sir, this law is contrary to the basic principles of humanity and morality. When Jesus Christ was born, King Herod passed a law that all the first-born sons must be killed. If such a law was passed in Kenya today, it would be unconstitutional and illegal because it offends public policy and the basic principles of morality. We cannot support a law for wanton killing of human beings. The Indemnity Act is a law, like King Herod's law, which justifies the killing of first-born sons among the Somali and Borana communities. It is a law which gives immunity to the people who have committed those crimes against the people of northern Kenya must be brought to book. We are not asking for too much, we are asking for justice. You cannot talk about justice in abstract. Kenya is not made of big places. Kenya is every small village in this country and we have to look at the injustices at the village level. We are to look at the injustices in the *manyattas* among the Somali and the Borana communities. Let us find out what compensation can be done. With those few remarks, I beg to second.

Mr. Murungi was at the time a member of the opposition and the shadow Attorney-General. Their attempt to right this historical wrong was defeated and the motion did not succeed at this time.

It is important to note, given the debate was held in an expanded democratic space, the atmosphere was less poisoned and allowed MPs to freely express themselves. More details of alleged atrocities were put on record in parliament. Their contributions also touched on other crimes and massacres that took place outside the time frame covered by the Indemnity Act. The mover said as part of moving the motion:

Mr. Temporary Deputy Speaker, Sir, in the world today, everybody must be accountable for his actions. This is why we are demanding that the likes of the late Mzee Kenyatta be tried posthumously because they committed a lot of crimes against the residents of North Eastern.

Such breach of taboo broke new ground in facing difficult memories in public. The old approach will not work any more. The deliberations clearly showed the memories of survivors and victims will not fade away.

But, as explained in the text of the Chapter, the Indemnity Act remains as part of our laws today.



# 3

## PLURALISM, ETHNICITY AND GOVERNANCE IN KENYA

*Karuti Kanyinga*

### **Introduction**

The subject of pluralism, governance, and the practice of politics in Africa has received significant attention for a long while. In particular, the subject of ethnic diversity, which on its own is an important manifestation of socio-political pluralism, has continued to dominate academic and policy debates since the early 1990s, when many states in Africa opened up the hitherto closed economic and political arena. The opening up of the economies to the markets led to liberalisation of economies and subsequent proliferation of new non-state forces in the economic space that the state had dominated. Alongside this development was an equally significant development in the political arena: there was resurgence of multiparty political arrangements characterised by the opening of the political sphere to multiparty politics and diverse interests.

Africa's diverse ethnic groups came to play an important role in this development. In some countries, political parties formed along ethnic and sometimes religious lines, thereby causing major political divisions. Different identities comingled to either deepen divisions or to accelerate the demands for change. In yet other countries, there was tolerance and recognition of pluralism as an important value central to commonwealth. Plural identities became important for establishing stable foundations on which to launch democratisation of the society. Diversity in this sense provided the opportunity for participation of citizens in furthering the democratisation of the society. Demands for fairness, respect and tolerance for others, and demands for respect and promotion of rights and equality of all citizens characterised the new movements that sought to compel the state to firmly anchor and protect socio-political pluralism.

The focus on the state was not without a reason. Africa's post-colonial states had without exception become the site of inter-group struggles, which in turn contracted the space for political pluralism through conflicts emanating from inter-linkages between ethnicity, class and power. Indeed many studies have pointed out that state power was and remains the main source of accumulation of wealth. State power is acquired through and maintained by mobilising numeric support from ethnic groups that are politically important and strategic. Thus, numeric strength of an ethnic group, and its economic influence comparative to other groups, are important factors in power politics. This interrelationship between power and ethnicity and political conflicts arising from how ethnicity influences distribution of power is one subject that much has been written about (Mafeje, 1971, 1997; Horowitz, 1985; Jackson and Roseberg, 1985; Nnoli 1989).

This paper discusses the significance of ethnicity in Kenya's governance. It is about how ethnic pluralism or diversity is appropriated in the practice of governance and what this practice implies for the stability of the society. The discussion notes in particular that the practice of governance, by exploiting ethnic differences, contributed to Kenya's post-2007 election violence, which threatened the existence of Kenya as a nation-state. The conflict displaced over half a million people and left over one thousand dead. The conflict itself was the result of competition over control of state power by a small group of elites using their ethnic constituencies to outcompete one another. International mediation persuaded the two parties in the conflict, the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) to form a Coalition government to undertake far-reaching reforms, including revisions of the constitution and addressing factors underpinning the conflict, such as ethnic inequalities and imbalances in regional development. The political settlement that ended the violence produced a new constitution and established several institutions to check state power. But the settlement continues to experience several contradictions. The question of post-2007 election violence has remained unanswered. Although a few lower level perpetrators have been prosecuted, five years on, senior, middle and many lower level perpetrators are yet to be successfully prosecuted. Because of this failure, the International Criminal Court (ICC) identified several influential ethnic elites for prosecution for crimes against humanity committed during the violence. Ironically, two of those indicted by the ICC exploited the numeric strength of their hitherto warring communities to form an alliance to win the March 2013 general election. They won and formed a new government in spite of the ICC cases.

This discussion shows how ethnicity is used to undermine political pluralism or respect for political diversity in Kenya and how, in turn, divisions emanating from the use of ethnicity affect governance. The discussion notes that ethnicity critically influences politics of representation and that the elites use ethnicity to acquire and maintain state power. The discussion also recognises that ethnicity (i.e., the consciousness of belonging to a community as opposed to other communities) is often about mobilising common values for common good. It is a public good for promoting commonwealth. For instance, communities have a tradition of self-help in which they join together to help those in need. *Harambee*<sup>18</sup> in Kenya is a good example of self-help initiatives. People sharing ethnic identities pool their resources to provide basic services and respond to local development challenges. Of course, with time, political elites weakened the moral basis of *Harambee* through political patronage. *Harambee* projects became state projects. This disconnected *Harambee* projects from the citizenry.

It is observed here that ethnicity is used to advance the interests of a few; elites mobilise ethnic groups to access and maintain political power. The electoral system of first-past-the-post through which elites accede to elective posts, is largely responsible for this. Elites mobilise numbers to outcompete one another but the groups they mobilise are of equal size and therefore there is no group that is large enough to control others. Nonetheless, there are at least five numerically large groups that constitute the majority while the rest are numerically a minority. This structure of ethnicity implies continued interest in mobilising numbers so as to access and control state power. However, once in office, elites fail to account even to their ethnic constituencies. Self-interest dominates desires to promote the public good. Even though some may distribute benefits to their regions, this is done in order to maintain control of regional groups. The implications of this for governance are clear: leaders lack accountability and ignore the rule of law. This results in increased conflict and a deepening of divisions and further social fragmentation. These are some of the issues covered in this discussion.

### Understanding Ethnicity

As mentioned above, ethnicity is a common consciousness of being a member of one ethnic group as opposed to other groups. It concerns using that 'ethnic identity' to exclude or even outbid others; it is a belief in and practice of exclusion of other groups that do not share

<sup>18</sup> *Harambee* is a form of fundraising drive among a community for a specific purpose, which is now, as Zein Abubakar observes in the previous chapter, often used in connection with politics: raising money for politics, or politicians giving money for political advantage.

common ancestry, language, and culture or even territory. But this does not mean a multi-ethnic setting is a sufficient and necessary condition for giving rise to ethnicity. For ethnicity to concretise, as argued by Samuel Egwu (1998), “there must be deliberate mobilisation and use of ethnic criteria to foster and advance the cause of individuals and groups at the expense of other individuals and groups”. This is a phenomenon that John Lonsdale (1994) describes as “political tribalism” or the use of ethnic identity in competition with other groups.<sup>19</sup>

Ethnicity manifests itself in competitive situations and especially over scarce resources and political power. Ethnic consciousness and solidarity intensifies when resources are scarce and inadequate. Ethnic elites tend to accentuate this competition: those in positions of power profile ethnicity through use of their positions to influence distribution and allocation of public resources towards their regions and ethnic constituencies. Public positions are used as conduits for state resources to regions where the elite come from. Allocations and distribution of resources is also done in favour of politically powerful groups and in line with the share of power in the hands of their own elite. Groups that have politically powerful elites outbid others in this competition because they are the gatekeepers at the centre of power. They use ethnic criteria to lock others out.

But why do ethnic elites do this? They have expectations. They expect their groups to provide coherent and consistent political support. They expect their communities to provide them with solid political support during elections or even during intra-elite competitions at the national level. The local communities thus are expected to perform the role of defence for their senior politicians without whom the communities are made to believe that they would not get development benefits.<sup>20</sup>

It is noteworthy that the fear of exclusion based on ethnic criteria creates conditions for cooperation between elites from different groups. Those excluded begin to mobilise their own constituencies to constitute solid groupings as a bargain for entering into cooperation with those at the centre of power. Inter-group divisions, such as sub-ethnic identities, become the main basis for such mobilisation, especially when it is difficult for the excluded elites to mobilise their

<sup>19</sup> Lonsdale (1994) distinguishes this from “moral tribalism”, which he describes as an internal standard of civic virtue against which we measure our personal esteem. Moral ethnicity is an actualisation of citizenship and obligations of citizens to one another. Every member of the community is obligated to support another member of the group irrespective of whether they know each other.

<sup>20</sup> State development services were used in the past to justify elite mobilisation of ethnic constituencies. Declining capacity of the state to deliver development in recent years has made it even easier for the elites to justify their relations with ethnic constituencies.

ethnic groups in entirety. They turn to their subgroups, which they transform into tools for bargaining. They are then accepted and/or incorporated into the groups in power so as to form a coalition. Ethno-political coalitions have generally evolved based on fears of exclusions and strategies to outbid others using ethnic criteria. Because such coalitions are based on fears of exclusion, they become situational. They do not have fixed identities. Their identity remains fluid, dynamic and changes in line with the main political events at the centre of power. For instance, entry of a rival group into the coalition would lead to the withdrawal the incumbent group unless both of their interests are equally promoted and protected. However, this is usually difficult in ethnic-based competitive politics.

This discussion underlines that ethnicity is about concrete representation of group interests in relation to other groups. As argued by Mafeje (1997), ethnicity is not merely an abstract concept; it is an ideologically-loaded concept that has no independent existence of its own. It is always driven by other factors and in particular by elite competition over political and economic power using the state framework. On its own, ethnicity is dormant; it requires external factors to make it active. Those external factors include competition over political power both at the local and national levels, as well as competition over scarce resources. In other words, ethnicity does not occur simply because of differences in identities and divisions based on language and culture; its emergence and expression relates more with competition over resources, and is associated with ethnic elites.

O. Kwadiba Nnoli (1989) notes that ethnicity exists in a polity in which there is a variety of competing ethnic groups and interests. But first, as noted already, ethnic pluralism is not a sufficient condition for ethnicity to manifest itself; there must be mobilisation and politicisation of ethnic identities. Second, ethnicity has exclusiveness as an important characteristic; it is built on the basis of excluding those who do not share the same identity with "us." Third, ethnicity manifests itself in situations of competition for resources, which are scarce relative to interests around them. Finally, ethnicity is about consciousness of belonging to a group that has a common ancestry, culture, language and territory. This consciousness builds an identity that distinguishes groups from one another; ethnicity thus is about "we" versus "them". One is born into this identity and is classified by others on the basis of this identity. This identity is always dormant until groups or individuals begin to compete over state resources and power (Mafeje 1997; Nnoli 1998). As one writer puts it, to speak of ethnicity is to speak of inter-ethnic interactive situations characterised by suspicion, competition, and rivalry and often conflict as well

(Oyugi 1993). This implies that multi-ethnic countries have potential for ethnic conflicts if ethnicity is politicised and ethnic identities mobilised collectively to outbid each other in the struggle for political power. It also means that ethnicity is a problem for public policies when the identities are politicised and reinforced to assist competition against other groups and used to foster inequalities.

As shown above, ethnicity is also used to advance the interests of a few; elites mobilise ethnic groups to access and maintain political power. This is what Lonsdale refers to as political tribalism. The electoral system of first-past-the-post, through which elites accede to elective posts, is largely responsible for this. Elites mobilise numbers to outcompete one another. Once in office, they distribute benefits to their regions in order to maintain control of the groups. What, then, are the implications of this practice for governance?

### **Ethnicity and politics in Kenya**

Kenya comprises many ethnic groups lumped together not on basis of shared historical origins and cultural practices but on the basis of what the colonial situation desired. The actual number of these groups is difficult to obtain given the fluid nature of ethnic identities and desire by some groups to have distinct identities. Estimates from various sources show that the country has about forty groups. Some of these are further sub-divided into several sub-groups while others acquired collective ethnic identities very recently; they “developed a common name and identity only during the last few years” (Berg-Schlosser, 1992: 248). Most of these groups are not monolithic entities; they are characterised by internal sub-divisions based on differences in linguistics and dialectics. These divisions are at times reinforced to firm up a separate identity from the parent group.

Among the ethnic groups in Kenya, there is no group that is numerically large enough to dominate other groups in the public sector. There is relative equality in population shares of at least the five large groups. The largest group, the Kikuyu is about 18% of the population. Other large groups are the Luhya, Luo, Kalenjin and Kamba. The population shares of these four groups range from 11% to 14%. The five, however, account for about 65% of the country's population. Another three groups, the Kisii, Meru, Somali, and the Mijikenda account for 16% of the population. On the whole, the combined population of these eight groups is about 86% of the country's population. The remaining so-called thirty-two plus groups have about 14% and none is more than 2%. Many are less than 1%.

The absence of a single dominant group, and the near equal size of these groups, has given ethnicity increased significance in Kenya's politics. In many respects, ethnicity is the main fulcrum around which political competition in Kenya revolves. But it is important to recognise that ethnicity and its salience in politics has origins in the colonial situation. As argued by Mamdani (1996), among others, the colonial state was forged by use of force. In Kenya, as was the case in other settler economies, the colonial administration created native reserves for various ethnic groups and settled them in these reserves by force. The state did not allow interaction between groups. This alone firmed up ethnic identities. The state imposed restrictions on movement of these groups from one area to another. Consequently, the society became ethnicised. Each group undertook its own activities without reference to others. Groups became isolated.

The colonial state in Kenya also forced imbalances in regional development. The areas scheduled for settler farming and settlement attracted investments in infrastructure and provision of other basic services to induce settler interests. These areas were developed faster than the rest of the country. The native reserves and Africans were generally neglected. Those who were to benefit later from colonial development included those groups that were gradually interlinked with the colonial settler economy.

This structure of the colonial economy had an important consequence for the society. It reproduced inequalities in regional development. And given that regional boundaries are coterminous with ethnic territories these inequalities were ethnic in character. Groups in regions that were close to the areas scheduled for the colonial settler economy, notably the central region inhabited by the Kikuyu, came out of the colonial situation comparatively more developed than others. Regions and groups that were located far from areas of interest to the colonial administration were neglected. The Somali in the North Eastern Province, the Luo in Nyanza, the Luhya in the Western Province, the Miji Kenda at the Coast, among others, suffered this neglect. They were not integrated into the colonial settler economy. In fact, the colonial settler economy destroyed indigenous economies as the administration sought to restructure state society relations.

This, of course, is a simplification of an intricate process through which ethnicity was reproduced. It suffices to note that the creation of native reserves and an imbalanced approach to development of various regions had the result of sharpening ethnic identities. Groups did not have a common reference point. In fact, forming nationalist political parties during the struggle for decolonisation became difficult

because of this. That is, this mode of administration had consequences for the struggle for decolonisation because political parties formed along ethnic lines. Therefore, the struggle for independence reproduced these ethnic divisions and became the theatre on which ethnic differences and divisions were played out. These differences emanated from how the colonial government created the native reserves and the government's deliberate campaign to play one group against the other. Pejorative terms describing various groups played an important part in this regard, especially during the forming of political associations. This alone prevented the emergence of strong nationalist political groups.

There were two main parties that formed to agitate for independence. The first was the Kenya African National Union (KANU) whose membership comprised the numerically large groups, the Kikuyu and Luo. With regard to constitutional development, the party argued for provisions that would support a unitary and centralised government after independence. The other main party was the Kenya African Democratic Union (KADU). Its membership was comprised especially of numerically smaller communities such as the various Kalenjin groups, some groups among the Luhya, the Mijikenda, and the Maasai among others. These groups feared domination by the numerically large groups and therefore supported a federal form of government. They were concerned that large groups would dominate leadership and prevent them from having a voice on national matters. And given that some of these groups lived around the white highlands and their land had been expropriated for the white settler economy, the groups were anxious about how the land question would be resolved after independence. Thus they favoured a federal form of government (*majimbo* in Kiswahili) in which groups had control over matters such as land administration. The party was so vocal on this question of land that it preferred delay of independence if federalism as a form of government was not agreed upon. To hasten the pace towards independence, KANU acquiesced in these demands. KANU also won the pre-independence election and constituted the first transition government, under President Jomo Kenyatta, a Kikuyu, and Vice President Jaramogi Oginga Odinga, a Luo.

This suggests that political parties were formed on ethnic bases and interests. Political elites represented particular ethnic interests and articulated these through political parties. But it is also important to recognise that group interests were intertwined with elite interests. Electoral politics became the platform on which these were expressed. Thus elites would mobilise their communities using collective fears or hopes to form or be included in future governments. This contestation

undermined the institutional basis of political parties; they acted as the base on which elites would articulate their interests and negotiate with other elites. Because of such interests, KADU wound up in 1964 in the “public interest” and joined KANU. Its members were appointed to senior positions in government and later awarded with large tracts of land in the white highlands.

*Ethnicity during the Kenyatta regime*

The post-independence government adopted, intact, the colonial economic and political structures. No significant changes were made to the structure of governance. Ethnicity remained a central factor in the organisation of politics. Within KANU, for instance, elites disagreed on land policies. The divisions spilled over to the organisation of the party, thereby causing divisions which later took ethnic dimensions. Concerned that the party had not fulfilled its promises on land policies, among others, the Vice President, Jaramogi Oginga Odinga, broke away from the party and formed the Kenya People’s Union (KPU). The new party drew membership from his ethnic community especially. The party nonetheless had significant presence of radical elites from outside the Luo community. These included Bildad Kagia, a Kikuyu, who was also concerned about the failure of the government to fulfil its promises. From this period onwards, politics became increasingly ethnicised. Federalism itself was dismantled in the period between 1964 and 1965. The government deliberately undermined the new federal units by denying them resources to implement critical policies. This certainly meant undermining the interests of elites who represented KADU, the party most vocal about federalism. Even though most of the senior elites had crossed over to KANU and the new government, their own constituencies remained concerned about resolution of the land question and remained fearful of losing their land to the dominant groups, especially to the Kikuyu, whose numbers in the highlands continued to increase as a result of land hunger in their native reserves.

With regard to the organisation of politics, the Kenyatta administration became anxious about the new development and banned the KPU in 1969. From then on, the government did not allow the formation of political groups. Critics of the government were jailed on trumped-up charges or detained for years without trial. Without opposition politics, Parliament became the mouthpiece of those critical of government policies. And even within Parliament, critics were only found on the back benches among ordinary Members of Parliament. Again, the fear of detention or being jailed on trumped-up charges meant increased trepidation among members.

Kenyatta's administration pursued a liberal approach to economic development to prevent destabilisation of the colonial settler economy. The market economy provided a framework for accumulation of wealth, especially by those proximate to state power. Some got access to finances to buy large tracts of land from the departing settlers. Others mobilised their communities to form land buying companies through which they acquired land and other assets from the settlers. Elites from Kenyatta's ethnic community naturally benefited from this state-led framework of accumulation of wealth. One factor facilitated their access to wealth through the state. They were related by ethnicity to senior Kikuyu politicians in government. In particular, the Kikuyu were a majority in cabinet and other executive posts. As shown in table 1 below, the Kikuyu were the majority in terms of numbers in Kenyatta's government 1966 to 1978. Although the Kikuyu population was about 20% of the total population, its representatives comprised about 29% of the cabinet posts during the period.

**Table 1: The Ethnic Composition of Kenyatta's Cabinets, 1966-1978**

Ethnic group	1966		1967		1968		1970		1978	
	No.	%								
Kikuyu	6	28.57	6	28.57	8	31.57	6	28.57	6	28.57
Luhya	2	9.52	2	9.52	1	5.26	2	9.52	1	4.76
Luo	3	14.28	3	14.28	3	15.78	2	9.52	3	14.28
Kamba	1	4.76	2	9.52	2	10.52	2	9.52	2	9.52
Kisii	2	9.20	2	9.52	1	5.26	2	9.52	2	9.52
Meru	1	4.76	1	4.76	1	5.26	1	4.76	1	4.76
Miji Kenda	2	9.25	2	9.52	2	10.52	2	9.52	3	14.28
Other	3	14.28	2	9.52	1	10.52	2	9.52	2	9.52

Source: *Republic of Kenya: the Structure of the Government of Kenya, various issues.*

The Kikuyu were the majority among the Permanent Secretaries (PSs). This is an important post within the civil service because the PSs are responsible for Ministries and for executing government policies. The Kikuyu PSs numbered about 30% in 1966 and increased to about 38% in 1970 before decreasing to 24% in 1978.

**Table 2: Ethnic Composition of Kenyatta's Permanent Secretaries (PSs), 1966-1978**

Ethnic group	1966		1970		1978	
	No.	%	No.	%	No.	%
Kikuyu	7	30.4	9	37.5	5	23.8
Luhya	3	13.0	2	8.0	1	4.8
Luo	3	13.0	3	12.5	2	9.5
Kalenjin	1	4.3	2	8.3	1	4.8
Kamba	4	17.4	2	8.3	3	14.3
Kisii	1	4.3	2	8.3	0	0.0
Meru	1	4.3	2	8.3	3	14.3
Miji Kenya	2	8.7	1	4.2	2	9.5
Others	1	4.3	1	4.2	4	19.0
<b>Total</b>	<b>23</b>		<b>24</b>		<b>21</b>	

Source: *Republic of Kenya: the Structure of the Government of Kenya, various issues.*

The Kenyatta regime had other important features. The regime generally encouraged pluralisation of the society. Inclined to a liberal economic approach, the state provided for increased participation of citizens in socio-economic activities. The government supported growth of voluntary and charitable or self-welfare groups because they complemented the government's development initiatives. On the whole, there was a liberalised space for civil society engagement. In this respect, *Harambee* groups increasingly dotted the countryside. Many people formed voluntary associations to engage in provision of welfare or provision of basic services such as water through self-help water associations or even through '*harambee*' schools and other projects.

Communities contributed their resources to address locally defined needs with limited support from the government. In some instances, Members of Parliament (MPs) including Cabinet Ministers constituted the avenue through which state resources reached these projects. Ironically, the state often took over some of the successful projects, in spite of the fact that communities had invested their energies and resources to develop them. For instance, the government often took over the running of *harambee* schools on the argument that the government was relieving the community of the burden of financing the management of these schools. The immediate consequence of this takeover was that these new 'government schools' led to reduced

numbers of local students being admitted to because admission was generally competitive. This meant new responsibilities for communities; they would yet again begin another school project to absorb their own students who could not join what now became “government-aided schools”.

Although the government tolerated socio-political pluralisation, it was opposed to the formation of advocacy or political groups. The only group that played an open role in politics was the Gikuyu, Embu, Meru Association (GEMA). The association was formed as a forum to promote the welfare of the Kikuyu and allied groups, but became the main forum for articulating their political interests. The Association was so powerful that even the ruling party, KANU, appeared to be subservient to the group and its elites. Indeed, KANU itself was moribund; no political association remained in the open after the 1969 banning of KPU. KANU’s work as a political party was subsumed under the functions of provincial administrators, the public officers who represented the presidency from the national to the local grassroots. GEMA dominated these too. Other groups could not engage in political advocacy. Neither could they be critical of government. Ethnicity thus enhanced and at the same time constrained the space for civic engagement. Ethnic identity facilitated civic engagement if those doing so shared the same identity with the state elites. But it was also a source of tension between the state and elites in this respect if those involved belonged to other ethnic groups.

The space for political pluralism therefore remained restrictive with regard to political organising. The space was open with regard to economic organising. The only reason that one can advance for this increased tolerance of socio-economic pluralism was that the state would gain from development initiatives of the various groups engaged in voluntary development. Such groups were seen as complementing government development efforts and filling gaps in the state delivery of services. This endeared welfare groups to the state. They were not antithetical to the state and the governing elites.

#### *Ethnicity and the Moi regime*

Pluralism and use of ethnic identity underwent significant transformation after the regime of President Kenyatta. Kenyatta died in 1978 and a new government under then Vice President Daniel Arap Moi, a Kalenjin, took over. The single political party, KANU, was reactivated to constitute a platform on which Moi would entrench himself in politics and the society, in general. Rather than use an ethnic welfare group to advance political interests, Moi opted to revamp the political party and to appoint new elites to act as party patrons for different ethnic groups. Each community had an ethnic patron in this

respect. This had the consequence of deepening political patronage, which in effect became embedded in the society as Moi sought to entrench himself.

Importantly, Moi legalised the phenomenon of a single ruling party through practice and amendment of the law to provide for this dominance. The result of this legal transformation was obvious: the party stood in open opposition to all other groups, including the provincial administrators that Kenyatta had moulded to represent the government at the local level. The party's authority, though not backed by law, superseded legal regimes. The party could overturn decisions by various organs of the government and could punish MPs for whatever they said during parliamentary debates. This reality prevailed although the Standing Orders gave them immunity from this form of harassment and persecution.

Identifying party patrons through which Moi reached the various communities resulted in both deepening of political patronage and further ethnicisation of the society. First, Moi deconstructed the structures that owed their existence to the Kenyatta regime. The first to go in this respect was the Kikuyu numeric strength in the Cabinet and in the executive in general. Beginning with about 30% in 1979 after the first general election of his regime, nine years later, in 1987, Moi had reduced the Kikuyu presence in the Cabinet to about 14%. The paring down of the Kikuyu in government continued. Their numbers reduced drastically in the 1990s after the re-introduction of multi-party politics. Table 3 below shows this trend.

**Table 3: Ethnic Composition of Moi's Cabinets**

Ethnic Group	1979		1982		1985		1987		1994		1998		2001	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Kikuyu	8	30	7	25	5	20	4	14.2	1	14.16	1	4	1	4
Luhya	3	11	3	11	2	8	3	10.7	4	16.66	5	19	4	14
Luo	3	11	3	11	4	16	5	17.8	1	14.16	0	0	2	7
Kalenjin	3	11	3	11	3	12	2	7.1	4	16.66	6	22	5	17
Kamba	2	7.6	2	7.4	2	8	3	10.7	4	16.66	4	14.16	4	14
Kisii	2	7.6	2	7.4	1		2	7.1	2	8.3	2	7.4	2	7
Meru	1	3.8	2	7.4	1	4	1	3.5	2	8.3	1	3.7	1	3.57
Mijikenda	2	7.6	2	7.4	2	8	2	7.1	2	8.3	4	7.4	2	7
Others	2	7.6	3	11	5	20	6	21.2	4	16.66	6	22	7	25

Source: *Republic of Kenya: the Structure of the Government of Kenya, various issues.*

Moi also scaled back the influence of the Kikuyu by reducing the number of Permanent Secretaries in the government – from 30% in 1979 to 22% in 1988 and to 9% in 2001, when Moi was leaving office (see overleaf).

The results of ethnicisation of politics were not experienced in the governance of the public sector alone. The economy deteriorated; growth declined considerably. Whether in agriculture, the main stay of the economy, or tourism and manufacturing, the effects were the same: a slowed growth rate. Poverty levels increased, too. The number of people living below the poverty line increased and the state capacity to provide development declined. Both the economic and political stress points contributed to the laying of a foundation for opposition politics, because each group had grievances with the centre – and grievances with the government, in particular. It is these pressures that contributed to demands for political pluralisation or competitive politics in the form of multi-party democracy. The section that follows discusses this issue.

**Table 4: Ethnic Composition of Moi's Permanent Secretaries' Posts**

Ethnic Group	1979		1982		1985		1988		1994		1998		2001	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Kikuyu	8	29.6	9	30	7	28	7	21.9	7	10.7	3	10.7	2	8.7
Luhya	3	11.1	4	13.3	3	12	2	6.3	4	14.3	3	10.7	3	13.0
Luo	1	3.7	2	6.7	2	8	4	12.5	1	3.6	2	7.1	2	8.7
Kalenjin	3	11.1	3	10	5	20	7	21.9	7	25.0	8	28.6	8	34.8
Kamba	3	7.4	3	10	3	12	4	12.5	6	21.4	1	3.6	1	4.3
Kisii	2	7.4	1	3.3	1	4	1	3.1	1	3.6	2	7.1	1	4.3
Meru	2	11.1	3	10	2	8	1	3.1	1	3.6	2	7.1	2	8.7
Mijikenda	1	3.7	2	6.7	1	4	2	6.3	3	10.7	4	14.3	3	13.0
Others	4	14.8	3	10	4	4	4	12.5	2	7.1	3	10.7	1	4
<b>Total</b>	<b>27</b>		<b>30</b>		<b>25</b>		<b>32</b>		<b>28</b>		<b>28</b>		<b>23</b>	

Source: *Republic of Kenya: the Structure of the Government of Kenya, various issues.*

Other features of the Moi regime with regard to political pluralism included the state's tendency to stifle the space for political associations, and open distaste for groups that were critical of the government. The space for civic engagement was so constrained that the government introduced laws to regulate operations of non-governmental organisations based on the argument that they received funding from outside governments but were critical of the government or were keen to overthrow the government. The government also

infiltrated professional associations with a view to drawing their support as well as silencing them from critiquing the mode of governance. This infiltration also enabled the state to keep surveillance over civic space and to undermine the potential of these groups to further democratic governance. Groups such as the Law Society of Kenya, business groups such as the Kenyan National Chamber of Commerce, and voluntary groups such as the umbrella women's association, the Maendeleo ya Wanawake, had the state influencing their internal governance by gaining control of who they elected as their leaders.

Political pluralism that flourished in the previous decade experienced challenges that constrained further growth. The state and political elites increasingly patronised various initiatives, thereby eroding the foundation on which pluralism was based. The *Harambee* movement became increasingly weakened. Groups of politicians hijacked communities' pet projects and turned them into resources for patronage and raising political capital.

*The Moi regime, ethnicity and political pluralism*

Demands for the re-introduction of competitive politics and general liberalisation of the society began in the late 1980s. Momentum increased from the early 1990s, leading to the amendment of the constitution to allow for multi-party politics. This had an immediate consequence for political pluralism. It activated the birth of numerous political parties and advocacy groups in an unprecedented manner. It also gave rise to the formation of governance and human rights civil society groups. The state had prevented development of these groups during the one-party regime. Some had even been co-opted into the ruling party.

Ethnic politics constituted the fulcrum around which the new politics revolved. In particular, the re-introduction of multi-party politics in 1991 was followed by a national election in December 1992. One of the first political parties to be registered at the time was the Forum for Restoration of Democracy (FORD), which comprised elites from different regions. Before the election, however, leadership rivalry among the elites from the large ethnic groups led to fragmentation of the party into different factions.<sup>21</sup> Some of these registered as separate political parties. The most important of these factions were Ford-Kenya led by Oginga Odinga (Luo) and Ford-Asili led by Kenneth Matiba (Kikuyu). Both groups formed alliances with different Luhya subgroups. The ruling party, the Kenya African National Union

<sup>21</sup> The rivalry for leadership was between Kikuyu and the Luo ethnic elites.

(KANU) led by Moi also allied with other sub-groups among the Luhya. The Kikuyu had another political party – the Democratic Party (DP) led by Mwai Kibaki. This fragmentation saw KANU's candidate, President Moi, win the election with about 36% of the vote. The combined opposition lost with about 64% of the total votes.

The second multi-party elections held in December 1997 saw a repeat performance of this structure although the actors had changed. The Luhya this time had a Presidential candidate, but still the various subgroups divided their support between their own candidate and KANU's candidate, President Moi. The Kikuyu this time provided only one candidate, Mwai Kibaki of the DP. On the other hand, the Luo changed parties: they entered the elections through the National Development Party (NDP) of Raila Odinga. The result of the election was similar to the 1992 pattern: KANU won with about 40%. The result and emerging pattern again reflected the country's ethnic settlement pattern.

The question of who among the numerically large groups would provide a presidential candidate, given their almost equal strength, has constrained the building of a national coalition. This observation requires a caveat, however. Among these groups, it is only the Luo who are politically "monolithic" in that they provide united support to their presidential candidates and their political party. The Luhya have distinct sub-ethnic divisions that have historically prevented the group from providing a homogenous political support to any particular political party. In the 1992 and 1997 elections, for instance, the different ethnic subgroups voted for different political parties. In 1997, the Luhya had a presidential candidate but they did not vote as a block. Similarly, the Kamba have had divided political support: they have been straddling the Kikuyu and the "Kalenjin coalition". It was only in the 1997 elections that they had a presidential candidate. Again the support to their own was not homogenous; the voting was fragmented along geo-political zones in the area inhabited by the Kamba ethnic group.

The Kalenjin have been able to organise a solid coalition comprising numerically smaller groups such as the pastoralists, economically marginalized, and geographically isolated communities. Through President Moi, KANU won both the 1992 and the 1997 elections because of this coalition with smaller groups. Firstly, the party ensured solid support from Kalenjin and the related groups – the Maasai, Turkana and Samburu or KAMATUSA.<sup>22</sup> Like the Kalenjin, these

<sup>22</sup> KAMATUSA (Kalenjin, Maasai, Turkana, and Samburu) emerged in the late 1960s in reaction to GEMA's approach to improving on political strength.

groups share pastoralism as their main economic activity and they share the same territory – the Rift Valley region. KANU brought on board other smaller groups such as the Somali of North Eastern Province, sections of the Luhya ethnic group, and the coastal groups. These groups have a shared political history. They were the main members in KADU, a party in which Kalenjin elites had key leadership positions in the 1960s. This shared history united them against other groups in both the 1992 and the 1997 elections.

*Birth of a multi-ethnic coalition*

Neglect of a national coalition by the big groups continued until early 2002, when ethnic elites formed a broad-based coalition for the purpose of defeating KANU, Kenya's ruling party since independence in 1963. Several factors contributed to this new development. Firstly, past electoral defeats of opposition political parties had contributed to pressures for a united opposition party. KANU worried about going into an election without President Moi. In his last term in office, Moi sought an alliance in 1998 with the NDP of Raila Odinga (Luo). This cooperation resulted in the merger of the two parties a few months before the December 2003 elections. Worried about a third electoral defeat, the mainstream opposition also began to design strategies for united opposition against KANU/NDP (now New KANU). Through intense pressure from civil society and religious groups, the mainstream opposition developed a memorandum of understanding and agreed to field one Presidential candidate in the election.

No sooner had the mainstream opposition, comprising ethno-political elites from the Kikuyu, Luhya and Kamba, agreed on unity than the merger in KANU collapsed. The collapse followed President Moi's proposal to have Uhuru Kenyatta – a Kikuyu and a son of the first president of the Republic, Jomo Kenyatta – run as the presidential candidate for New KANU in the elections. Other ethnic elites in the party, including Raila Odinga, who had provided the bulk of support through a block support from Luo Nyanza, walked out of the party and formed a new alliance – the Rainbow Alliance. Together with other KANU luminaries they joined the mainstream opposition that had assembled around the National Alliance of Kenya (NAK) – a coalition of 13, comprising political parties and two pressure groups. The former New KANU leaders joined NAK to form the National Rainbow Coalition (NARC).

The motivation for the elites to join the coalition was twofold. First, the elites agreed to a new structure of power which included the positions of a President, two Vice Presidents, a Prime Minister and

two Deputy Prime Ministers. This new structure had the potential to accommodate leaders of the main ethnic groups. Elites from other politically important groups would get cabinet positions. Second, there was ethnic pressure on elites to join the coalition. Many warned against supporting the leaders who did not join the coalition to avoid an electoral defeat. Mainstream civil society groups were critical in articulating this concern.

The results of the December 2002 elections reproduced a pattern similar to that in the 1992 and the 1997 elections but this time in favour of the opposition. The NARC presidential candidate won with about 62% of the votes while KANU's candidate got about 31%. A new ethnic alliance had finally led to the defeat of KANU. It is instructive to note that President Moi opted to support a Kikuyu candidate for political and strategic reasons. First, given that the mainstream opposition had opted for Kibaki, a Kikuyu, as the Presidential candidate, the KANU elite thought it would be strategic to provide another Kikuyu candidate to split the Kikuyu vote. They presumed that the Kalenjin and related groups that had provided support to Moi would vote for his choice. Second, Moi worried other ethnic groups would vote for a Luo given the association of Luos with radical politics. Whether their alliance with the Kalenjin would hold was debatable. This worry prompted Moi to seek support for Uhuru Kenyatta from the Rift Valley and other traditional KANU areas such as the North Eastern Province and parts of Coast.

Critical here is that NARC exemplified the elites' tendency to build alliances along ethnic lines. NARC formed as a result of internal fragmentation of KANU. Those left out by Moi's decisive direction on succession politics within KANU found accommodation within the new NARC alliance. This alliance then, was not necessarily the result of ideological commitment but the result of a growing passion at that time to defeat Moi and KANU. The outcome was a conglomeration of elite interests and a parallel erosion of the reform agenda on which the alliance was initially grounded. Elites came with ethnic and individual interests which eventually overwhelmed the party, leading to further fragmentation, as argued below.

The above notwithstanding, NARC's defeat of KANU in the December 2002 general elections had significant consequences for governance. NARC campaigned on a reform platform and was keen to demonstrate a departure from the past. But how did NARC and the Kibaki administration in general approach the problem of ethnicity? How different was Kibaki from his predecessors?

*The Kibaki regime and the deepening of ethnic divisions*

President Kibaki got to office first through NARC, an alliance of political parties and pressure groups that formed ostensibly to defeat KANU in the 2002 general elections. After his first five years in office, in December 2007, he again campaigned for the presidency but this time for the Party of National Unity (PNU). The opposition, the Orange Democratic Movement (ODM), hotly disputed the result of that election. The dispute led to widespread violence across the country. The ensuing violence threatened the existence of Kenya as a nation-state until the international community constituted an African Union-led international mediation process under former UN Secretary General Kofi Annan. The mediation resulted in the formation of a Coalition Government in which both PNU and ODM shared political power including cabinet posts.

The following discussion focuses on Kibaki's first administration under NARC and then Kibaki's tenure in the Coalition Government. The first government under Kibaki showed a commitment to share cabinet posts and other positions equitably. The first cabinet had equal representation of all the numerically large groups as illustrated by table 5. The only group with relatively fewer posts than the other large groups was the Kalenjin. This was because the Kalenjin community voted overwhelmingly in favour of KANU in the 2002 elections. The number of Kalenjin votes that NARC received did not warrant equal treatment with the other numerically large groups.

Although Kibaki shared the cabinet posts equally among the numerically large groups that supported NARC, the distribution of PS posts drew protest from some members in the alliance who felt the distribution was tilted in favour of the GEMA community, the President's region. The Kikuyu and the Meru got about 37% of PS posts. The Luo, Kamba and the Kalenjin had 15% each while the Luhya had 7%. To some groups in the alliance, Kibaki and his GEMA elites had settled on dominating these posts because the PSs are critical for decision-making and implementation. They were keen to acquire and accumulate power for the regional elites and therefore promote regional interests rather than common good.

**Table 5: Ethnic composition of Kibaki's first Cabinet, 2003-2005**

<b>Ethnic Group</b>	<b>Total No.</b>	<b>Total %</b>
Kikuyu	4	16
Luhya	4	16
Luo	4	16
Kamba	3	12
Kalenjin	1	4
Kisii	0	0
Meru	2	8
Somali	0	0
Mijikenda	2	8
Taita	0	0
Pokomo	0	0
Bajun	0	0
Embu	1	4
Arab/Swahili	1	4
European	0	0
Asian	0	0
Others	0	0
<b>Total</b>	<b>25</b>	<b>100</b>

Source: *Republic of Kenya: the Structure of the Government of Kenya 2003*

**Table 6: Ethnic composition of Kibaki's Permanent Secretaries' posts, 2003-2005**

<b>Ethnic Group</b>	<b>Total</b>	<b>% Share of Total</b>
Kikuyu	6	22
Luhya	2	7
Luo	4	15
Kamba	4	15
Kalenjin	4	15
Kisii	1	4
Meru	4	15
Somali	1	4
Mijikenda	1	4
<b>Total</b>	<b>27</b>	<b>100</b>

Source: *Republic of Kenya: the Structure of the Government of Kenya, 2003*

Disagreements over distribution of power between groups resulted in the fragmentation of NARC. The Luo and Luhya groups that came from KANU were increasingly marginalised. Due to internal divisions,

it became difficult for the government to pass bills in Parliament. The government resorted to courting support from other groups including KANU in order to push its legislative agenda through the house. To solidify this new relationship with other parties, Kibaki increased the size of the cabinet and brought in other parties to constitute a “Government of National Unity”.

**Table 7: Kibaki’s cabinet after the first reshuffle, 2005**

Tribe	No	%
Kikuyu	5	17.2
Luhya	4	13.7
Luo	4	13.7
Kalenjin	3	10.3
Kamba	3	10.3
Kisii	1	3.4
Meru	2	6.8
Mijikenda	2	6.8
Somali	1	3.4
Maasai	2	6.8
Coastal Arab	1	3.4
Embu	1	3.4
<b>TOTAL</b>	<b>29</b>	<b>100.0</b>

Source: *Republic of Kenya: the Structure of the Government of Kenya 2005*

**Table 8: The Kibaki’s PS posts in Government of National Unity, 2005**

Tribe	No	%
Meru	5	17.2
Kikuyu	5	17.2
Kamba	3	10.3
Kalenjin	3	10.3
Luo	3	10.3
Somali	2	6.8
Luhya	2	6.8
Maasai	1	3.4
Coastal/Mijikenda	2	6.8
Kisii	2	6.8
Other	1	3.4
<b>TOTAL</b>	<b>29</b>	<b>100.0</b>

Source: *Republic of Kenya: the Structure of the Government of Kenya 2005*

Through this new approach, the number of Luo and Luhya in the PS posts was reduced. The number of PSs from the GEMA community also decreased marginally. This action did not heal the divisions; on the contrary, it deepened ethnic hostility and inter-communal rivalry especially between the Kikuyu and the groups that had delivered the bulk of NARC's support but which now found themselves marginalised in the government.

The divisions in NARC spilled over to the constitution-making process. The review of the constitution had begun during the last years of President Moi's tenure, but he dissolved Parliament in late 2002 before the Kenya National Constitutional Conference (KNCC or "Bomas") – the organ that was mandated to debate a draft constitution before the referendum – could conclude deliberations. After NARC came to power, the KNCC re-started the deliberations but the animosity among elites in NARC and especially between NARC's two main factions spilled over into the conference. Participants were divided into these two main factions. The President's faction pulled out of the conference but the remaining delegates continued with deliberations and adopted a draft constitution. The Kibaki faction continued efforts to undermine the review process even after this. The faction challenged the legality of that draft and the constitutional division of the High Court (presided over by a friend of the Minister of Justice who was also an applicant for the plum post of the head of the anti-corruption body) issued a judgment in its favour. With support from the Minister of Justice, an ally of the President, the Kibaki faction then revised the draft constitution without reference to KNCC delegates or even the statutory Constitution Review Commission of Kenya (CKRC). The government subjected this draft to a referendum vote in 2005 but people rejected it.

Following the failure to pass the draft constitution Kibaki dissolved the government with a view to reconstituting the cabinet. The new cabinet had only one Luo although Kibaki increased the number of Luhya representatives. To accommodate the new groups that the government needed to fight off opposition from the NARC factions, the size of the cabinet increased from 25 in 2003 to 29 in 2005 and to 33 after the referendum.

The first five years of Kibaki's NARC administration appear to have undermined the principle of equitable distribution of cabinet and other public sector posts. His own community, the Kikuyu, and allied groups comprised about 24% of his first government. The number of Kikuyu in the cabinet remained at this level throughout his first term irrespective of cabinet size. However, the composition of the PS posts favoured the

**Table 9: Kibaki's Cabinet post Referendum - 2005-2007**

Tribe	No.	%
Kikuyu	6	18.1
Luhya	7	21.2
Kamba	4	12.1
Maasai	2	6.1
Meru	2	6.1
Kisii	2	6.1
Turkana	1	3.1
Somali	2	6.1
Luo	1	3.1
Embu	1	3.1
Kalenjin	2	6.1
Mijikenda	3	9.0
<b>Total</b>	<b>33</b>	<b>100.0</b>

*Source: Republic of Kenya: the Structure of the Government of Kenya 2005*

Kikuyu. This marginalisation of other elites in NARC fed the country's growing inter-communal tensions, especially against the Kikuyu. This context constituted the main backdrop to the 2007 general election in which Kibaki campaigned with a new party, the PNU.

*Post-2007 electoral violence and the Coalition Government*

The contested outcome of the general elections held in December 2007 halted the domineering influence of the President in appointing public officers. The election occasioned a dispute between PNU, the party of the incumbent President Kibaki, and the main opposition party, the ODM, over the flawed vote count and the final result. The dispute resulted in a violent conflict in which over half a million people were displaced from their homes and over 1000 were killed. International mediation persuaded the two parties to form a Coalition Government for the purpose of undertaking far-reaching reforms, especially addressing the factors that caused the conflict.

The Coalition Government had both the PNU and ODM sharing the cabinet posts on an equal basis. Meeting this condition required increasing the size of cabinet to about 44 posts with over 50 deputies. The number of PSs was also raised to 44. These changes, however, did not affect other posts in the civil service, because PNU argued it would lead to the politicisation of key government decisions. Table 10 shows the composition of the Coalition cabinet by ethnic group and the main parties in the Coalition between 2008 and 2011.

**Table 10: Ethnic composition of the Coalition Government's Cabinet, 2008-2011**

Ethnic Group	Political party		No.	% total
	PNU	ODM		
Kikuyu	8		8	19
Luhya	3	4	7	17
Kalenjin		5	5	12
Luo		5	5	12
Kamba	2	1	3	7
Somali	2	1	3	7
Maasai		1	1	2
Kisii	1	1	2	5
Mijikenda	1	1	2	5
Taita	1		1	2
Meru	1		1	2
Arab		1	1	2
Pokot	1		1	2
Turkana	1		1	2
Embu		1	1	2
<b>TOTAL</b>	<b>21</b>	<b>21</b>	<b>42</b>	<b>100</b>

The post-election violence and the National Accord that halted the violence had an important consequence. They brought to light the factors that fuelled the violence and that have prevented national cohesion. While recognising the significance of pluralism and the need for unity in diversity, the National Accord pointed out that perceptions of exclusion and imbalances in development had contributed to the violence and, therefore, the Coalition Government, based on the principle of power sharing, would put in place reforms to address some of these challenges. Thus, at the time the Coalition government was formed, both parties acknowledged the need to adopt an “ethnic-inclusive” approach to filling their respective cabinet posts. But the regional spread of party support limited how inclusive each party could be, in terms of bringing in elites from the different ethnic groups. The absence of Kikuyu elites in the ODM meant the party would not appoint any Kikuyu to its side, although ODM did appoint one member from Embu, one of the communities in GEMA, to the cabinet. Similarly, PNU did not appoint anyone from the Luo and Kalenjin communities, which largely supported ODM. In other words, polarisation that followed the violent conflict increasingly undermined pluralism. However, unlike ODM, PNU did not make any attempt to appoint anyone from these communities. This form of representation stabilised the society. Although the Coalition lacked cohesion from the

outset, all ethnic groups were represented in the new government.

It is notable that PNU members were not keen on a Coalition government despite the fact it offered an opportunity for consociation and, therefore, for stabilizing the nation. As of 2011, both parties had become fractious factions within the Coalition. In early 2012, both parties agreed to shuffle the cabinet. The PNU, in particular, was keen to fill one post that had remained vacant following the death of a PNU minister. At the same time, the International Criminal Court (ICC) indicted another PNU Minister – the Deputy Prime Minister and Minister of Finance – for crimes against humanity during the post-2007 election violence. This charge required the Minister to step down, thereby creating another vacant post for the PNU. Although he resigned as Minister of Finance, he declined to resign as Deputy Prime Minister, citing lack of clarity of the constitutional provisions of the National Accord in respect to the removal of a Deputy Prime Minister from office. Nevertheless, in the shuffle, PNU filled the two posts, which gave it more numbers than ODM due to the continued presence of the indicted Deputy Prime Minister. This act widened the political divisions in the Coalition and made government decision-making more incoherent. The act also negated the values that the National Accord had sought to build in order to create a better condition for pluralism and respect for diversity.

In the meantime, there were a number of unintended checks that emerged in the operations of the Coalition Government. The mediation agreement required the two parties to consult in making appointments in the public sector. This alone has checked the President's appetite to reward elites from his ethnic community. Nonetheless, the President's faction of the Coalition has flouted this requirement several times, leading to open protest from the ODM section of the Coalition. Such protests have checked composition of key posts on the basis of ethnicity. But this does not mean that the ODM has not been guilty of making appointments on the basis of ethnic considerations. The party's appointments to key posts have also been criticised for being biased towards the elites from the Prime Minister's community. Table 11 highlights the ethnic composition of PS posts under the Coalition Government.

**Table 11: Ethnic Composition of PS posts under the Coalition Government**

<b>Ethnic Group</b>	<b>No</b>	<b>% total</b>
Kikuyu	11	26%
Luhya	7	16%
Somali	4	9%
Meru	4	9%
Kalenjin	4	9%
Luo	4	9%
Maasai	3	7%
Kamba	2	5%
Kisii	2	5%
Taita	1	2%
Giriama	1	2%
<b>Grand total</b>	<b>43<sup>23</sup></b>	

### **Ethnicity and the March 2013 general election**

In spite of lack of internal coherence, the Coalition government facilitated the passing of a new constitution in 2010. The constitution review itself had been on a bumpy path for about two decades because powerful elites often exploited the review process to draft provisions that favoured their positions. These would be rejected and the process would begin afresh. Nonetheless, the 2010 constitution envisages the challenges of ethnicity in Kenya's governance and therefore provides for respect of minority rights and respect for diversity in composition of governments. It also alters Kenya's electoral system in one fundamental way. It requires a winning candidate to have 50% plus one vote, and to get at least 25 per cent of votes cast in each of half of 47 new counties. This requirement is meant to ensure that the person winning the presidency has legitimacy and broad base of support and specifically support from a number of ethnic regions.

The March 2013 elections, however, produced contradictory results. Two communities, the Kikuyu and the Kalenjin, whose elites have been indicated by the ICC, formed an alliance to outcompete others. Using the numeric strength of their communities, they launched a campaign in which they would tell their constituencies that they have allied for purposes of peace or so that the two communities can live in peace. Their campaign outside their ethnic territories spelt different messages including messages of generational change, employment for

<sup>23</sup> The Office of the PM has its own PS, while the Ministry of Public Service has two permanent Secretaries, hence accounting for the extra 2 PSs.

the youth, and the importance of implementing the devolved structure of government. They presented themselves as victims of the post-2007 election violence. They observed that they had work together to transform Kenya and address all issue that had contributed to the violence. They won the election and formed a new government.<sup>24</sup> Their new government, like governments before them, comprises the Kikuyu and the Kalenjin as a majority in the cabinet. Their government is not a break from the past.

### **Conclusion**

Political pluralism in Kenya has meant increased space for political engagement. The proliferation of political parties from the early 1990s has been an important mark of pluralism. However, the practice of electoral politics has increasingly undermined the values of a plural society; rather than enhancing democratic ideals, tolerance and respect for others, political practice has fostered divisions along ethnic lines. It has caused social fragmentation of the society by deepening ethnic differences. Moreover, the exclusion of groups considered to be opposed to the incumbent president has accentuated the erosion of the values of pluralism, including respect for diversity. These divisions are the product of one important practice: Presidents invariably staff key public sector posts with elites from their own community. Also the elites from the numerically large communities appear to undermine the values of political pluralism; they are the only ones with sufficient numbers to compete against others in the majoritarian electoral system.

This discussion has shown that the electoral system of 'first-past-the-post' has tended to encourage highly divisive ethnic politics as well as foster exclusion based on ethnic criteria. It encourages the main groups to form their own parties on the assumption that it is possible to win by building alliances with smaller groups and outbidding opponents. The electoral system also encourages the formation of coalitions that are not inclusive enough. The calculation here is not based on how much one wants to include and accommodate diverse ethnic interests but how much potential to win the election a group brings into an alliance or coalition. Numbers are a minimum requirement in this calculation. Each group looks outward for a group with significant strength to assist in winning the election.

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<sup>24</sup> For some more information on the election, see Chapter 5.



## 4

ETHNICITY, NATIONHOOD AND PLURALISM:  
THE 2010 KENYA CONSTITUTION*Yash Pal Ghai***State and Constitution**

James Madison, justifiably regarded as the father of the United States constitution, distinguished two steps in establishing a state, following Rousseau's analysis of the social contract. The first is a compact, mostly unwritten, among the people, diverse as they may be, to form one society, with common values. The second, necessarily following from the compact, is an agreement on how they would be governed, which Madison regarded as the constitution proper. He thought that the people of the former 13 British colonies had already achieved the first compact when they set out to write the constitution towards the end of the 18<sup>th</sup> century (Berns, 1988:121-2). True, a minimum degree of social consensus and solidarity is necessary for the governance of society. But he exaggerated the extent of consensus in the 13 former colonies. The assembly of 55 male drafters, drawn from broadly the same social stratum, might have appeared to represent consensus, but it was only by the exclusion of slaves, indigenous peoples and women from the political sphere.

Today, with the "artificial" and externally engineered creation of many states as a result of colonial history, the constitution maker is confronted, simultaneously, with fashioning the consensus on one society ("nation"), and agreement on how to govern that society. This is most evident in multi-ethnic states which are tearing themselves apart, with parochial, tribal loyalties ("ethnicity") and competing claims, harnessed to the exercise of votes. People's primary identity is the tribe, often with culture and values not shared by others. Nationalism may surface occasionally, but mostly briefly, when a citizen wins the marathon or the soccer team brings home a trophy.

*Liberal state*

When loyalties are dispersed and competing, there are at least three broad approaches to constitution making (for a more detailed examination see Ghai 2002 and 2004; McGarry et al 2008): the liberal state, the nationalist state, and the consociational or multi-national state.

The liberal state is marked by its concern for the individual. The rights of the individual are more central to it than even democracy. The justification of the state is to enable individuals to pursue their interests and the good life as they see them, not as others would define these for them. The identity, autonomy and self-fulfilment of the individual are the primary objects of the organisation of the state. In this conception, the individual is somewhat abstracted from the community in which she lives, atomised and self-centred. The state is therefore neutral as to public and private values, choices about which must be made by individuals. It is also neutral as between different communities and religions, not privileging one over others. Nor does it seek to regulate relations between different communities. For the most part, communities are not recognised as corporate groups; each community is merely a collection of individuals who may associate among themselves for private or even public purposes. The bearer of rights is the individual, known in the political sphere as a citizen. Each individual is valued equally, so that the legal equality of all citizens is the fundamental organising principle of liberal society.

The role of the state is limited to essential tasks of maintaining law and order, external defence, and a protective framework in which individuals may pursue their economic, social, religious and political activities. In this model, there are no rights or special recognition of minorities; the emphasis is on constitutional symmetries. The neutrality and the limited role of the state are uncomfortable even with official intervention to remedy injustices of the past, such as affirmative action.

This description of the liberal state might give the picture of a polity which is hostile to minorities. This picture is far from the truth—or at least from the aspirations of the liberal society. Although politically the state operates on the majoritarian principle, by insisting on the neutrality of the state as among communities and religions, liberalism seeks to protect minorities from the values or preferences of, and ultimately oppression by, the majority. The liberal vision of a multi-ethnic society is that of a tolerant and pluralistic society, in which all cultures may flourish and members of minorities may freely

pursue their goals. An extensive bill of rights, concentrating on civil and political rights, is central to this protective framework, guaranteeing various rights, such as the right to association, the freedom of expression, the use of languages, the freedom of conscience, protections of due process, freedom from discrimination and torture, etc. The liberal state achieves these goals by relegating a large sector of life and society to the private domain, the scope of which is itself expansively defined, in part by the protections of rights and the definition of the polity (and its ultimate goal of individual freedom). In the civil or private domain, communities may organise their own social, religious, educational and economic life. They may converse with others in their own language, and may cultivate cultural and social links with members of their own ethnic or kin communities in other lands, such as through vernacular newspapers, visits and other exchanges. At the same time, they are protected from the imposition of the norms, culture, institutions, and symbols of the majority communities. Thus a sharp distinction between the public and private, which underlies the liberal state, is essential to the protection of minorities.

In recent years, the liberal approach has come under considerable attack (see Parekh, 1997). It is argued that the modern liberal state, with its lineage of the market-oriented and homogenising regime, built on the principle of individualism and equal citizenship, is inherently incapable of dealing with the ethnic and social diversity that characterizes most countries. Constitutionalism associated with the modern state was concerned at first with limits on power, and the rule of law, to which were later added democracy and human rights. Noting different communities or groups who are seeking constitutional recognition of their cultural or social specificity – immigrants, women, indigenous peoples, religious or linguistic minorities – James Tully (1995) concludes that what they seek is participation in existing institutions of the dominant society, but in ways that recognise and affirm, rather than exclude, assimilate, and denigrate, their culturally diverse ways of thinking, speaking, and acting. He says that what they share is a longing for self-rule: to rule themselves in accordance with their customs and ways. The modern constitution is based on the assumption of a homogenous culture, but in practice it was designed to exclude or assimilate other cultures and thus deny diversity. One might add that the distinctions between the public and the private are difficult to maintain, especially in multi-ethnic societies, where consciously or unconsciously there is the desire for the political recognition of the fundamental values or symbols of the community, as well as dominance of even the private domain by the politically and economically powerful. For reasons explained below, the traditional

version of liberalism seems unsuited in all aspects to countries like Kenya, with its colonial background, economic and social inequalities, the dominance of the state, and with its exclusionary policies and so on. Migration into Europe of groups with a different culture from the majority has created some sort of a crisis for liberalism.

*Nationalist, hegemonic state*

The “nationalist” state is based on the theory of nationalism—that each nation/people is entitled to its own state. I use the expression “nationalist” rather than the more usual “national” state to convey the impression of an ethnically-based leadership actively engaged in establishing a state on the principle of the supremacy of one ethnic group over others. The essence of the nationalist state is well captured by the preamble of the 1990 Constitution of Croatia after the collapse of the Yugoslav Federation, which states: “The Republic of Croatia is established as a national state of the Croat nation and a state of members of other nations and minorities, who are its citizens: Serbs, Muslims, Slovaks, Italians, Hungarians, Jews and others.” The preamble also has a brief history of Croats from the seventh century. As Pajic (1995) says, “This historical saga reads as an argument in favour of continuous Croat statehood, irrespective of long periods of consociation with others in wider, pluralistic entities”.

The 1991 Constitution of the Republic of Slovenia describes the state of Slovenia as an entity stemming from: “The basic and permanent right of the Slovene nation to self-determination and from the fact that the Slovenes have formed, over many centuries of struggle for national liberation, their own national identity and established their own statehood”.

And Article 3 of the Constitution states: “Slovenia is a state of all citizens, based on the permanent and inviolable right of the Slovene nation to self-determination.”

Pajic is thus able to say of these and other constitutions in Eastern Europe that “the tendency towards an ethnically ‘pure’ state is easily noticeable. The common starting point is most of these constitutions is the idea that the *raison d’être* of the state is to serve the nation and not the citizens....If an individual belongs to a small group that cannot qualify as a ‘national minority’, there is very little possibility to claim rights on the basis of citizenship alone” (1995:161).

There is no single mould into which all nationalist states fit. But certain common characteristics may be identified. The most important point is the dominance of one ethnic group. Thus the Jews dominate in Israel,

the Malays in Malaysia, the whites in apartheid South Africa, and, for most the part, indigenous Fijians in Fiji (as a few illustrations). The symbols or language or religion of the dominant group are frequently also the symbols of the nation, or dominate the public discourse. These symbols are very important because they seek to signify the character and orientation of the state and acknowledge the superior claims of the dominant group. More concretely, the law acknowledges or provides for a privileged position for the dominant group—in electoral arrangements, sometimes through over-representation (e.g., Fiji's 1990 Constitution which is the most explicit of all its constitutions about indigenous Fijian supremacy; Cottrell and Ghai, 2008), special land rights (Israel, Fiji and Malaysia), the political recognition of its institutions, and so on. In this way rights are tied to a considerable extent to the membership of communities.

Many rights are group rights, either in the sense that they belong to members of a particular community or that they may be exercised by or through communal institutions. The situation is not always as extreme as Pajic has described for some East European states, which he contends leave little room for individual rights. An individual is treated as a member of a group, and rights and freedoms are granted and guaranteed only on the basis of such membership. If an individual belongs to a small group that cannot qualify as a “national minority”, there is very little possibility to claim rights on the sole basis of citizenship. Not belonging to a recognised group, the individual does not belong anywhere, because the state, as the above mentioned constitutional provisions suggest, is owned in the first place by the “host” ethnic group and only in the second place can serve as a home for the people who can qualify as members of a recognised minority ethnic group who are treated as “historical guests”.

The imagery of the guest is powerful in putting minorities in their place, indicating that any “rights” they have are contingent, really a matter of grace and favour. Indigenous Fijians want Indo-Fijians and other communities to acknowledge that they are “guests”, and then, as good hosts, indigenous Fijians would accord them the status and “rights” that guests deserve. By a stroke of the pen, the South African apartheid regime turned the indigenous South Africans into “guests” in their own ancestral lands, by declaring them citizens of “Bantustans” not of South Africa. The rights of Arab Israeli citizens are limited by the necessity to acknowledge the supremacy of the Jews (Peled 1992). Much is made in Malaysia of the Malays as *bhumiputras* (or indigenous), a concept carrying greater weight than citizenship.

It is obvious that in such a state public authorities cannot stand aside from matters cultural or ethnic. The state has to define the criteria

by which people are to be classified into ethnic categories. It has to undertake the task of promoting the different cultures. So curiously, at least in some instances when the state advances the pre-eminent claims of one community, there is also the political recognition of a culture of other communities, and an interest in maintaining these cultures—because it is precisely the *distinctiveness* of cultures which justifies the cultural foundation of the state. The apartheid government manifested great, indeed scrupulous, interest in the culture of indigenous people and ultimately granted each major “tribe” its “state”. Indigenous Fijians have been very scrupulous about maintaining Indian culture because it was the very presence of a very different culture within Fiji that advanced the claims of ethnic Fijians. Israel recognises 14 religious groups, each with its own system of religions or personal law, and its own judicial institutions to administer these laws (Edelman, 1994 and Jacobsohn, 1993). It is another matter that a culture which is so managed loses its authenticity, or more likely, is reconstructed to suit the interests of the rulers. What matters is that it sustains the ideological basis of the state.

There is a strong belief, in such a system, that the state can indeed define the relationship between ethnic groups. The modes of domination can vary. There does not have to be total exclusion of the dominated. That is frequently counterproductive (as the apartheid regime discovered). Frequently minorities are junior partners in the system and are accused of being the stooges of the ruling group, not having an independent political base. What has so often been interpreted as consociationalism in Fiji and Malaysia has been criticised by others as forms of hegemony of the majority, a device for co-optation. In some states the rights of citizenship of minorities are indeed wide—and sometimes they are secured through the acceptance of their role as junior partners in enterprises of the state.

#### *Consociational or multinational state*

The third major approach, of the multinational or multi-ethnic state, shares features of both the liberal and the “nationalist” state (see the leading authority on the subject, Lijpart, 1977). It aims at liberal values of democracy and rights, but is based on the view that in multi-ethnic states the institutions and procedures of liberalism are incapable of achieving them. The emphasis on citizenship has to be moderated through the political and constitutional recognition of groups, based on the explicit acknowledgment that the state consists of diverse cultural communities and that they all have the right to the recognition of their diversity. In theory the essence of multinational states is that different

ethnic groups or “nations” have agreed to live as one polity where there is the recognition of their distinctive character and corporate status. A multinational state differs from the “nationalist” state in that the purpose of the recognition of ethnic groups is not the subordination of some, but to accord to all an equal standing and respect.

A particular characteristic of consociationalism is that many political or even private rights may be attached to the membership of a group. Some constitutions allocate seats in the legislature and the executive to groups, and only a member of that group can vote in communal elections or secure appointment to the executive. Unlike in the hegemonic state, the ethnic allocations are made on the basis of proportionality. Groups may have significant control over group and cultural affairs, such as marriage and family relations, reflecting diversity of legal orders. There is a particular emphasis on power sharing. This frequently takes the form of federation or territorial autonomy, if the groups are concentrated in different localities, and, where this is not possible, some aspects of public life may be handled through cultural or national councils. At the national level, power sharing takes the form of coalition governments. Sometimes posts in public services have to be allocated proportionately among members of the key groups/communities. And occasionally rules for making decisions in the legislature or the executive, at least on some topics, require a high majority, sometimes even unanimity, to encourage consensus. (But often unanimity means no decision at all, which produces tensions, even animosities, and leaves that important issue unresolved).

Consociation has enjoyed considerable popularity in recent decades: Spain, Northern Ireland, Bosnia-Herzegovina, Belgium, Sudan (2005-2011), Kosovo, Malaysia, and Iraq; and has been often an interim solution while longer term solutions are worked out (Sudan, Kenya, Zimbabwe). But it is not without its critics. When there is a dominant group, consociation can turn into a hegemonic state. The tendency of consociation is to solidify ethnic differences, and slow down national integration. It often takes the form of inter-elite negotiations, at the expense of the interests of the less privileged sectors of society. And it undermines the primacy of human rights, due to the importance attached to cultures and their collectivist tendencies, and subjects vulnerable or disadvantaged members of the group to social hierarchies under which they are subordinated and exploited by upper caste or elite groups.

Thus, an important distinction between consociational and liberal states is not only that the former are not concerned merely with the

relationship of the state and the citizen (albeit that it is often mediated through the group), but also that between the state and groups, and of groups among themselves. Inevitably they produce political and constitutional complexity.

*Mixed system?*

None of the states discussed above has been fully able to resolve political and social issues of multi-ethnic states, although most recent constitutions have had to deal with them. There is in practice often no sharp distinction between them. In its origin, Canada was perceived to be a bi-national state, of the English and French speaking peoples, but it did not require a complex and ethnicity-driven constitution. India today can be seen as a multi-lingual state, but the concessions to linguistic groups are structured to avoid the downgrading of individual and citizenship rights. In these instances, multinationalism is to be woven into the state structures to hold the people together, not divide and separate them. The same can be said of Spain, where its "historic" and other communities enjoy considerable autonomy, but not in any marked spirit of hostility to the central authorities. Fiji's 1997 constitution made a major effort to move towards a non-racial, integrated state, but could not dispense with some remnants of the earlier consociational/hegemonic system. It is therefore possible to have a multinational state in which individual rights are well protected, and it has many of the attributes of liberalism. Nevertheless, there may be an overall logic of the system which prevails over features drawn from another tradition. Today it is hard to make a constitution which has a linear consistency, especially as constitutions are now negotiated documents, with a host of participants, internal and external. But what is clear is that none of them can avoid the centrality of the state, in the face of a fragmented society.

**Kenya: Background**

It is hard to assess the relevance of these approaches until we examine the problem of "ethnicity/tribalism" in Kenya. During colonial times, group distinctions were based on three major, racial categories: Africans, Europeans and Indians (and occasionally Arabs and Somalis). Shortly after independence, the critical divisions emerged within the African community, and took the form of tribalism (which had already emerged as a political phenomenon in the last stages of negotiations on independence), although the constitution had abolished racial categories. There were premonitions of the nationalist state, with widespread discrimination against Asians, particularly by the cancellation of their trading licences, and exclusion from the public service, two important sources of their livelihood, leading

to significant emigration (for a contemporary record, see Dharam Ghai and Yash Ghai (eds), 1970). But soon the emphasis shifted to intra-African competition which has remained the dominant theme of Kenya politics.

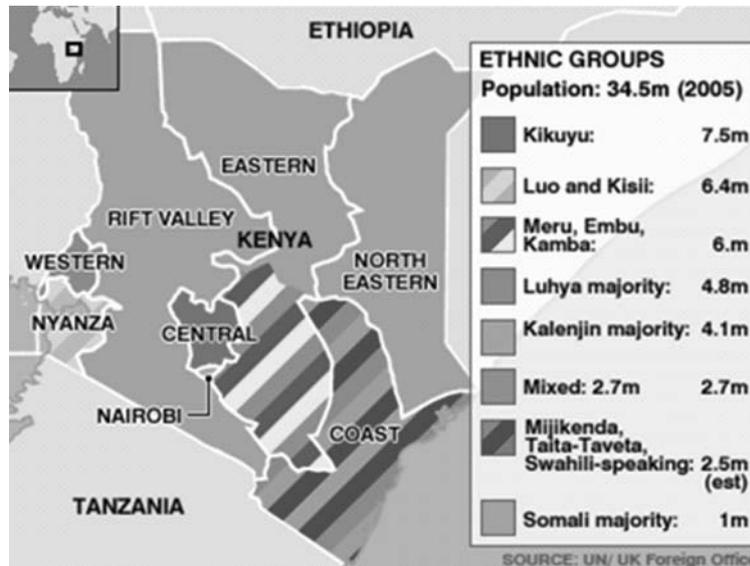
In Kenya, communalism operates more in the political than social domain, because community is not as strong as one would think, because of colonial and post-colonial policies and development, absence of hierarchy within tribes, unlike parts of Uganda and certainly unlike the chiefly societies of West Africa; ethnicity is therefore more manufactured and manipulated than communities held together by tribal structures. Occasionally “chiefs” and “elders” have tried to provide leadership and guidance within ethnic community, but their efforts have been in vain.

Kenyans are fortunate that no tribe can ordinarily dominate others; though at county and constituency levels, some groups are dominant. There are over 40 tribes (and significant groups of South Asian and European origin), although among them are five “big” tribes with considerable leverage (see Karuti Kanyinga’s chapter in this volume for some figures on the distribution of the population among different ethnic groups and also the map below<sup>25</sup>). Most groups live in their “homeland”, where they enjoy a measure, albeit declining, of security and self-government. There are disparities in distribution of resources, but not beyond amelioration by sensible policies. Communal lifestyles have adapted to climate and terrain, easing tensions between communities.

Traditional cultures have undergone attrition for more than a century under colonial and post-colonial regimes. Aspirations of Kenyans are broadly the same as is the background of education (despite occasional talk of traditional culture and identity). Kenyans are able, and content, to communicate with others, and conduct the business of state, in Swahili and English, and are spared divisive language politics. Though they have several religions, they have no conflicts based on belief (at least not until recently). If anything, religions, transcending tribe and territory, bring Kenyans closer. We have common colonial experience and legacy that have shaped our educational system, ideas and moral standards, so there are few differences in our perceptions and values. Urbanisation has mixed cultures and tribes, with which for the most part Kenyans have coped well. We are able to work amicably in professional, business and social organisations (overcoming the colonial divide and rule legacy). People marry across racial and tribal

<sup>25</sup> The map is taken from the Unitarian Universalist Service Committee website at [http://staging.uusc.org/content/map\\_ethnic\\_groups\\_kenya](http://staging.uusc.org/content/map_ethnic_groups_kenya)

lines, and live happily ever after. There have been few demands from ethnic groups to the Constitution of Kenya Review Commission (CKRC) or the Committee of Experts for special rights or institutions, beyond the claim for basic justice and respect for difference.



However, past deprivations and injustices complicate Kenya's ethnic relations, compounded by collective memories (see Zein Abubakar's chapter). He asks, "How does a divided nation work its way towards this deeper, more meaningful engagement with its past?" The exploiters often do not understand (or do not want to) the deep resentment of the exploited, and therefore the prospect of a meaningful dialogue is diminished. During the constitution making process several people and organisations called for a transitional justice mechanism (which was eventually agreed after the ethnic violence following the 2007 elections).

### Challenge of constitution making

The demand for a new constitution was motivated by the desire of Kenyans to move away from the authoritarian rule under the hegemony of one tribe (perfected by Presidents Jomo Kenyatta and Daniel arap Moi in their long reigns). The major, indeed the only, prize of politics was the capture of the state, for the many advantages it offered the incumbent. Reinforced by the then vitality of tribal affiliation, the mobilisation of ethnic support became a principal mode of capturing and using power. Politics took an intensely ethnic hue. This led to the exclusion of most other ethnic groups from the access to the state and benefits from its resources. This also bred an inefficient, corrupt and authoritarian state.

The public discourse and politics are replete with tribalism, due to the style of politicians, ignoring policy issues and playing on ethnic emotions. Prevalence of ethnicity in public life is a major political and social problem facing Kenya (Ghai, 2012b). Our politics have become largely the politics of ethnicity (as documented by Zein Abubakar and Karuti Kanyinga in this volume). Politicians find that an easy way to build support is by playing on ethnicity, by stirring up ethnic loyalties on one hand, and ethnic animosities on the other. Sometimes they incite people against other tribes, even to violence, as is well demonstrated by the Waki Commission (*Report of the Commission of Inquiry into Post-Election Violence 2008*). They promise their tribe development and other benefits if they get their vote. They claim a political monopoly over “their tribal area” and insist that no outside politician can enter it without their permission. Tribe is set against tribe, no matter that politicians are able to change their own strategic tribal alliances routinely. The politician’s principal interest is to grab state power, for only in this way can he or she accumulate wealth and influence. Through the politics of stealing public resources, and patronage for cronies, successive presidents and their associates have corrupted public morals, and given the impression that the advancement of a tribe occurs through the capture of presidency (though the only beneficiaries are the president’s relatives and cronies). Many people respond to ethnic appeals because of their vulnerability, brought about by the market and the state, which have fundamentally disrupted the rhythm of their traditional life, and exposed them to the vagaries of mechanisms they neither control nor understand. Negative ethnic feelings then spill over into other spheres of life.

The country has paid a heavy price for the politicisation of ethnicity (Ghai, 2012b). Tribal politics are based on patronage, which is one cause of corruption, whether in the form of money transfers, grants of land, contracts, evasion of bureaucratic procedures, or jobs for relatives and friends. It has led to the abuse of the electoral process, including bussing in voters from outside and using state agencies to rig elections or declare fraudulent “results”. The obsession with ethnicity means that it becomes the sole criterion for judging people. Very little attention is paid to social, economic and environment policies (other than on how they affect one’s tribe). Some people are all too eager to defend their ethnic “leaders” against even well-founded allegations of corruption or violence. In this way, the whole question of illegality is transformed into an issue of “harassment or guilt of tribe”, which weakens the entire concept of guilt and accountability.

Ethnic politics have influenced people’s attitude to state institutions: either they are “ours” or they are the “enemy”. There is no loyalty to

the state: theft from or abuse of state authority is fair game. The lack of trust in government is pervasive. Many communities, often justifiably, feel they have been deliberately marginalised, denied opportunities of education, ignored in recruitment to public service jobs, discriminated when they tender for government contracts, or had their land illegally taken away from them. The notion of equal citizenship, the foundation of justice and unity in any state, is greatly debased. All these unequal policies and practices lead to ethnic tensions and conflicts. As we saw in the 2007 elections and the subsequent violence, they have become a major threat to human security, and ultimately to national unity.

The challenge of making a new constitution was therefore to promote a sense of Kenyan identity, transcending other particularistic identities springing from religion or ethnicity or language, strengthening national unity, and secondly, to restructure the state, to make it inclusive, democratic, protective of human rights, and accountable to the people. The second must follow from the first, which in turn must focus on national values and principles. The first chapter has given an indication of how national amity can be established, and the kind of choices and the balancing of interests that have to be negotiated. The purpose of this chapter is to show how these twin objectives are intended to be achieved by the constitution. But first a brief history of the process of constitution making.

#### *Making constitutions and dealing with ethnicity*

There were two phases in the making of the Kenyan constitution. The first, between November 2000 and April 2004, was conducted by the Constitution of Kenya Review Commission (CKRC) and the Kenya National Constitutional Conference (popularly known as Bomas). It produced a draft constitution whose adoption was sabotaged by President Kibaki and his faction, itself an ethnic reaction to the attempt at a non-ethnic political order. Two major proposals were seen by the Kikuyu faction around Kibaki as undermining Kikuyu hegemony: the abolition of the imperial presidency and the devolution of some state powers to provinces. Nor did this faction support proportional representation as recommended by the CKRC. A referendum in 2005 held by the Kibaki regime on a constitution without these features was heavily defeated (Yash Ghai and Jill Cottrell, 2007).

The second phase, between early 2008 and August 2010, was led by the Committee of Experts (CoE), which resulted in the current constitution. Where the first phase was driven by the search for democratisation and human rights, the 2008 phase, coming in the wake of ethnic violence, was driven by the need for national unity and reconciliation. It is therefore somewhat ironic that the CKRC

paid much more attention to the causes of ethnic conflict and how it could be overcome than did the CoE, which retained the executive presidency, a largely centralised state, and the first-past-the-post electoral system.

Although not many among those who made submissions to the CKRC said much about ethnic discrimination, the CKRC was aware of the damage done to the nation (in political and economic terms) by the ethnicisation of politics and saw a close connection between ethnicity and corruption. The domination of the state by one ethnic group had led to uneven development; exclusionary policies; massive violation of human and community rights; wide-scale corruption; impunity; and for my purpose here, the lack of a common, national identity. The CKRC approach was first to understand the causes of the emergence of ethnicity in public life and second to decide how the constitution should seek to reduce its salience. It analysed ethnicity not as deriving from some form of primordialism or “ancient hatreds”, but from historical and political causes. Its provenance was modernity, central to which was the colonial state, in both the pre-independence and post-independence periods. It realised that neither the liberal nor the consociational model was sufficient to resolve Kenya’s predicament. Elements of both were necessary, although there was little appetite for the political recognition of ethnic communities. The CKRC was drawn to a mix of measures: human and community (cultural) rights; basic needs; fair representation; inclusion; access to state service; social justice; and redress of past injustices.

#### *The Kenyan State*

Since there is, I realise, a risk of reifying the state, I want to clarify that I do not mean the state as an abstract entity. The state is always an agency of particular groups, although its structures and procedures may, and often do, have their own dynamics. My focus is on the aggregation of the powers and resources secured through the state, and its relationship to society as a whole and to particular groups within it.

The growth of the colonial state was not gradual or organic as, perhaps, in Europe. Nor was it rooted in local developments. It was imposed and designed to suit colonialism (Ghai and McAuslan, 1970). Nor was it a reflection of civil society and the dominance within it. The colonial state was exclusionary, built on racial and ethnic distinctions, the bureaucracy rooted in the imperative of the domination of the various societies that made up the colony, on the close relationship between the colonial administration and the foreign, business community, and its resistance to democracy. This

system was buttressed by a battery of repressive laws and a repressive legal system, reinforced by control of the armed forces. Its impact on African society was massive. It destroyed the rhythm and autonomy of traditional social systems, brought different communities together within common borders, under foreign sovereignty, and colonial domination, kept them apart and competing (in typical forms of divide and rule), and produced new forms and division of labour. With its magical doctrine of *bona vacantia*, and legislation on land, it appropriated huge tracts and transferred some of it to promote colonial objectives. However, the effect of the colonial state was uneven between different communities and regions, which left a difficult legacy resistant to the post-colonial project of nation-building.

Despite Kenya's independence and its grand constitution, the colonial state was not transformed in its essence. It continued to dominate society and to rely on coercion. Its superficial democratisation did not lead to the practice of democracy or respect for human rights. Its principal role in the accumulation of wealth continued unabated, but now took crude and personalised forms. With universal franchise came not genuine democracy but the ethnicisation of politics, accompanied by violence, serving to obscure the underlying process and reality of inequality and powerlessness. The state is now closely connected to the politics of eating (which is not, as Bayart (1993) clarifies, merely gastronomic, but aspires to a network of relations, patronage, incentives and sanctions that sustain an individual or group's hegemony). The state became the principal terrain of political competition. It has been monopolised by ethnic cliques close to the presidents (under all three presidents we have had). Ethnicity led to corruption in at least two ways: it led to patronage type of politics requiring some measure of transfer of money; and it led to the neglect of areas whose people were seen as antagonistic to the ruling elite. The state came largely under the domination of one group, leading to the marginalisation or exclusion of many others—and their increasing deprivation of property and opportunity (as shown by Abubakar in this volume; Ghai, 2012). And ethnic consciousness became so dominant that it hid the formation of new classes, built on the back of the state. But Kenyans now increasingly realise that politicians have become a class of their own, with a common interest in the colonial state.

#### *Restructuring the state*

The CKRC aimed through the new constitution to provide a basis for diminishing the importance of tribalism/ethnicity in Kenyan politics and the economy, and to deal with corruption. It rejected consociational solutions, which focussed on the political and economic

accommodation of ethnic groups, as such (under the theme of power sharing). Although there were no nationwide majorities or minorities in numerical terms, there were plenty of groups which could be considered as minorities in sociological and economic terms. For them, traditional minority rights were less important than rights to participation and inclusion. The very presence of numerous ethnic groups, differing in size and economic salience, ruled out power sharing at the political level, which would most probably generate into alliances between the five or so major ethnic groups. Instead, the constitution had to deal with the colonial roots of ethnicity.

This required a major restructuring of the state. This in turn necessitated, on the one hand, the cultivation of new national values, aspirations and identity and, on the other hand, institutions which would support their achievement and provide an acceptable constitutional framework for constructive ethnic and personal relationships. It was essential to re-establish trust in state institutions, the lack of which in itself had led many to seek support and refuge in their ethnic community. The state had to be humanised, recognising the dignity of both individuals and communities. Consequently, this chapter is structured around two axes: values and institutions. In regard to the first, the 2010 constitution reflects the CKRC/Bomas draft; less so as regards the second.

*Values: nation building*

The essential values for the new constitution were set out in the terms of reference for both the CKRC and the CoE, and they were broadly similar. They were people-centred and emphasised the primacy of human and, where appropriate, community rights. Other values, particularly relevant to the present volume, included national unity, respect for ethnic and regional diversity, inclusion of all communities in institutions of the state, and devolution of powers to facilitate the participation of people in the governance of the country (and presumably to provide for sharing of power, and effective government at local levels). These objectives were agreed in the 1990s in a series of national conferences at Bomas and Safari Park, and represented essentially the values advocated by civil society.

The 2010 constitution is based largely on the approach developed by the CKRC for the balance between the respect for ethnic diversity and the promotion of a Kenyan identity and national unity—and protection of individual rights. In a multi-ethnic state it is important that each community should feel, or be made to feel, that it is part of the wider nation and be accepted as such. It should be able to practise its culture, including religion and language. All citizens should enjoy

equal rights and equal opportunities. All communities should be included in state institutions and other spheres of life. If a community has been disadvantaged in the past, (like Nubians and residents of the North East) they should be compensated. In this way, a state may be able to promote social solidarity, which is essential to the running of the country and effectiveness of the state.

However, in fashioning such a state and constitution, the authors were confronted by several dilemmas (Ghai, 2000; 2010). Human rights are normally universal, though norms for diversity are developing (Ghai, 2012a). There is conflict between personal choice (a highly desirable aspect of pluralism) and a community's claims on norms for its members. There is also the paradox that sometimes, for pluralism, significant interventions by the state in society are necessary when communal and cultural claims are advanced or more likely, when they are challenged as barriers to pluralism. When social justice, especially in the form of affirmative action, is necessary for pluralism and harmony, it often involves differentiation of citizenship. But affirmative action generally identifies communities as beneficiaries, and thus ignores the fact that even within the generally well-off communities there will be poor and marginalised groups. And an aggressive form of state-sponsored pluralism may provoke resistance and revolt from the dominant group. There is no easy way around these dilemmas broadly implicated in nation and state building, as the CKRC discovered.

#### *Fundamental Principles*

An approach of the constitution is to state clearly and emphatically the values and principles for governance, the policies and conduct of the government and its officials. These values and principles are reiterated throughout the Constitution, in their application to specific institutions and officers. The reiterations build up a strong sense of these values and principles and enter the consciousness of the public – and become for them the basis of proper conduct as well. These values and principles touch frequently on pluralism, positive recognition of diversity, equality, and social justice.

The fundamental principles of the new constitutional order are best gleaned from the Preamble and Article 10 (“National values and principles of governance”). The Preamble records the people’s “pride in our ethnic, cultural and religious diversity” and their determination to “live in peace and unity as one indivisible sovereign nation”, the two ideas requiring that national identity and other personal and communal identities must be balanced.

The values set out in Article 10 include national unity, sharing of power, social justice, inclusiveness, equality, human rights and human dignity, and protection of the marginalised—and hints at the complexity of the task promised in the Preamble. There are for example limits to formal inclusion—if as may happen, this means that leaders of different communities must be found a place in the state structure. This would lead merely to a slight enlargement of the politico-bourgeois class. Social justice of a broader kind is more effective—and morally more acceptable.

Article 131 (2) (c)-(d) says that the President has a special responsibility to promote and enhance the unity of the nation, as well as promote respect for Kenya's regional and ethnic diversity. County governments have similar obligations; an objective of devolution is to protect and promote the interests and rights of minorities and marginalised communities (Art. 174) (e)).

### *Citizenship*

Citizenship is of course central to pluralism. There were several problems with the previous regime of citizenship—restrictive entitlement to citizenship, even for people born and bred in the country, and in some ways discriminatory against women and non-Africans. The administration of the law, informed both by racism and corruption, caused further difficulties for many. By breaching the foundational principle of equality it denied members of several communities their rights and dignity, and prospects of education or employment. Above all it denied them participation and a sense of belonging to the country—rendering them close to statelessness.

Most of these weaknesses have been remedied by the Constitution and subsequent legislation, if not always in practice. However, the judiciary has taken a strong view on compliance by the state authorities (see the judgment of the Mombasa High Court in *Muslims for Human Rights v. The Registrar of Persons*, Petition 1 of 2011, discussed in the final chapter).

Citizenship and equality, central to the Constitution, raise the dilemma of individual and community rights. On one hand, equality dictates that all citizens must have the same rights. On the other hand, formal equality under the law tends to freeze, indeed increase, inequalities in society. To achieve *de facto* equality, it becomes necessary to establish categories of citizens with differential entitlements (albeit temporarily).

How citizens relate to the state, whether directly or through the community, is another important issue, for if they all relate in

an identical way, abstracted from the community, the element of pluralism is likely to disappear to some extent (as we shall see later in the discussion on customary or religious regimes of personal law).

As a result of considerable pressure from the Kenyan diaspora, the Constitution allows dual nationality – which not only helps Kenyans living abroad, but also foreigners living in Kenya, many of whom are now eligible for Kenyan citizenship, and may retain their original citizenship. It is an indication of greater willingness to embrace all groups in the country and is less fixated on “nationalism”. Many countries have recognised dual nationality in recent decades; perhaps this is a sign of international pluralism, recognition of migrations and multiple identities.

These complexities influenced the structure of many rights and obligations, rules and procedure, as shown below.

#### *Human rights and social justice*

The Kenya Constitution has perhaps the most extensive and elaborate Bill of Rights of any constitution. Human rights values are central to the Constitution and are seen as protective of both individuals and communities.

Pluralism or the recognition of diversity is seen as part of the broader project of social justice, which is the leitmotif of the constitution (as in redress of past injustices, socio-economic rights, notion of marginalisation/disadvantaged communities; see Ghai, 2011). The scene for social justice is set in considerable part by establishing concepts of marginalised community, marginalised group, disadvantaged group, and minorities. Minority and disadvantaged groups are not defined, but “marginalised community” and “marginalised group” are. The recognition and rights of these groups are considered later.

Article 10 aims at fairness and national integration, which are both essential for the recognition of diversity.

Article 6 (3) requires the state to ensure access to services throughout the country (unlike in the past when some areas were gravely neglected).

Social justice aims at equality, but, given past and existing inequalities, the attainment of social justice requires, often on a temporary basis, special provisions for the disadvantaged. This is strikingly illustrated by the formulation of equality: Article 27 guarantees equality and freedom from discrimination (direct or indirect discrimination is

prohibited on any ground including race, ethnic origin, colour, religion, conscience, belief, culture or language); but, it also requires that affirmative action *must* be taken to redress past disadvantages due to discrimination (see also Art. 56). Affirmative action is defined to include “any measure designed to overcome or ameliorate an inequity or the systematic denial or infringement of a right or fundamental freedom” (Art. 260).

An example of how the Constitution tries to balance individual and collective rights is the way in which it defines the scope of the freedom of expression. The right is very broad (Art. 33) as is the freedom of the media (Art. 34). But in respect of both rights, the freedom does not extend to propaganda for war, incitement to violence, hate speech, or the advocacy of hatred that constitutes ethnic incitement, vilification of others, or incitement to cause harm, or is based on any factor in respect of which discrimination is prohibited. In other words, any law that penalises or restricts expression of this sort cannot be challenged relying on these Articles.

#### *Language*

English and Swahili are official languages, and Swahili is also the national language (although the significance of this designation is not stated). However, the state is required to promote and protect the diversity of language of Kenyans as well as promote its use and development, in addition to Braille and sign language (Art. 7). Local languages are recognised and their use granted to their speakers in the Bill of Rights (see Art. 44 and discussion on culture).

There is no provision that a person not speaking either of the two official languages can deal with state officials in their own language (although in courts translation is provided, as access to justice requires, while there are specific provisions about communications to accused persons in language they understand). It seems that local languages (“vernaculars”) are used among staff in some ministries (a result of ministers seeking to employ people from their own communities), but this is officially frowned upon. It is likely that the use of the dominant local language in official business at the county level will occur, and could lead to a measure of exclusion of county minorities. The County Governments Act says very firmly, “No business of the county assembly or any of its committees or other organs may be conducted or transacted in a language other than the official languages (s. 18(2)). But already some county assembly members have been urging that this is changed, and it may be hard to reconcile with the Constitution, which says, “(3) The State shall - (a) promote and protect the diversity of language of the people of Kenya” (Article 7).

It could therefore be argued that a conflict could arise between inclusion (which requires choice of language) and national unity. In Kenya, fortunately, an increasing number of people speak Swahili and it serves the country well as the main language of communication. There seems little resistance to it, and with compulsory teaching of it, at least in state and state-sponsored schools, literacy in Swahili is spreading all over the country.

### *Religion*

Article 8 declares that there is no state religion. Presumably an implication is that all religions must be treated equally. Constitutionally, Kenya is now a secular state, but not an atheist state. The freedom of all religions is respected, and the Constitution provides ample freedom to religious groups for worship (Art. 32), though the scope of guaranteed activities (e.g., with respect to establishing educational institutions) has been narrowed. The Constitution seems to prohibit any county from having its own policy about county/religion relations, as the relationship between religion and the state is a national government matter (Schedule 4).

What might be its significance? In recent history, the Christian religion has played a central role in state celebrations and ceremonies. At State House lunches or dinners under Moi, the musical accompaniment comprised non-stop playing of Christian hymns, by members of the armed forces no less, – even on the occasion when Professor Wade of Senegal, a Muslim, was the chief guest of honour – talk of symbolism!

Although members of religious groups are guaranteed their beliefs and rituals, unfortunately many of them have not shown the same consideration to people with different beliefs or practices. The Christian faith has been particularly intolerant, and the Church has lobbied against the application of Muslim family law, and (in this they are supported by most religions) against abortion and gay marriages and relationships. Since these features constitute an important element of identity and lifestyle, the denial of them at the behest of religious groups is a denial of pluralism in most grievous ways – quite apart from being a violation of the constitutional prescription of the separation of the state and religion.

Chapter 6 discusses recent development in the form of cases before the courts raising issues such as wearing of the *hijab*, and the application of Shari'a principles in criminal cases.

### *Culture*

Article 11 recognises culture “as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation” and obligates the State to “promote all forms of national and cultural expression through literature, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage”. But unlike earlier drafts of the constitution, the emphasis is more on intellectual property rights than the recognition and celebration of Kenya’s diverse cultural heritage.

However, several other provisions recognise the more traditional aspects of culture. Article 44 guarantees every person the right to use the language, as well as participate in the cultural life, of his or her choice—no one can compel another to perform, observe or undergo any cultural practice or rite (a classic case of pluralism based on the individual). But the same Article also recognises community-based rights: a person, together with the community to which he or she ‘belongs’, is assured the right to enjoy the person’s culture and use the person’s language. All persons and communities have the right to form, join and maintain cultural and linguistic associations and other organs of civil society. This approach is consistent with pluralism liberalism-style where matters like this are assumed to be resolved in the private sphere.

Another aspect of the protection of culture is the recognition in Article 45 of marriages “concluded under any tradition, or system of religious, personal or family law”. More broadly, a family is entitled to have its internal relationships governed by its “personal law”, by the recognition of “any system of personal and family law under any tradition, or adhered to by persons professing a particular religion”.

However, marriages and personal laws apply only in so far as they are consistent with the Constitution. Any inconsistency that may arise is likely to be in respect of fundamental rights and freedoms, often involving the inferior status of women - through this formulation the constitution places human rights over traditional (customary) or religious rules or practices. The application of this principle to the Islamic personal law raised considerable controversy. Suffice it here to note that there is a limited exemption restricted to “personal status, marriage, divorce and inheritance” before the Kadhi courts, qualifying only the right to equality, not other rights (Art. 24(4)). Article 170 provides for Kadhi courts to apply Muslim law - only on matters of

personal laws. Although this has upset some Christian clergy, it seems eminently compatible with respect for diversity and pluralism. But the reaction also shows how differentiation is often resented by the majority group, seemingly giving others a special status, or enabling them to opt out of the law closely connected to the values of the dominant group (on legal pluralism and regimes of personal laws, see the International Council on Human Rights Policy, 2009).

The superiority of human rights over tradition or religion is another manifestation of the difficulty and consequent complexity of pluralism. It is possible that over time some features of diversity will be eroded through the nationally applicable standards deriving from principles of human rights (as indeed, also from social change) – by removing discriminations and inequality.

### *Lifestyles*

The previous paragraph alerts us to the erosion of traditional values and lifestyles. Chapter 5 (on land) while not directly addressed to minority rights, vests “trust land” (essentially land held under customary law) directly in communities, including those whose lifestyle is tied to forests or grazing or hunting-and-gathering (Art. 63(2) (d)). In the past, such land was held in trust by local authorities, but was frequently appropriated by influential councillors, and massively by the president, who had authority to alienate such land. The effect of this type of land grabbing has seriously threatened the traditions and lifestyle of these communities which they have been anxious to maintain (Korir Sing’Oei, 2012).

The preservation of its traditional lifestyle, if a community so wishes, is also affirmed in the definition of marginalised communities deserving special consideration, which includes groups that seek to preserve their lifestyle. The definition of marginalised community includes “a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole” (Art. 260). Article 56(d) requires the State to provide programmes to “develop their cultural values, languages and practices”.

### *Minorities*

Although no community is a “majority”, there certainly are minorities: communities too small in size to negotiate with the larger, dominant communities or marginalised through the last hundred years or so. And there certainly are minorities within the classical definition at level of the county. The designation “minorities” is used mostly in the

context of marginalised, disadvantaged groups, their rights requiring protection and promotion. The discussion above indicates that the constitution recognises their marginalisation and seeks to redress past injustices through special remedial policies, access to the state and more generally the promotion of their interests (Korir Sing'Oei, 2012).

Apart from the general scheme of human and community rights which also benefit them, the concern for social justice for minorities is expressed in Article 56 (in a section of the Bill of Rights designed to “elaborate certain rights to ensure greater certainty as to the application of those rights and freedoms to certain groups of persons” (Art. 52(1)). The Article requires affirmative action to ensure to minorities and marginalised groups their participation and representation in governance and other spheres of life; special opportunities in educational and economic fields; special opportunities for access to employment; the development of their cultural values, languages and practices; and reasonable access to water, health services and infrastructure. The principle of affirmative action is expressed more generally in the right to equality (Art. 27).

The scheme of community land introduced by the constitution strengthens the sense of common belonging and seeks to ensure collective control or regulation of their land (Arts. 61 and 63). And there is also recognition and protection of ancestral lands and of lands traditionally occupied by hunter-gatherer communities (Art. 63(2)(d)(ii)).

Legislative representation of ethnic, minority and marginalised communities is to be promoted through laws to be passed by Parliament (Art. 100). There is a particular concern with minorities at the county level, since many counties have a clear majority community – which may be tempted to monopolise the government. The constitution requires legislation to ensure that the community and cultural diversity of a county is reflected in its county assembly and executive, but no proportion is specified (Art. 197(2)(a)). More generally, Parliament is obligated to legislate for members to represent marginalised groups in the county assemblies (Art. 177(1)(c)). However, it should be noted that no specific figures or proportions are provided in the constitution, in contrast to those for women; the legislation provides for a fixed number (the same for every county assembly whatever its size). All state organs and officials must “address the needs of the vulnerable groups within society”, including members of minority or marginalised communities and members of particular ethnic, religious or cultural communities (Art. 21(3)).

*Power sharing and devolution*

Political dimensions are crucial in the scheme of diversity. The new constitutional principle is that the sovereign power of the people is exercised at the national level and the county level (Art. 1(4)). The decentralisation and sharing of power ranked high among constitutional reforms. A major problem with Kenya's political order has been the centralisation of state power in the national government, exercised largely out of Nairobi. Kenya became independent with a system of "regional government". There were to be 8 regions with elected Assemblies and Regional Executives. Each was to have the power to make laws, including on some aspects of education, health and agriculture. There were to be regional contingents of the police. And the regions were to be able to tax incomes of residents, impose land rates, and raise certain taxes. The regional governments would not have been very strong but one of the first acts of Jomo Kenyatta as Prime Minister was to ensure the deletion of regional and local government from the constitution (and though local government survived under legislation it was gradually deprived of most powers and resources). The centralisation of power meant effectively that one tribe exercised authority over all communities.

One of the objectives of devolution under the new constitution is to recognise and empower communities, which may be easier at the level of the county than the national ("to recognise the right of communities to manage their own affairs and to further their development"), but also to "protect and promote the interests and rights of minorities and marginalised communities" (both in Article 174). Devolution is also a form of power sharing with counties as the base of authority of local communities ("to foster national unity by recognising diversity", Art. 174(b)).

However, the boundaries of the counties were not drawn afresh, but taken from the boundaries established at independence, when the emphasis was on creating districts on the principle of homogeneity (far as possible with dominance of one ethnic community (Kenya, 1962)). Although there has been considerable movement of people since then, with the rise of urban centres, the counties represent a considerable convergence of ethnicity and territory. Transferring power on the basis of ethnicity runs contrary to the general philosophy of national integration – and necessitates specific measure for minorities.

*Representation*

The Constitution describes Parliament as a body which "manifests the diversity of the nation" (Art. 94(2)). The first-past-the-post electoral

system (FPTP) which Kenya adopted at independence has worked against smaller ethnic groups. In hardly any constituency do they have enough members to make a difference much less to elect one of their own. Consequently political parties did not have much incentive to recruit members of small communities, much less adopt them as candidates.

Among the factors for drawing electoral boundaries is “community of interest, historical, economic and cultural ties” (not dissimilar to the previous rule) (Art. 89(5)(a)). Often, it led to ethnically homogenous constituencies, but it rarely resulted in the election of a member of a really small community. The new system is still the FPTP, but adjustments have been made to ensure some representation for marginalised groups, primarily women.

For the National Assembly, out of a total membership of 349 members, in 47 seats (one from each county) only women can be candidates (Art. 97(1) (b)), but the voting is open to all registered voters. Twelve seats are reserved for “special interests including the youth, persons with disabilities and workers”, allocated in proportion to parties’ share of the seats (Art. 97(1)(c)). The Senate consists of 67 members, of whom at least 20 must be women – 16 from party lists allocated in proportion to parties’ seats, and one of two to represent the youth and one of two to represent persons with disabilities (Art. 98). Each list must reflect “the regional and ethnic diversity of the people of Kenya” (Art. 90(2)(c)).

The constitution does not specify the number of members of the county assembly (this is done in legislation). As in the National Assembly, the majority of the members are elected in single member constituencies (wards). But members of each gender must be no more than two-thirds, so that if enough members of a gender are not elected in this way, additional members of that gender are taken from party lists in proportion to each party’s seats (for the time being this means women). There is to be special representation of “marginalised groups, including persons with disabilities and the youth” as prescribed by national legislation, also through party lists (Art. 177).

Basic requirements for political parties include to “respect the rights of all parties to participate in the political process, including minorities and marginalised groups” (Art. 91(1) (e)).

Parliament has been given the obligation to promote through laws the representation of special groups, including ethnic and other minorities, and marginalised communities (Art. 100(d)-(3)).

*Political parties*

From the above account, it is obvious that the representation of ethnic minorities and marginalised groups depends largely on the candidates nominated by the political parties. Traditionally, political parties are linked to the larger ethnic communities and so are not particularly qualified to decide on who among the special groups should represent them. Parties are also known for not having policies, being dominated by highly personalised politics and based on ethnicity. They are for the most part disorganised, emerge only in the context of elections, merge with and demerge from other parties in bewildering rapidity – and have no internal democracy. They have been the primary reasons for the ethnicisation of politics – and for violence.

The constitution seeks to change all this. Article 91 specifies that political parties must have a “national character” (presumably meaning that they must have members from all over the country and in their governing bodies), must uphold national unity, cannot be based on religion, language, race, sex or region, and must not advocate hatred on any of these grounds. The aim here is the political integration of the people. They must abide by democratic principles of good governance, promote and practise democracy through fair internal elections, and must not engage in or encourage violence and intimidation (which often takes ethnic colouration) (for an analysis of first elections under the new constitution in 2013 from the perspectives of ethnicity, see Chapter 5 of this book).

*Proportionality*

Closely connected to representation is the principle of proportionality (particularly in respect of appointed positions). The national executive (that is, the President, Deputy-President and the Cabinet) must reflect the ethnic and regional diversity of the people (Art. 130(2)). Although it is not clear how this provision will be enforced – perhaps by Parliament as it has to approve presidential nominations of cabinet secretaries (the new terminology for ministers) (Art. 152 (2)). Kenya’s diverse communities must be represented in the public service (Art. 232 (h)). As with women and the disabled, members of all ethnic groups must be afforded adequate and equal opportunities for appointment, training and advancement (Art. 232 (i)).

The community and the cultural diversity of a county must be reflected in its county assembly and county executive committee and mechanisms must be prescribed to protect minorities within counties (Art. 197, which requires Parliament to ensure that appropriate laws are made for this purpose).

The security organs are expressly told that, in performing their functions and exercising their powers, they must respect the diverse cultures of the communities within Kenya (Art. 238 (2)(c) and that in their recruitment, they must, “reflect the diversity of the Kenyan people in equitable proportions” (Art. 238(2)(d)).

Even where there is no explicit reference to proportionality (as with judges), it is required under Article 10 (“inclusiveness”).

### *Financial and other resources*

Although not often discussed in these terms, provisions for socio-economic rights (health, housing, food, clean and safe water, education, social security (Art. 43) and a clean and healthy environment (Art. 42)) are designed to bring about a major redistribution of resources, especially since over 60% of Kenyans live below the poverty line, and extreme poverty in many areas exists among particular communities.

More directly, ensuring equitable sharing of national and local resources throughout Kenya is a major objective of devolution (Art. 174(f))—and this, too, has an ethnic dimension because of significant convergence between territory and ethnicity, as mentioned above. The principles of public finance (to which a whole chapter is devoted) include the promotion of an equitable society, the equitable sharing of revenue among national and county governments, and that expenditure must promote the equitable development of the country, including by making special provision for marginalised groups and areas (Art. 201(b)). The criteria for allocation of revenue include measures to reduce economic disparities “within and among counties” (Art. 203 (g)) and “affirmative action in respect of disadvantaged areas and groups” (Art. 203 (h)).

### **Institutions: missed opportunities?**

One concern mentioned earlier is the lack of trust in state institutions. If these institutions can be more representative of the diversity of Kenyans and if their members and staff can be prevented from using the state as a resource to be plundered, that trust might begin to be built. Mindful of this, the constitution, as in the CKRC draft, sets out very clearly the values of honesty, competence, and responsibility in public life, including the statement that public office confers the responsibility to serve rather than the power to rule (Art. 73) (1)). And it lays down the general principle that holders of a state office must not permit their personal interests to conflict with their public duties (Art. 73)(2); Art. 75) (1)). In fact, it specifies in some detail the ways in which personal interest may conflict with public duty, such as that a gift on an official occasion must not be retained by an individual, and

that a person holding a full-time state office must not at the same time be otherwise employed (Art. 76(1)); Art. 77(1)). The state is to reflect as never before the diversity of the people in its institutions. The state is no longer to be the preserve of one or two dominant tribes. Favouritism towards one's tribal or family members is unconstitutional, showing a lack of integrity and inclusiveness, as well as conflict between personal interest and duty.

In three major respects there are important differences between the CKRC draft and the new constitution as regards the recognition of diversity or the promotion of pluralism. The CKRC advocated a system of government which would promote inclusion, so that state power would not be monopolised by one or two ethnic communities. For this purpose, it proposed a parliamentary cabinet system, where power would be exercised collectively. In the 1990s, the "imperial presidency" was criticised not only for violations of rights, but also for the monopolisation of the state by one ethnic group (in truth, one man and his cronies). The presidency would be largely ceremonial, as is common in parliamentary systems, but the CKRC draft gave the president special responsibility for the protection of minorities and for the respect of human rights. In the 2010 constitution, the connection between the executive presidency and ethnicity was ignored. Although the CoE's harmonised drafts had largely adopted the CKRC model, the Parliamentary Select Committee inserted an executive presidential system – and the CoE did not claw this back, as it did with some other provisions.

And so the presidency remains the one big political prize that all communities covet (urged on by manipulation by politicians), for which people are willing to kill others (as most past presidential elections have shown). Already it is clear that the politics of accession to the presidency remain the major pre-occupation of politicians, the media and, to a lesser extent, the general public. The presidency will most likely remain the foundation of ethnic hegemony and exclusion. It is true that there is now a greater separation between the president and the legislature, and perhaps greater presidential accountability. It remains to be seen whether the aura and ethos of the presidency will survive these modifications.

The second departure from the CKRC draft respects the system of voting. The CKRC had proposed, for the legislative bodies, a proportional system, based on a Mixed Member Proportional system,<sup>26</sup> to facilitate the representation of minorities (including women).

<sup>26</sup> Used in, for example, Germany and New Zealand: some members are elected for single member constituencies, and others on party lists, the allocation of list seats to parties taking into account the number of constituency seats won by each party, in order to achieve overall proportionality.

The CoE rejected the CKRC approach in favour of something closer to the Bomas provisions, and closer to the previous majoritarian system that almost always disadvantages smaller groups. It is a system which is likely to keep the emphasis on ethnic voting and affiliation (see Chapter 5). However, as we have seen, the Constitution requires that a law is passed to “promote” the representation of minorities and marginalised groups. This has to be done within five years (Article 100 and Schedule 5) - but a proportional system of representation (PR), which is better for ensuring the representation of minorities and women, will not be possible.

The rule for the election of the president is different, and acknowledges the diversity of the people. The president is directly elected by the people (as previously), but with a requirement that to be elected on the first round a candidate must receive over half of the votes cast and the support of at least 25% of the voters in at least half the counties (i.e. at least 24 counties). However if this does not happen on the first round, the top two candidates must go forward to a second election - and the one who gets the highest number of votes wins, without the need to show the spread of support across the country ((Arts. 136 and 138). Since no candidate can expect to win merely on the basis of his or her ethnic group, some degree of inter-ethnic negotiations and alliances is necessary, and candidates has to demonstrate concern beyond purely local support.

The third departure from the CKRC is in the modification of devolution provisions. There has long been a strong feeling that far too much power is concentrated in Nairobi, and decisions that affect people have been made far away from them. Local governments have been weak - and very much under the control of the national government. Power has been highly centralised. The central control of money and other resources were used to penalise districts that have refused to support the president. The constitution establishes an independent commission on allocation of the revenue to counties (and as between the national and county governments) to facilitate a fair distribution of revenue, and the Senate, representing the counties, has considerable control over financial allocations (see chapter 12 on public finance, particularly Part IV). Powers of appointment have been used to bring people from other regions under control. So devolution was an important means of self-government for communities.

Previously, the main mechanism for decentralisation of the things that have to be done under national law has been the Provincial Administration, with its Provincial and District Commissioners, through various levels to the chiefs and assistant chiefs. For example, chiefs have the duty “to maintain order” in the area for which they are

appointed; they have functions in connection with disease control, can issue orders “prohibiting or restricting the ...manufacture, transfer, sale and possession of noxious drugs or poisons”, “preventing the spread of disease”, they deal with registration of births and deaths, and so on.

The Provincial Administration has been a very “top-down” system – a method of control originally set up by the colonial power, which now has its apex in the Office of the President. It has become an object of suspicion in some ways –accused of being not just an arm of the government but an arm of the party in power, and the president in particular. And there is no democratic control over the system, at least not from the people in the area concerned. They do not choose their PCs, DCs, DOs and chiefs; there is no accountability of these officials to the people. Many people have wanted the system abolished. The CKRC draft would have abolished the system of administration; the constitution now says merely that it would be restructured. But the interests of this powerful bureaucratic structure and the desire of government to maintain as much central control as possible have combined to preserve the old under a new name: National Administration.

The question of “devolving” power to lower levels of government has another importance: what is reserved to the local levels of government is not within the power of the national government. This would have the effect of reducing the power of the national government and its head, the President. However, in a somewhat confusing provision, the constitution says that “For greater certainty, Parliament may legislate for any matter” (Art. 186 (4)). The constitution also gives the national government to make policy even in many matters that counties have responsibility for (Schedule 4).

The actual powers given to counties are disappointing. There is already national law on all, or virtually all, of the items listed under the powers of counties (not perhaps on dog licensing). It will not be easy for the counties to take the plunge to make new law on a topic on which there is already national law, without knowing whether their law will be held to be within their powers, or something that the courts may decide that the national government should continue to do. So counties may end up merely administering national laws, leaving little possibility for locally suitable laws.

Bhargava writes that no strategy of multiculturalism (of respect for difference, integration) “can work in the absence of an effective state.

Conditions of peaceful co-existence are reproduced automatically, but require a fairly strong state. Second, a solution is hardly likely to work unless a modicum of democratic politics exists. A minimally democratic state may not be good enough but what it may manage to prevent is much worse". The state is especially important where it is so dominant over civil society and other formations. How effective in this sense will the new Kenyan state prove to be?

### **Conclusion**

If there is one fundamental theme of the new constitution, it is justice. The CKRC heard from people many stories of injustice going back a century and half—theft of land and other property, communal violence, politically motivated killing and displacement of people, torture, discrimination against and exclusion of minorities, and a perverted political and legal system under which impunity flourished. They wanted the constitution to redress these past and continuing injustices. But Kenya has inherited a colonial legacy which created differentiation (and conflict of interests) among its people as a matter of policy (people now covering communities from India and Britain). It led to uneven development of regions and communities. The new government inherited a state built on coercion and a perfect instrument for primitive accumulation, which still remains its task—and which makes so hard the establishment of a truly national or democratic or honest or accountable government. Kenya's history, the diversity of cultures, religions and ethnicities, and the clash between traditional and modern values, often within the same community, alerted the CKRC that the worth of particular rules, rituals and practices can be perceived differently by its communities or social groups. This fact assumes a special importance in the Kenyan context where the state has been used, from colonial times to the present, to privilege some communities and religions and to marginalize others. This has caused great resentment among the marginalized, who feel alienated from the state, and arrogance among the privileged who think the state belongs to them. I have already said that the constitution had to address justice between communities, not just individuals. Kenya's constitution needed to serve two critical functions: nation building and state building. Questions of justice belonged to the former, in terms of values, rights, citizenship and relationship among communities, while to the latter belonged institutions for representation, power sharing, accountability, litigation and so on. Conceived in this way, justice is not only about the claims of individuals, but about the building of national solidarity, bound by common values and a commitment to fairness for all—and institutions faithful to these principles and goals. With that aim, the constitution tried to create and promote a common

understanding of justice and fairness; to disallow certain forms of loyalties (e.g., tribalism), or impunity or some local ideas of justice; and to produce a vision of Kenya as “an open and democratic society based on human dignity, equality, equity and freedom” (Art. 20(4) (a)).

To a considerable extent, the constitution was a negotiated document, at different stages, which introduced a degree of pragmatism, through concession and compromise. But it was not often necessary to stray far from the initial agreement on values and principles, worked out largely by civil society organizations, and incorporated into the legislation for the review process. So now the alert reader of the constitution will notice that many articles, including the preamble itself, are a careful balance of the general and the particular (for example, national identity with local affiliations), of the parochial and the national (as in devolution), the respect for difference and the necessity of universal norms (as in arrangements for the application of Muslim law), and equity and efficiency (as in land policies). So the state is neither fully consociational, nor multi-ethnic, nor liberal.

There is no doubting the commitment in the constitution to justice. But a constitution cannot guarantee its own effectiveness. Kenya’s constitution was imposed by the people on a recalcitrant legislature and government. They are still sitting in seats of power (despite elections under the electoral system in the new constitution), entrusted with the responsibility for its implementation. They will do everything in their capacity to sabotage implementation. They control not only the state, but also key sectors in society: through bribery, commercial and financial empires, manipulation of ethnicity, intimidation, armed force, and more. The constitution does, however, offer openings and opportunities for people to bring about change, such as participation, petitions, sensible use of the vote, contesting for public offices, resort to courts, and solidarity. Who will win the battle? It is too early to say, but people seem to regard the constitution as their friend, and show some determination to implement and protect it.

## 5

ETHNICITY, NATIONHOOD AND PLURALISM  
AND 2013 ELECTIONS*Jill Cottrell and Yash Pal Ghai**Introduction: framework for elections*

Kenya went through its first general elections under the Constitution in April 2013. Before this a few by-elections had been held, organised by the new model election commission, and governed by new constitutional values. But the 2013 elections were not merely under the new laws; they ushered in the new structures of government, including the system of devolution, the significance of which for the theme of this book has been discussed earlier. Each voter cast six votes: for the President, a member of the House of Assembly in a local constituency, a woman to represent the county, the Senator for the county, the county Governor, and a member of the county assembly for the local ward (2-5 of these in each constituency).

Before we describe and analyse the election results, it is necessary to set out the approach of the constitution to the electoral system and its connections to pluralism. The adoption of the new constitution was precipitated by the allegations of irregularity in the 2007 general election and the subsequent violence. Almost from the time of independence, elections had been rigged, and mostly accompanied by corruption and tribal violence. The 2010 constitution addresses head on the problems that marked previous elections. But it also addresses another problem: ethnic politics that dominate elections and bring deep divisions in society. For this purpose it attempts to shape political parties and mould their culture, so that they must not only focus on social and economic policies, but also strengthen national unity. It is unlikely that there is another constitution which contains so many provisions and prescriptions on elections and political parties. In this way it seeks to usher in a kind of pluralism different from ethnic pluralism discussed in rest of this volume. As regards parties and

elections, the emphasis is on political pluralism, national integration and democracy.

Part 3 of Chapter 7 (“Representation of the People”) prescribes basic requirements for political parties. Foremost among these is that “every political party shall have a national character”. It must promote and uphold national unity. It cannot be founded on a religious, linguistic, racial, ethnic, gender or regional basis (Article 91(2)(a)), nor must “it seek to engage in advocacy of hatred on any such basis”. The second basic principle is the observance of democracy both internal and external to it. The constitution says that every political party must “abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party”; “respect the right of all persons to participate in the political process, including minorities and marginalised groups” ; “respect and promote human rights and fundamental freedoms, and gender equality and equity”; and “promote the objects and principles of this Constitution and the rule of law” (Art. 91 (1)). In addition parties must not engage in bribery or other forms of corruption, nor engage in or encourage violence (Art. 91(2)).

The third aspect of elections dealt with in the constitution is institutional, where the major body is the Independent Electoral and Boundaries Commission (IEBC) (Art. 88). Its composition and mandate reflect past failures of electoral commissions, including violence connected with elections. Its composition is completely divorced from past or current members of political parties or the state. Its independence is reflected in the manner of the appointment and tenure of its members. Apart from conducting elections, it has the responsibility for drawing constituencies, providing voter education, compiling and revising electoral rolls, rules for nomination of candidates, and regulating the amount of money that can be spent by or on behalf of candidates or parties. It is to observe electoral values of transparency and the conduct of elections in an impartial, neutral, efficient, accurate and accountable manner (Art. 81(e)).

### *The polls*

In the presidential elections there were eight candidates, but it shaped up to be a two-horse race, between Uhuru Kenyatta and Raila Odinga. It is too early to give any comprehensive assessment of the elections, for a variety of reasons. At the level of the presidential polls, the results announced by the IEBC remain the object of suspicion in the eyes of many Kenyans. This is despite the Supreme Court having

upheld that result.<sup>27</sup> The basis for the court's decision was primarily that the petitioners, including the defeated presidential candidate, had failed to establish enough numerical discrepancies to cast the result in doubt. Certain issues of constitutional and statutory interpretation, themselves also contested, assisted the court in reaching that conclusion.

This is not the place to analyse the judgment.<sup>28</sup> The point is simply that if the court was mistaken in its assessment of the force of the evidence, or if there was in reality more evidence that could have been placed before the court, and the voting facts are not as announced by the IEBC, any conclusions based on apparent voting patterns must be tentative, or would at least be viewed as contestable by many – and not only because they “lost”, as it were. Doubts have only been reinforced by news of an exit poll carried out by US academics that suggested that both main presidential candidates obtained between 40 and 41% of the overall vote, neither thus winning outright.<sup>29</sup> Under the Constitution if no-one obtained more than 50% of the votes cast there was to be a run-off.<sup>30</sup> Other aspects of the elections will require more research and reflection, including the extent to which provisions to ensure reflection of diversity and representation of minorities were successful, or even taken seriously.

The point has been made in this book that voting in Kenya has tended to be very much on ethnic lines. The purpose of this chapter is to present some evidence as to whether this was true of the recent elections, and indeed what it means to say in the Kenyan context that voting is “ethnic”, in order to assess the achievement of some of the objectives of the constitution regarding pluralism.

### **Before the election**

The media, and Kenyans generally tend to conceptualise elections in ethnic terms. A flavour of the ethnic perspective on plans for the election is in this passage by a Somali writing on-line in mid-February 2013:

[T]he several thousand strong group of Somali students at colleges in Mombasa spent their holidays mobilising

<sup>27</sup> See the case *Odinga v Independent Electoral Commission* Petition No. 5 of 2013 available on the website of Kenya Law Reports, [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>28</sup> The Katiba Institute does propose to publish a study of the case in due course.

<sup>29</sup> See the youtube video of the seminar at the School of Advanced International Studies at Johns Hopkins University at which James Long and Clarke Gibson presented their results ““Fraud and Vote Patterns in Kenya’s 2013 Election: Evidence from an Exit Poll” <http://kenopalo.com/2013/05/07/fraud-and-vote-patterns-in-kenyas-2013-election/>.

<sup>30</sup> Article 38.

the normally indifferent Somali community and getting its members to register in large numbers. The result is 25,000 Somalis registered as voters in Mombasa county easily displacing the Luo bloc vote and vying for number one spot with the Kamba voters. I am told the Luo bloc vote doesn't even exceed 15,000 whilst Kambas are up to 30,000.

Wisely, the Somali community decided not to gun for parliament in this election for fear of a backlash. Instead, they have sponsored three sc. candidates] for ward representatives and Mrs Sureya Hersi for women's representative.<sup>[31]</sup>

...The Isiolo Somalis number 30,000 and are second to Boranas. The Somalis drawn from eleven ethnic groups formed the Isiolo Somali Elders Council which endorsed Guled to be running mate to Doyo.

In Mandera, another member of our Harti Community is running for ward representative. In Kamukunji, all three leading parliamentary candidates are Somalis. They are: Yusuf Hassan, TNA; Omar Yusuf, cousin to Jonny, ODM; and Mohamed Isaak, UDF. At the ward level, we have several candidates competing for North Eastleigh ward. In Nakuru, the former mayor, Suraw, is running for parliament. Jonny himself is running mate to Nairobi governor aspirant Jimnah Mbaru on APK ticket. To Nigerians [Nairobians?], Jonny is a nickname but he is a Muslim Ibrahim Yusuf.<sup>32</sup>

The expectation that ethnicity would drive the results was explicitly, and controversially, spelled out by a commentator, Mutahi Ngunyi, who talked of the "tyranny of numbers", arguing that the election was already lost by the time voter registration ended on December 8<sup>th</sup>, because of the pattern of registration.<sup>33</sup> Although with a population of about 40 million, and a voting age of 18, it was assumed that about 21 million would be entitled to vote, only just over 14 million registered in the one month period allowed for the exercise. Ngunyi's analysis pointed out that the areas of the country dominated by Kikuyus (Kenyatta's tribe) and Kalenjins (the community of Kenyatta's running mate, William Ruto) had registered over 6 million voters, whereas the

<sup>31</sup> An interesting distinction: between "Parliament" and the Women's Representative - who is a member of the National Assembly.

<sup>32</sup> How many of these were elected? The writer's estimate of Luo strength in Mombasa was perhaps an underestimate: 5 of the 30 county assembly members seem to be Luo. Or maybe Coast people vote for Luos rather than Somalis? Doyo and his Somali running mate did win in Isiolo. The MP for Kamukunji is Somali, as is the county assembly member for Eastleigh North ward.

<sup>33</sup> See the presentation (with voice-over) at <http://ictville.com/2013/02/video-the-tyranny-of-numbers-hypothetically-mutahi-ngunyi-predicts-a-jubilee-alliance-win/>.

core support for Odinga's alliance, CORD, reached only 2.5 million. This left the uncertainties surrounding the way in which the Luhyas would vote, as well as how 36 other groups, comprising, as he viewed it, 3.4 million registered voters,<sup>34</sup> would vote. But for Kenyatta to get to 50%, with a start, as Ngunyi assumed, of 6 million, would require much less effort than for Odinga. His analysis sparked off a storm of controversy, including from those who objected to the idea that everyone would continue to vote ethnically, and from those who pointed out that not everyone in the former central province was Kikuyu, nor everyone in the Rift Valley Kalenjin.

### *Alliances*

Perhaps because of the Political Parties Act, which regulates coalitions, (“(1) Two or more political parties may form a coalition before or after an election and shall deposit the coalition agreement with the Registrar”) there were far more formal, pre-election agreements than in the past. By the time the elections took place, one major alliance was the Jubilee Alliance, designed to unite most of the Kikuyu with most of the Kalenjin through leaders Uhuru Kenyatta and William Ruto, and including Charity Ngilu, a Kamba. The CORD alliance was to unite the Luo with the Kamba and a section of the Luhyas (the Bukusu), through Raila Odinga, Kalonzo Musyoka and Moses Wetangula, while the Amani Alliance comprised a major Luhya leader, Musalia Mudavadi, and two other small parties, KANU and New Ford Kenya (led by Eugene Wamalwa, a Luhya – also Bukusu).

### *Jockeying for party and ethnic support*

In 2002 Odinga (Luo) was allied with Kibaki (Kikuyu) to defeat Kenyatta (Kikuyu) (and in a sense to defeat the Kalenjin also as Kenyatta was a “project” of the departing, Kalenjin, President Moi). In 2007 Odinga was allied with Ruto (Kalenjin) to try to defeat Kibaki.

Arriving at the final line-up of alliances in 2013 had involved remarkable manoeuvrings, over the year or so before the elections – “a protracted and bewildering dance”<sup>35</sup>. Odinga played with the idea of an alliance with Ruto, despite the objections of strong supporters (of whom Odinga has been one) of the ICC before which Ruto is indicted. In the end, despite the fact that in 2007-8 their people killed each other, Ruto and Kenyatta came together.

<sup>34</sup> See his presentation at <http://ictville.com/2013/02/video-the-tyranny-of-numbers-hypothetically-mutahi-ngunyi-predicts-a-jubilee-alliance-win/>.

<sup>35</sup> Richard Dowden, “Kenya’s Election: Brave New World Or Highway To Hell?” <http://africanarguments.org/2013/01/29/kenya%E2%80%99s-election-brave-new-world-or-highway-to-hell-%E2%80%93-by-richard-dowden/>.

In mid-2012 it was rumoured that Raphael Tuju, a Luo politician, and Eugene Wamalwa (Luhya) were going to join up with Kenyatta. But then Tuju brought together his Party of Action with Chama cha Mwananchi, the Social Democratic Party, Chama cha Uzalendo, the Peoples Party of Kenya, the New Democrats, and Saba Saba Asili. Their appeal was in terms of anti-tribalism and fighting poverty. But cynics attributed it to 'stop Raila at any cost' motivation. As an alliance it did not last and Tuju joined forces with Peter Kenneth in the Eagle Alliance ("anchored on a set of shared and highly cherished values", said Tuju's Facebook page). Tuju dropped his own plans to stand for President and backed Kenneth's; in fact not a single Party of Action candidates won a seat – though it did have 10 National Assembly candidates.

Eugene Wamalwa flirted with the idea of joining Kenyatta, Ruto and Ngilu in mid-2012, as possibly Uhuru's running mate. But in November he formed the Pambazuka Alliance with the small Shirikisho, New Vision and Federal Parties, but this lasted less than a month. By late November Wamalwa was reported as talking to Kenyatta. Then he was said to be considering an independent bid to be President. Then he shifted attention to the Eagle Alliance (of Peter Kenneth), but eventually joined Mudavadi's Amani Alliance. But even before the elections he was reported to be preparing to back Uhuru in a second round election. After the elections he did indeed join Jubilee, but has found it hard to achieve satisfactory recognition in that party, as he would view it.

The behaviour of the main contenders in building alliances with leaders of other communities itself is revealing of the way they conceptualise politics. They are not looking for ideologically like-minded groups. Almost any party will do, any ethnic group will do.

The other side of the coin is the efforts to prevent vote banks falling into the camp of a serious rival. For Kenyatta, a concern was the Luhya, the second largest ethnic group, after the Kikuyu. Of this group Professor Makau Mutua wrote,<sup>36</sup>

The Luhya are a complex bunch and don't have a single commanding leader. ...It's a fractious group. That's why the Luhya weren't really a serious cog in Mr Kenyatta's plans. I believe he wanted to scatter the Luhya to the four winds and keep them out of Mr Odinga's grasp. He dangled a carrot before Mr Wamalwa and then dropped him. He then toyed with Mr Mudavadi by promising, and then renegeing,

<sup>36</sup> See <http://www.kenyan-post.com/2013/03/makau-mutua-finally-agrees-with-mutahi.html>.

on making him the Jubilee flag-bearer. Mr Mudavadi was left hanging, unable to join Mr Odinga.<sup>37</sup>

### *The electoral system*

The electoral system also conceals certain features of the voting. In Mvita constituency in Mombasa, Kenyatta received 17,565 votes (almost 30% of the total). This has been attributed to the Arab vote. But not only is the MP elected from Mvita an ODM member, so are all five county assembly members. In the absence of detailed voting figures, it is impossible to know how those Arabs voted, but if they also voted against ODM at the county level, and they are evenly distributed around the constituency, the first-past-the-post system would prevent them getting any seat. Had the system been more proportional: for example if Mvita were a single, five-member constituency for the county assembly elections, 30% of the electorate would have a good chance of getting a member elected. The same may well be true of many other constituencies. But the Constitution does not allow any other voting system: Article 177 says, "(1) A county assembly consists of – (a) members elected by the registered voters of the wards, each ward constituting a single member constituency,..."

### **The Parties**

Over 50 parties contested various seats and positions. Kenyan parties are not generally based on ideology, nor do they offer the sort of support for their candidates that would be their role in more established democracies. Parties take money from individuals to stand as candidates, and they do not provide financial or other support for campaigning.

As mentioned above, under the Constitution and the law parties are not supposed to be sectional. And in order to be registered to put up candidates they are required to have offices in a certain number of counties, and membership and internal governance structures indicating a degree of national support.

Some are vehicles for particular individuals, and for the coagulation of particular ethnic support around those individuals. This is most apparent with those parties that were new for the 2013 election, such as TNA, URP and Wiper and the UDF. The Wiper Democratic Movement is unique in Kenya (so far) by virtue of being named after its leader: Kalonzo Musyoka, former Vice-President, or Wiper.

<sup>37</sup> The reference to Kenyatta and Mudavadi is to a curious episode when it seemed that Kenyatta might be prepared to give up his presidential bid (rumours had it either that he thought Kenyans would not accept another Kikuyu President at this time or that he was afraid the ICC proceedings might prevent him from standing effectively) in favour of Mudavadi. Many would accept Mutua's analysis of this.

Some other parties are also mainly vehicles for individuals but much less successfully; of these a few are well established and others quite new. The legacy of the one-party state means that few are really old. KANU is a shadow of its former self, now associated with former President Moi and his sons. Martha Karua and Charity Ngilu retain the rump of their parties, from which others have left. Of the other presidential candidates, Paul Muite stood on a Safina ticket (also an older-established party) while the other four had the tickets of new parties, which had come into existence for the purpose.

Some parties have been around for a number of years but with little identifiable “character”; except possibly some ideological bent professed by a leader. They are shells, perhaps continuing to be used by leaders, but also offering a home for those wishing to stand who cannot find support in a larger party. What seems to happen is that candidates shop around until they find a party that is prepared to accept them to stand in their own area. They may try for the major parties, if their calculation is that such a party is a vote winner in their area, and shift to smaller ones if unsuccessful. It is less clear whether small parties are too concerned about recruiting vote winners. The statutory requirements about national support almost certainly provide an incentive for parties to recruit candidates – almost any candidates. In fact some parties advertised for candidates. On the other hand, there are some parties whose leaders seriously hope to recruit significant numbers of possible vote winners, if for no other reason than that this enhances the leader’s value to major leaders. At the national (presidential election) level many anticipated the necessity for a run-off, and party leaders believed that they would be in a strong position if they could “deliver” “their” people to the winner. Mudavadi was assumed to be such a leader. In the event, Kenyatta was declared the winner without any need to rely on Mudavadi or any other leader on second round.

### **The choice offered to voters**

A list-serve contribution noted that in Nairobi (and suggested in other urban centres) ODM was far more ethnically mixed: “In conclusion party’s ethnic diversity in Nairobi and other cosmopolitan towns : TNA = 99.9% Kikuyu, 0.1 other tribes...ODM = 30% Luo, 20% Luhya, 10% Kisii, 15% Kikuyu, 10% Somali, 10% Kamba, 5% other small tribes”.<sup>38</sup> This may have been unfair.

Parties present mainly candidates likely to appeal – in ethnic terms – to the local community. We can see this very clear in counties with

<sup>38</sup> <http://www.kenyanlist.com/kls-listing-show.php?id=110592>.

mainly Somali populations. In Garissa, WDM, UDF, TNA and ODM each nominated a Somali candidate for governor, as did TNA, ODM and URP in Mandera and URP, ODM, KNC and UDF in Wajir. In fact this seems to be generally the case: parties put up candidates from the particular area even if the leader of the party is from somewhere else. Or at least this is true of those who won.

On the other hand, major parties occasionally did not even put forward candidates in a rival's "stronghold" – presumably on the basis that to be associated with the party would be the kiss of death. Thus neither ODM nor any affiliated party had a candidate for governor in Nyandarua, Kirinyaga, Baringo, Laikipia, or Bomet (mainly Kikuyu or Kalenjin constituencies), while neither TNA nor any affiliate had a candidate in Machakos, Makueni, Vihiga, Busia or Siaya (mostly Luhya areas). However, each did have a candidate in some rival heartlands such as Kiambu for ODM and Kisumu for TNA.

In mixed areas some ethnic balancing takes place. Soon after the Constitution was adopted it was reported that in some areas ethnic groups had got together and allocated the Governorship to one, the Senator to another and the Women's Representative to another. Such manoeuvres assume too much: about the willingness of individuals to give up a chance to others, and of the electorate to "play ball". It is not clear that such sharing was the final outcome.

However, ethnic balancing can be well seen in gubernatorial candidates, because each candidate ran with a deputy governor running mate. In mixed areas they chose running mates from other major groups. Hassan Joho (Coast) in Mombasa ran with Hazel Katana (Mijikenda), in Lamu Timamy Issa Abdalla with Erick Kinyua Mugo, in Taita Taveta Johnson Mtuta Mruttu with Mary Ndiga Kibuka, in Laikipia Joshua W. Irungu with Josphat Gitonga Kabugi, in Nakuru Kinuthia Mbugua (Kikutyu) with Joseph Kibore Rutto (Kalenjin), in Nairobi Evans Odhiambo Kidero (Luo) with J. Mwangangi Mueke (Kikuyu), and, as we have seen, in Isiolo a Borana ran with a Somali running mate.<sup>39</sup>

### **How did they vote?**

It is clear that candidates calculate in largely ethnic terms. How far do voters do likewise?

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<sup>39</sup> An item analysing the pairings at the Coast for governors and running mates found at [http://www.ipsos.co.ke/NEWBASE\\_EXPORTS/Kenya%20Shell/130211\\_The%20county%20Weekly\\_18\\_4a88e.xml](http://www.ipsos.co.ke/NEWBASE_EXPORTS/Kenya%20Shell/130211_The%20county%20Weekly_18_4a88e.xml) (but is not formatted and hard to read).

*The Presidential election*

Most of the focus since the elections has been on the presidential race. It is an unfortunate consequence of the decision to move to the US-style presidential system that that one big prize remains the cynosure of the political scene and the principal objective of political ambition.

Many have said of the results “Ngunyi was right!” Certainly the IEBC’s results did look rather like that. The results were:<sup>40</sup>

Name	Valid votes
James Legilisho Kiyiapi	40,998
Martha Wangari Karua	43,881
Mohamed Abduba Dida	52,848
Musaliala Mudavadi	483,981
Paul Kibugi Muite	12,580
Peter Kenneth	72,786
Raila Odinga	5,340,546
Uhuru Kenyatta	6,173,433
<b>Total</b>	<b>12,221,053</b>

The exit poll carried out by US academics covered not only “Who did you vote for” but also demographic information, including ethnicity. Respondents reported that they had voted as follows:

Ethnicity	Voted for (%)			
	Kenyatta	Odinga	Another	Refused to answer
Kikuyu	83	4	3	10
Luos	1	94	1	4
Kalenjin	74	11	4	12
Luhya	6	53	22	14
Kamba	12	63	6	18
Somalis	41	48	8	2
Kisii	15	72	4	9
Maasai	29	60	2	9
Meru	75	10	4	11
Mijikenda	13	72	7	8
“Kenyan”	33	33	8	26

<sup>40</sup> They are available on the IEBC website [www.iebc.or.ke](http://www.iebc.or.ke)

The unusually high proportion who “refused to answer” adds a complication, and the authors were unable to explain it from their data. The data do appear to suggest that, while Luo support for Odinga was rock solid, the Kikuyus were, as Professor Long said in the presentation “softer than you might expect”, although 4% for Odinga is still very small; but the Meru, ethnically close to the Kikuyu, voted 10% for Odinga. The 3% “other” Kikuyu supporters could well have voted for other Kikuyus.

The Kalenjin were less strongly “UhuRuto” supporters; 11% voted for Odinga. Relevant factors might have included the fact that in the 2007 election the bulk of the Kalenjin were allied to Odinga (through Ruto), the lingering resentment about the violence of 2008, and perhaps about the underlying land issues that, for many, lay at the root of that post-election violence, rather than simple ethnicity, as well as the fact that support for “our man” is likely to be less strong where that man is vying to be Deputy President only.

Makau Mutua, writing after the elections, said

...Mr Kenyatta’s strategy worked to perfection. He had split the Luhya to Mr Odinga’s disadvantage and forced Mr Musyoka to join Mr Odinga. Neutralising the Luhya was key.

If we look at the IEBC’s own results, so far as concerns the Luhyas, overall in the Luhya dominated counties Odinga got 755,525 (63% of valid votes cast), Mudavadi 353,865 (29.5% of valid votes cast) and Kenyatta 73,185 (6% of valid votes cast). Not very different from the exit poll figures.

The exit poll figures show a definite pattern for the various groups, except for the Somalis, those who chose to identify themselves as “Kenyans” and, to some extent, the Luhyas. A striking feature of those patterns is that they show support for Odinga rather than for Kenyatta. The official results show that Odinga won in 27 of the 47 counties and Kenyatta in the rest. In other words, it is true that Odinga’s support was more widespread than Kenyatta’s. But the Kikuyu are the largest single group, and the Kalenjin are also a large, if diverse, group. Turnout was also officially reported as high in the Kikuyu areas.

When “their” leader is standing for election, most people will support him or her. And most leaders can bring significant support from their people if they are in an alliance that seems to promise office and, people hope, benefits, for the people. Yet there is also pragmatism: Karua, Kenneth and Muite have been MPs. But as presidential candidates they could not garner from the whole country as many votes as they

used to get as MPs. But “their” people did vote “Kikuyu” for President – but for Kenyatta, presumably because they did not want to vote for a “loser”.

There was perhaps another, special, reason for this tendency of voters to vote for one of the main contenders: the fear of violence. The authors of the exit poll study asked about this before the polls and 25% of their respondents were afraid of violence at that stage. This might lead people to want a clear winner. The same motive presumably explains the fact that most of respondents to questions after the Supreme Court case said that they supported the court’s decision, which confirmed Kenyatta, even if they had doubts about the conduct of the elections, an attitude that fits with the fact that 87% of respondents said they valued peace over an accurate outcome of the elections.

If Kenyatta had not enticed Mudavadi to support him for a while (and thus, as Mutua suggests, disabling him from joining up with Odinga), and he had in fact joined Odinga, and brought with him the 483,981 votes that he got, Odinga would still not have won, nor would Kenyatta’s having obtained over 50% of the valid votes cast been affected.

At the national level there was not much of a choice – and there was the risk of violence. There is also the factor of perception: the voters share the image of the elections portrayed by the media: a two horse race. If we take into account what we know of vernacular media, essentially radio, we have to add the truly negative side of ethnicity: “don’t on any account vote for that person”, or for that tribe.

Perhaps we learn more about people’s approach to voting at the other levels, on which there is far less media attention.

### **The other elections**

Each alliance put forward a single presidential candidate, but generally agreement did not extend to sharing legislative seats, so there was far more choice for the voters. National leaders tend to urge their followers to vote six-suit (all for the same party, or alliance). And – if there was a complete coincidence between ethnicity and party loyalty – one would expect the party of the county woman representative, the Governor and the Senator for the county to be the same: same electorate voting on the same day. In 27 counties all three elected were from the same party. The most interesting are those where those elected were not even from the same alliance. In Bungoma the woman representative was URP while the other two were Luhya associated parties (which suggests that the individual was the factor in voting for

the woman). In Garissa the Wiper Party (CORD Alliance) Governor and woman representative are joined by a TNA Senator. In Kajiado the Governor is ODM and the other two TNA. In Nairobi there is an ODM Governor while the other two are TNA.

A few counties elected these officers from three different parties : most strikingly, in Lamu the Governor is UDF, the Senator TNA and the woman representative Wiper Party (one from each alliance). In Nyeri the Governor is Grand National Union (not formally part of Jubilee), the Senator NARC (Jubilee) and the woman representative TNA (also Jubilee). In Turkana the Governor ODM, the Senator Ford-Kenya and the woman representative URP (so 2 CORD and one Jubilee), and Vihiga the Governor from the People's Party, the Senator UDF and the woman representative ODM. We should also note that in the Somali dominated counties a different party's gubernatorial candidate won in each: WDM in Garissa, URP in Mandera and ODM in Wajir.

This suggests that voters are voting more for the individual than the party. Or for local leaders rather than national ones.

In what are often described as the heartlands of the main candidates, especially Kenyatta, Ruto and Odinga, suit voting did occur. At the end of this paper is a Table setting out how the counties voted – in terms of which parties obtained seats. The most party-homogenous counties are shaded. None is completely so. Mombasa is perhaps the closest. The popularity of ODM has been attributed by some to the gubernatorial candidate, Hassan Ali Joho, who ran the most dominant, and extremely expensive<sup>41</sup>, campaign, while others attribute his success at least in part to his association with Odinga. Others would add a rejection of “up-country” people, of whom the Kikuyus are the most prominent, and the most resented, including the Kenyatta family, widely perceived as having “grabbed” a great deal of land in and around Mombasa.<sup>42</sup> The WDM Senator (and perhaps two WDM

<sup>41</sup> See “Kenya Big money campaigns that paid off. Ali Hassan Joho spent well over Sh700 million” <http://ictville.com/2013/03/kenya-big-money-campaigns-that-paid-off-ali-hassan-joho-spent-well-over-sh700-million/>.

<sup>42</sup> The following paragraph was excised from the Report of the Truth Justice and Reconciliation Report submitted to President Kenyatta (Jnr.) in May 2013, according to the three non-Kenyan members who released a separate, dissenting, report on this matter – see <http://www.the-star.co.ke/news/article-122862/missing-paragraphs-tjrc-report-land-question-for-the-missing-paragraphs>. The full report is at [http://www.tjrckenya.org/index.php?option=com\\_content&view=article&id=573&Itemid=238](http://www.tjrckenya.org/index.php?option=com_content&view=article&id=573&Itemid=238):

257. However, after Kenya attained independence, in 1972, President Kenyatta unlawfully alienated to himself 250 acres of the land, especially portions on the beach. He also allocated part of the land to his friends, relatives and other associates. He directed residents that whatever was left of the trust lands would be established as settlement schemes for their benefit. However, without following due procedures of law, he again took part of whatever remained for himself and his relatives. He also demanded that local communities that should have benefited from the trust lands accept payment of KSh600 per acre. When the locals declined to accept the money, he told them that whether or not they accepted it, the remainder of the trust lands would go to the government. That is how irregularly President Kenyatta took all of Tiwi and Diani trust lands at the expense of local people who immediately became ‘squatters’ on the land and were subsequently evicted, rendering them landless and poor. By 2012, land in the former trust lands fetched KSh15 million per acre.

MPs) are a result of a prominent Mombasa person having quit ODM for WDM because he did not want to be closely associated with Joho: "He said his conscience could not let him campaign for Kisauni MP Hassan Joho because he is an alleged drug lord who is surrounded by "criminal and integrity issues'." <sup>43</sup> Others hypothesised that he had given up hope of winning the ODM nomination, so shifted to an allied party. <sup>44</sup>

In the National Assembly TNA won 86 constituency and county woman seats (out of a total of 337) and URP 73 – and Charity Ngilu's NARC party three (making 162 for Jubilee). From CORD, ODM won 93 (in other words, Odinga's party won more seats than Kenyatta's party), while Kalonzo's WDM-K won 26, FORD-Kenya 10, and other allied parties 9 (overall 138). In the Amani Coalition Mudavadi's party won 11 seats, Kanu 6 and the third party (New Ford Kenya) also 6. The remaining 14 seats were won by independents, other parties that ran presidential candidates (Peter Kenneth's KNC – 2, Martha Karua's NARC-Kenya-1), while four other parties shared 9 seats, of which Kiraitu Murungi's Alliance Party won 4. Interestingly, all the woman representatives came from five major parties, though there had been candidates, in some constituencies, from many parties (13 candidates in Kiambu, for example). Does this suggest that voters are going for the party rather than the woman – perhaps that women find it harder to establish individual profiles?

### *County assemblies*

It is at the county level that the greatest variety of voting patterns appears, not unnaturally; 2450 seats were to be filled, in the 47 county assemblies. The results are intriguing. Some counties have solid support for a single party: in the Kikuyu heartland TNA won "hands down". Strong dominance of one party is seen in many Rift Valley counties where in Uasin-Gishu, Ruto's home, his party, the URP, won 27, TNA one, and ODM one.

ODM is a little different: although it was mainly a vehicle for Odinga, it came into existence in 2005 and has a wider appeal. For example, ODM has 16 Governors, while TNA has 8 and URP 10 (and Wiper 2). TNA's Governors are all from Kikuyu dominated areas (Laikipia is a bit mixed). URP had support from some of the pastoralist areas, <sup>45</sup>

<sup>43</sup> Kenya Online Newspaper <http://www.kenyan2013.com/2013/01/18/i-quit-odm-because-hassan-joho-is-a-drug-lord-omar-hassan/>.

<sup>44</sup> For very mixed assessments of his chances of winning – at the time of his shift to Wiper – see the Jukwaa discussion board at <http://jukwaa.proboards.com/thread/7787/alai-hassan-omar-out-odm?page=1>.

<sup>45</sup> See Kanyinga above on Kalenjin and other pastoralist alliances.

and its governors include those from Mandera, Isiolo, Samburu and Narok. ODM's Governors include those of three Coast counties and Taita Taveta, four or five pastoralist counties and Nairobi, as well as the Luo and Kisii counties. To what extent, however, is this appeal to be attributed to anti-Kikuyu sentiment?

Looking at the smaller parties: the leaders of the smaller parties that won seats often do not come from these places, which suggests that the criterion is probably local support for the particular candidate. Similarly, some parties with prominent leaders achieved scattered support, often in areas not those of their leaders. One example is Kenya National Congress (of Peter Kenneth, a presidential candidate) (with one NA member in Lamu and one in Narok, and county assembly members in Kwale, Wajir, Meru (2), Tharaka-Nithi (2), West Pokot, Narok (6) Kericho, Kisii and Nyamira (2) - in other words none from Murang'a, Kenneth's own county. Koigi wa Wamwere's Chama cha Uzalendo won seats only in Kilifi and in Kamba areas: far from the areas of Nakuru from which he came and for which he had been MP.<sup>46</sup>

NARC-Kenya won one NA seat and a number of county assembly seats: none of these in the home area of Martha Karua: several were in the pastoralist areas and others in Kamba or Kisii areas as well as Meru and Embu. As far as this author is able to tell, the candidates in those areas are not from the ethnic group of the party leader.

On the other hand, though NARC won one senatorial seat (not in Kitui, the home territory of its leader, but in Nyeri) and one National Assembly seat in Nyeri and one in Muranga, it also won one NA seat in Kitui - and 10 county assembly seats of which most were in Kitui. This suggests that Charity Ngilu has some appeal in her home area. On the other hand, that appeal was not enough for any part of Kitui to vote in greater numbers for Kenyatta than for Odinga; even Kitui Central, her former constituency, voted 11,352 for Kenyatta and 26,969 for Odinga.

The Grand National Union seems to be a small Kikuyu Party with a mainly Kikuyu leadership (headed by a former Assistant Minister), which won the Governorship in Nyeri, and 17 county assembly seats especially in Nyeri, Meru, and Embu, and in Laikipia (where the leader was formerly MP).

Other local parties include the Alliance Party of Kenya, headed by a former Minister, from Meru, Kiraitu Murungi. It won the gubernatorial

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<sup>46</sup> Two MPs in Machakos, and it got five county assembly seats in Kilifi, and eight in three Kamba dominated counties

and senatorial races in Meru, and has the Senator in Embu, and two MPs in Meru, and one each in Embu, Tharaka-Nithi and Nyandarua. And it has county assembly members in Lamu (a person with at least a partly Kikuyu name), and Isiolo, 13 in Meru and 4 in Embu, one in Bungoma and one in Nairobi.

Similarly, on a smaller scale, among the more local parties, Muungano Party succeeded in getting its gubernatorial candidate elected in Makueni, one MP in Machakos, eight county assembly members in Makueni, and two elsewhere.

Paul Muite got hardly any votes in the presidential race, but his party, Safina, of which he was one of its original founders (1995) won one county assembly seat in Lamu (a person with a Kikuyu name), two in Mandera, and one each in Wajir, Meru, Samburu and Kisii. It has declined from its 2007 position: when it had 5 MPs and 60 local government councillors; it had about 20 candidates for the National Assembly. Is the decline as result of its having a presidential candidate? Or of its being seen as a single person vehicle party? Are its successes, such as they are, a result of candidates shopping for parties – and these were simply the most locally acceptable candidates? Or are they a reflection – on the part of candidates or voters or both – of the original multi-ethnic nature of this party?

There are several other parties with small number of wins. National Vision party, for example, won 10 county assembly seats, each in a different county. The Farmers Party 3: in different counties. This would suggest that these are truly umbrella parties, offering shelter for local candidates.

### **How ethnic are Kenyan voters?**

So Kenyan voting remains largely “ethnic”. But ethnic voting means something other than long-held antagonisms, or friendships, among ethnic groups. As in international relations there are no permanent enemies or friends when it comes to Kenyan ethnic groups in politics. There are a number of facts about the elections that make it hard to assume that Kenyans simply vote ethnically, even if “ethnically” means for a local rather than a national leader.

The first is the intriguing appearance of three Asian members for constituencies in the new National Assembly. All of them are closely connected to the area where they stood and won. Shakheel Shabir, once mayor of Kisumu, was successfully re-elected for ODM. Irshad Sumra was elected for ODM in a densely populated Nairobi suburb, where he has been in business, while Abdul Rahim Dawood was

elected on the ticket of the APK, in South Imenti, in Meru, where he had also been in business. They share the following characteristics: having been councillors before entering national politics, being locally involved in various other ways, and being on the ticket of a major leader; in the case of two of them local leaders (Shabir – Odinga and Dawood – Kiraitu Murungi). A commentator wrote, “It was a victory over ethnicity, race, religion, age, and creed. ... Shakeel Shabir, Irshad Sumra, and Rahim Dawood were elected as legislators in different counties, beating their opponents who came from numerically strong communities.”<sup>47</sup>

There are a number of features of the elections, or Kenyan elections generally, that make it unfair to accuse voters simply of blind ethnic allegiance, however fair it may be to accuse leaders of ethnic manipulation. First is the role of leaders themselves with the support of the media, in portraying elections as a simply ethnic matter. In national media talk of this sort is a little muted, on the part of the politicians themselves. But it is all too clear, as we have seen, that this is the way they think.

Secondly, it might be fair to blame voters if they were presented with the choice of credible candidates, about whom they had the chance to judge, who were not merely ethnic leaders. But Kenyan politics militates against this. The influence of money is so great, the absence of issue based parties so dominant, and the past performance of government generally so unimpressive, that a voter can have little conception of what a really wise choice might be.

Thirdly, there is a good deal of evidence that at the local level people are concerned with a candidate’s local profile and perhaps reputation – though that reputation may not be for very savoury activities. Is this a bad thing? The electoral method, based on the “first-past-the-post” system,<sup>48</sup> focusses attention on the locality: the elected member is viewed as a local leader, and there is little awareness of the member’s role at the national level. A proportional representation system might play out differently in ethnic terms. Yet we should also remember that one of the virtues of PR is supposed to be that it is inclusive precisely because it appeals to everyone: parties are said to have an incentive to include people from all groups because people from those groups are voters.

<sup>47</sup> Wanhoji Kabukuru, “The Return of President Kenyatta” in *New African*, April 4 2013, <http://www.newafricanmagazine.com/features/politics/the-return-of-president-kenyatta>.

<sup>48</sup> This very English expression is not universally understood: the analogy is a race – the winner is the person who first gets past the winning post, regardless of how close or how far away the next person or horse is. In elections the winner is the person who got the largest number of votes, regardless of how many votes other candidates may have got, which may have totalled far more than the winner’s haul of votes.

Fourthly, Kenyan voters do not always vote blindly for “their person”. William Ntimama, MP for many years, who pleaded with the Maasai to allow him to die in harness, was not re-elected. Incumbents are regularly voted out – including in the primaries.<sup>49</sup> As the “Nation” newspaper put it, “Dissatisfied voters slay giants”.<sup>50</sup> The voters are looking for something better.

For the first time since the introduction of the ‘legal’ one party state, it was possible for individuals to stand not as party candidates (IC). There were in fact 9 ICs for Governor, 7 for Senator, 3 for county women, and 45 for MP. Only four of these were elected – all as MPs. There was also just one independent elected as county assembly member. At least one of the others was a “local hero” – a world class marathon runner. Arguably the preparedness of voters to vote in non-party candidates also indicates a willingness to think beyond party and traditional allegiances; those voted in are still “ours”, of course, but the voters are showing more independence of mind.

Among the many factors that must have affected the voting patterns and perceptions is the increased use of party primary elections, though only by the four main parties, the others not having enough resources.<sup>51</sup> Unfortunately, the primaries have widely been described as “chaotic”. Many parties simply did not have lists of their registered members and had to open the voting to the public generally.

However chaotic, the primaries may have reinforced voters’ sense of their own role in the process, and resentment of the ODM party overriding the primary result seems to have been important in Siaya (see below). The interesting question for our purposes would be: what were the main factors influencing voting behaviour in the primaries? There is no research of which we are aware on this subject.

Mount Elgon is an area where voters do not apparently think in terms of “our people our party”. On one hand Kenyatta obtained 29,286 votes out of 43,861 cast, suggesting support through the Kalenjin, to whom the Sabaot people of Mount Elgon are connected. But once that pragmatic element was absent, Ruto’s own party got little support. The URP incumbent MP lost to a notionally “independent”; the constituency voted for the New Ford Kenya candidates for Governor and Senator, New Ford Kenya led by the Luhya Eugene Wamalwa; and at the county assembly level they elected one independent

<sup>49</sup> As commented in the interesting account of primaries by David Zarembka <http://kenyanelections2013.org/?author=1>.

<sup>50</sup> March 5 2013.

<sup>51</sup> See “Corruption and violence mar Kenyan primaries” [http://sabahionline.com/en\\_GB/articles/hoa/articles/features/2013/01/28/feature-02](http://sabahionline.com/en_GB/articles/hoa/articles/features/2013/01/28/feature-02).

candidate, one Ford Kenya candidate, one Alliance Party of Kenya<sup>52</sup> candidate, one URP, one New Ford Kenya and one ODM.<sup>53</sup>

Again, Raila Odinga found that, though his personal support is still overwhelming in Nyanza, he can no longer always envelop others in his own mantle. For example, despite getting all but a tiny handful of votes in Siaya in the presidential election, he could not win the National Assembly seat in Alego Usonga constituency (it went to his ally Kalonzo's Wiper party), nor three of the four county assembly seats from the same constituency (two went to FORD-K and one to the National Vision Party). The loss of the National Assembly seat seems to be because the people of this constituency were disenchanted by the manipulation by CORD that led to the person who won the NA primaries not being the ODM candidate.<sup>54</sup> That person shifted to WDM and won. Some have interpreted this as indicating that the electorate is becoming more willing to think for itself, a process which having primaries, however, chaotic, as many were, is likely to hasten.

As Mazalendo said<sup>55</sup>,

We have seen some political parties completely ignore the results of the party primaries and resort to a system of direct nominations citing the need for regional balance. ...Political parties have included the names of incumbents who lost in the primaries in their list of direct nominees to parliament, much to the disdain and annoyance of voters who signaled their disapproval of certain candidates by choosing to vote them out. ...There have seen 11th hour defections from aspirants who lost the primaries in their initial party of choice. In some instances political parties issued multiple nomination certificates to different aspirants and those are just the irregularities that were made public.

### **The list members**

A final note on the effort of the constitution to broaden the range of elected members to include more women, youth, persons with disability and marginalised groups through party lists. This experience awaits fuller research effort. Clearly the IEBC and the parties found it difficult. Lists often did not comply with the law and the Constitution.

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<sup>52</sup> Founded by the Meru Kiraitu Murungi.

<sup>53</sup> Daniel Psirmoi, "Mt Elgon Constituency, where voters defied party euphoria", [http://sabaots.com/2013\\_Kenya\\_Elections.html](http://sabaots.com/2013_Kenya_Elections.html).

<sup>54</sup> See [saykenya.com/Thread-no-democracy-in-cord-muluan-omondi-alego-usonga-moans](http://saykenya.com/Thread-no-democracy-in-cord-muluan-omondi-alego-usonga-moans).

<sup>55</sup> "Non-partisan project started in 2003 whose mission is to 'keep an eye on the Kenyan parliament'" - Blog on 5th February 2013 at <http://www.mzalendo.com/blog/page/2/>

There are at the time of writing cases in court arising from the issue of diversity. There is one Asian woman in the National Assembly (from the URP list), and several other legislators at the various levels from unusual backgrounds.

### **Conclusion**

One general election may not be a sufficient basis for conclusions on how far the constitutional objectives of the electoral system have been achieved. One cannot be clear about any trends that might be significant for the future. The re-distribution of state power and the multiplicity of elections at different levels introduce complexities that make it hard to understand the logic of the selection of candidates and the decisions of the voters. The retention of the office of president as the key state institution with executive powers and the first-past-the-post system of voting have clearly influenced election campaigns, the pattern of voting and outcomes. We have analysed a number of issues, around the influence of centrality, by examining the formation and role of political parties, the emergence of party alliances, the nomination of candidates, election campaigns, and the voting patterns.

In so far as the constitution sees elections and political parties as central to democratisation, the 2013 elections have made little contribution to democracy. It is clear that ethnicity continues to have a major influence on elections, though not always in the ways anticipated. A key factor which determines various aspects of elections is still its function of governing access to power, not to decide on and implement policy, but to make money. In many other ways too, elections were driven by money – from the crude role of money as bribery to secure votes to becoming rich by capture of the state. Candidates and voters alike seem to make decisions on financial benefits to themselves. Because the role of ethnicity is mediated through money, the role of ethnicity is complex. While the main appeal that political parties and individual candidates make is ethnic, the voters may take other factors into account as well, such as local connections and record of the candidate, and the importance of being seen as having voted for the winning party or group. And while a party may have a distinct ethnic affiliation, it may have to enter into electoral alliance with another party, affiliated to another ethnic group, in the hope of capturing sufficient votes for victory. Ironically, in this way, the pre-occupation with one's own ethnic group may lead to alliances and co-operation across ethnic groups—a factor likely to lead to political pluralism. Unfortunately these alliances are unstable, driven by exigencies of the moment, which can vary rapidly.

The sort of loyalty that people often show in “developed democracies”

for parties they show in Kenya for leaders. Though they may understand that having their person in power may be of little or no value to them, there is probably no reason for them to think that having anyone else in power will be any better. People have had little reason to expect any more of government than that they or their group or some prominent member of it might gain some small benefit.

Ethnic voting was particularly prominent in the presidential elections. But the post of the deputy president as the running mate of the presidential candidate inevitably led to a search, not so much for a suitable candidate, as a suitable ethnic group. Part of ethnic strategies were attempts to prevent opponents from making strong and effective alliances (illustrated well by Kenyatta's tactics to deprive Odinga of the Luhya vote) and to divide the vote of presidential candidate's ethnic group (again Kenyatta's wooing of Luo, and Odinga's forays into Kikuyuland). And because elections in the past have been fraught with violence, many Kenyans are reported to favour, if necessary, a decisive result over a fair result which may have counterbalanced the purely ethnic approach.

The elections failed to achieve another goal—that of corruption free voting. There is little doubt that there was massive bribery, some well documented. The IEBC did little to investigate corrupt deals or act on information in the public domain. Corruption was fuelled by the lack of limits on expenditure by candidates or parties—MPs in the previous parliament had resisted legislation on limits, though this did not prevent, or should not have prevented, the IEBC from regulating expenditure (Art. 88(4)(i)). The conduct of the IEBC (from perspectives of integrity and fair conduct of elections) has now come under considerable scrutiny. There is reason to believe that the constitution's aims of an independent and competent electoral commission and process also failed in these elections.

The failure of the elections to achieve constitutional objectives can be attributed in part to the constitution itself—the retention of the presidency as the single political prize (rather than a more collegial executive of the parliamentary type) and the first-past-the-post system of voting (in preference to a proportional representation system). On the other hand, the devolution of powers to counties with their own system of elected executive and assemblies mitigated to some extent the tensions in the result of national level elections.

The general conclusion must be that the first general elections under the constitution were driven by ethnic considerations, fuelled by improper uses of money, devoid of policy options available to the voters, and did little to promote national integration or democracy.

## Appendix

## County table of all elections

County	President <sup>50</sup>	MP	Woman R	Senator	Governor	County Assembly
Mombasa	K64: <b>O189</b>	3 ODM 2 WDM	ODM	WDM*	ODM	30 ODM
Kwale	K14: <b>O80</b>	2 ODM 1 FORD-K 1 WDM	ODM	ODM	ODM	ODM 6 URP 2 TNA 3 KADU-Asili 1 UDF 4 Shirikisho 1 K Nat Cong 1 Ford People 1
Kilifi	K10: <b>O83</b>	3 ODM 1 KADU-A 1 Federal P 1 URP	ODM	ODM	ODM	ODM 21 URP 1 KADU-Asili 4 Chama Cha Uzalendo 5 Shirikisho 1 Federal P
Tana River	K34: <b>O61</b>	1URP 1UDF 1TNA	WDM	WDM	WDM	ODM 3 TNA 2 URP 3 WDM 5 Mazingira Greens 1 UDF 1
Lamu	K40: <b>51</b>	1 UDF 1 KNCong	WDM	TNA	UDF	UDF 1 Unity P 1 DPK 1 ODM 2 New Democrats 1 Safina 1 Alliance P 1 TNA 1 Farmers P 1
Taita Taveta	K13: <b>O81</b>	1 TNA 3 ODM	IDM	ODM	ODM	Soc Democ P 2 TNA 7 Farmers 1 ODM 12 Restore and Build 1 URP 1

<sup>56</sup> Kenya: Odinga in whole '000s (Clear winner in bold)

County	President <sup>30</sup>	MP	Woman R	Senator	Governor	County Assembly
Garissa	K45:O48	3 ODM 2 URP 1 TNA	WDM	TNA	WDM	ODM 11 TNA 6 NARC-K 2 FORD-K 2 WDM 2 URP 5 UDF 1 Nat Vision P 1
Wajir	K38:O49	5 ODM 1 URP	ODM	ODM	ODM	NARC-K 2 ODM 7 WDM 4 TNA 5 NARC 1 URP 2 K Nat Congress 1 UDF 1 FORD-K 1 Muungano 2 Safina 1 Agano P 1
Mandera	K92:O4	6 URP	URP	URP	URP	URP 19 TNA 2 U-Democratic P 1 Nat. Vision 1 Safina 2
Marsabit	K47:O48	2 ODM 1 UDF 1 URP	ODM	ODM	ODM	TNA 4 ODM 8 URP 4 FORD-K 1 WDM 2
Isiolo	K55:O29	2 URP	TNA	URP	URP	URP 4 NARC 1 ODM 1 Independent Party 1 TNA 2 Alliance P 1

County	President <sup>30</sup>	MP	Woman R	Senator	Governor	County Assembly
Meru	K89:O7	4 TNA 2 Alliance P 2 ODM 1 Indepdt.	TNA	Alliance P	Alliance P	TNA 11 Alliance P 12 DP 2 Peoples Party 1 Safina 1 G.National Union 4 FORD-K 1 NARC-K 4 Mwangaza 1 K Nat Cong 2 UDF 1 URP 1 FORD-P 1
Tharaka -Nithi	K92:O5	1 TNA	TNA 1 Alliance P 1 URP	TNA	TNA	GNU 2 TNA 5 Unity Party 3 K Nat Cong 2 URP 2 DP 1
Embu	K89:O7	3 TNA 1 Alliance P	TNA	Alliance P	TNA	NARC 1 TNA 13 Alliance P 4 NARC-K 1 GNU 1
Kitui	K14:O79	7 WDM 1 NARC	WDM	WDM	WDM	WDM 26 CC Uzalendo 3 Muungano 1 NARC 6 Peoples P 1 Independent P 1 TNA 2
Machakos	K9:O85	3 WDM 2 CC 1Uzalendo 1 Ford-P 17 Muungano 1 TIP	WDM	WDM	WDM	WDM 20 Independent Party 1 PICK 3 Mazingira Greens 1 CC Uzalendo 4 DP 3 New Democrats 1 Agano P 1 ODM 1 National P 1 Peoples Democ P 1 Rep Cong P 1

County	President <sup>30</sup>	MP	Woman R	Senator	Governor	County Assembly
Makueni	K5:O90	3 WDM 1 Independt.	WDM	WDM	Muungano	Independent Party 3 PICK 1 Muungano P 8 WDM 12 New Democrats 1 Nat Vision 1 CC Uzalendo 1 ODM 1 Peoples P 1 CC Mwananchi 1
Nyandarua	K97:O1	4 TNA 1 Alliance P	TNA	TNA	TNA	TNA 23 DP 2
Nyeri	K96:O1	5 TNA 1 NARC	TNA	NARC	GNU	TNA 23 GNU 5 Saba Saba Asili 1
Kirinyaga	K95:O1	4 TNA	TNA	TNA	TNA	TNA 19 DP 1
Muranga	K95:O2	6 TNA 1 NARC	TNA	TNA	TNA	TNA 34 Mzalendo S.S 1
Kiambu	K90:O7	12 TNA	TNA	TNA	TNA	TNA 56 Farmers P 1 GNU 1 Agano P 1
Turkana	K29:O67	3 URP 1 TNA 1 ODM 1 FORD-K	URP	FORD-K	ODM	ODM 8 FORD-K 8 URP 8 KANU 4 TNA 1 NARC-K 1
West Pokot	K73:O22	3 URP 1 KANU	URP	KANU	KANU	KANU 8 K Nat Cong 1 Federal P 1 ODM 4 URP 4 Nat Vision 1 Mazingira Greens 1
Samburu	K40:O57	2 TNA 1 URP	TNA	URP	URP	ODM 1 URP 5 TNA 6 Safina 1 KANU 1

County	President <sup>30</sup>	MP	Woman R	Senator	Governor	County Assembly
Trans-Nzoia	K37:O46	2 FORD-K 1 New Fd K 1 URP 1 Indepnt.	N.FORD-K	FORD-K	FORD-K	New Ford K 9 FORD-K 4 TNA 2 URP 7 ODM 1 Federal P 1
Uasin-Gishu	K74:O21	6 URP	URP	URP	URP 27 TNA 1	ODM 1
Elegyo Marakwet	K92:O4	4 URP	URP	URP	URP	KANU 2 URP 17 PICK 1
Nandi	K81:O8	6 URP	URP	URP	URP	URP 23 UDF 4 KANU 1 P of Demo Unity 1 NARC 1
Baringo	K87:O9	5 URP 1 KANU	URP	KANU	URP	URP 20 KANU 3 NARC-K 1 UDF 1 Nat Agenda P 1 ODM 2 TNA 2
Laikipia	K85:O12	2 TNA 1 ODM	TNA	TNA	TNA	TNA 10 URP 3 GNU 1 ODM 1
Nakuru	K80:O17	7 TNA 2 KANU 1 URP 1 ODM	TNA	TNA	TNA	URP 9 TNA 37 GNU 1 ODM 3 Mazingira Greens 1 KANU 1 UDF 1

County	President <sup>30</sup>	MP	Woman R	Senator	Governor	County Assembly
Narok	K48:O50	4 URP 1 TNA 1 KNCong	URP	URP	URP	Restore & Build K 2 URP 11 K Nat Cong 6 TNA 2 ODM 4 WDM 1
Kajiado	K52:O44	3 TNA 1 ODM	TNA	TNA	ODM	TNA 17 URP 3 ODM 2 GNU 1 NARC 1
Kericho	K90:O6	5 URP 1 KANU	URP	URP	URP	URP 29 K Nat Cong 1
Bomet	K92:O4	5 URP	URP	URP	URP	URP 24 Nat Vision 1
Kakamega	K2:O63	6 ODM 4 UDF 1 Maendeleo 1New Fd K	ODM	UDF	ODM	FORD-K 3 Federal P 2 UDF 11 ODM 34 KANU 1 NARC-K 1 WDM 1 New FORD-K 2 Nat Vision 1
Vihiga	K1:O46	2 UDF 2 ODM 1 Federal P	ODM	UDF	PPK	FORD-K 1 UDF 16 ODM 6 WDM 1 Progressive P 1
Bungoma	K12:O52	4 FORD-K 3 New Fd K 1 ODM 1 Independt.	URP	Ford-K	N.Ford-K	ODM 11 URP 2 FORD-K 5 New Ford K 12 Independent 1 UDF 2 KANU 1 Nat Vision 1 Federal Party 1 FORD-K 3

County	President <sup>30</sup>	MP	Woman R	Senator	Governor	County Assembly
Busia	K3:O85 Mudavadi:8	3 ODM 2 URP 1 UDF 1 Federal P	ODM	ODM	ODM	WDM 1 ODM 19 FORD-P 1 UDF 4 Federal P 1 URP 1 Labour P 3 FORD-K 5
Siaya	K0:O98	5 ODM 1 WDM	ODM	ODM	ODM	ODM 26 FORD-K 2 Nat Vision 1
Kisumu	K1:O96	5 ODM PDP 1 FORD-K 1	ODM	ODM	ODM	ODM 29 Federal P 1 People's Democ P4
Homa Bay	K0:O98	8 ODM	ODM	ODM	ODM	ODM 13 WDM 1 Federal P 2 FORD-K 1 PD Party 1 Labour P 1
Migori	K9:O96	4 ODM 1 FORD-K 1URP 1KANU	ODM	ODM	PDP	ODM 23 Ford-K 1 Indep P 1 National P 1 People's Demo P 1 WDM 3 Agano P 1 P of Demo. Unity 1 TNA 1 URP 1 K Nat Cong 1
Kisii	K37:O67	4 ODM 2 TNA 2 Ford-P 1 NARC-K	ODM	ODM	ODM	ODM 19 K Nat Cong 1 FORD-People 6 TNA 3 Safina 1 Nat Vision 1 K Soc Cong 3 Farmers P 1 NARC-K 1 People's Dem P 1 UDF 1 Agano P 1 CC Mwananchi 1 PICK 1

County	President <sup>30</sup>	MP	Woman R	Senator	Governor	County Assembly
Nyamira	K29:O66	4 ODM 1 WDM	ODM	FORD-K	ODM	TNA 2 Progressive P 2 ODM 6 People's DP 2 URP 1 NARC-K 2 KANU 1 PICK 1 Nat Vision P 1 K Nat Cong 2
Nairobi	K46:O49	10 TNA 7 ODM	TNA	TNA	ODM	ODM 41 TNA 41 Alliance P 1 WDM 2



## 6

INTERPRETING THE CONSTITUTION: BALANCING THE  
GENERAL AND THE PARTICULAR*Yash Pal Ghai***Introduction***Constitutional values and goals*

In Chapter 4 I tried to show the importance placed in the constitution on promoting a common Kenya identity, to strengthen political unity and integration. Over the years Kenya politics have become highly ethnicised, sometimes even imperilling the unity of the country. Most politicians have divided the people for narrow selfish interests, so much so that it can be stated with some confidence that our elections approximate to a census of the adult population by ethnic affiliation. The apparatus of the state has belonged to the tribe of the president, with a few junior partners, making the state fairly exclusionary. The sense of injustice that these practices have produced is a major hurdle to amicable relations between Kenya's different communities, and to the development of a common identity and purpose. Yet Kenyans have for long yearned for unity. The national anthem says:

Let all with one accord  
In common bond united  
Build this nation together  
And the glory of Kenya  
The fruit of our labour  
Fill every heart with thanksgiving.

This sentiment is echoed in the preamble of the 2010 constitution which states that the people of Kenya are "proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible nation". The preamble also recognises "the

aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law". In this way the preamble acknowledges that unity has to be based on cultural diversity, and the state has to be restructured in accordance with principles that constitute the common identity and aspirations of the people. The constitution therefore is constantly balancing the promotion of unity with preserving ethnic, cultural and religious diversity. This balancing has led to complex and intricate arrangements, sometimes in the form of general principles to be elaborated by legislation or the jurisprudence of the courts. The delicate balancing has to be worked through with great sensitivity to both the imperative of unity and the pull and value of culture and religion. Broadly speaking, one can say that the constitution is not too prescriptive as regards the role of culture or religion, but strong on social justice and fairness (and the framework of politics), in the expectation that the latter will lead in due course to integration with which it would be easier to negotiate religious and cultural differences.

The constitution declares that there shall be no State religion (Art. 8), but says nothing about what this means for the relationship between the state and Kenya's diverse religions. And though Article 11 "recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenya people and nation", and commits the state to "promote all forms of national and cultural expression", culture does not feature in the national values, though there are several articles in the Bill of Rights chapter directed to the recognition of culture (Arts. 32, 33, 44, 45 and 56). In respect of traditional or religious forms of marriage and other family matters, only such rules apply as are consistent with the constitution (Art. 45). And in the domain of the state, the national values and principles of governance emphasise patriotism, national unity, inclusiveness, human dignity, sharing of power, equality and non-discrimination and social justice (Art. 11). Thus there is a built in tension between civic values on one hand and culture and religion on the other.

#### *Courts' interpretation and balancing of goals*

In this chapter I discuss how the courts have dealt with this tension and balanced competing goals and values. The constitution gives the judiciary the primary responsibility for its interpretation and enforcement. As the constitution is the supreme law, the courts have the final say on the validity of all laws and administrative acts. The judiciary is now truly independent unlike the past. Access to the courts is easy, especially on constitutional issues. The courts can give

a variety of remedies for violation of the constitution. A number of judges from the previous regime have been vetted out. And for the first time Kenya has a Supreme Court with responsibility to see to the proper interpretation and implementation of the constitution. All these provisions have given legitimacy to the courts which the judiciary has never enjoyed before.

I analyse three main cases, all connected in different ways to religion. Religion has not been a major source of division in Kenya. This is in part because of the dominance of Christianity, to the extent that it became a sort of official religion. This was facilitated by the fact that most of the Muslims, a minority, lived, as a majority, along the coast in what was a British protectorate. Its merger with the colony of Kenya at independence assured the preservation of Islam and the traditional system of local administration. The Hindus constituted a small group, and their religion was inward looking. For several years after independence this position did not change significantly. The Muslim Somalis were marginalised, their civil rights denied; in turn they looked to the newly independent state of Somalia for their future. But the situation now is different. Somalis have entered mainstream politics and in other ways too play an increasingly important role in the public domain. Muslims are now to be found in most parts of the country, their numbers, proportionately, have probably increased, they are better organised now and beginning to be assertive. Perhaps the turning point was the Christian attack at the Bomas National Constitutional Conference on the adoption of Islamic personal law which broke up the unity of faith as manifested in Ufungamano.<sup>57</sup> Eventually sufficient support was mobilised to ensure that the constitution guaranteed their personal law (covering marriage, divorce, custody of children, and *wakf* (trusts)).

Now however a number of issues have arisen about the role of religion in the public domain. In different ways, non-Africans, particularly Somalis and Asians, had difficulty in obtaining citizenship after independence. Another issue connected to religion has been the wearing of dress with religious connotations by Muslim girls at their schools. There has also been for some years concern about the effectiveness or appropriateness of the criminal process for communities still embedded in traditional life style, particularly pastoral communities in the north, mostly Muslims (Tanja Chopra, 2009<sup>58</sup>). Recently the High Court had to decide whether customary

<sup>57</sup>Ufungamano was a multi sectoral civil society grouping, including different religions and denominations that played an important part in the pressure for a new constitution in the late 90s and early stages of the CKRC process.

<sup>58</sup>She writes, "Establishing the rule of law in post-conflict environments often faces a dilemma when prosecution of serious crimes is at odds with calming passions after fighting has stopped. This problem has been frequently debated in the field of transitional justice. It reflects a similar, less obvious, challenge in the context of developing countries, where the formal justice system can be at odds with conflict management initiatives," at p. 185.

Islamic mode of compensation to settle a dispute arising from a murder could replace the formal process and punishment for the murder. But other issues are looming. Adherents of Islam and the Seventh Day Adventists are claiming that their students should not be required to attend school on their Sabbath days (late Friday to Saturday) and those employed should similarly be given time off. And recently the Governor of the Garissa County has stated that he intends to establish a ministry to deal with Islamic issues as the majority of the people there are Muslims, a move which would probably be contrary to the Constitution. The Council of Imams has demanded that state corporations or corporations with government shareholding should not produce or market goods contrary to Islamic thought or belief (such as alcohol).

Where exactly does this fit within Kenya's secular state and the equal rights of all citizens? I discuss the judicial responses in three instances: citizenship, Islamic dress at schools, and Islam and the criminal process (I should state members of other religious or cultural communities could easily be involved in these types of cases). In the conclusion I discuss, more generally, how the courts should deal with similar types of issues consistent with the goals and values of the constitution.

### **Citizenship**

The first case concerns citizenship of "Arabs, Asians and Muslims". First a word about the importance of citizenship. Kenya is not merely a territory, a geographical space. Kenya is essentially about its people: a political community and organization, to which Kenyans are related in terms of citizenship: membership of the country, with duties and rights, and expectations on both sides. Citizenship is also an emotional and psychological matter, which can give a sense of belonging, even pride, an identity that links us to others. So it is surprising that throughout its modern history, Kenya did not have a concept and category of common citizenship. Some were British citizens, some British subjects and some British protected persons. They were entitled to different rights, if rights is the correct term for many. But even more important than personal status was membership of the racial community, for rights were also defined by race. So the concept of citizenship as understood in democratic, integrated societies was inapplicable. Instead, personal status became a source of hierarchy and antagonism. Even the independence constitution did not entirely erase some distinctions. And administrative practices ensured that even when certain groups were entitled to full citizenship rights, they suffered discrimination, being denied ID cards or passports – without

which documents it is hard to exercise most citizenship rights. To a considerable extent administrative discrimination coincided with racial or religious distinctions – undermining any reasonable basis of pluralism.

The great achievement of the 2010 constitution was its concept of citizenship, embracing all Kenyans equally, regardless of race, religion, sex or culture – for the first time in Kenya’s history (chapter 3). The only differential treatment among citizens concerns affirmative action for citizens or communities who for historical or other reasons had been left economically or socially deprived (for example Arts. 27(6), 56 and 100). Also for the first time dual nationality is allowed. Special rights are conferred on or promised to long term residents – most of whom would be eligible to citizenship as well.

But in practice not members of all communities had access to the plenitude of citizenship rights, or even to the designation of citizen (Kenyan Asians and Somalis were particular victims in the early years of Jomo Kenyatta’s regime). What the constitution gave, the government (in the form of provincial administration, which means the office of the president) took away. The case which I now want to turn to was one such instance (*Muslims for Human Rights v Registrar of Societies* (Petition 1 of 2011)). The Office of the President had issued instructions to provincial officers dealing with applications for ID cards or citizenship to require Arabs, Asians and Muslims to produce documentation not required of others. The documents were: ID cards of the applicant’s parents, birth certificates of their parents and grandparents (in addition to their own), school leaving certificate, certificate of religion, and a certificate of the applicant’s age assessment from a government hospital.

An ID card is essential for the exercise of many rights of citizenship, including access to education and the fundamental right to vote. The discrimination that Asians and Arabs (and some other minorities) face in obtaining ID cards denies them these rights, and disadvantages them as against other citizens. There were many complaints to the Constitution of Kenya Review Commission from members of minority communities of discrimination in obtaining ID cards, and the consequent denial of basic rights (see *The Final Report of the Constitution of Kenya Review Commission 2005*, at pp. 81-83). Thus the fundamental principle of equal rights and equal treatment of all citizens is violated. It was for this reason that the CKRC proposed that the constitution should expressly guarantee all Kenyans the right to a passport and any document of registration. This proposal is implemented in Article 12 of the Constitution.

The discriminatory practices regarding the issue of ID cards have major consequences for the cohesion of Kenyan society, which is integral to national unity. The CKRC commented that the “question of nationality is fundamental to the development of internal cohesion and external stability of the State. In that issue lies not only loyalty but also the regeneration and survival of the State through time” (page 80 of the CKRC report). The humiliation and the resentment that minority communities feel at the discriminatory treatment undermines the national values and principles of governance of “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalized” (Article 10(b)) as well as of “national unity” (Art. 10(1)). Article 28 recognises the inherent dignity of every person and “the right to have that dignity respected and protected”. Secret or confidential instructions to administrative officers on how to exercise the power of state which have a fundamental effect on people’s right are a denial of the principle of the rule of law, good governance and transparency as required by Article 10 (a) and (c).

The requirement of “religious certificate” is inconsistent with a fundamental principle of the Republic of Kenya as stated in Article 8 that there shall be no State religion. Religion is a private matter, which the requirement of certificate violates. Moreover, Article 32(3) prohibits the denial of access to “any institution, employment or facility, or the enjoyment of any right, because of the person’s belief or religion”. Compulsory disclosure of one’s religious affiliation also violates the right to privacy, which says that every person has the right not to have “information relating to their family or private affairs unnecessarily required or revealed” (Art. 31(c)). Nor is the rationale for the certificate obvious, other than the furtherance of systemic discrimination against the targeted community. Given the widespread belief among some religious communities that they have been discriminated and marginalized because of their religion, the requirement in the circular violates this right.

#### *Court’s judgment*

The judgment was delivered by Justice Ojwang (then of the High Court and now of the Supreme Court). In a tone highly critical of the government, he upheld the application of the petitioners. His judgment was based on two principal reasons. The first was the consistency of the demand for the certificate of religion with the constitutional status of the Kenyan state as secular. He said, “Religion, the belief in and worship of a supreme power, is a personal and inherently informal commitment, also apt to change and take different

forms, which ought not to be the basis of mandatory document for the formal institutions of Government, in a secular state as Kenya.”

The second reason was grounded on the prohibition of discrimination and the guarantee of equality. The fact that the instructions of the provincial administration applied only to “Asians, Arabs and Muslims” rendered them unconstitutional.

Underlying the decision of Justice Ojwang was his sense of the importance of citizenship in the new Kenya. He saw this form of discrimination as fundamentally violation of Kenya’s constitutional principles and values. Although he did not quite put it in this form, the unequal treatment of citizens based on ethnic communities would have been a severe blow to pluralism.

It is interesting to note that provincial administration continued to follow the old, unconstitutional instructions, overruling new instructions from the ministry of immigration in charge of passports. Under considerable pressure and threat of another legal suit, there was some capitulation. The instructions and the defiance of the constitution show how deep is the influence of the ethos and practice of the colonial state, and how the colonial roots of provincial administration continue to inspire and sustain it.

The constitution enabled the judiciary to undo injustice to the Somalia community in another context (in the case of *Hersi Hassan Gutale v AG* (Petition 50/2011) [2013] eKLR). The petitioner, a Somalia, had his Kenya ID card cancelled by a Task Force in 1990 (at the time of great harassment of Somalis). The Task Force was set up to examine the validity of ID cards of Somalis and to cancel them if the holder of the card could not prove that he was a “genuine” Kenya Somali. The High Court at that time dismissed his application against the decision upholding the validity of the process (under the old constitution) but did not pronounce on the decision itself. In 2011, he brought an action under the new constitution, under Articles 12 (which entitles every citizen to a passport and any documents of identity). The High Court judge (Justice Majanja) tried to minimise the reach of the older decision, to open the opportunity to do justice this time. Stating that “Citizenship of any person is a very serious matter”, Justice Majanja ordered the Registrar of Persons to deal with the claims of the petitioners in accordance with the new constitution (under which the petitioners would be citizens, entitled to have passport and other documents of identity).

These two cases are symptomatic of the new approach to citizenship through which minorities (like the Nubians, long subject of systematic

discrimination) have their lawful rights restored to them, now fully accepted as Kenyans. The psychological impact is entirely positive, apart from the material benefits of citizenship. Few other provisions so far have been so effective in promoting a sense of both the diversity and the equality of Kenyans – and as boost to pluralism.

### **Religion, dress and diversity**

#### *Introduction*

This case concerns the right to wear dress expressive of a religion in an educational institution, in this instance a school (*Republic (ex p SMY) v Head Teacher Kenya High School*, [2012] eKLR). While the previous case was relatively straightforward, the wearing of the headscarf is a complex and multi-faceted issue that has been fiercely debated in most European countries during recent years, particularly in the areas of education and employment. It is in these areas that the issue of the headscarf has become controversial, as it is seen as a symbol of female oppression and gender inequality, or antithetical to the promotion of a common identity in multi-ethnic societies. There are many reasons for the complexity of legal issues in a case like this. A number of constitutional rights can be involved in the case: the freedom of religion, the right to manifest it in public, the right to culture, the right to education, the freedom of expression, the right to equal treatment and freedom from discrimination, rights related to gender, and the right to dignity, as mediated through the rules providing for the limitation of rights and freedoms. The level of the educational institution may also be relevant, for example, greater freedom of dress may be allowed in tertiary than primary levels. And the rules about dress may also depend on how much of the body it covers, the headscarf (“*hijab*”) being more acceptable than the full length dress, hiding the face including eyes (“*burqa*”). For our purposes, the mixture of religious groups in the country may also be a factor in the decision to regulate the dress and to what extent. Several evidentiary issues are raised, as to the effect of the dress or the banning of the dress (which are seldom satisfactorily resolved). Ideology may play a more important role; the approach is often determined by the ideology of a “single nation” or a “multi-religious nation” or a “secular state”. There may be disagreement as to which state authority (including schools) should determine policy on dress. Many countries have faced the existence of diverse religions, several of them have regulations on dress, and a considerable amount of litigation has ensued. I return to some of these approaches and experiences after an analysis of the Kenya case.

### *Kenya High School*

The regulations of the Kenya High School provide for a school uniform and prohibit the wearing of a dress with religious significance. A Muslim girl was not allowed to wear a hijab. Apparently this was also the case in a number of other schools. A number of Muslim organisations (including the National Council of Imams and Ulamaa) had complained to the ministry of education about this rule, as against the constitutionally protected freedom of religion, in this case the manifestation of their belief (relying on Art. 32 of the constitution).

Article 32 Freedom of conscience, religion, belief and opinion

- (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Every person has the right, either individually or in community with others, in public or private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.
- (3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.
- (4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.

In response to the complaints, the permanent secretary sent the following letter to all schools on behalf of the minister:

“RE: RELIGIOUS DRESSING

It has come to my attention that some heads of school have refused to permit Muslim girls dressed in the Hijab an Islamic headgear, to attend school.

I wish to remind you that no child should be denied the right to education on the basis of religion, a right enshrined in the Constitution. Further, I direct principals who may have expelled students on the basis of wearing the Hijab to admit them immediately.

Prof. Karega Mutahi

Permanent Secretary”

Reliance was also placed on Article 27 which ensures equality and prohibits discrimination on several grounds, including religion, conscience or belief. For the applicant it was argued that the *hijab* was meant to “protect and safeguard the honour, dignity, chastity, purity, integrity and moral character of Muslim women”. She complained that the practice by the respondents of refusing her and other Muslim girls to wear the *hijab* at school as a manifestation of their religion and beliefs amounted to denial of equality as well as freedom of religion.

The prohibition was indeed a denial of the freedom to manifest one’s religion. The issue was whether the limitation on this right was justified. Recognising that rights and freedoms cannot always be absolute, the constitution allows limitations on rights and freedoms if certain conditions are satisfied in Article 24, as follows.

- (1) A right or freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
  - (a) the nature of the right or fundamental freedom;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
  - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

The Article also says that no right or fundamental freedom can be limited so as to “derogate from its core or essential content” (Clause 2). Article 25 sets out rights and freedoms that cannot be limited at all (but these are not relevant to this case).

When discussing pluralism it is useful to reflect on the nature and purpose of Article 24. A principal task in promoting pluralism is the balancing of different, sometimes competing, interests. Accommodating widely divergent concepts of morality, gender relations, cultural practices etc. requires negotiated concessions, give and take, that would be impossible if each person’s right were

absolute. However, there is a limit to how far deviations from the core of rights and concessions in negotiations (or indeed sometimes an imposition) can be made. The limitation must be proportional to the purpose for limiting a right, and the purpose itself must satisfy tough criteria. Alternative, less onerous, methods of limitations to achieve the purpose must be adopted where possible. The preferences and views of relevant parties must be considered. The constitution builds other safeguards in the scheme to ensure that limitations are not made without careful thought. By making several national principles and values the benchmark for the validity of the limitations, the constitution seeks to ensure that many of the values and methods of pluralism would be safeguarded.

Returning to the *Kenya High* case, the school authorities convinced the court that its regulations constituted the legal authority for limiting the rights (a point not relevant to us now); and it seems that teachers and parents were consulted and were happy with the rule as were most students. Parents and students are told of the rule about the dress before the student is enrolled. The school authorities then proceeded to justify limiting the freedom of religion (and one might say also the freedom of expression) by describing the mixed nature of the student body, thus, "The students community, both past and current is multi-faceted, and comprises and represents various and [sic] ethnic, cultural, socio-economic, class, racial and religious sphere who have their different dress codes, traditions, practice, who have been brought together under a delicately balanced schooling environment where equalization as a policy plays the pivotal role in the set-up and maintenance of students co-existence."

It then explained the origins of the school, "Though the school was originally designed to be a Christian institution and has a strong Anglican Christian background and population, it has over the years evolved to accommodate students from other religions and religious inclination such as the Muslim, Hindus, Buddhist, Sikhs and known sects such as the Legio Maria, Akorino and other traditionalist, albeit within reasonably defined and generally accepted/standard parameters dictated by the equalization policy within the school environment."

The school asserted that the limitation of the right was reasonable and necessary for the proper management, discipline and good governance in the school. It argued that uniform school dress serves a critical role in the education set up as it creates harmony, cohesion and unity among students which in turn contributes to high academic performance. It identifies and associates students to a particular school

and helps to maintain uniformity, order and discipline in schools. It justified the policy by reference to overriding educational need for multi religious, multi-cultural, and multi-racial student community integrating all social classes. It argued that if the applicants were allowed to wear the *hijab*, the other students from other religions, denominations and religious sects would feel discriminated against and may start agitating to be allowed to outwardly manifest their religions and beliefs through the wearing of religious attires which would translate into disharmony and disorder not only at the Kenya High School but also in other national schools in the country.

It defended its record of respecting Islam and providing ample opportunities for Muslim and other students the freedom to manifest and practice their religion through worship and observance of their religious practices. Islamic religious education is taught in the school and examined as part of the education curriculum and an Islamic preacher is allowed to the school once a week to attend to their spiritual needs. The school also argued that as students were aware of the rules about dress which they accepted, they could not now object to that dress and insist on the *hijab*.

#### *Court's decision*

The judge (Justice C. W. Githua) ruled that there was no violation of equality (Art. 27) since Muslim students enjoyed the same facilities for prayers and observance of religion as students of other faiths. On the question of the freedom of religion, she said that it was important to take into account the overall situation, the broad context of the case, including the extent to which the individual could reasonably expect to be at liberty to manifest his [sic] beliefs in practice. In regard to this the judge said, "I wish to state at this juncture that the freedom of thought, conscience and religion which includes the right to manifest one's religion is one of the foundations and pillars of a democratic society. In democratic societies in which several religions co-exist within one another in the same population, it may be necessary to restrict peoples' manifestations of religious beliefs in order to reconcile the interests of the various groups and ensure that every person's beliefs are respected". She also accepted the arguments of the school authorities on the virtues of the benefits of a school uniform. Consequently the undoubted restriction on the applicant's freedom to manifest her religion was held to be justified.

#### *Comment*

It is worth quoting the judge's reasoning at length; extracts from her judgement are in roman, and my comments in italic, script.

“The significant and critical role played by standardized dress codes and observance of rules in controlled environments which one would expect to find in any national secondary school in Kenya or say for example in the Armed Forces cannot be overemphasized. It is not disputed that school uniforms assist in the identification of students and gives them a sense of belonging to one community of students. It promotes discipline, unity and harmonious co-existence among students. It instils a sense of inclusivity and unity of purpose. In my view, the most important role played by a standardized school uniform is that it creates uniformity and visual equality that obscures the economic disparities and religious backgrounds of students who hail from all walks of life”.

*This defence has become common in almost all countries where the matter has been litigated. Most judges want to accept it, even though no evidence is ever presented for it. Schools in poor countries where parents cannot afford uniforms seem to manage quite well. In any case, should “a sense of belonging to one community” justify violation of a student’s right to the freedom of religion and expression? Conflating school uniforms with military uniforms is not helpful, for obvious reasons. And what is the advantage in obscuring religious backgrounds of students? Surely the school is the place to learn about cultures and religions and other things. If students knew about the religious backgrounds of fellow students, they would be interested in and learn about differences, in relatively friendly environment, under the guidance of the teacher. And the emphasis in the judgment on the provision of religious education for all groups (with priests from outside the school) is surely calculated to keep religions apart, breeding ignorance and mutual suspicion. And as for economic differences, surely those who can afford to send their children to Kenya High are well heeled.*

“If the court were to allow the applicant’s quest to wear *hijab* in school, the 48 Muslim girls in the school would look different from the others and this might give the impression that the applicants were being accorded special or preferential treatment. This may in all probability lead to agitation by students who profess different faiths to demand the right to adorn their different and perhaps multi-coloured religious attires of all shapes and sizes which the school administrators will not be in a position to resist if the Muslim students are allowed to wear a *hijab*. The result of these turn of events would be that students will be turning up in school dressed in a mosaic of colours and consequently, the concept of equality and harmonization brought about by the school uniform would come to an abrupt end. It goes without saying that this kind of scenario would invite disorder, indiscipline, social disintegration and disharmony in our learning institutions. Such an eventuality should be avoided at all costs since it is in the public

interest to have order and harmonious co-existence in schools. It is also in the public interest to have well managed and disciplined schools in a democratic society”.

*If Muslim students look a little different from other students in their attire (but only by a small head cover little larger than a handkerchief), surely this is all to the good. Does not the preamble of the constitution exult our diversity (“proud of our diversity”)? And what is wrong with a “mosaic of colours” – does it not sound as a wonderful depiction of our blessed land? Neither the respondents nor the judge addressed the question whether other religious groups have a distinct religious dress and have asked for their children to be allowed to wear them. In the absence of such religious prescription, it does not make sense to talk of discrimination against other members of other religions. As it happens, school uniforms in Kenya closely resemble the “European, Christian garb”. This exclusive garb, far from promoting harmony, as the judge claims, has in fact become a bone of contention in numerous countries.*

*What a leap in misguided imagination to say, as the judge says, that a hijab would “invite disorder, indiscipline, social disintegration and disharmony in our learning institutions”? No evidence for this proposition was provided, other than the say so of the headteacher. What evidence was produced by the respondents to prove this cataclysmic event? Which school in Kenya (without the benefit of rich parents who can afford uniforms) has suffered such a calamity? And what is the significance of the statement that it is in the “public interest to have well managed and disciplined schools in a democratic society”? – that it is all right for non-democratic societies to have anarchy in schools? The judgment contains several other non-sequiturs. But perhaps there is a sub-text here – the fear of Islamic fundamentalism. If so, this should have been articulated and debated. So much of the case law, locally and internationally, has been influenced by unspoken assumptions of Islamic fundamentalism without regard to reality, leading to erroneous rulings.*

*The judge does not discuss the reasons whether Muslim girls are required by their religion to wear the hijab, as the applicant claims, or why she considered that it was important for her to wear it. By the total disregard of this issue, the judge disabled herself from considering a fundamental question required by the criteria for determining the validity of the limitation of a human right – the test of proportionality. This omission is sufficient to render the judgment flawed.*

*This omission is surprising also because at point the judge says that she is considering the case in its “overall context” – she has missed a key component of the context.*

*It is true that most parents and perhaps students also had approved the school uniform. But it would seem a significant minority did not. The ethos of the*

*constitution is a sympathetic understanding of the concerns of minorities (Art. 21(3)). The governors and staff of the school and the judge alike failed in this duty.*

“It is important to bear in mind that the Republic of Kenya is a secular State. This has been pronounced boldly and in no uncertain terms by Article 8 of the Constitution. This in effect means that no religion is superior than [sic] the other in the eyes of the law. Considering that the Kenya High School, just like any other national school is a secular public school admitting students of all faiths and religious inclinations, allowing the applicant’s prayer in this motion would in my opinion be tantamount to elevating the applicant and their religion to a different category from the other students who belong to other religions. This would in fact amount to discrimination of the other students who would be required to continue wearing the prescribed school uniform.”

*The court is somewhat confused about the concept of secular state. On the one hand the judge says that national schools are secular and on the other hand she praises the school for organising prayer sessions for the religious groups represented in the school! It is a bit of an exaggeration to say that the constitution pronounces “boldly and in no uncertain terms” that the Republic is a secular state. Article 8 merely says, “There shall be no State religion”. Most schools have in fact a religious orientation, being organised by a religious community. Most schools start the day with prayers. There are many understandings of secularism (certainly what goes on in Kenyan schools about religion and prayers would be declared unconstitutional in secular Turkey). One has only to go to national celebrations to notice that Kenya is no secular state in the sense the court assumes: prayer after prayer, and endless Christian hymns. So the court should have tried to define its understanding of Article 8.*

*The judge does not discuss the “dress” that the applicant wanted to wear. No attempt was made to examine the style of hijab. Some other forms might denote inferiority of women (especially jilbab – an all-enveloping garment from head to toe) or even the face veil (niqab) but hardly the hijab.*

*A reader might get the impression that applicant wanted a jilbab. She wanted merely a headscarf; her face, much less her eyes, would not be hidden. She was not abandoning the school uniform as such. The school might have suggested that the headscarf display school colours (as happens in some schools in Britain) to fit in with the school uniform.*

“From the foregoing, it is clear that if the practice sought to be enforced by the applicant was allowed, it would fly in the face of the constitutional principles of non-discrimination on the basis of

religion and the principle of equality before the law which ironically the applicant is seeking to enforce in the instant application”.

*I have already mentioned that there is no evidence that members of other religions desired to wear a particular dress. Most of them and their parents expressed a preference for the school uniform. So where is the discrimination? Difference is not always discrimination. We need to understand other cultures sympathetically if we are to build a Kenyan nation in accordance with the goal and method of the constitution.*

“For the foregoing reasons, I am satisfied that in the circumstances of this case, the respondents’ limitation of the applicant’s right to outwardly manifest her religion by wearing a *hijab* in school was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. I am persuaded to find that the uniform school policy was designed by the Respondents with the legitimate aim ensuring equality among all students and to facilitate enforcement of discipline for continued improvement of academic standards in the school.”

*I have already indicated a major weakness of the judgment – the failure to follow the criteria and procedure of Article 24 dealing with the limitation of rights and fundamental freedoms, including that the limitation on rights be no greater than necessary to achieve the legitimate objective. So the judge’s conclusion is not reliable. Nor does it matter what the intention of the school might have been behind its uniform policy. The constitution provides a framework within which difficult and sensitive decisions like this must be made. What matters is the consequence of the policy. Here, as I have tried to show, there are serious flaws in the judgment.*

*Nor is there any discussion of what is entailed in human dignity and freedom which the judge mentions as compatible with the restriction on the applicant. Dignity is closely connected to identity – to which the respondent and the court seem to have paid no attention. And on the question of the jurisdiction of the court, his reasoning is full of technicalities.*

### ***Lessons from other jurisdictions***

It is in the West that the debate about the veil has been most intense, with severe restriction on the use of it, particular in educational institutions and public service. All these countries have elaborate Bills of Rights, and many in Europe are also signatories to the European Convention on Human Rights, which has spawned considerable litigation. There is now considerable international jurisprudence on the subject to which we can turn briefly. A number of these decisions were referred to the Kenya court (the judge referred to them as a

“raft of foreign decisions”). She said she had read them, but did not find them useful (without any discussion whatsoever why) and instead relied on a Kenyan decision under the old constitution with an orientation very different from the new constitution<sup>59</sup>.

It is not easy to characterise Western attitudes towards the veil (or indeed in other parts of the world). One reason is the multiple dimensions of the veil – and its many meanings, not fully understood by the host countries. Not surprisingly there is considerable diversity among European states on the rules on wearing religious dress. But the general orientation seems to be the same. The objectives of restrictions on the veil are somewhat different from those in Turkey and once in Iran – where, in these Muslim countries, the ban was part of a movement of modernisation and the reduction of the influence of Islam in political and social life. In Europe the debate is part of the broader issue of the integration of its Muslim population, recently migrated there. This concern has been fuelled by the rise of Islamic fundamentalism – with the danger of conflating all Islamic practices with fundamentalism. As European states are bound by Bills of Rights, the banning of veils has to be determined within the framework of human rights and the limits on them (not unlike in Kenya). This has led to considerable legislation as well as litigation. My purpose is not to analyse the decisions of the courts, but to point to the critical issues which have been canvassed.<sup>60</sup> In this way we may get some insight on how we in Kenya might balance the general interest in national integration with the particular interest – both protected by the constitution.

In the West, the approach is determined by the broad policy of dealing with the diversity of cultures, and in particular the policy towards new immigrants, often from different religious and cultural traditions than in the West. The general position in the West is that those who come to settle in Europe must accept its values and practices. With respect to the necessity of interference with rights of religion or culture in a democratic society, the European Court of Human Rights (ECtHR) observed that “in democratic societies, in which several religions coexist within one and the same population,

<sup>59</sup> Academics (and no doubt practitioners) find it somewhat infuriating when judges say this. It would seem also discourteous to practitioners who may have done considerable research. In another recent Kenyan case judges took this line; a year or so later, another set of judges not only discussed these cases in detail but also followed them!

<sup>60</sup> The following account is based on the cases: *Leyla Sahin v. Turkey* (App. No. 44774/98) [2006] ELR 73, (2007) 44 EHRR 5, 19 BHRC 590, 44 EHRR 5, [2005] ECHR 819 (ECtHR), *Dahlab v. Switzerland* [2001] ECtHR (App. 42393/98) (ECtHR), *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sep. 24, 2003, R.(on the Application of Begum) v Headteacher and Governors of Denbigh School* [2006] UKHL 15, [2006] 2 All ER 487, [2007] AC 100; see also the following articles; Ssenyonjo 2007; Kahn, 2007.

it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected". That here policy may override the law is demonstrated by the current French government which effectively overruled the Constitutional Council on the invalidity of the ban—largely for political and ideological reasons. This policy is driven in part because of the Western bias in favour of individual rights at the expense of the community; and in part because of concern with social and political unrest, leading to armed confrontation.

There has been no thorough investigation by the courts whether Islamic requires its female adherents to wear the veil, and if so, what kind of veil. Is it merely exhortatory or compulsory? Is it part of Islam or remnants from cultures of communities which were converted a long time ago? On the contrary, courts have been prepared to assume that it was obligatory for the purposes only of the decision (perhaps not wanting to give it the status of obligatory). For example the ECtHR on Turkey found that, irrespective of whether the Islamic headscarf was a precept of Islam, granting legal recognition to a religious symbol of that type in institutions of higher education was not compatible with the principle that State education must be neutral, as it would be liable to generate conflicts between students with differing religious convictions or beliefs.

There has been much controversy over the consequences of banning or not banning the veil. It has been argued that if there are no restrictions, it would breed discontent in schools, lead to intolerance of other religions, put pressure on those Muslim students who do not wish to wear the veil, undermine the principle of equality, and promote the subordination of women and so their marginalisation. It has also been argued that the veil would prevent the integration of Muslim women in the wider community. In *Dahlab v. Switzerland*, the ECtHR asserted that it "appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils". On the whole the courts have accepted this analysis (as did the Kenya court) without much scientific evidence. However, in the *Lundin* case a majority of the German Constitutional concluded that the headscarf *per se* could not simply be considered as merely a sign of suppression of women or a symbol of female submission, and noted that there was insufficient empirical data to indicate any harmful influence of the headscarf on children.

For those who are opposed to the veil, a major consideration was the cumulative, negative effect on the equality and participation of women. This view is reinforced by the premise that all Muslims girls who wear the veil are oppressed, and wear the veil involuntarily because of social pressure by their family or even harassment by their peer group. This view was frequently expressed by Western courts, perhaps seeing the status of women as distinguishing the West from the East. This appeared particularly strongly in the Baroness Hale concurring judgment in the *Denbigh* case, who provided this as the justification for the restriction on the right to manifest religion. She also said, "Like it or not, this is a society committed, in principle and in law, to equal freedom for men and women to choose how they will lead their lives within the law. Young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture. A good school will enable and support them". Here the school is to enable immigrant children to integrate in the host community by imbibing its values.

And, as the other side of the picture, the courts have generally assumed many values of the uniform, reiterated in the Kenya decision.

Of the various rights and freedoms violated by the restrictions against the veil (freedom of religion, racial and gender discrimination/equality, minority rights, right to education, protection of culture, and personal autonomy), the greatest attention has been paid to freedom of religion and discrimination in favour of those who want to wear the veil. Culture has hardly ever been discussed in this context, other than to, impliedly, criticise some cultures. In some cases, particularly Turkey, secularism has been the basis for banning the veil. It is interesting to note that in France, the most secular of states, the Constitutional Council has repeatedly held that the wearing of *hijab* is not against secularism and that its ban is a denial of the freedom of religion (so long as the wearing of it was not designed to proselytize others to Islam). At one level, the banning of a religious practice on the grounds of secularism is strange, as the purpose of secularism is not to abolish religion but to provide for equal treatment for all religions (unless the state subscribes to communist atheistic ideology). A minority in ECtHR case of *Sahin* held that the force of the principle of secularism did not release it from its obligation to establish that the ban on wearing the Islamic head- scarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a "pressing social need". "Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries

or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention”.

Considering that there are several varieties of “Female Islamic dress”, it is surprising that the courts have not made much of a distinction. The female Islamic dress takes three main forms, namely (i) the headscarf in longer or shorter version (*khimar* or *hijab*), the former covering the hair and the neck or long enough to cover the bosom; (ii) loose robe, the head-to-toe garment that obscures women’s bodily features and hides all parts of the body except hands and face called *jilbab* and (iii) the full veil (an all-enveloping garment) covering the whole of the body (*burka*) and possibly including the face veil (*niqab/purdah*). The UN Human Rights Council has said that the full *burqa* (but not the *hijab*) could be banned on grounds of pedagogy (the need to see face and eyes of the students for the teacher, and to establish contact with the student). Others have seen the *hijab* not in practical terms but as symbols and have banned its use in schools (see the next paragraph).

Courts have said that the legitimacy of the ban depends on the level of the educational institute. Children are more malleable at a young age, but also less in charge of what they wear. So in principle courts should be more willing to accept restrictions at primary schools, perhaps even secondary, than tertiary (though the ECtHR has cheerfully upheld bans in Turkish universities). In general, it is hard to understand why grownups should be prevented from practising their religion (even if it is walking through the streets of Amsterdam in their *burqa*) if no harm is done to others. In *Denbigh* Baroness Hale justifies special rules for schools. She identifies their task as

to educate the young from all the many and diverse families and communities in this country in accordance with the national curriculum. Their task is to help all of their pupils achieve their full potential. This includes growing up to play whatever part they choose in the society in which they are living. The school’s task is also to promote the ability of people of diverse races, religions and cultures to live together in harmony. Fostering a sense of community and cohesion within the school is an important part of that.

One may argue that in this way the Baroness would take away the responsibilities of the parents (and even the community to which they belong) for the upbringing of the children – and the Baroness has been frank enough to admit that it is part of her purpose. But this grave matter cannot be so lightly disposed of.

Even if schools should have this mission, it is hard to understand why it is best discharged by negating differences between children from different religions and communities. Some might think that the first task might be to introduce students to the cultural, linguistic and religious diversity among them, to show the specificity and richness of each as they search for common values and experiences. At their age, unencumbered with prejudices, they could approach diversity constructively (unlike the ghettoisation of religion at the Kenya High).

An approach taken in some of the courts regarding the violation of the rights of the student (especially regarding the right to education) is to establish the existence of other schools which allow a veil. There are at three problems with this solution. One noted by the dissenting judgment in *Sahin* and endorsed by Baroness Hale in *Denbigh* concerns the inconvenience and difficulties of the change of school. Another is being forced into a “female only” and mono-cultural institution, which largely defeats the objectives of those who oppose the veil – as well as possibly those of the student. The third possible problem is that the school being offered to her is likely to have lower standards of teaching and facilities – there are not many Kenya Highs in our country. This is calculated to produce a great sense of injustice among students whose options are so closed.

A related arguments that the courts have used to defeat the claims of the student to the veil runs like this: “You and your parents had prior knowledge of the restrictions about dress in the school and so now you are stopped from challenging it. You have therefore acquiesced in the forfeiture of the right to freedom of religion (at least to this extent).” Is this contractual approach to a constitutional right appropriate? Can an institution escape its constitutional obligation by an arrangement like this? And does this take account of the scarcity of educational facilities in many parts of Kenya? Is a student condemned to what may turn out to be a poor school, forgoing a better endowed school? And she may not want to go to a sectarian school which may be the only school which would accept her with the veil – it is wrong to assume that a student who acknowledges her religion in this way has no interest in other religions or friendships across religions.

I now turn to the issue as to which body is qualified or suited to make the decision about dress. In some cases the ban is through national legislation (as in Turkey) but in many cases the decision is of individual schools. In the Kenya case, the government issued a directive that no child should be excluded from a school because she wore the veil. But the case turned on the validity of the rules

of the school (albeit that they were made under state authority). In the Turkish case, the ECtHR was content to accept the sovereignty of the national government. In Kenya the court held that the most suitable institution was the school (knowing as it does, the nature of the student body, etc.)—thus disregarding the imperatives of the constitution. In *Lundin* the German Constitutional Court required legislation on the subject—but at the regional (Länder) level. What is best for Kenya? I argue later that national legislation should at least set out the broad framework, given the directive in the constitution for “unity in diversity”, and other reasons connected to the circumstances of the country.

The final issue is to see if and how courts have tried to resolve this difficult issue in a positive and constructive way—acknowledging the limits on judicial function and process. But as I have already noted, the Kenya judiciary has substantial responsibility for the implementation of the constitution. The Kenya court could have explored the constitution, but in so far as it did refer to the constitution, its analysis was somewhat superficial. Of the foreign decisions under discussion, the closest that comes to an examination of options explored by the school to resolve the dispute about the dress in a fair way is *Denbigh*.

*The way forward for Kenya?*

The ban is a blunt instrument, and may aggravate the problem (may, for example, lead to fewer female students, and fewer women in professions)<sup>61</sup>. It may lead to a lower degree of pluralism, as the emphasis is on some kind of a common culture, but it may worsen the case for a common culture as it will lead to resentment by the groups adversely affected. It would reduce possibilities of learning about other cultures (particularly sad when students are denied the opportunity) and integrating them into a common culture. It is likely to drive Muslim girls to schools which have a “fundamentalist” tendency. It negates one important aspect of secularism, which is equal opportunity and status of all religions, not the denial of manifestation to some. And it represents an almost visceral reaction to an imagined notion of Islamic fundamentalism, perpetuating ignorance and myths. I do not believe that this is consistent with the message of the constitution.

Despite some problems that I have with the House of Lords in *Denbigh*, it is worth looking at how it dealt with the issues, for I believe it comes close to what is envisaged in Kenya’s constitution. The court was

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<sup>61</sup> See Manisuli Ssenyonjo, 2007.

clearly impressed by the extent to which the school had gone to secure general support for the uniform. It had held long consultations with parents of different religious persuasions; it consulted their clerics; and it consulted teachers and students. It even adopted three different kinds of dress – which of course diminishes the highly moral virtues of school uniforms that most courts (including ours) have so emphasised! And it did allow the *hijab*, with colours matching the uniform. And when the applicant, after some years at the school, protested at the outlawing of the *jilbab*, the school went to great lengths to find a place for her in a school which would allow the *jilbab*. The head teacher and the majority of the governors and staff were of the Muslim faith, who must have been sensitive to the concerns of their religion.

A very recent Canadian Supreme Court decision<sup>62</sup> (delivered on the day I am writing this!) shows a way forward for us as well. It was not concerned with education but judicial trials. Like many other countries, Canada has had to deal with accommodating the veil in the voting booth, citizenship ceremonies or at educational institutions. The case was about a criminal trial in which a Muslim woman accused her cousin of sexual assaults over a period of time when she was a young girl. The Supreme Court had to decide whether a Muslim woman could have her wish to testify wearing a full body veil (including her face and eyes) against the accused. As against that, was the accused's right to a fair trial, particularly in relation to his right under the Human Rights Charter to present his defence and cross examine his accuser. The Supreme Court tried to strike a balance between competing interests. Not surprisingly the court was deeply divided (4 in majority, 3 dissenting).

The majority refused to lay down a firm rule; instead it wanted to balance interests in the context of each case. Led by Chief Justice Beverley McLachlin, four judges said judges should neither ban outright, nor routinely allow, the *niqab* (covering the face). Instead, judges should consider the veiled witness's "sincerity of belief"; any risk to "trial fairness" (unlikely in cases where evidence is uncontested, and credibility or cross-examination are not at play, the ruling suggested); ways to "accommodate" the beliefs by using "reasonably available alternative measures" (courts sometimes allow evidence to be given behind a screen or via closed-circuit video); and whether the harm of veiled testimony in a particular case outweighs the benefit to society of encouraging victims to come forward.

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<sup>62</sup>R. v. N.S., 2012 SCC 72

Dissenting Justices Louis LeBel and Marshall Rothstein said the appeal “illustrates the tension and changes caused by the rapid evolution of contemporary society and by the growing presence in Canada of new cultures, religions, traditions and social practices.” But they would have reconciled that tension by never allowing the *niqab* to override the rights of the accused, concluding a veiled accuser doesn’t square with the “constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada.” The seventh judge, Justice Rosalie Abella, on the other hand, favoured the wearing of the *niqab*, said that the balance must almost always be struck in favour of *niqab*-wearing witnesses, in order to encourage victims to come forward, with rare exceptions for where a witness’s identity is in issue. And, not surprisingly, the public opinion was similarly divided.

I believe that the orientation of the Kenya constitution is similar to the position taken by the majority in the Canadian case. There is considerable emphasis on freedom of religion (Art. 32), culture (Art. 44) and the protection of minorities, which the Muslim community is (Art. 56). But the constitution is also strong on individual rights. The two sets of values have to be balanced; Article 24 provides a reasonable basis for doing so. This conclusion also follows from the constant emphasis on national unity and political integration as well as diversity (an issue discussed at length in chapter 5 of this volume). In the *Kenya High* case no attempt was made to consider the religious importance of the veil to the applicant or how it could be balanced by the legitimate interests of the school and the wider community – and thus an opportunity for a dialogue, indeed a national dialogue, was squandered by the court.

There are important pedagogical reasons why there should be open interaction between the teachers and students, and as among the students. That might suggest a rule against a full body dress with only face and/or eyes visible, depriving others of the ability to understand body language and facial expression. But the *hijab* or the headscarf is another matter altogether (especially if the scarf reflects the colours of the school uniform). A similar conclusion follows if we focus on the broader functions of educational institutions as regards nation building. The ending of the colonial segregation of schools by race schools provide a great opportunity for children of different groups to understand others, to foster common interests going beyond community concerns, and forming friendships lasting into the

future—thus laying the foundations of nation building as envisaged in the constitution. Neither approach is without its difficulties as the Canadian case shows; there is nothing in the constitution which suggests otherwise. But it helps to lay the foundations early at schools.

I discussed at length the issues that have emerged in the cases on the veil in other jurisdiction in order for us to discuss them and determine how we configure them. I should clarify that I am talking here primarily about the judicial function, which is restricted to the constitution. Europe has had to deal with for the most part new migrants, and often very different in religion and culture. That is not the situation in Kenya, where its various religions and cultures have been with the people for a century and a half. There is, at the worst, ignorance rather than suspicion of the other, although there are disparities of wealth and opportunities.

And there have been periods of the persecution of some groups, particularly Somali Muslims, and some coastal and other communities have for long hard memories of unjust treatment (as Zein Abubakar has shown in this volume). Again, as he has argued, the answer is dealing with past injustices, which has been tried through transitional justice strategies, however faulty the process turned out to be.

We need more research on educational and other policies for better understanding and accepting of our diversity. As happened in the *Kenya High* case, it is too easy to borrow orthodoxies from foreign courts based on no sound research. It is hard to believe that a policy of exclusion, whereby a community is not allowed to practice its religion can be justified in the name of tolerance. Anyway we need to go beyond tolerance, to an understanding of and interaction between different schools of thought—for which few institutions are better placed than schools and universities. And in this context I should also say that policy on these matters should be determined by the national government after appropriate consultations with the people, including other government agencies at the national and county level, and with experts from academies and civil society. The policies will have such major influence on the future of Kenya as a nation that they ought not to be left to each school.

The judiciary should be aware of the multiplicity of social and political issues around the veil, many of which are addressed by constitutional issues. The debate about the veil has to be cast in the broad framework of the constitution, not confined to a narrow framework as in the *Kenya High*. With a broad framework the prospects of some settlement improve. In this regard courts should distinguish between different

kinds of Islamic dress, from the point of their impact on pedagogy, and the intrusion and visibility of the dress. Likewise attention should be given to the level of the educational institution, greater discretion being given to the student the higher the level.

### **Religion, crimes and the law**

In *Republic v. Mohamed Abdow Mohamed* (Criminal Case 86/2011) (2013)eKLR), the accused was charged with the murder of a fellow Somali, both Muslims, in Eastleigh (in Nairobi). There seems to have been ample evidence of the murder. However at the trial the Director of Prosecutions asked for the withdrawal of the prosecution and the termination of the case. His representative argued that the families of the murderer and the victim had resolved their dispute in the “traditional and Islamic way” by the payment to the victim’s family of sufficient number of camels and goats and other livestock. He relied on Article 159(1) of the Constitution which he said provides for alternative forms of dispute resolution, including traditional dispute resolution mechanism (in fact the relevant provision is Art. 159(2) (c)). He urged the court to “consider the case as ‘sui generis’ as parties had submitted themselves to tradition and Islamic law” (it is not clear to me what this means). Justice Lagat-Korir, noting that Article 157 gives the DPP authority to discontinue a prosecution, dismissed the charges. He said, “In the unique circumstances of the present application, I am satisfied that the ends of justice will be met by allowing rather than disallowing the application”.

It is true that the prosecution informed the court that its witnesses had refused to testify saying that they would not go against traditional mode of settlement. But the application was based on the use of traditional settlement procedure, and likewise the judge did not refer to this point in his reason for accepting the application for discharging the accused. In a sense, the application to the court admitted that the accused had in fact committed the murder.

As far as the court was concerned, the dispute was not between the families but between the state representing the people and the murderer. The prosecution had brought a charge of perhaps the most serious criminal offence; it was not civil proceedings to secure compensation for the murder. But the prosecution and the court changed the nature of the case by treating it as a matter purely of a personal or family dispute, in which the state or society had no interest. The implications of this approach (that customs of a community can override the imperative of criminal law) are far reaching. The judge does not seem to have raised with the accused or the prosecutor arguments against dismissal of charges. He seems

to have completely ignored the scheme of the constitution about the discontinuation of prosecutions which were meant to deal with abuses of prosecutorial powers previously

Even more fundamentally, both the DPP and the judge have misunderstood or overlooked the scope of traditional dispute resolution mechanisms, or chose to ignore it. The constitution very clearly sets limits to the recognition of such mechanisms. Article 159(3) states that traditional dispute resolution mechanisms shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any other written law. There is no reference to these limits either by the DPP or the judge. It is clear that all three limits are applicable in this case.

Article 157(6) says, that the DPP cannot take over a prosecution instituted by another party without the permission of that party (not an issue in this case), and second, and critical for this case, Article 157(8) prohibits the DPP from withdrawing a prosecution without the permission of the court. This places an enormous responsibility on the judge as she or he has to decide the issue in the wider interest of society, especially given that both parties before the court (the accused and the DPP) were advocating a fundamental disregard of essential legal principles. There is no evidence that either the DPP or the judge considered the wider implications of the discharge of the accused. The judgment takes all of one page! Together the DPP and the judge have freed a murderer in a context of alarming increase in murders and other criminal acts, with which the police are incapable of dealing. The criminal law is supposed to emphasise the sanctity of life – which objective this acquittal negates. It privileges the rich (who can afford the compensation) over the poor (who would not be able to make this type of payment). We have suffered enough from the privatisation of the criminal process, to introduce yet another escape from the rigours of the law.

From the perspectives of diversity and pluralism this decision could of great significance if it were followed. It would allow ethnic or religious communities to evade the state system of criminal justice, replacing it with their own system of penal justice. It would convert crimes into civil disputes to be resolved within the community. Each community which has some sort of internal mechanism could seek to opt out of large sections of the criminal offences and process.

The justification that Justice Lagat-Korir gave for his decision was its unique circumstances – but what was unique was not clarified. In

fact a large number of offences within the Somali and probably other communities are settled in this way. Should the legal and judicial system endorse this approach? In a study of conflicts and disputes between members of different clans in northern Kenya, Tanja Chopra (2009) advances a case for reliance on traditional mode of dispute settlement (most of the following account is based on her work). Noting the inaccessibility to or incompatibility with local socio-cultural values, she demonstrates that official justice institutions in developing countries do not fully pervade society. The legal notion of “justice” is frequently at variance with that of the community. Policy makers and practitioners are confronted with a choice between applying official justice, which may be inefficient in settling disputes, or resorting to conflict management techniques, including traditional methods to resolve conflicts, which can run counter to the official law.

Chopra notes some inefficiency in the provision of legal services in the region. Only magistrates are sent there, and then only a small number, leading to long waits for trial and judgment. The delay can precipitate revenge by the victim’s clan, aggravating the conflict. There are also lack of prosecutors and few lawyers. The accused generally have to defend themselves. Due to weak prosecution, an accused party who can afford a lawyer may go free even if they are guilty, undermining people’s trust in the official justice system. Not many civil cases are brought by citizens. Many of the cases are the result of cattle rustling or which can be the result of a conflict between communities. The police take over and try to resolve them, leaving the courts out. Sometimes the community would ask the court to withdraw the case. Even if the court decides the case, the community passes its own judgments and imposes its own sanctions, leading to the growth of a parallel system.

The withdrawal of cases – in particular criminal cases – poses legal challenges for the magistrates. Most magistrates are aware of the tension between the legal framework and the reality in which they operate. Some defer to traditional authorities and their justice, realising the ineffectiveness of the formal process. Others would deal by themselves serious cases, such as sexual offences or killing. This does not prevent communities from taking matters into their hands. As Chopra explains (p. 192), “When social reality proves more powerful than the forces of the government and the judiciary, communities are able to impose their will on official institutions”. Often prosecution witnesses or complaints refuse to go to court. This makes it impossible for the court and the police to proceed with the case. Once local negotiations to resolve a conflict have been

successfully concluded (whether by traditional methods or the police) there appears to be a common understanding amongst the parties that the court should not intervene. The victim's family has a particular interest in receiving compensation payments rather than watching the criminal trial of the individual perpetrator - which will leave them with nothing.

If the compensation payment following informal negotiations is delayed or a perpetrator's group is no longer willing to compensate, the victim's family may threaten to have the perpetrator detained by the police in order to enforce the outcome of the informal negotiations. This illustrates how - instead of accepting the formal system as a parallel process - communities utilize it more as a back-up to ensure the implementation of informal agreements. Chopra argues that such incidents demonstrate the different definitions of who is a perpetrator of a crime, and who ought to be punished. The official system focuses on the individual involved in a criminal act in order to provide a "deterrent" effect or to simply remove the perpetrator and protect society. But in most pastoralist societies the kin group is held responsible if one of its members commits an offence. It is the kin who assume control of social safeguards in order to prevent crimes, and they are therefore held responsible if they fail to do so.

At one level this approach may be seen to be closely connected to and promoting pluralism. The rule in the *Mohamed case* would mean that different regimes of law or custom would apply to different citizens depending on the community they belong to. It would also mean that the rules that apply to the commission of and punishment for crimes would vary for the accused depending on whether the victim came from the same or different community. It would also mean that the institutions of the community would determine the outcome. This would introduce great plurality in the legal system - and considerable autonomy for religious or cultural communities. But the question is, is this plurality a good thing? Is it compatible with the objectives of the constitution? Does it represent the right balance between the general and the particular, between unity and diversity?

It certainly seems to exceed the limited role envisaged in the constitution for community laws, customs and institutions. The communities which are frequently referred to are those which are "marginalised" or "disadvantaged", in the context of representation, inclusion and affirmative action (e.g., Arts. 10(2)(b), 27(6), 54, 56, 100). When community norms are recognised, they are restricted to family matters, including marriage and its dissolution, "under any tradition, or adhered to by persons professing a particular religion",

but only to “the extent that any such marriage or system of law are consistent with this Constitution” (Art. 45(4)). There is nothing in the constitution which enables religious or customary rules to trump the criminal law and procedure. I have already argued that the police, prosecution and the court misunderstood the constitution on the scope of traditional dispute resolution mechanism or rather failed to notice Article 159(3) where the limits of traditional mechanism are set out.

Even if one endorses the collective method of dispute resolution, there are considerable differences between the situation in the arid zones of northern Kenya, with its pastoral communities, in scarcely populated areas and little of the apparatus of the formal justice, with the circumstances of the *Mohamed* case. Here the killing took place in the capital city, in a highly urban area. Nairobi has a good supply of courts, prosecutors and lawyers. Disputes in urban areas are more likely to be individual rather than community oriented. The safety of people inside or outside the community from criminals suffers if they are dealt with in the traditional manner instead of being tied openly in court, with ensures publicity. By imprisoning the guilty accused, he or she is withdrawn from society for periods of time.

It will create confusion in the law. Does the doctrine of the case apply only to murders? What about other transgressions of the criminal law? Can customary practices override the law? If we accept the traditional practices of one community, can we deny it to others? It would seem that the neither the DPP nor the judge assumed that it was confined to religious rules. Can we have a system of criminal law that applies unequally as among citizens and other, depending on the community they belong to?

If we were to follow the *Mohamed*, we would weaken the state legal system and the authority of the courts and the police, replacing them in significant ways by “traditional” (communal) notions of justice and institutions. It would increase problems of law and order. It would undoubtedly weaken the sense of national unity which comes from a country’s legal system—and notions of justice and fairness. It would certainly upset the balance between the state, community and the individual in the constitution.

There are further problems with this case, as noted by Pravin Bowry (a leading Kenyan criminal lawyer) (2013). He says that, most unusually for criminal proceedings, evidence was received on the basis of affidavits. He raises pertinent questions: “Does the case now dictate that in Kenyan criminal law customary and Islamic law are applicable? Can a criminal offence be excused by law by payment of blood

money? Has the court jurisdiction or mandate to “settle” criminal cases, receive affidavit evidence in murder trials and “discharge” an accused in a ruling without conviction?” He reminds us of Article 2(4) of the constitution which states that the constitution is the supreme law of the country and “any law including customary law that is inconsistent with it is void to the extent of inconsistency, and any act or omission in contravention of this Constitution is invalid”. The approach of the judge also negates the purposes of criminal law, including those of punishment. He criticises the judge for failing to consider the extent to which criminal responsibility has developed in the institutional context, including policing, criminal procedure and practices of punishment. There is also very real danger of further corruption creeping into the system of criminal justice if this case was upheld – of the communal groups paying money to the police, or DPP or the judge (or all together) to ensure endorsement of the traditional settlement.

It is clear that the functions we associate with the criminal law would not be achieved with any degree of effectiveness, functions such as providing predictability, so they know what acts are prohibited and the punishment for them, so they can organise their conduct and activities accordingly. In this way it fulfils its main mission of maintaining order in society. Its three principal tasks are retribution (punishment), deterrence, and rehabilitation. By ensuring that criminals will be punished, it prevents the public taking the law into their hands, with its undesirable consequences. This way the criminal law and procedure ensure security to the people and protect their rights. None of these concerns were considered by the court.

### Conclusion

These three cases bear in different ways on pluralism and nation building. While the *Muhuri* case endorsed an important principle of both diversity and nation building, the *Kenya High* case weakened diversity disproportionately, while the *Mohamed* case gave diversity priority undermining several important constitutional values of nation building and the security of the public. In the second case the courts focussed on only one aspect of “nation building” (unity) disregarding diversity completely. In the last case, all parties overlooked fundamental principles of the constitution, giving excessive scope to diversity at the expense of nation building and a variety of national rights and values, including equality, citizenship, and most of all the right to life.

It is true that requiring uniformity of laws in respect of all matters may cause unnecessary harm to and resentment of a minority, and

ultimately damage the project of nation building. Exceptions should be allowed if fundamental values for the nation are not at stake. Rajeev Bhargava (1999:11) urges that “Fair treatment entails that a slightly different dress code be acceptable if their religion so requires”. The Indian solution on application of Islamic law to Muslims is good illustration – the law will continue until Muslims demand otherwise, but there is an opting out provision for those who wish. But difficulties can arise when the divisions are within the community itself; in fact one problem with some adherents of multiculturalism is that they underestimate differences within a community as well as commonality between communities.

In Kenya this issue arose from the opposition of some to allowing aspects of Islamic law in family matters (those dealing with status and rights of women). Kenya’s traditional as well as colonial approach was to let each community have its own system of personal law; Hindus opted for massive reforms following reforms in India. The strategy of the CKRC was to consult widely with the Muslim community (particularly with the women on their own, exclusively with women members of the CKRC), consultations which showed considerable support for this, limited, scope of Islamic law (confined of course to the Muslim community). Since the Christian groups mobilised considerable opposition to this proposal, the CKRC organised a meeting of some key members together with leaders of all religious communities, and some eminent Kenyans to develop a consensus. Although these efforts were not entirely successful (due principally to the intransigence of some Christian groups – driven perhaps also by some non-religious motives) some ground was cleared. This facilitated an agreement when the issue appeared before the plenary of Bomas. This shows the importance of dialogue, the weighing of the interests of different communities, and resolution by reference to agreed fundamental principles. The same approach facilitated agreement on the retention of the system of Kadhi courts.

Sometimes the solution may lie in accepting that there are certain individual rights that trump group rights (like dignity, right to life, freedom from torture, fundamental equality) but there may be some areas, of particular concern/ideology/religion where a group may be allowed to have its own rules. Another factor is the effect on the nation building project in deeply divided societies. If group rules hinder nation building, then there would be justification for modifying or removing them, since nation building is also a sort of group right, that of the entire people. Here the issue is not necessarily the superiority of individual rights, for this approach depends on agreeing on and abiding by national values as a means towards a transcending,

national identity – and thus to a considerable extent on private and public obligations.

To a considerable extent this is the constitutional framework within which legislative and judicial decisions should be made. The cases analysed here show that prosecutors, lawyers and judges have paid regard to specific provisions of the constitution but often do not display a rounded understanding of the constitution – despite often citing the Ugandan case (*Tinyefuza v Attorney General* (Constitutional Petition No.1 of 1996) [1997] UGCC 3) :

The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.<sup>63</sup>

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<sup>63</sup> Cited in, for example, *Commission for The Implementation of The Constitution v Parliament of Kenya & Another* [2013] eKLR



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