

ETHNICITY, HUMAN RIGHTS AND CONSTITUTIONALISM IN AFRICA

*We have become not a melting pot but a beautiful mosaic.
Different people, different beliefs, different yearnings, different hopes, different dreams*

Jimmy Carter

{ 39th US President, 1977-1981 - Nobel prize for peace in 2002 }



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1. ABBREVIATIONS

GTZ	Good Governance Support Project, Kenya
ICJ Kenya	International Commission of Jurist, the Kenyan Chapter
UNDP	United Nations Development Programme
USAID	United States Agency For International Development
DRC	Democratic Republic of Kenya
KANU	Kenya African National Union
KADU	Kenya African Democratic Union
KPU	Kenya Peoples Union
UNHCR	United Nations High Commissioner for Refugees
KNCHR	Kenya National Commission On Human Rights
KACC	Kenya Anti-Corruption Commission
ECK	Electoral Commission of Kenya
IPPG	Inter Parliamentary
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of Children
DFRD	District Focus for Rural Development
DDC	District Development Committees
NARC	National Rainbow Coalition
CKRC	Constitution of Kenya Review Commission
GNU	Government of National Unity
PNU	Party of National Unity
ODM	Orange Democratic Union
MOU	Memorandum of Understanding
SDF	Social Democratic Front
CPDM	Cameroon Peoples Democratic Party
CPI	Corruption Prevention Index
TCCM	Technical Committee on Constitutional Matters
IEC	Independent Electoral Commission
EPRDF	Ethiopian Peoples Revolutionary Democratic Front
GPNRS	Gambella Peoples National Regional State
NDDC	Niger Delta Development Committee
NDBDA	Niger Delta Basin Development Authority
MOSOP	Movement for the Salvation of the Ogoni People
IEF	Ijau Elder Forum
ENC	Egbena National Congress
IYC	Ijau Youth Council
OMPADEC	Oil and Mineral Producing Areas Development Committee
ANC	African National Congress
IFP	Ithaka Freedom Party

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We trust that you will find this report a useful resource.

Thank you all.

Ms. Priscilla Nyokabi Kanyua

Ag. Executive Director

3. EXECUTIVE SUMMARY

In recent years, many countries all over the world have seen a resurgence of ethnic and cultural demands by minority people who do not control the power of the state. Many of the major political (including violent) conflicts that the world has witness have a clear cut ethnic dimension.

Ethnic mobilization defies the fundamental concepts on which the modern nation state has been built and therefore presents a formidable challenge to policy makers and “nation building”. In Africa, not all states have faced this question head- on in their Constitutions and legislations. Ethnic enlistment has many causes. It is partly a response to the problems and tensions engendered by the process of economic development. In many cases unequal development is linked to governance systems in which subordinate ethnic groups, often regionally localized, bear the social costs of capital accumulation and unequal exchange which causes them to resist.

Ethnic conflicts are often the expression of underlying social and political conflicts between classes, population segments, or interest groups within the wider society. The politicization of ethnicity is simply one form of politics, but one which tends to increase and harden divisions and barriers through the symbols and myths that openly question the bases of the nation- state. In the political struggles of our times, ethnicity and classism complicate the terms of social conflict and make institutional reforms more difficult. Over time, the ease with which ethnic myths have become powerful political instruments testifies to the strength and resilience of ethnic identities as a fundamental expression of human solidarity and social integration. The social and economic policies of state can only ignore these forces at their own peril.

The theme chosen for this publication is of crucial importance in light of recent conflicts as well as for the future of the continent because given the number and variety of ethnic conflict, development strategies cannot afford to ignore the effects of ethnicity. The prospects of peace and war, the maintenance of national unity, and the enjoyment of fundamental human rights in many parts of the world depend on the adequate solution to ethnic tensions. To ignore the problem is to therefore neglect an important aspect of the contemporary reality.

The task for legal experts, social scientists, development planners and nation builders is to understand the dynamics of ethnicity in relation to other social forces and to forego structures in which basic human rights and the right to self determination of ethnic groups may be safeguarded within the framework of national and international society.

This will involve accepting the diversity of conditions, circumstances and communities within which democracy will develop. This means that we must learn to manage the complexity that is the very substance of democracy, to lay the ethical foundations and to discover the practical modalities of reconciliation between universal values and cultural specificities.

4. EDITOR'S PREFACE

George Mukundi Wachira^{1}*

The political crisis witnessed in Kenya following the December 2007 elections disclosed that there exist deep seated and unresolved issues facing the Nation. Indeed, while the elections may have been a spark of the violence that ensued, the root causes of the conflict lie elsewhere. Among other issues, the role of negative ethnicity has been at the center of debates. Various commentators have also fingered the emotive issue of historical injustices related to land and inequitable distribution of the 'national cake' -wealth, resources and jobs. These issues demand a comprehensive investigation, analysis and eventual resolution for peace and tranquillity to prevail. It also presents an opportunity for the public to engage in an honest conversation with a view to finding solutions in order to forge ahead as a united nation.

A number of ad hoc commissions established whenever a serious matter of national interest arises seems to have become a national preoccupation. In this case, the pattern repeats itself with the creation of commissions to investigate, among others, the root causes of the violence and related conflicts. Without passing judgment before the egg hatches – in order to accord these initiatives a fair chance to inform the public on the subject, it is necessary for Kenyans and the public across the globe to engage with this emotive issue.

Such an exercise is not only useful for Kenya. Lessons learnt and solutions coined might equally be replicated in other similarly situated countries. Indeed, in Africa, the Kenyan 'political solution' - the government of national unity that followed the unfortunate events- has increasingly gained currency and is being floated, despite its shortcomings, as a potential lesson for other countries in similar position. Zimbabwe, itself emerging from the throes of disputed elections, is a case in point. While the political problem in Zimbabwe, like other political stalemates in Africa are not necessarily ethnic based, ethnicity in politics and governance continue to impinge on democracy and peaceful co-existence of communities in a state. Numerous examples abound of horrendous ethnic based violence pitting communities that perhaps once co-existed peacefully. These include Kenya, Rwanda, Burundi, Ethiopia, Somalia, Sudan, Democratic Republic of Congo, Nigeria, Chad, Ivory Coast, Algeria, Mauritania, Senegal, Cameroon, South Africa to mention but a few of the stark examples.

How to prevent and deal with these kinds of conflicts and violence is undoubtedly a key issue of contemporary times. The co-existence of diverse cultures, religious, linguistic and ethnic communities with multiple and sometimes competing identities raise profound moral,

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philosophical, legal and practical questions. These issues impinge on the domestic legal framework, and pose difficult questions on the role of human rights, rule of law, constitutionalism and democracy to prevent and redress problems posed by ethnic conflict. Additionally, the role of international standards, norms, and institutions in the national regulation and accommodation of diversity is tested. ethnic communities with multiple and sometimes competing identities raise profound moral, philosophical, legal and practical questions. These issues impinge on the domestic legal framework, and pose difficult questions on the role of human rights, rule of law, constitutionalism and democracy to prevent and redress problems posed by ethnic conflict. Additionally, the role of international standards, norms, and institutions in the national regulation and accommodation of diversity is tested.

In its concrete manifestation, ethnicity is underpinned by suspicion, competition, rivalry and often conflict. Further, ethnicity entails pedant and self-exalting attitudes in which from the perspective of the conscious ethnic group, it is the other ethnic group(s) who practice ethnicity and therefore impede its economic and political aspirations. Critical to understanding ethnicity therefore, is the in-group/ out-group dynamic. An ethnic group can only be so identified amongst other groups who do not belong and whose objectives and interests are perceived to be incompatible. The essence of ethnicity is therefore ethnic exclusiveness.

This publication examines ways in which the state can be designed or re-designed to respond to the imperative of ethnicity, and the competing theories that underline these efforts. It surveys different approaches that could be employed to accommodate ethnic diversity. Based on human rights standards and principles of constitutionalism, the contributions propose solutions that include devolution of powers through various forms of self-governance, affirmative action, and devices to overcome marginalization, oppression and bitterness of the past in the search for national reconciliation.

Solomon Dersso's contribution sets the stage for the conversation. He argues 'that ethnic conflict in Africa is mainly a product of the failure of the post-colonial state to recognise ethnic diversity and develop the necessary institutions and policies for accommodating the interests and identities of members of various groups'. By recourse to examples across the continent, his chapter demonstrates that most post-colonial states in Africa, failed to harness their ethnic diversity and instead pursued what he calls the 'nation building' project. He argues that the 'project' failed both in its design and implementation due to its lack of respect and regard for peoples' attachment to their ethnic membership which could not simply be wished away. The chapter importantly makes a case for the adoption of a legal and institutional framework that takes into account ethnic diversity through the principles of justice and equality.

It is imperative to locate legal and institutional frameworks that guarantee respect and management of ethnic diversity in the Constitution of a state. The significance of positioning legal guarantees in a Constitution cannot be gainsaid, given its supremacy and legitimacy. Beverline Ongaro and Osogo Ambani's chapter examines the issue of constitutionalism as a solution to the ethnic divisions in Kenya. Written from a post-2007 election violence perspective, Ongaro and Ambani argue that Kenya, despite having a Constitution that purports to uphold constitutionalism, lacks this important aspect in practice. The deficiency of constitutionalism and the rule of law in practice, they contend, contributed and would continue to threaten peace and unity of the nation.

Dan Juma's and Godfrey Musila's pieces are closely related. The two chapters seek to make a case for devolution of power as a means of managing ethnic diversity. While both chapters seek to un-pack the controversial federalism debate, Juma's contribution identifies the need to restructure political structures to ensure accountable governance as key to managing ethnic diversity. Musila on the other hand places focus and emphasis on the importance of 'meaningful political participation, and sharing national resources (including land) and exercise of powers associated with it' for all Kenyans as an effective mechanism to contain ethnic differences. While he is supportive of the federal arrangement, Musila argues that such a framework should importantly be cognizant and reflective of the particular circumstances that are resident within a state.

Sarah Kinyanjui and Grace Maina, provide an interesting review of the impact of free markets on ethnicity in Kenya. Their joint chapter additionally looks at the politicization of ethnicity in igniting ethnic based conflict. In terms of solutions, Kinyanjui and Maina, suggest that 'embracing principles of consociationalism which focus on multiethnic cooperation and equitable distribution of national resources would work towards ameliorating ethnic tensions in Kenya'.

Beyond ethnic based conflicts, certain communities in Kenya struggle for recognition and enjoyment of their citizenship rights. Indeed, while most Kenyans may take citizenship rights for granted, to some communities and individuals, these rights are realized, if at all, after numerous hurdles and struggles. Using the Nubian and Somali case studies, Korir Sing'Oei provides an expose of the constraints faced by minority communities and some of the fundamental human rights that are breached in the process.

Although the main focus of this publication is on Kenya, it contains four contributions that consolidate specific regional experiences from Sub-Sahara Africa. The contributions by Charles Fombad, Emezat Mengesha, Yonatan Tesfaye, and ES Nwauche survey four states

in the sub-region: Cameroon, Ethiopia, South Africa, and Nigeria, whose experiences offer critical lessons for other states on the continent. Although those states are each drawn from the four sub-regions of Sub-Sahara Africa (Central, East, South, and West) this contribution does not purport that the surveys fully reflect the situation on the continent. However, what the surveys do is to make a fair amount of assessment of the specific issues surveyed in those countries.

Fombad examines Cameroon's constitutional framework- that has its tradition in both common and civil law systems- and the extent to which that mix 'accommodates the interests of the diverse ethnic, cultural and linguistic communities'. Emezat's chapter analyses the Ethiopian federal experiment and evaluates the extent to which it has succeeded in promoting national cohesion and respect for the state's diverse ethnic composition. Nwauche brings to the fore and criticises the legal and institutional measures that have been adopted by Nigeria to protect ethnic minorities in the oil producing Niger Delta. Finally, Yonatan looks at South Africa's progressive constitutional framework as a possible good practice on the continent on managing ethnic diversity. The lessons that the four case studies tease out, not apply to the states that are surveyed, but could inform initiatives in many others across the continent.

5. POST-COLONIAL NATION-BUILDING AND ETHNIC DIVERSITY IN AFRICA

Solomon A. Dersso^{1*}

Abstract

The main thesis of this paper is that ethnic conflict in Africa is mainly a product of the failure of the post-colonial state to recognise ethnic diversity and develop the necessary institutions and policies for accommodating the interests and identities of members of various groups. This is a central feature of Africa's post-colonial nation-building. With their colonial origin and arbitrarily contrived borders, at independence African states inherited numerous and politically and socio-economically unequal as well as culturally divergent ethno-cultural groups with no shared political past. As a result, nation-building became appropriately one of the major political agenda of the post-colonial African state. This paper argues that Africa's post-colonial nation-building has been misguided both in its characterisation and treatment of ethnic diversity. Dismissing ethnicity as obstacle to modernity and national integration, it equated national integration with the achievement of homogeneity at best without regard to peoples' sense of attachment to their ethnic membership at worst by coercively displacing it. It is further contended that the nature and application of Africa's post-colonial nation-building instead of achieving national integration has further entrenched ethnic divisions and inequalities inherited from the colonial state. To this end, the paper discusses the nature and different dimensions of post-colonial nation-building. This relies on the distinction between assimilationist and multicultural forms of nation-building as well as the political and legal discourse and practice of the post-colonial state and African international norms. The paper also examines how this impacted upon not only the linguistic and cultural identity of various groups but also their socio-economic and political position leading ultimately to ethnic antagonism and conflicts in many African countries particularly at the end of the cold war with the onset of multi-party politics.

5.1 Introduction

The post-colonial African state is beset with numerous ailments. One of its most serious structural deficiencies is its lack of national integration and a failure to build a workable constitutional framework that democratically accommodates and mediates the interests and identity of its diverse population. Not only does its institutions and norms lack a foundation in the culture, social values and historical traditions of its diverse people, but importantly, it fails to serve as a suitable framework for achieving a just and democratic society.

This paper is divided into four parts. The first part is an introduction. Part two examines the nature and various dimensions of Africa's post-colonial nation-building. The part argues that Africa's post-colonial nation-building is mainly inspired by the nation-state model and has

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been assimilationist in its orientation and coercive in its operation.

In part three, the resultant crisis of state legitimacy and fragmentation is examined. This is expressed by the emergence of unequal patterns of relations between members of various groups and the state involving what Shivji calls national oppression.² This oppression takes two related forms. The first involves the domination of the state by some groups and the resultant alienation and marginalization of the members of many of the constituent groups from the political-economic structure of society. This engenders patterns of competition for control of state power on one hand and structures of domination and marginalization on the other. The result has been competition rather than cooperation, domination and exclusion rather than accommodation and inclusion.

As Ben Nwabueze put it, under these circumstances '[i]t is inevitable that ... the control of power would generate among the competent groups a bitter struggle marked by violence, to the detriment of efforts at nation-building.'³ The other is rooted in the socio-cultural realm of society. In many African states, this involves the nationalization of the culture and language of the dominant group and the assimilation of members of other groups into the culture and language that is given a national character. It is also expressed in the continuation of the non-recognition, marginalization as well as active denigration and repression of the language, way of life and cultural institutions and values of many of these groups.⁴ The post-colonial state continues to operate on the basis of 'Eurocentric norms and values'⁵ perpetuating the denigration and marginalization of indigenous languages, cultures, and norms with the consequence of furthering the alienation of the majority of Africans from the processes of the state.⁶

Finally, part IV concludes the paper with a discussion of the flaws and ultimate failures of the post-colonial nation-building processes. Against this backdrop, it is submitted that Africa can achieve a just and inclusive national integration only through a process of multiethnic nation-building processes on the basis of institutional arrangements and policies that provide sufficient public space for the expression and affirmation of the equality of membership in the different ethno-cultural groups.

2 IG. Shivji 'State and constitutionalism: A new democratic perspective' in IG Shivji *State and Constitutionalism an African Debate* (1991) 27-54, 33-36 & 41.

3 B Nwabueze *Constitutional democracy in Africa* (Vol. 5, 2004) 307.

4 See B Davidson *The Black Man's Burden* (1992) Chapter 3; M Mutua 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339; AG Selassie 'Ethnic identity and constitutional design for Africa' (Fall 1992-1993) 29(1) *Stanford Journal of International Law* 1-56.

5 Mutua (n 3 as above) 367.

6 As Mutua rightly argued this problem 'is not merely a function of the loss of independence or self-governance over pre-colonial political and social structures and the radical imposition of new territorial bounds with unfamiliar citizenry. It is above all a crisis of cultural and philosophical identity: the delegitimation of values, notions, and philosophies about the individual, society, politics, and nature developed over centuries.' As above, 343.

5.2 Post-colonial nation-building: Its nature and institutional implications

At the time of independence, one of the fundamental constitutional problems that African states faced was how to address the demands of their diverse constituent communities. The problem arose due to state's arbitrarily contrived colonial origin and structures. What makes this problem particularly formidable is that almost all African states, as products of colonial adventurism in state making, lack national cohesion. The fragility of the post-colonial state was further compounded by the weak institutional foundation and capacity of the independent governments.⁷ To further accentuate their predicament, these states have been running economies that have been extremely underdeveloped and fragmented.⁸ Nation-building thus rightly became the top agenda of the post-colonial African states.⁹ As David Welsh has noted, 'in the heydays of independence, that began in Ghana in 1957, accelerating in the 1960s "nation building" was assumed to be the priority of all the newly emerging [African] states.'¹⁰

5.2.1 Two approaches to nation-building

Given the colonial origin of the African state as a political unit constituted by an amalgamation of various ethno-political communities of different histories, political traditions and cultures, the independent governments had two options in their endeavor to achieve nation-building. The first is based on the concept of the nation-state. The other is what may be referred to as a multicultural model of nation-building. That option is exemplified by Switzerland, but probably more relevant to Africa, India. The nation-state model tends to ignore and even combat expressions of ethnic identity with its strong assimilationist features emphasizing national unity. Central to the nation-state model is the idea that there has to be coincidence between the nation as a culturally and linguistically homogenous entity and the state. Accordingly, the dominant view of the 20th century has been that a state should have a homogenous national identity.

The second approach by contrast recognizes the reality of the various ethno-political communities constituting a state and institutionalizes mechanisms to accommodate their interests. It thereby actively nurtures a sense of allegiance of their individual members to the state. Under this system of nation-building as is the case in Switzerland and India, ethnic identity is given

7 Despite the deceiving nature of the authoritarian structure and the centralised power of the state inherited from colonial powers, the state was also described as the 'soft state.' As D Rothchild and VA Olorunsola aptly put it: 'In Africa, the soft state is marked by fragile institutions; not only are these institutions constrained by the ineffectiveness of linkages and the unavailability of human, material and fiscal resources, but the presence of domestic and international demands'. Rothchild and Olorunsola 'Managing competing state and ethnic claims' in D Rothchild and VA Olorunsola (eds.) State versus ethnic claims: African policy dilemmas (1983) 1, 7.

8 As Nwabueze has put it in vivid terms, in these countries 'even those basic necessities for human existence are either non-existent or minimal for the vast majority of the population, for whom poverty, illiteracy, disease and apathy are inescapable conditions, hovering over the community like plague.' B Nwabueze Constitutionalism in the Emergent States (1973) 164.

9 'The fundamental political problem,' as W Arthur Lewis aptly noted in 1965, 'is neither economic policy nor foreign policy, but the creation of nations out of heterogeneous peoples.' Politics in West Africa (1965) 49-50. Also see Davidson (n 3 above) Chapter VI & VII.

10 D Welsh 'Ethnicity in Sub-Saharan Africa' (1996) 72 International Affairs 477-491, 477.

recognition through institutions and policies that provide public space for its expression while at the same time national identity is fostered through common institutions, shared values and symbols as well. Although it was not widely accepted at the time of independence of the post-colonial state, this has increasingly become a common mode of nation-building in multiethnic states in recent times.

5.2.2 The option chosen by post-colonial African states

Almost all African states, as many others elsewhere in the world, opted for the first option on the basis of various constitutional models.¹¹ Many African states worked within some variation of the liberal constitutional framework based on either the Westminster constitution model or the French Constitution of the Fifth Republic grafted into their independent constitutions.¹² Countries such as Tanzania and Ghana later adopted a constitutional system based on the so-called African socialism. African countries allied with the Soviet Union such as Angola, Benin and Mozambique adopted a socialist constitutional model. Nigeria and Mauritius have for a long time been the only countries that followed some form of a multicultural model of nation-building.

Irrespective of the difference in their constitutional models, the post-independent constitutional systems and nation-building policy of African countries have conceived of national unity in terms of homogeneity and oneness.¹³ The constitutions, the laws and development policies of these states have all become instruments of a highly centralised, unitarist and homogenizing nation-building process. As Francis Deng puts it, '[u]nity was postulated in a way that assumed a mythical homogeneity amidst diversity.'¹⁴ This has been expressed in the constitutions of many of these countries in various ways. For example, article 4 of the 1975 Constitution of Angola provides that '[t]he People's Republic of Angola shall be a unitary and indivisible state ... and any attempt at separatism or dismemberment of its territory shall be vigorously combated.' Similarly, the very first article of the independent constitutions of almost all of the ex-French colonial countries declared the national unity, indivisibility and sovereignty of the state and 'have tried to pursue a top-down Jacobian nation-building strategy'.¹⁵ A typical formulation

11 See B Neuberger 'State and nation in African thought' in J Hutchinson & AD. Smith (eds.) *Nationalism* (1994) 231-235.

12 On Anglophone countries see Y P Ghai 'Constitutions and the political order in East Africa' (1972) 21(3) *International and Comparative Law Quarterly* 403-434; for Francophone countries see Filip Reyntjens 'Authoritarianism for Francophone Africa from colonial to the post-colonial' (1988) *Third World Legal Studies* 59; his 'Recent developments in the public law of Francophone African states' 30(2) *Journal of African Law* (1986) 75-90; and see generally VT Le Vine 'The fall and rise of constitutionalism in West Africa' (1997) 35(2) *The Journal of Modern African Studies* 181-206, 184-186.

13 See IJ Wani 'Cultural preservation and the challenges of diversity and nationhood: The dilemmas of indigenous cultures in Africa' (1991) 59 *UMKC L Rev.* 611, 634; NJ Udombana 'The unfinished business: Conflicts, the African Union and the New Partnership for Africa's Development' (2003) 35 *Geo. Wash. Int'l L. Rev.* 55, 93-94.

14 FM Deng 'Ethnicity: An African predicament' (1997) 15 (3) *The Brookings Review* 28-31, 28.

15 On the nature of this nation-building approach see B Berman et al. 'Introduction: Ethnicity and the politics of democratic nation-building in Africa' in B Berman, D Eyoh & W Kymlicka (eds.) *Ethnicity and democracy in Africa* (2004) 1, 17-18.

of this can be found in the 1960 Constitution of Ivory Coast.¹⁶ According to article 2 of this Constitution, '[t]he Republic of the Ivory Coast is *one and indivisible*, secular, democratic and social.'¹⁷ Although the independent constitutions of some of Anglophone countries have incorporated some institutional guarantees such as federalism or regionalism in an attempt to accommodate diversity and as a mechanism for the protection of minorities, most of them were subsequently amended giving way to a highly centralized unitary political system.¹⁸ A typical example of that is the declaration in the 1960 Constitution of the Republic of Ghana that 'Ghana is a sovereign unitary state.'¹⁹

'Too often, however,' observed former Secretary General of the UN Kofi Annan, 'the necessity of building national unity was pursued through the heavy centralization of political and economic power and the suppression of political pluralism.'²⁰ The homogenization impulse of the motto of national unity in the rhetoric and practice of post-colonial nation-building has thus also been seen as requiring restriction of political and ethno-cultural pluralism. The predication of the nation-building project on the emphatic premise of creating a singular national identity and oneness as a precondition for development and national unity was translated into a requirement that the various ethno-political communities were molded into an artificially constructed state identity or assimilated into the nationalized identity of the dominant ethnic group.²¹

The constituent ethnic groups branded as atavistic 'tribal' ruminants of 'uncivilized' past thus soon became the main targets of the nation-building project.²² Thus, one common theme running through almost all the constitutions of these countries has been the refusal to give any legal or political recognition and institutional expression to the various distinct groups constituting the state.²³ The belief that ethnicity is divisive and undermines national unity informs the constitutional and political discourse of many African states throughout the post-

16 Constitution of Ivory Coast of 3 November 1960 as amended 11 January 1963 reprinted in Amos in Peaslee (eds.) *Constitutions of Nations* (1965) Vol. 1 Africa 242-253. In many of the constitutions of the ex-french colonies, one of the common themes of their motto is 'unity'. The Constitution of the Republic of Mali of 1960 as amended in 1961 thus provides in its Article 1 that '[t]he motto is "one people, one purpose, one faith"'. Reprinted in Peaslee (as above) 535-545, at 535.

17 Constitution of Ivory Coast (as above) 242 (my emphasis).

18 VT Le Vine 'The fall and rise of constitutionalism in West Africa' (1997) 35(2) *The Journal of Modern African Studies* 181-206; F Reyntjens 'Authoritarianism for Francophone Africa from colonial to the post-colonial' *Third World Legal Studies* (1988) 59; See below notes 27-42 and accompanying text.

19 Art. 4(1) reprinted in Peaslee (ed.) (n 15 above) 213-228, at 214.

20 The causes of conflict and the promotion of durable peace and sustainable development in Africa Report of Secretary General Kofi Annan to the Security Council April 16, 1998 para. 8.

21 See H Bienen 'The state and ethnicity: Integrative formulas in Africa' in Rothchild & Olorunsola (eds.) (n 6 above) 100-126, 102. (arguing that in Africa the dominant models for nation-building have been assimilationsit types)

22 FRELIMO, the Mozambiquan ruling party, in the 1970s solemnly pledged 'to kill the tribe to build the nation' M. Cheg 'Remembering Africa' 71 *Foreign Affairs* (1992) 146. The reasoning for such conception of national unity is that 'since the nation-state must be seen as an integral part of modernity, and sub-state groups must be seen as existing in competition with the nation-state, the fragmentation of states must, invariably, be undesirable, a disintegrating factor, an obstacle to be overcome.' OC Okafor *Re-defining Legitimate Statehood: International Law and State Fragmentation in Africa* (2000) 93.

23 See Filip Reyntjens 'The Constitutional Status of Ethnicity in Africa South of the Sahara' (1993) 8(1) *South African Public Law* 36-52.

colonial period.²⁴ In almost all the multinational countries of Africa, expression of ethnic solidarity and the mobilization of people on the basis of group identity have therefore been proscribed in various ways. For instance, almost all of the constitutions of francophone countries prohibit the expression of any particularist propaganda of a racial or ethnic character.²⁵ In other countries such as Ghana, a law was enacted to proscribe the establishment of organizations along ethnic, regional or religious lines.²⁶ In so declaring, the states hoped to wipe out the distinct collectivities constituting them and institutionalize a common national identity, hence transforming the state into a nation-state proper and happily live ever after.²⁷ Partly this is a result of the characterization of ethnic identification as a cause of rivalry and conflict by its own and hence antithetical to national integration.

5.3 The institutional implications

5.3.1 The rejection of accommodative structures of governance: Centralization of state power

A logical consequence of this pre-occupation of the post-colonial African states to speedily become nation-states proper at the expense of ethnic identities was also the abrogation of any form of group protection incorporated into the independent constitutions. Soon after independence, these states eschewed all such constitutional or legal guarantees that made limited attempt for accommodating the interests of the various communities lamped together within the post-colonial state.²⁸ Thus, although various kinds of federal arrangements were incorporated into the constitutions of many countries including Kenya, Uganda, DRC, Ghana, Nigeria, Ethiopia, Sudan, and Cameroon, these federal experiments were abandoned as a ploy of the divide and rule system of colonial powers in all but Nigeria.²⁹

24 See G Selassie (n 3 above) 11-21; Deng (n 13 above); Wani (n 12 above).

25 For example, see Article 4 of the 1963 Constitution of Togo which provides that '... any regionalist propaganda which might threaten the internal security of the state, national unity or the integrity of the territory, shall be punished by law.' As reprinted in Peaslee (n 15 above) 890-905, 891.

26 S K B Asante 'Nation building and human rights in emergent African nations 2 (1969) Cornell International Law Journal 83, 93-96. As Asante has put it the 'Ghanaian Act did more than merely ban political organisations using or engaging in tribal, racial or religious propaganda to the detriment of any other community; it also forbade the election of persons on account of their tribal or religious affiliation – in my view an unwarrantable fetter on the principle of free elections.' As above, 95.

27 As B Davidson has put it, the post-colonial governments 'accepted the aim of building nation-states on the British model(or, later, on the French) because, as it seemed to them and as they were strongly advised, there could exist no other useful objective. Nkrumah's advise that they should seek the political kingdom, and all would then be added to them, expressed a central maxim of which the truth appeared self-evident: once sovereignty was seized by Africans ... the road to freedom and development would be theirs to follow.' Davidson (n 3 above) 162.

28 Welsh (n 9 above) 483. This led to struggles for regional power, local autonomy and for decentralization, which in some cases degenerated into violent conflicts. Okafor (n 21 above) 103.

29 Many of the leading African nationalist leaders of the post-independent era including Kwame Nkrumah, Milton Obote, Jomo Kenyatta, and Patrice Lumumba saw federalism as an external plot by western countries to weaken the newly independent African states by further balkanization. According to them, federalism was inefficient, an invitation to 'tribalism, and a waste of resources'. M Mutua 'Why redraw the map of Africa: A moral and legal inquiry' (1995) 16 Michigan J. Int'l L. 1113, 1169.

The 1963 ‘Majimbo Constitution’ of Kenya established a quasi-federal arrangement that divided legislative and executive powers between the central government and the seven regions.³⁰ Its aim was to provide a framework in which the interests of smaller ethnic groups would be accommodated. It however had a very short existence. Neuberger succinctly summarized this short lived federal experiment as follows

In Kenya the quasi-federal ‘Majimbo Constitution’, which divided the country into regions with their regional Assemblies, Regional Civil Service and regional powers, was designed to protect the small ethnic groups from the Kikuyu-Luo alliance. It had strong support in KADU, which represented the Coastal, Baluhya and Kalenjin tribes. One of its leaders, Masinde Muliro, saw in federalism the ideal solution for Africa ... because it provides for ‘free association’ and prevents ‘imposed unity’. The dominant Kenyan African National Union opposed federalism, which it regarded as a colonial device to strengthen those tribes which did not participate in the anticolonial national movement, and to weaken the position of the ‘radical’ kikuyu. KANU accepted the ‘Majimbo Constitution’ because that was the British Condition for independence. It very soon eroded and then abolished the federal system, and imposed a unitary regime strongly dominated by the kikuyu bureaucracy.³¹

The emergence of a unitary system led to the domination of the machinery of the state by particular groups and the consequent political and socio-economic disparities between regions and members of various groups. This has in the past two decades induced a call for Majimbo.

The independent constitution of Uganda had similarly introduced some form of asymmetrical federal system recognizing self-government for some of the pre-colonial ethnic based states. Accordingly, its Article 2(1) stipulated that ‘Uganda consists of Federal States, Districts and the territory of Mbale.’³² Although the influential Ugandan People’s Congress under the leadership of Milton Obote initially accepted this arrangement for fear of the secession of Buganda and to take control of state power, four years after independence it abrogated the federal structure, violently destroyed the Baganda Kingdom and centralized power under a unitary system.³³ This created resentment on the part of Baganda and various groups from western Uganda towards the system.

The 1960 Constitution of the DRC similarly provided that ‘[t]he Democratic Republic of the Congo is composed of the city of Leopoldville and the autonomous provinces’.³⁴ Interestingly

³⁰ names of the seven regions, their organisations and powers are provided for in Chapter VI of the Constitution, reprinted in Peaslee (n 15 above) 257-418, 313-322.

³¹ B Neuberger ‘Federalism in Africa: Experience and prospects’ in DJ Elazar (ed.) *Federalism and political integration* as quoted in Mutua, (n 28 above) 1154.

³² See the Constitution of Uganda of 2 October 1962, as amended 30 September 1963 reprinted in Peaslee (n 15 above) 921-987, 921

³³ It was in February 1966 that the Constitution was suspended and in April that year a new one promulgated abolishing the federal status of Buganda. Under the 1967 Constitution Uganda became a unitary republic and all the traditional kingdoms were abolished. See *Constitutions of the World* (Dorothy Peaslee Xydis ed.) (1974) 999-1000, 1000.

³⁴ Art. 4 Constitution of the Congo (Leopoldville) of 30 May 1960 reprinted in Peaslee (n 15 above) 102-147, 103.

enough, its Article 5 stipulated that the provinces shall be autonomous and each shall have separate judicial personality.³⁵ This system did not get the opportunity to be tested as the DRC sank into a crisis following the conflict between the unionist party Mouvement National Congolais of Lumumba and the leaders of the Kongo people and Katanga Joseph Kasavubu and Moïse Tshombe. After Mobutu took power by a military Coup in 1965, the federal arrangement of the provinces was put aside. Under the 1967 Constitution, DRC was named Zaire and became a unitary state.³⁶ This has not however totally diminish the movement for the independence of Katanga, although it was only in late 1970s that the movement made another failed attempt to control Katanga.³⁷

In the run up to its independence, one political development that emerged in Ghana, as in other African countries, was the establishment of a powerful Ashanti based party as rival to Nkrumah's party. The main political agenda of this party was to achieve a federal constitution under which Ashanti could enjoy territorial autonomy. As a result the issue of federalism became part of the negotiation for Ghana's independence. 'Since the British refused to grant independence unless Agreement was reached with Ashanti, Nkrumah agreed to a semi-federal constitution in 1957, but went back on the agreement immediately after independence, pleading duress.'³⁸ As a result, the 1960 Constitution declared Ghana to be 'a sovereign unitary state' with one party under the leadership of Nkrumah.³⁹

The federal constitutions of Cameroon⁴⁰ and Ethiopia⁴¹ were replaced by unitary ones in 1972 and 1962 respectively. Other attempted federal arrangements include Sudan,⁴² the union of Tanganyika and Zanzibar that created the United Republic of Tanzania,⁴³ the Mali Federation, the Federation of French West Africa and the Federation of French Equatorial Africa.

5.3.2 The rise of one party rule

One of the other developments of the homogenizing nation-building processes of the post-colonial African state has also been the rejection of multiparty politics leading to either *de jure* or *de facto* single-party authoritarianism or military dictatorship in one country after

35 As above. The organisation and powers of the provinces is stipulated under Title V of the Constitution at 125-130.

36 See Constitution of the Republic of Zaire of 1967 in Xydys (n 32 above) 1028-146, 1029.

37 See Minorities At Risk data of the University of Maryland on Lunda and Yeke of the DRC available at <http://www.cidcm.umd.edu/mar/assessment.asp?groupId=49005>

38 W Arthur Lewis Politics in West Africa (1965) 53.

39 Art. 4(1) reprinted in Peaslee (ed.) (n 15 above) 213-228, at 214.

40 See AN Fru 'The reunification question in Cameroon history: Was the bride an enthusiastic or a reluctant one' (Spring 2000) 47(2) Africa Today 91-119; MW DeLancey 'The construction of the Cameroon political system: The Ahidjo years 1958-1982' 6 Journal of Contemporary African Studies (April 1987) 3-24.

41 H Erlich 'The Eritrean autonomy 1952-1962: Its failure and its contribution to further escalation' in Y Dinstein (ed.) Models of autonomy (1981).

42 Under the Addis Ababa Peace Accord of 1972, South Sudan achieved regional autonomy leading to the emergence of a federal form of state structure in the Sudan by virtue of the Self-government Act of 1972. See DM Wai 'Geoethnicity and the margin of autonomy in the Sudan' in Rothchild and Olorunsola (eds.) (n 6 above) 304ff.

43 See Art. 2 Interim Constitution of Tanzania of 11 July 1965 in Xidys (n 32 above) 926-982, 926.

the other.⁴⁴ What informed this development initially was the same reason that motivated post-colonial governments to proscribe ethnic based movements and defy any institutional guarantees bent to recognize the constituent ethnic communities.⁴⁵ The opinion that President Ahmadou Ahidjo of Cameroon gave in one interview encapsulates this very well. He said

For me, the one party structure is the only way to escape this demagogy [‘appeals to tribal, ethnic and religious differences in politics’], the only means to forge national unity.⁴⁶

Many post-colonial African leaders as well as several scholars were convinced that the one party rule was the best framework to accomplish the task of nation-building, as it was thought that it would put politics beyond the reach of the prevailing ethnic cleavages in society.

One of the advocates for a one party state was Kwame Nkrumah of Ghana. Under his leadership, the Ghanaian Avoidance of Discrimination Act was passed ‘to prohibit organizations using or engaging in tribal, regional, racial or religious propaganda to the detriment of any other community, or securing the elections of persons on account of their tribal, regional or religious affiliation and for other purposes connected therewith.’⁴⁷ Subsequently, Ghana revised its independent constitution in 1960 to become a one party state under the Presidency of Kwame Nkrumah.

Other constitutions that provided for a one party system include Algeria,⁴⁸ Central African Republic,⁴⁹ and Tanzania.⁵⁰ Although multiparty politics was not prohibited under the independent constitutions of DRC and the Sudan, both countries became one party states under their 1967⁵¹ and the 1971⁵² constitutions respectively. The Sierra Leonean foreign minister, Abdulaih Osman Conteh, arguing that the one party state would settle the problems posed by ethnic cleavages prevalent in African countries posited that his country’s ‘new constitution will put an end to tribalism, instability and other factional tendencies, and no more will brother rise against brother, or family against family.’⁵³ And so, Sierra Leon became a *de jure* one party

44 ML Kilson ‘Authoritarian and single-party tendencies in African politics’ 15 *World Politics* (Jan 1963) 262-294.

45 ‘Political plurality and ethnic diversity,’ maintains Hameso, ‘were decried as bottlenecks for the project of “nation-building” and national unity.’ S Hameso ‘Issues and dilemmas of multi-party democracy in Africa’ 2002 *West Africa Review* ISSN:1525-4488. Similarly, Crawford Young pointed out that ‘[t]he urgency of containing cultural pluralism was not the only argument marshaled, but it was nonetheless a leading plank in the single party platform.’ Crawford Young ‘Competing images of Africa: Democratization and its challenges’ in O Akiba (ed.) *Constitutionalism and society in Africa* (2004) Chapter 9, 145.

46 As quoted in A Rivkin *Nation-building in Africa: Problems and Prospects* (1969) 48-49.

47 Asante (n 25 above) 93.

48 Article 23 of the 1963 Constitution of Algeria states that ‘[t]he National Liberation Front is the single Vanguard Party in Algeria.’ See further Arts. 23-26 the 1963 Constitution of Algeria reprinted in Peaslee (n 15 above) 6-15, 10.

49 ee Art. 2 of the Constitution of the Central African Republic in Peaslee (n 15 above) 50-64, 53.

50 See Art. 3 Interim Constitution of Tanzania (n 42 above) 927.

51 According to Article 4 of the 1967 Constitution ‘[t]he People’s Revolutionary Movement is the sole political party of the Zaire Republic.’ See Constitution of the Republic of Zaire at 1028-1046, 1029.

52 Article 6(b) Republican Order No. 5 of 13 August 1971 stipulated that ‘[t]he Sudanese Socialist Union is the only political organization allowed to be established in the Sudan.’ See Xydis (n 32 above) 835-841, 835.

53 As quoted in Rothchild and Olorunsola (n 6 above) 6.

state. Similarly, Malawi became a one party state following the abrogation of the independent constitution of 1964 and its replacement by the 1966 Constitution of Malawi.⁵⁴ In late 1960s and 1970s the one party government became common in many other countries as well. Countries such as Kenya,⁵⁵ Zambia,⁵⁶ Ivory Coast,⁵⁷ Cameroon,⁵⁸ and Uganda⁵⁹ became *de facto* one party states. In many countries this was done either by absorption of the weak by the dominant party as in Guinea and Mali, or through merger as in Senegal or by coalition as in Uper Volta (Burkina Faso).⁶⁰ The list of countries that established the one party rule further includes Morocco, Mauritania, Niger and the UAR (Egypt).⁶¹ In Angola and Mozambique independence arrived later than most of Africa, and the political organizations that inherited the mantle of political power easily transformed themselves into the only legal party.⁶²

The natural fate of opposition and dissent under such circumstances was punishment and repression. As Hameso has noted '[i]n some cases, opposition met out with physical elimination and liquidation as in Ethiopia of the 1970s and 1980s, the period also known by White and Red Terror.'⁶³ The only countries that have continued to practice multipartism through out all or most of their post-colonial history have been the Gambia in West Africa, Botswana in Southern Africa and Mauritius in East Africa.⁶⁴

5.4 The crisis of national integration

5.4.1 Inequality, antagonism and division at the political and economic spheres

The homogenizing nation-building process of post-colonial Africa entrenched the crisis of legitimacy of the state and national integration. This is attributable to two factors. First, it was premised on the assumption of keeping the state ethno-culturally neutral. Given the prevailing deep ethno-cultural diversity and inequality, this assumption is not only unattainable but also

54 See Article 4 the Constitution of Malawi of July 1966 in Xidy's (n 32 above) 464-496, 465 (proclaiming the Malawi Congress Party to be the only National Party).

55 At the time of independence there were two principal political parties in Kenya, KADU and KANU. IN 1964 KADU dissolved itself and its members joined the ruling party KANU. Following the fracture of the alliance between Kikuyu and Luo and the tension between the two in the run up to the 1970 elections, the only remaining opposition party KPU was banned. In June 1982 Section 2A of the Constitution has turned Kenya into a de jure single party state. Until the reintroduction of multiparty politics in 1991, Kenya remained a one party state under KANU leading to the domination of the state initially by the Kikuyu and following the assumption of power by the Kalenjin. See generally Lawrence Juma 'Ethnic politics and the Constitutional review process in Kenya' (2002) 9 Tulsa Journal of Comparative and international law 471.

56 See MB Ndulo & Robert B Kent 'Constitutionalism in Zambia: Past, present and future' 40(2) Journal of African Law (1996) 256-278.

57 See AS Alexander Jr. 'The Ivory Coast Constitution: An accelerator, not a brake' (1963) 1(3) The Journal of Modern African Studies 293-311.

58 MW DeLancey 'The construction of the Cameroon political system: The Ahidjo years 1958-1982' (April 1987) 6 Journal of Contemporary African Studies 3-24.

59 P Willetts 'The politics of Uganda as a one party state' 1969-1970' (1975) 74 African Affairs 278-299.

60 Nwabueze (n 7 above) 156; Lewis (n 37 above) 29-30.

61 Nwabueze (n 7 above) 157.

62 On Mozambique see Pekka Virtanen 'Defining the "other": Democracy in Mozambique within' (2003) 2(3) African and Asian Studies 233-258.

63 Hameso (n 42 above).

64 M Owusu 'Domesticating democracy: Culture, civil society and constitutionalism in Africa' (January 1997) 39(1) Comparative Studies in Society and History 120-152, 123.

leads to the entrenchment of the political and socio-economic inequality of members of various groups. The most catastrophic consequence of this has been its inherent tendency to foster the co-option of the institutional apparatus of the state by one or more dominant groups to the relative exclusion of others.⁶⁵ Second, often the neutrality of the state was not in practice observed. In many African countries, '[p]ost-colonial attempts at nation-building were overlaid on top of ethnically defined patronage politics, which rapidly reproduced itself within national institutions of states and parties.'⁶⁶ Accordingly, political developments in many African countries have abundantly attested that the state has been often put to the benefit of relatively stronger communities and to the disadvantage of others.⁶⁷

The nature of the organization and distribution power within the state has also been such that the African state was not a neutral arbiter of the competing interests of its diverse constituent groups. The organization of its power in a unitary and centralized form with no regard to the prevailing inequalities among the constituent groups has often led to the domination of the state by the relatively stronger ethnic groups. In this context, politics has often played itself out in the form of a struggle between the constituent groups for control and share of political power and for access to societal resources of which the state is the principal dispenser. Yet, the domination of the state by relatively stronger communities often means that the state itself becomes involved in the struggle. This has predisposed the state to advance the interest of some ethnic groups while neglecting those of others.⁶⁸

The institutionalization of a unitary and individual based political order amid deep ethno-cultural division and inequality led to ethno-culturally unequal patterns of relations to the state. Not only that there has been unequal representation of the constituent groups in the decision-making framework of the state as well as in the bureaucracy, but also societal resources have often been disproportionately controlled by and distributed in favor of dominant groups further entrenching the inequality and marginalization of others. With such marginalization of certain sections of society from the state machinery and the spoils of economic developments, the ethnic fragmentation inherited from colonial rule was further accentuated or otherwise given new dimensions.

⁶⁵ See Okafor (61 above) 102; Donald Horowitz *Ethnic Groups in Conflict* (1985)193-194; G Selassie (n 3 above) 17; Ahmednasir M Abdulahi 'The refugee crisis in Africa as the crisis of the institution of the state' 6(4) *Int'l J. Refu. L.* (1994) 562, 567 & 570-578. In Kenya, it led to the domination of the state by the Kikuyu, and when Arap Moi became president mostly by Kelengi. In Liberia, the state was dominated by Samuel Doe's Kore Ethnic group, in Malawi the Chewa, in Zaire Mobutu's Ngbandi ethnic group, in Sudan Northerners and Arabs, In Rwanda Hutus until 1994, In Burundi Tutsis, In Djibouti Isa, in Ivory Coast southern ethnic groups and in Mozambique southerners and similar patterns prevailed in many other African countries.

⁶⁶ Berman, Eyoh & Kymlicka (n 14 above) 8.

⁶⁷ On how non-dominant groups felt excluded from the homogenizing conception of national unity and resisted their resultant marginalization see the contributions of C Hendricks (on South Africa) JS. Solway (on Botswana), G Mugai (on Kenya) M Diouf (on Senegal) D Eyoh (on Cameroon) and Falola (on Nigeria) in Berman, Eyoh & Kymlicka (eds.) (n 14 above). (arguing that the state in Africa has lacked appropriate power configuration and institutional structure to deter the predisposition of particular groups to control it to their benefits).

⁶⁸ Okafor (n 21 above) 95.

This led to the further alienation of large segments of society from the state. Indeed, the decline in the capacity of the state to provide for the basic necessities of its diverse people and the prevalent perception of its ethnic bias has further deepened existing ethnic cleavages as people sought refuge for their socio-economic and security needs in their ethnic groups and networks.⁶⁹ In many instances, this also increased the legitimacy and force of ethnic membership as the most effective framework for articulating political and socio-economic grievances and mobilizing people against the state. All these deepened the crisis of the legitimacy of the post-colonial African state and its fragmentation ultimately unleashing, during the post-Cold War period, widespread political upheavals, conflicts and even genocide and the collapse of several states.

5.4.2 Cultural domination and exclusion

In addition to socio-economic and political inequality, in many African countries post-colonial nation-building has also led to cultural domination and exclusion. When some groups are found in control of the state apparatus, the repression of other groups take the 'form of state sanctioned imposition of cultural or political motifs of one or more groups on the rest of the population'.⁷⁰ The excluded groups have often been silenced, and when protested against their marginalization and discrimination, they were subjected to repression.⁷¹

Accordingly, many African states actively sought to nationalise the culture and language of some groups and demand or enforce its appropriation by all members of society as a condition of membership as citizens of the country. One can categorise this process of nationalization as taking the form of any one or combination of two: a coercive one consisting of restriction or outlawing of a group's language, impositions on the expressions of its traditional practices and ways of life, the persecution of cultural leaders, clergy members and attacks on academics and intellectuals and an assimilationsit one involving a systematic process of nationalising the dominant culture to the exclusion of others.⁷²

A good example of a country that has employed a coercive approach to institutionalise the dominant culture is Algeria. The question of the identity of Algeria has been one of the most contentious issues in the post independence politics of Algeria. Although Algeria is multicultural

69 See JO Ihonvbere 'The "Irrelevant" State, ethnicity and the Quest for Nationhood in Africa' (1994) 17(1) *Ethnic and Racial Studies* 42-60.

70 See EE. Osaghae 'Ethnicity, the state and Constitutionalism in Africa: Preliminary observations' in Akiba (ed.) (n 44 above) 95, 96-97.

71 See Abdulahi (n 64 above) 567. Okafor observes that '[s]ocio-cultural groups have, in some cases such as the case of the Ogoni, Katafa and Bajju of Nigeria, been brutally suppressed in the drive to impose the power of the central authority on them.' (n 21 above) 72. It has been recorded that the 'Tuareg people have suffered from the violation of their right to existence in Niger and Mali where they have been killed by the army and militia.' See Report of the African Commission Working Group of Experts on Indigenous Populations/Communities (2005) 39. [ACHPR Report]

72 A Addis' definition of assimilation very much captures the essence of the assimilationist approach to minority identities. According to him, '[t]o assimilate means to mould, to the extent possible, the minority in the image of the dominant group, by requiring the minority to learn the language of the majority, to follow the cultural practices of the majority, and generally to adjust its social practices and rituals to conform to those of the majority.' Adeno Addis 'Individualism, communitarianism, and the rights of ethnic minorities' (1992) 67 *Notre Dame Law Review* 619-620.

and 27 per cent of its population is composed of the Amazigh, otherwise known as Berbers, throughout its post-independence existence Algeria has defined itself as a purely Arab state and pursued a policy Arabisation. As a result, Arabic was constituted as the only language of Algeria. Linguistic and cultural expressions of the Amazigh were forbidden and the practice of Amazigh nationalism labelled as ‘Berberism’ has been outlawed.⁷³ The institutionalisation of Arabisation reached its climax in 1998 when the government passed a comprehensive law that required the use of Arabic language in all spheres of public life.⁷⁴ The nationalisation of Arab identity has therefore been not only coercive but it also took ‘a systematic, even Machiavellain, instilling of nationalist ideology through the mass media, the educational system, administrative regulations and so forth,’⁷⁵ exclusively on the basis of the cultural attributes of the dominant Arab majority.

This has led to the emergence of ethno-cultural movement of the Amazigh that demand the equal recognition and protection of their languages and cultural practices.⁷⁶ The fierce resistance put by the Amazigh has often been received with violence leading to the death of several people and the arrest and injury of many.⁷⁷

The Amazigh in Morocco are also subject to similar threats and suppressions as their counterparts in Algeria.⁷⁸ Some of the restrictions that Morocco has imposed on the Amazigh are as repressive and manifestly contrary to human rights norms as the ones in Algeria. This is illustrated by the prohibition of the registration of Children who are given Amazigh names as well as the outlawing of the use of Tamazight in courts. Amazigh are not also allowed to give Amazigh names to their organizations and companies nor to write in Tifingh. Tamazight is not as yet officially recognised nor is it taught at any level of the education system.

The identity of the state has also been a point of contention between dominant groups in control of the state machinery and other smaller groups in many other African states. The most typical ones include countries composed of Arab and African origin population groups such as Sudan,

73 ‘From 1980 to 1988, an estimated 300 activists for Amazigh were imprisoned for “Berberism”.’ ACHPR Report (n 70 above) 43.

74 See UNHRC, Concluding observations of the Human Rights Committee on the Second Periodic Report of Algeria UN Doc. CCPR/C/79/ADD.95 (August 1998) para. 15 [Herein after UNHRC on Algeria].

75 B Anderson *Imagined Communities: Reflections on the origin and spread of nationalism* (London and New York: Verso revised ed., 1991) 113-114 [Hereinafter Anderson].

76 On struggle of the Berbers against arabization and their opposition to the official Arab nationalism of Algeria see James McDougal *History and the culture of nationalism in Algeria* (2006) 184-216.

77 For example in 1980 the violent suppression of the protest of the Imazinghe against the banning of a lecture on ancient Kabyle poetry at Tizi-Ouzou University caused led to the death of more than 30 people and the arrest and injury of several hundreds. J Maxted and A Zegeye ‘North and central Africa’ *World Directory of Minorities* 405-408, 394.

78 See ACHPR Report (n 70 above) 42-43.

Chad⁷⁹ and Mauritania.⁸⁰ Much of the post-independence political history of these countries reflects the struggle between the attempts of various governments to impose the dominant Arab culture and Arabic language on African population groups and the resistance of the latter.⁸¹ Indeed, this is one of the many factors which have led to the civil war in the Sudan.⁸² Indubitably, the approach employed by governments in these states was not any different from that of Algeria.

Other African states have employed a variation of the coercive approach. In these countries, institutional pressure has been put on certain groups to force them into abandoning their traditional practices and ways of life. One illustration of this is the attempt of Tanzanian authorities to destroy the cultural identity of the Maasai ethnic group, giving it a choice between 'abandoning the ancestral customs or exclusion from public life.'⁸³

The assimilationist approach is reminiscent of Benedict Anderson's idea of official nationalism.⁸⁴ This is a process by which a state institutionalises the culture of the dominant group as a national culture by way of 'stretching the short, tight, skin of the nation over the gigantic body of the empire.'⁸⁵ It involved the diffusion of the majority (or dominant) group's language and culture all over the territory of the state through the state institutions. The media, the education system and all other public activities reproduce the dominant culture and are conducted in the language of the dominant group. No space is left for expression of other cultures and those who are not members of the dominant culture have no choice but to assimilate into the dominant culture.⁸⁶ This has been the case, for example, in such countries as Ethiopia,⁸⁷ Malawi,⁸⁸ and Botswana.⁸⁹

79 See generally S Decalo 'Chad: The roots of centre periphery strife' (1980) 79 *African Affairs* 491.

80 The title of the news item 'Mauritania – Neither Arab nor African' from the Nordic Africa Institute succinctly captures the nature of the problem that characterizes much of the post independence politics of Mauritania. See G Diallo 'Mauritania – Neither Arab nor African' available at <<http://www.nai.uu.se/newsfromnia/arkiv/2000/diallo.html>> accessed 2006/05/15.

81 According to Horowitz for these Afro-Arab states the persistent question has been: Is the state to be Arab or African? And the derivative of which Who would rule it, Arabs or Africans? Horowitz (n 64 above) 189.

82 For a discussion on the cultural basis of the southern Sudan struggle see Francis M. Deng 'Sudan's turbulent road to nationhood in R Larémont Borders, nationalism and the African state (2005) 33, 42-60.

83 F Ougergouz, *The African Charter on Human and peoples' rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2005) 225-226.

84 See Anderson (n 74 above) particularly 83-112.

85 As above, 86.

86 This happens to be the case even when an effective and seemingly 'neutral' individual rights is accorded to all citizens. Such a system favours the dominant group and minorities are as a result marginalised as a result of 'the drawing of internal boundaries; the language of schools, courts and government services; the choice of public holidays; and the division of legislative power between central and local governments.' See W Kymlicka *Multicultural citizenship: A liberal theory of minority rights* (1995) 51.

87 See Christopher Clapham 'Ethnicity and the national question in Ethiopia' in P Woodward and M Forsyth (eds.) *Conflict and peace in the Horn of Africa: Federalism and its alternatives* (1994) 27-40.

88 See generally D Kaspin 'Tribes, regions and Nationalism in democratic Malawi' in Ian Shapiro and W Kymlicka (eds.) *Ethnicity and group rights* (New York and London: New York University Press, 1997) 464-503.

89 See generally JS Solway 'Reaching the limits of universal citizenship: "Minority" struggles in Botswana' in Berman et al. (eds.) (n 14 above) 129-147.

Ethiopia, which existed as an independent African state since the time of the Axumite Empire as far back as 500 B.C., took its current territorial and demographic shape towards the end of the 19th century by incorporating different communities of the south and the east.⁹⁰ The incorporation of peoples of different cultures into the Ethiopian empire and the process of centralisation of power led to a process that was very much like official nationalism. It involved, to use the words of Anderson, the ‘welding of two opposing political orders, one ancient (historic Ethiopia), one quite new (modern Ethiopia)’.⁹¹ The expected outcome of this was essentially the assimilation of modern Ethiopia with its newly incorporated heterogeneous population of the south and east into ‘historic Ethiopia’.⁹² For the newly incorporated peoples, this was meant conversion into Ethiopian Orthodox Christianity, taking Christian names, being conversant in Amharic language and embracing the culture of historic Ethiopia.⁹³ This led to the emergence of ethno-national movements who waged war of liberation.

Malawi is another African state that has sought to institutionalise the culture of the dominant group as its national culture. Although Malawi consisted of more than a dozen ethnic groups, its post-independence nation-building process under the one party rule of President Hastings Banda has been directed to ‘the promotion of one ethnicity – the Chewa – as the national mainstream, and one region – the centre – as Malawi’s heartland.’⁹⁴ As part of this process, Chechewa, the Chewa language, was made a national language. To ensure its dissemination and

90 The sovereignty of Ethiopia as a state was affirmed – after the Battle of Adwa, where Ethiopia defeated the colonial forces of Italy – when Ethiopia signed boundary agreements with France, Great Britain, and Italy between 1898 and 1907. See I Brownlie *African Boundaries: Legal and diplomatic encyclopedia* (1979) 775. There is little agreement among scholars on the interpretation of the process of state formation of Ethiopia that took place at the end of the 19th century and beginning of 20th century. One can therefore generally identify two opposing viewpoints on this. The first is the view of those who argue that the formation of the Ethiopian state was essentially colonial in nature. This is particularly a view held among the proponents (some Ethiopian intellectuals and a large number of foreign scholars) of self-determination for the various ethnic groups. See for instance A Jaleta Oromia and Ethiopia: The state formation and ethno-national conflict (1993); F Nahum *Constitution for a nation of nations: The Ethiopian Prospect* (1997) 13; B.K Holcomb and S Ibsa *The Invention of Ethiopia: The making of a dependent colonial state in northeast Africa* (1990). This is not shared by all intellectuals from the non-dominant ethnic groups. See for instance M Gudina *Ethiopia: Competing ethnic nationalism and the quest for democracy (1960-2000)* (2003) 100-105. The second is the view that is expressed in the conventional historiography of Ethiopia. See for example B Zewde who characterizes the process as ‘internal expansion’ and incorporation. *A history of Modern Ethiopia 1855-1974* (1991) 60-80. It is however possible to understand of the process by which Ethiopia has come to take its current shape in the light of similar empire building processes that were taking place in many parts of Africa before they were interrupted by the advent of colonialism into Africa. That was more of an organic process of state formation through expansion into and incorporation of neighboring territories and peoples. See Okafor (n 21) 21-26.

91 Anderson (n 73 above) 86 (The text in the parenthesis is added by author).

92 The origin of the modern Ethiopian state was what was known as historic Ethiopia. According to Adhana Haile Adhana, ‘[t]he historic Ethiopian state normally known as Abyssinia had the Tigray (speaking Tigrigna, the Christain Agew (speaking Agewigna) and the Amhara (speaking Amharic) as its core and as components of its nationhood, although the Tigray and the Amhara were preponderant ... The uniting or core culture consisted of common history and Christianity, not Amharic or the Amhara core culture.’ (emphasis mine). Contrary to this others such as Christopher Clapham and Assefa Feseha characterise historic Ethiopia’s core culture as essentially being the Amhara culture (Clapham, n 87, 28-31; Feseha *Federalism and the accommodation of diversity in Ethiopia* (2006) 54-58). This, however, seems to be giving too much credit to the role of Amhara and too little to the Tigre in the making of modern Ethiopia. Adhana’s view therefore seems to be more accurate. The only thing left out in Adhan’s analysis is the prominence that Amharic has come to acquire and its instrumentality in the process of nation-building under Haile Silassie I and subsequently under the military regime. But this was something of a recent development, hence Amharic was less an attribute of the core culture than say orthodox Christianity. Thus although non-Amharic speakers as in the case of Emperor Yohannes IV, could rise to the throne, it was not so possible for a non-orthodox Christian as the case of Lige Eyasu from modern Ethiopian history aptly demonstrates.

93 A Fiseha *Federalism and the accommodation of diversity in Ethiopia* (2006) 56.

94 Kaspin (n 87 above) 470.

standardisation, Chechewa received particular governmental support.⁹⁵ The education system, the bureaucracy, the media and literature were all put for the promotion of Chechewa. This went ‘hand in hand with the promotion of Chewa culture as the cornerstone of nationhood and the source of its political iconography.’⁹⁶ Naturally this has precipitated the cultural, linguistic and socio-economic marginalisation of other groups inspiring resentment among the non-Chewa towards the Chewa.

The post-independence constitutional and political order of Botswana was established on the premise of what Richard Werbner called the One-nation Consensus.⁹⁷ This was an assimilationist and exclusive policy that was directed at the official nationalisation of the Tswana nation with no regard to the cultures and languages of the various groups. Having been established on the premise that ‘we are all Tswana’, this policy ‘left virtually no space in the public sphere for the country’s many non-Tswana cultures, unless recast in a Tswana image.’⁹⁸ This was legally entrenched in the choice of official and national languages, the creation of the House of Chiefs and the drawing of district boundaries through the independence Constitution of Botswana, the Chieftainship Act and the Tribal Territories Act. Thus, Sections 77, 78 and 79 of the Constitution guarantee automatic membership to the House of Chiefs, one of the Houses of Parliament, only to the eight Setswana speaking paramount chiefs.⁹⁹ Similarly, Section 2 of the Chieftainship Act recognised as the ‘principal tribes’ only the eight Setswana speaking groups to the exclusion of others. This was taken to its logical conclusion under the Tribal Territories Act, which divided the country mainly in terms of the eight principal tribes, which means that only the Setswana speaking groups have constitutionally sanctioned territorial boundaries (districts) and hence access to land. The recently introduced amendments to the Constitution and the laws, contrary to their promise, did not fully rectify the discrimination suffered by non-Tswana speaking groups.¹⁰⁰

For much of the post-colonial period, many African states were relatively successful in suppressing dissenting groups and silencing their claims for equitable inclusion partly due to the East-West rivalry of the Cold War era. When the support of the super powers to African governments was withdrawn following the demise of the Cold War rivalry between the west and the east, African states sank into the abyss of political crisis. This found expression in many countries in the form of violent conflicts and civil wars. In others such as Somalia,

95 See P Kishindo ‘The impact of a national language on minority languages: The case of Malawi’ (1994) 12(2) *Journal of Contemporary African Studies* 138.

96 Kaspin (n 87 above) 483.

97 R Werbner ‘Introduction: Challenging minorities, difference and tribal citizenship in Botswana’ (2002) 28(4) *Journal of Southern African Studies* 676.

98 As above.

99 See for details the case report *Kamanakao and others V. Attorney-General and Another* (2002) *African Human Rights Law Reports* (BwHC 2001) 35-58.

100 For more see *Violations of linguistic and cultural rights of minority groups in Botswana* statement of L Ramahobo to the UN Working Group on Minorities (March 1, 2004) available at < <http://www.unhchr.ch/minorities/statements10/MCB3a.doc>> last accessed on 2006/09/27; also IRIN News ‘Botswana: Minority ethnic groups feel new bill still discriminates’; IWGIA *The Indigenous World* 2006 506-508.

Liberia, DRC, it involved the explosion and collapse of the state. In the case of Rwanda and Burundi, it has been marked by genocide and large scale ethnic (genocidal) massacres. Even relatively stable countries such as Cote d'Ivoire that co-opted ethnicity with relative success have finally succumbed to the crisis racking other African countries as they slipped into civil war. Others such as Djibouti, Kenya, Tanzania, have also been afflicted by violence, albeit in less violent forms. However, this was not entirely a post-Cold War phenomenon. Countries such as Nigeria, Sudan, Mauritania, Ethiopia, Angola, Mozambique, Uganda, among others, experienced violent conflicts and civil wars for the most part of (or at some point during) the Cold War period. In all of these conflicts the issue of minorities played an important part,¹⁰¹ while in some of them it was central, in others a significant component.

Clearly, the homogenizing, state-centric and authoritarian nation-building policies of African states have utterly failed.¹⁰² As rightly noted, 'the level of identification with the state remains very low, the strategy has simply not worked, and in many cases has backfired, by fuelling fear and resentment amongst groups who feel excluded.'¹⁰³ After more than four decades of the nation-building efforts, almost all of these states are still faced with the two challenging realities inherited from their colonial past: the urgent need for national integration and democratically accommodating the claims of their constituent sub-national groups.

5.5 Conclusion: Multiethnic nation-building as an alternative

The failure of the post-colonial state-centred and homogenising nation—building process unleashed, during the post-Cold War period, violent conflicts in almost all parts of Africa. In countries such as Somalia, Liberia, DRC, it involved the explosion and collapse of the state. In the case of Rwanda and Burundi, it has been marked by genocide and large scale massacres. Even relatively stable countries such as Cote d'Ivoire that co-opted ethnicity with relative success have finally succumbed to the crisis racking other African countries as the country slipped into a civil war. The post-election crisis in Kenya further illustrated the vulnerability of almost all African states to ethnic based violence and the limits of post-1990 processes of democratization in Africa. Others such as Djibouti and Tanzania, have also been afflicted by violence, albeit in less violent forms.

101 OC Okafor ' "Righting" restructuring, and rejuvenating the postcolonial African state: The case for the establishment of an AU Special Commission on National Minorities' 13 (2007) African Yearbook of International Law 43-64; Francis M. Deng 'Ethnicity: An African predicament' 15 (3) The Bookings Review (Summer 1997) 28-31; G. Selassie (n 3 above); Rothchild & Olorunsola (eds.) (n 20 above).

102 To be exact, what it resulted in was the further alienation of the state from society, the deterioration of the capacity of the state and ultimately the very disintegration of the state itself. It is in this context that it became common in the literature to speak of collapsed states, failed states etc. See IW Zartman (ed) Collapsed states: The disintegration and restoration of legitimate authority (1995); M Mutua 'Putting humpty dumpty back together again: The dilemmas of the post-colonial African state' 21 Brooklyn Journal of International law (1995) 505; K Mengisteab 'New approaches to state building in Africa: The case of Ethiopia's Ethnic-based federalism' 40(3) African Studies Review (1997) 111-132, 116-119.

103 Berman et al. (n 14 above) 18.

Makau wa Mutua, in his seminal work ‘Why redraw the map of Africa: A moral and legal inquiry’¹⁰⁴ has offered an analysis on the causes of and a possible solution for the problem of ethnic conflicts in Africa. He locates the source of the problem in the illegitimacy of the post-colonial African state and its failure to perform the functions of statehood.¹⁰⁵ Finally, however, after rejecting rather hastily the workability of such solutions as federalism and power-sharing in Africa apparently to back his proposal as a logical and inevitable way out, Mutua advances a radical solution that ‘Africa’s political map must first be unscrambled and the post-colonial state disassembled before the continent can move forward.’¹⁰⁶ Answering the question of how, he suggested that ‘pre-colonial entities (the state-societies and the various ethno-political communities whose sovereignty was robbed by European colonisation) within the post-colonial order be allowed to exercise their right to self-determination.’¹⁰⁷ According to him, this ‘surgical suggestion’, as he calls it, is the *only* solution that is capable of redeeming the African state from its illegitimacy and put it on the right course.

Although there can be circumstances under which such application of the right to self-determination can be legitimate,¹⁰⁸ generally however it would not be the right course of action to resolve the persistent dilemma of addressing the grievances of minorities and their members and building the legitimacy of the state. It is seriously questionable if indeed such groups as the Maasai of Kenya, or the San of Botswana for that matter Tigray of Ethiopia would be better off to be on their own by exercising the right to self-determination in that form.¹⁰⁹ Moreover, as the history of Europe aptly attests it cannot also be expected that such an exercise of the right to self-determination would ultimately resolve the issue of minorities.¹¹⁰ At any case for most of the cases, it seems to be ‘too late in the day to break up the inherited state in Africa into its various ethnic components.’¹¹¹

Although the issue of minorities and the ethno-cultural conflicts it often leads to ultimately reflect on the legitimacy and hence necessity of the state, the challenge that they raise in the

104 Mutua (n 28 above).

105 Mutua (n 28 above) 1126-1150. According to Mutua, the structural illegitimacy of the African state, at the root of the African dilemma, is attributable to ‘the nature of its conception and creation’. As above, 1142. As he puts it, ‘[I]n 1884-1885, the European imperial powers met in Berlin and without the consent or participation of the African people, demarcated the Continent of Africa into colonies or spheres of influence. In many cases, kingdoms or tribes were split with such reckless abandon that they came under two or three European imperial powers. This event was the genesis of many of the present-day conflicts and virtually insoluble problems in the African continent.’ As above.

106 As above, 1162.

107 As above, 1118, 1150.

108 See SA Dersso ‘The Right to Self-determination, Minorities and Indigenous Peoples in Africa’ in SA Dersso et al (eds) *Minority and Indigenous Rights in Africa* (Pretoria University Law Press, forthcoming 2008).

109 See NKA Busia, Jr. ‘The Right to Self-determination, the State and the Quest for Democracy in Africa: An Explanatory Analysis’ 4 *African Society of International and Comparative Law Proceeding* (1992) 29, 47.

110 As A Addis has put it ‘[t]he redrawing of political boundaries to create larger or smaller units might therefore only reproduce the issue at a larger or smaller level, rather than solving it. It would be like dividing up a crystal. When a crystal is cut into smaller pieces, those small pieces reproduce the same (molecular) structure as the original; the size not the structure changed.’ Addis (n 72 above) 626.

111 Nwabueze (n 2 above) 310; Deng (n 13 above) 28 (noting that To attempt at this late date to return to ancestral identities and resources as bases for building the modern African nation would risk the collapse of many countries).

post-colonial African state is however more on achieving socio-economic and political equality (justice) within the framework of the state than on abandoning the state and redrawing a new political map altogether. The main focus is thus on restructuring the state and its processes in such a way that it is anchored on the shared social values and cultures and traditions of its diverse people and that there emerges a just political order ‘which gives all the various groups the opportunity to participate in decision-making’¹¹² and ensure that members of various communities are treated, to use a powerful expression made popular by Dworkin, with equal concern and respect.

This as well as the changing international normative terrain as expressed in the plethora of international instruments adopted during the post-Cold War period recognising and articulating the rights of minorities including indigenous peoples. Those norms dictate that states adopt a multiethnic nation-building process involving institutional arrangements and policies that provide sufficient public space for the expression and affirmation of the equality of membership in the different ethno-cultural groups. Clearly, although circumstances have changed a lot since the 1960s, Arthur Lewis’ view in this regard seems to be even more valid to day than when he published his book in 1965. As he puts it:

Any idea that one can make different peoples into a nation by suppressing the religious or tribal or regional or other affiliations to which they themselves attach the highest political significance is simply a non-starter. National loyalty cannot immediately supplant tribal loyalty; it has to be built on top of tribal loyalty by creating a system in which all the tribes feel that there is room for self-expression.¹¹³

As more recent studies show, particularly in this era people experience the state as oppressive where they feel that their identity and group interest is not accommodated by the state. It is only where their ethnic identity is recognized and protected that people with deep commitment to their ethnic identity can develop strong attachment and allegiance to the state.¹¹⁴ As Kymlicka puts it although the existence of shared values and inspiring history are important to sustain solidarity in multinational states, ‘[p]eople from different national groups will only share an allegiance to the larger polity if they see it as the context within which their national identity is nurtured, rather than subordinated.’¹¹⁵

112 Lewis (n 37 above) 66.

113 As above, 68.

114 With respect to minorities, T Makkonen rightly observes that ‘the extent to which members of minorities feel accepted, through the accommodation of their specific needs, affects positively their ability to see the society as a common project. On the other hand, if people feel that society does not respect their particular identities and needs, they will feel harmed, and indeed are harmed, and will be less keen to participate in common affairs.’ ‘Is Multiculturalism Bad for the Fight Against Discrimination?’ in M Scheinin & R Toivanen (eds.) *Rethinking Non-Discrimination and Minority Rights* (2004) 155, at 173.

115 See W Kymlicka *Multicultural citizenship: A liberal Theory of Minority Rights* (1995) 189.

6. CONSTITUTIONALISM AS A PANACEA TO ETHNIC DIVISIONS IN KENYA: A POST 2007 ELECTION CRISIS PERSPECTIVE

Beverline Ongaro & Osogo Ambani***

The truth is naked but we prefer it with clothes on. We love it, something in the way mothers are loved.¹

We were informed that these elections would, to a large extend, be overshadowed by ethnic considerations. Our analysis of election results has corroborated that assertion. We believe that this is a dangerous trend that must be addressed to ensure national cohesion.²

6.1 Introduction

The Kenya State has grappled with the challenge of managing diversities since independence in 1963, often without much success. The major test in management of diversity has been the ethnic factor which ramifications have sometimes been catastrophic. The most recent threat to the nation was the post 2007 general elections conflict which resulted in the death of close to 1000 people in less than two months and displaced about 400,000 others.³ Whereas it is often alleged that these tensions are class based, the place of ethnicity cannot be gainsaid. The International Crisis Group described the post 2007 general elections conflict candidly thus:⁴

In the slums of Nairobi, Kisumu, Eldoret and Mombasa, protests and confrontations with the police rapidly turned into revenge killings targeting representatives of the political opponent's ethnic base. Kikuyu, Embu and Meru were violently evicted from Luo and Luhya dominated areas, while Luo, Luhya and Kalenjin were chased from Kikuyu-dominated settlements or sought refuge at police stations. Simultaneously, Kikuyu settlements, the largest migrant communities in the Rift Valley, were the primary victims of Kalenjin vigilante attacks that were reminiscent of the state-supported ethnic clashes of the mid-1990s.

The current ethnic tensions are further exacerbated by past conflicts. These include the clashes in 1991/1993 in some parts of Western Kenya, the 1991/1992 and 1997/1998 ethnic clashes in the Rift Valley, the 1997/1998 tribal clashes in some parts of Nyanza (Gucha, Migori and Kisii) and the clashes in Likoni, Coast Province.⁵ These disagreements have been given different interpretations. For instance, the 1992 clashes in Rift Valley were perceived by some as a form of punishment to the Kikuyu.⁶ There have also been allegations that some of these ethnic clashes were politically instigated ostensibly to alter the voting patterns in favour of the then

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F Fanon *The wretched of the earth* (1965) 7.

2 Kenya General Election, 27 December 2007, The Report of the Commonwealth Observer Group, Commonwealth Secretariat, P 28.

3 International Crisis Group, Africa Report No. 137. 21 February 2008.

4 As above.

5 See M Apollos 'Ethnicity, violence and democracy' (2001) XXII, 1 & 2 African Development 6.

6 'Class v kinship in Kenya's eruption to violence' (2008) 23, 1 & 2 Wajibu 16.

ruling party, Kenya African National Union (KANU).⁷

Ethnic conflicts have confounded Kenya's governance structures that they rank top on the list of the challenges of State. Prof Ali Mazrui has recounted Kenya's predicament, perhaps, in the most dramatic format:⁸

One major characteristic of politics in postcolonial Africa is that they are ethnic-prone. My favourite illustration from Kenya's postcolonial history was Oginga Odinga's efforts to convince Kenyans that they had not yet achieved *Uhuru* but were being taken for a ride by corrupt elite and their foreign backers. Oginga Odinga called upon all underprivileged Kenyans regardless of their ethnic communities to follow him towards a more just society. When Oginga Odinga looked to see who was following him, it was not all underprivileged Kenyans regardless of ethnic group but fellow Luo regardless of social classes. It was not the song of social justice, which attracted his followers; it was who the singer was – a distinguished Luo. Not the message but the messenger.

It has been argued that the ethnic proneness of Africa's politics affects not only who is elected, but also how jobs are allocated and affects the triumph of ethnic nepotism as one branch of corruption.⁹ Indeed, power-plays, capital-transfers, loyalties and solidarities, jobs and opportunities, scholarships and bursaries, loans and gifts, are all influenced in one degree or another by the pervasive power of ethnicity in Africa.¹⁰

The thesis here is that erecting a political dispensation that upholds the concept of constitutionalism is likely to avert most of the negative effects of ethnicity. This thesis is achieved in three stages. First, a conceptual foundation is laid. Second, the concept is tested in Kenya's constitutional framework with attention paid to the ethnic conflicts. And lastly, suggestions aimed at addressing lapses in constitutionalism and the challenges of ethnic diversities are made.

6.2 Conceptual framework

One conception envisions constitutionalism to be government limited by the law for the sake of the liberty of the individual.¹¹ In this respect, a legal regime that underscores the constitutionalism doctrine attempts as much as possible to delineate state power leaving little to the discretion of the wielders of political power. The desired end, usually, is the realization of human rights. De Smith argues that:

⁷ Apollos (n 5 above) 17.

⁸ A Mazrui "'Katiba na Kabila": If African Politics are Ethnic-Prone, Can African Constitutions be Ethnic-Proof?' (2004) 1 University of Nairobi Law Journal 144.

⁹ Mazrui (n 8 above) 144.

¹⁰ As above 144.

¹¹ See generally, SA de Smith *The new Commonwealth and its constitutions* (1964).

The idea of constitutionalism involves the proposition that the exercise of government power shall be bound by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content.¹²

In this sense

Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the *extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty*.¹³

One method by which ‘arbitrariness of discretion’ is curbed is through the device of the doctrine of separation of powers. This doctrine is underpinned by a philosophy akin to Aristotle’s sentiment that ‘power tends to corrupt’ and that ‘absolute power tends to corrupt absolutely’.¹⁴ To avert this situation where power may corrupt holders of constitutional office, it has been variously suggested that executive, legislative and judicial functions should be separated and that these must not vest in the same individual(s). It was Montesquieu who gave the doctrine the most convincing definition. In his own words:¹⁵

Political liberty is to be found ... only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another... When the legislative and executive powers are united in the same person or body... there can be no liberty... Again, there is no liberty if the judicial power is not separated from the legislative and the executive... There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all the three powers.

Even before Montesquieu, Locke was aware that:¹⁶

It may be too great a temptation to humane frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their private advantage.

It is submitted that the doctrine of separation of powers has the rule of law as its condition precedent. The rule of law, as a concept, is often ascribed to AV Dicey.¹⁷ In Dicey’s theory, the

12 SA de Smith (n 11 above) 106.

13 SA de Smith (n 11 above) 106 (Emphasis added).

14 JD Kaplan (ed) *The pocket Aristotle* trans WD Ross (1958).

15 For an English version, see B de Montesquieu *The spirit of laws* trans T Nugent (1949) xi, 4.

16 J Locke *Second treatise of civil government* (1690) ch xii, 143.

17 See ECS Wade & AW Bradley *Constitutional law* (1970) 63, where it is stated: ‘Of all writers on the constitution since Blackstone the most influential has been the late A.V. Dicey...’

rule of law is one expression with at least three though kindred conceptions.¹⁸ In the first place, the concept entails that no man can be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, he argued that the rule of law is contrasted with every system of government based on the exercise by persons in authority of *wide, arbitrary, or discretionary powers* of constraint.¹⁹ In the second sense, the concept entails not only that no man is above the law, but also that every man, whatever be his/her rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals. Dicey underscored the need for judicial processes being effected in ordinary tribunals hence elevating the role of the judicial branch of state. In its third conception, the rule of law entails that:²⁰

The constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us as the result of judicial decisions determining the rights of private persons in criminal cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

Indeed, aside from the Westminster constitutional model, the practice in most democracies is to have human rights engrained within written constitutions. It is now common to find a chapter on the Bill of Rights embossed in the constitutional document. More recent practice has been to entrench civil and political liberties, as well as economic and social rights.²¹ At the core of the human rights discourse are the equality and non-discrimination notions, which are now prescribed for every state.²² Minority protection is equally critical. To secure the protection of these entitlements, it has become necessary that oversight institutions specifically for the protection of human rights be established. The United Nations High Commission for Human Rights (UNHCHR) has, indeed, reckoned that:²³

It has therefore become increasingly apparent that the effective enjoyment of human rights calls for the establishment of national infrastructures for their protection and promotion. Official human rights institutions have been set up by many countries in recent years.

6.3 The constitutionalism doctrine and management of ethnicity: The practice

As demonstrated below, the constitutionalism doctrine described above has been attempted in Kenya with varying degrees of success. Both the content and the practice of the Constitution

18 See generally, AV Dicey Introduction to the study of the law of the constitution (1885)

19 Dicey (n 18 above).

20 Dicey (n 18 above) 196.

21 See, for instance, the Constitution of the Republic of South Africa.

22 See, article 2 on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

23 National Institutions for the Promotion and Protection of Human Rights, Fact Sheet No.19, para 7.

have been wanting; at least when compared to the ideal that is the constitutionalism doctrine.

Kenya has a written Constitution with a Bill of Rights which entrenches civil and political liberties. The Constitution also delimits the powers of State. The Constitution declares itself sovereign and subordinates all other laws and customs.²⁴ It delineates power to three distinct organs, namely, the Executive, the Legislative and the Judiciary. The President heads the Executive, which runs the Government.²⁵ Other key members of this organ include the Vice President, the Prime Minister and cabinet ministers.²⁶ Parliament, composed of the National Assembly and the President, has the legislative mandate²⁷ while the High Court, Court of Appeal and other subordinate courts are charged with the adjudication of disputes.²⁸

Kenya's dispensation also comprises of a national human rights institution, the Kenya National Commission on Human Rights (KNCHR)²⁹ as well as other oversight institutions such as the Kenya Anti Corruption Commission (KACC).³⁰ The Constitution further entrenches an electoral management body, the Electoral Commission of Kenya (ECK).³¹

However, an argument is tenable that Kenya's Constitution does not effectively uphold constitutionalism. For example, the institution of the Presidency has enormous powers, which trump over the other organs of State. Until the enactment of the National Accord for Reconciliation Act, in February 2008, the President appointed all cabinet ministers without having to consult any other institution. The President also has the power to appoint judges, senior civil servants, and heads of public corporations amongst others. These powers have, in the past, been utilised to exert ethnic dominance in favour of the incumbent's ethnic community. Press, thus, writes of former President Daniel Moi's tenure as President of Kenya:³²

Former President Moi surmounted the resistance from the Kikuyu power brokers who were out to prevent him as the Vice-President from succeeding by attempting to change the Constitution. The President faced a formidable political challenge, on how to apply corrective politics to redistribute power and resources away from those who had previously enjoyed them, towards those least favoured by the previous regime with the consent of the majority. During the regime majority of public appointments were made with members from one community being favoured.

Similar excesses were replicated between 2003 and 2007 during President Mwai Kibaki's first term in office.³³ A report presented by a former legislator, Hon Ochillo Ayako, to the 9th

24 Section 3, Constitution.
 25 Section 23, Constitution.
 26 Section 17(1), Constitution. See also, National Accord and Reconciliation Act, 2008.
 27 See, section 30, Constitution.
 28 See, section 60, Constitution.
 29 Established by the Kenya National Commission on Human Rights Act, 2002.
 30 Established by the Anti Corruption and Economic Crimes Act, 2003.
 31 See, section 41, Constitution.
 32 RM Press (n 6 above) pg 62
 33 President Mwai Kibaki was sworn into office in December 2002 for his first term.

Parliament in June 2007, confirmed the fact that ethnic nepotism has continued to be widespread, especially in appointments to the Executive and Judiciary.³⁴

However, it is the power to constitute the Judiciary single-handedly that is more deafening. In just five years, between 2003 and 2007, President Mwai Kibaki single-handedly appointed close to forty judges, a feat hardly achieved in any constitutional democracy. Indeed, by the end of 2004, President Kibaki had appointed up to 29 new judges within a span of just two years of his coming to power - in a Judiciary, then, with a maximum capacity of 60 judges.³⁵ During the year 2007, about 10 new judges were appointed. Although the Constitution provides that the President is to consult with the Judicial Service Commission, it is worth noting that the key members of the Commission, Chief Justice, the Attorney General and two judges are presidential appointees as well.³⁶ This means that one individual has determined almost two thirds of the Judiciary, quite a devastating blow to the independence of the institution. Worse still, the Constitution fails to expressly assert the independence of the judicial organ of state in the same way it has provided for the other two arms. Section 23(1) of the Constitution, for example, stipulates that the executive authority of the State is vested in the President. Similarly, section 30 of the Constitution provides that the legislative power is vested in Parliament. The absence of a corresponding provision for the Judiciary inevitably means that constitutional provisions have not properly addressed the institutional independence of the Judiciary.³⁷

Consequently, Kenyans have had little faith in the judicial organ partly due to the fact that this branch of State is not autonomous and partly because the capacity or competence of the judicial officers has invariably been questioned.³⁸ The diminishing confidence in the Judiciary is evidenced by the fact that the Orange Democratic Movement's 2007 presidential candidate Hon Raila Odinga (now Prime Minister in the Grand Coalition Government) immediately rejected the Judiciary as a forum for resolving the disputed 2007 presidential elections.³⁹ As the State sunk into violence, there was quick consensus that the judicial organ would not adjudicate effectively over the dispute, hence the ensuing state of anarchy.

The result of this non-promising Judiciary has been lack of protection of Kenyan people, including ethnic minorities, occasioning more conflicts. The Maasai and Ogiek have, for instance, traditionally had conflicts over their communal lands with other migrant communities in the Rift Valley, which conflicts have not adequately been addressed through courts of law.

34 See the report titled 'The skewed government appointments in Kenya', Presented by Hon. Ochiillo Ayako to 9th Parliament in June 2007.

35 See, Gazette Notices No 3630 and 3631 of 22 May 2003; No 9935 of 10 December 2004; No 9933 and 9934 of 2004.

36 Section 61 and 68 of the Constitution.

37 See W Mitullah, M Odhiambo & O Ambani Kenya's Democratisation: Gains or Losses (2005) 37.

38 See, for instance, An Anatomy of Corruption in Kenyan Judiciary, Report of the Integrity and Anti Corruption Committee appointed by the Chief Justice of the Republic of Kenya in 2003. The report implicated 5 Court of Appeal and 18 High Court judges, 82 magistrates and 43 paralegal officers in corruption. Also see the 2005 report by the International Commission for Jurists titled: Kenya Judicial Independence Corruption and Reform

39 'Breaking Kenya's Impasse: Chaos or Courts?' Africa Policy Brief, Africa Policy Institute. P 3.

In the case of *Francis Kemai and Others versus Attorney General of the Republic of Kenya*,⁴⁰ the Ogiek seized the occasion to state before the High Court some of the problems bedeviling their 'indigenous' lifestyle. They challenged their eviction from their traditional habitat, Tinnet Forest, and even proceeded to seek compensation. The community argued that the eviction of its members from their habitat amounted to a deprivation of livelihoods given that their lives hinge on the forest environment.

Although the Government had evicted the community ostensibly to secure a water catchments area, the community alleged that logging companies and members of other aggressing and major communities had since been allotted their traditional lands. In a most controversial decision delivered on 23 March 2000, the superior court of record dismissed the application citing, amongst others, the environmental imperative of protecting a water catchments area and lack of sufficient evidence in the applicant's case. This decision has done little to quell the ethnic conflicts, and the judicial organ is largely to blame.⁴¹ It is instructive that the two judicial officers who adjudicated over this dispute (*puisne* judges Kuloba and Oguk) have since been retired on the grounds of corruption and misconduct.⁴²

It is not only appointments of judicial officers that have heightened conflicts. The constitutional power of the President to appoint Commissioners of the ECK⁴³ has equally been destructive. As currently constituted, the ECK has 22 Commissioners, including a Chairman and his Deputy. In 2007, the President single-handedly appointed 19 new Commissioners, another deadly blow to the emerging democracy. Although the Constitution gives the President such powers, the act was directly against the prevailing spirit and the practice established since the 1997 Inter Parliamentary Parties Group (IPPG) Agreement which suggested that the composition of the electoral management body must be determined by all the major political parties. Indeed, according to the European Union Election Observation Mission, Kenya, this unilateral act by the President;⁴⁴

... Reduced the confidence in the ECK... as it was against the Inter Parliamentary Parties Group (IPPG) Agreement of 1997 that requires consultation with the opposition parties when appointing new ECK commissioners. In addition, most recently appointed commissioners lacked experience in election administration.

40 Civil case no. 238 of 1999.

41 The decision has been lamented; see, for instance, G Mukundi, *Vindicating Indigenous Peoples' Land Rights in Kenya*. LLD Thesis, University of Pretoria.

42 See, Mitullah, *Odhiambo & Ambani* (n 37 above) 48.

43 Section 41(1) of the Constitution gives the President the power to appoint the commissioners of the ECK.

44 *Doubts About the Credibility of the Presidential Results Hamper Kenya's Democratic Progress*, European Union Election Observation Mission Kenya, General Elections, 27 December 2007. Preliminary Statement.

It is little wonder that the post 2007 elections violence, which has mostly been assigned the ethnic tag, is also traced to ECK's perceived bias in the conduct of elections. It is documented, for instance, that:⁴⁵

The events that unfolded since polling day have eroded the confidence of the people of Kenya. The manner in which the results were announced has raised suspicion and caused widespread mistrust.

The President is further vested with authority over land and has the discretion to allocate this important resource almost at whim. By virtue of section 3 of the Government Lands Act,⁴⁶ the President has special powers over Government land and may 'make grants or dispositions of an estate, interests of rights in or over unalienated Government land amongst other powers'. Although Trust Lands constitutionally vest in county councils,⁴⁷ the President has the power, in consultation with the respective local authority, to set apart such lands⁴⁸. The Constitution additionally accords the President enormous latitude in acquiring and allocating such resources.⁴⁹ The consequence of these wide and discretionary powers over natural resources has been that irregular and illegal land allocation in Kenya is now an acknowledged fact.⁵⁰ Indeed, the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Constitutional Framework for Land Administration, appreciated that:⁵¹

There has been abuse of trust by the Government and the county councils, its officials and councillors in the irregular allocation of public and community land without following legally laid down procedures that ensure appropriateness, transparency and fairness. The abuse has led to massive grabbing of land reserved for public use.

This position is corroborated by the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land which revealed that:⁵²

Land was no longer allocated for development purposes but as political reward and for speculation purposes... 'land grabbing' became part and parcel of official grand corruption through which land meant for public purposes ... has been acquired by individuals and corporations.

45 Kenya General Election, 27 December 2007, The Report of the Commonwealth Observer Group, Commonwealth Secretariat, P 28.

46 Chapter 280, Laws of Kenya.

47 Section 115, Constitution.

48 Section 118, Constitution.

49 See generally, section 118 of the Constitution.

50 Listening to the poor? Housing rights in Nairobi, Kenya. P 132. COHRE Fact-finding mission to Nairobi, Kenya, June 2006. P 132.

51 Republic of Kenya, Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Constitutional Framework for Land Administration, (June 2004). P 188

52 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land. P 8.

These reports demonstrate how public land was illegally allocated to individuals and corporations associated with senior Government officials during the KANU era. Illegal and irregular allocations of forestlands were often made in total disregard of their value to the local communities. For instance, the Karura, Ngong and Kiptagich forests were illegally and irregularly allocated to private developers. In 1997, 1,812 hectares of the Kiptagich forest were set aside ostensibly to resettle the Ogiek community. However the requisite notice de-gazetting the forest was not published by the then Minister for Lands. The earmarked forest area was surveyed; sub-divided and allocated to developers who were prominent and influential individuals and companies, mostly from the President's ethnic community. Very few members of the Ogiek community received negligible portions of the land.⁵³ The companies that benefited from the illegal allocations have had the latitude to conceal the identities of the actual company directors. The case of *National Social Security Fund Board of Trustees v Ankhan Holding Limited and 2 Others* is illustrative. In this case, the directors of a litigant company were listed as Sammy Kogo and Hubert Mwakiwa when in actual sense the actual owner was Jonathan K. Toroitich Moi, a relative of the former President.⁵⁴

Because of this poor management of the land resource, injustices have been occasioned especially to minority ethnic communities. The African Peer Review Mechanism's Country Review Report of the Republic of Kenya, indeed, reckoned that:⁵⁵

After the departure of the British colonial administration, a few ethnic groups managed to amass significant portions of land in the former 'white highlands', entrenching their dominance of commercial agriculture and hence development in the economic sector and, consequently, in other key areas such as service delivery.

True, due to the culture of political corruption, misrule and mismanagement, large tracts of land were allocated to influential individuals in the 1980s and 1990s, sometimes at the expense of local communities.⁵⁶ These lands continue to be a source of conflict throughout the country. The Maasai lands, for example, are a potential source and incubator of conflicts that have existed since these lands were taken away by the colonial administration and allocated to white settlers.⁵⁷ Maasai have therefore consistently staged demonstrations demanding for compensation.⁵⁸ There have also been clashes between the Maasai and other migrant communities as a result of these

53 Kenya National Commission on Human Rights and the Kenya Land Alliance, *Unjust Enrichment, The making of Land Grabbing Millionaires*, Living Large series, Vol.2, 2006

54 Kenya National Commission on Human Rights and the Kenya Land Alliance, *Unjust Enrichment, The making of Land Grabbing Millionaires*, Living Large series, Vol.2, 2006

55 Country Review Report of the Republic of Kenya, African Peer Review Mechanism, May 2006. P 47.

56 (note 55 above) 49.

57 As above.

58 As above.

lands.⁵⁹ It is now trite that resource based conflicts occur in most cases over the politicization of land ownership and land rights, arbitrary allocation of community land, scarcity of land for pasture and crop farming, struggle for access to and use of water resources, and depletion of limited water.⁶⁰ Yet,⁶¹

The grievances remain unresolved because successive post independence Governments have failed to address them in a holistic manner. In the post-independence period, the problem has been exacerbated by the lack of clear, relevant and comprehensive policies and laws.

A case in point is Sessional Paper No. 10 of 1965 on African Socialism and its application to Kenya, which influenced budgetary allocation in different regions within the State. The thrust of the policy paper was to inject more resources in the ‘productive’ regions of the country and then divest the profits from these areas to the less productive ones. Thus, communities which resided in the former white highlands that already had a good infrastructure compared to the rest of the country became the core recipients of budgetary allocation to develop their regions while the rest were limited to the periphery. The economic activities of different ethnic communities were dichotomised from their socio-economic necessities, this is especially the case for the communities in the arid and semi arid areas despite the fact that the Arid and Semi Arid Lands account for more than 80% of the 575,000 of Kenya’s land mass.

In the face of all these atrocities, the Legislature remains without the requisite and corresponding autonomy to effectively check the Executive. Even the tenure and calendar of Parliament is itself in the hands of the Executive. The Constitution vests with the President the power to commence the sessions of Parliament.⁶² The Presidency also has the power to prorogue⁶³ as well as dissolve⁶⁴ Parliament, leaving the August House largely at the mercy of the Executive as regards conduct of its own business. Even though Parliament could pass a vote of no confidence in the President, the result of such a decision would be to terminate the life of Parliament itself.⁶⁵ Thus, ‘vote of no confidence’ as a parliamentary arsenal threatens the very life of the Legislature. However, Parliament recently made significant strides towards autonomy by passing a substantive motion against a Cabinet Minister, Hon Amos Kimunya.⁶⁶

59 As above.

60 As above.

61 See Draft National Land Policy, Government of Kenya, 2006, para 190.

62 Section 58.

63 Section 59(1).

64 Section 59(2).

65 Section 59(3).

66 See, East African Standard, 3 July 2008, P 1.

Worth of note, also, is the fact that the doctrine of separation of powers is not strictly adhered to in Kenya's constitutional order.⁶⁷ For example, the Executive (the Vice President, the Prime Minister and cabinet ministers) is drawn from the members of Parliament.⁶⁸ At the moment, close to half the members of the National Assembly have been incorporated into the Grand Coalition Government, incredibly weakening the autonomy of the Legislature⁶⁹ and its capacity to check the Executive organ.

Although the Constitution has a Bill of Rights prescribing a number of human rights for the people of Kenya, the Chapter is crippled in at least five critical regards. First, the supreme legislation makes no reference to economic, social and cultural rights. Second, it does not exhaustively proscribe all known grounds upon which discrimination may be perpetrated.⁷⁰ The Constitution prohibits discrimination only on the grounds of race, tribe, and place of origin, political connection, colour, creed or sex.⁷¹ These grounds clearly exclude distinctions on the basis of disability, HIV/AIDS status, sexual orientation, property *et cetera*. However, legislations such as the *Children Act* (sec 5), the *Persons with Disabilities Act* (sec 11), and the *National Commission on Gender and Development Act* (sec 6(2)(d)), *HIV/AIDS Prevention and Coordination Act* have broadened the scope of definition of discrimination, thus, enhancing human rights. Third, and more critical, the Bill of Rights permits discrimination on the ground of gender, for example, in matters of personal law such as adoption, marriage, divorce, burial and devolution of property on death.⁷² Fourth, Kenya has not domesticated most of her international obligations, for example, under the Convention on the Elimination of All Forms of Discrimination (CEDAW). Even where international standards have been domesticated as in the case of the Convention on the Rights of the Child (CRC), they are yet to find constitutional expression. Fifth, the Bill of Rights has no sound protection of minorities and other under-privileged groups. Affirmative action as well as other safeguards conventionally erected to protect marginalized sections of the community are conspicuously absent in Kenya's dispensation. Professor Patricia Kameri-Mbote has, thus, stated the case for affirmative action:⁷³

Substantive equality seeks to address the shortcomings of formal equal equality and seeks to ensure that equality is achieved. The quest for substantive equality will lead to some form of discrimination or differential treatment. This is justified on the account of levelling the playing field, it being recognised that equal rights will not deal with past injustices occasioned by formal equality that does not take into account structural distinctions.

67 This is not to say complete separation is always desirable. See, for instance, OH Phillips & Jackson Constitutional and administrative law (2001) 12.

68 See, section 15, 16 & 17, Constitution.

69 The current Grand Coalition Government incorporates about 100 members of Parliament.

70 Human Rights in Kenya: The Post Moi Era (2002 -2007), Human Rights House, 2007, P 7.

71 Section 82(1) and (3).

72 Section 82(4)(b).

73 P Kameri-Mbote, P. 'Gender considerations in constitution making: Engendering women's rights in the legal process,' (2003) 1 University of Nairobi Law Journal 156.

Because of the prevailing lame Bill of Rights, inequalities of kinds have thrived, and the ethnic differentiations have particularly proved catastrophic. Already, inequalities in wellbeing have taken a worrying regional dimension. According to Society for International Development (SID), these differences are observed between urban and rural areas, and between defined administrative regions.⁷⁴ SID argues that differences in regional or geographical well-being more often coincide with ethnic identities because ethnic groups often reside in given geographical regions.⁷⁵ This averment is only accurate as,⁷⁶

It emerges that informal and formal employment in Kenya tends to be concentrated in a few provinces. These are Nairobi, Rift Valley and Central which jointly account for about 60% of the total employment even though they account for a total of 45% of Kenya's total population.

These apparent differences in well-being between regions, and therefore communities, could have contributed to the destabilizing post 2007 conflict.⁷⁷ These differences have often been used by the political elites in the past to create and catalyse ethnic tensions. Yet these inequalities could be traced to a defective constitutional framework that does not pay sufficient tribute to the concept of constitutionalism.

6.4 Conclusion

This discussion initially defined the ideal that is constitutionalism. The ideal has been tested in Kenya's constitutional theatre – this process has found Kenya's dispensation wanting. The constitutional order has lumped enormous powers in the institution of the Presidency leaving the other organs of State not only freak but also frail. The Bill of Rights has been found inept, especially where the protection of minorities is concerned. Moreover, the electoral management body (ECK) has been subjected to too much Executive control that it cannot be a neutral arbiter in democratic elections. The result has been that ethnic conflicts have heightened and this happens under the noses of these terribly weakened institutions. Clearly, a link was established between the ills of ethnicity and the defective constitutional structures.

It is, therefore, suggested that by establishing constitutionalism, that is: The rule of law; the doctrine of separation of powers; an independent Judiciary; a sound Bill of Rights protecting minorities; and other oversight institutions, the problem of ethnicity, could simultaneously be addressed. A proper constitutional regime is certainly long overdue.

⁷⁴ Pulling Apart: Facts and Figures on Inequality in Kenya, Society for International Development (2004), P 13.

⁷⁵ (note 74 above) 13.

⁷⁶ (note 74 above) 16.

⁷⁷ (note 6 above) 16.

7. DEVOLUTION OF POWER AS CONSTITUTIONALISM: THE CONSTITUTIONAL DEBATE AND BEYOND

Dan Juma^{1*}

Abstract

Devolution of power has long been a subject of interest to many. But in recent years, devolution has become one of the most highly contested, even divisive concepts in Kenya. While devolution has been advanced as a means of managing Kenya's ethnic diversity and the failures of the centralized State, it is surprising that there is no agreement on how to devolve power. Even more surprising is the contestation over the advantages and pitfalls of devolution. Of the different shades of the debate, no genre has attracted as much interest, if not fear, as majimboism.

With the ensuing resumption in the constitution making process, there is no doubt that another round of debate on devolution is in waiting. Yet again, contested discourses will revolve around the structure, spheres, and form of devolution of power. But is devolution a panacea to Kenya's problems? Is the clamour for devolution a mere search for new institutions or means of democratic constitutionalism? What are the irreducible normative elements which devolution of power should entail? Should the primary concern of devolution be the transfer of power to territorial units, or a means of constitutional development and democratic constitutionalism?

36

7.1 Introduction

The debate on devolution of power is back. The debate traces its antecedents to Kenya's pre-independence discourse and the immediate post-independence politics, and most recently, attempts to write a new constitution, a process punctuated after the rejection of the Draft Constitution in a referendum in 2005. During that referendum, as was during the entire constitution making process and its antecedents, devolution was perhaps the most widely debated principle. Following the failed constitutional reform process, the debate slumped, only to be retrieved during the 2007 elections. With talks about constitutional reforms, the debate is back.

The premises for the renewed interest in devolution are as follows: First, it has been recognized that underlying Kenya's political crisis is the normative framework of Kenyan politics and governance, characterized by concentration of power in the presidency and centralized institutions without appropriate checks on those powers. Devolution is arraigned as a means of enacting self-governance, and an efficient and effective government responsive to the needs of local communities. Second, devolution is also viewed as a means of democratising governance

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and accommodating diverse ethnic, linguistic and religious identities. To these premises add the prospect of self-rule, public participation, accountability, good governance and equitable development.

Despite these promises of devolution, the idea remains highly contested in Kenya. This chapter examines the concept and practice of devolution of power, and more broadly, the case for and pitfalls of devolution. While no examination of the devolution question can bypass the historiography of Kenya's independence discourse, only a thin review of the historical narrative will be provided here. In an attempt to reposition the debate on devolution, the chapter then examines devolution and its linkage with the principle of democratic constitutionalism. The central argument is that the discourse must transit from the institutionalist to the normativist perspective that views devolution as a state formative and normative process. Following this, the chapter concludes that devolution of power, like constitution making, should not merely be a mechanical establishment of institutions, but a reconstitution of the state and its normative foundations. Finally, the balance of the Chapter highlights some elements of future process that should inform the post-reform phase.

Some caveats are in order. Devolution of power is a complex and wide subject, with different connotations and meanings across time and space. The contours of the debate cannot therefore be covered here, even in outline. As will become apparent, the chapter deliberately eschews dealing with institutional design questions, in favour of values and meta-theoretical issues that should be considered in the devolution debate. No trace of specific institutional design proposals will therefore be found resident in the chapter. Secondly, every discussion on devolution invites a critical examination of comparative experiences. The ensuing work is however not home to any systematic comparative analysis of devolution. *In lieu* of this, the chapter makes reference to historical constitutional developments in Kenya and literature that corroborate various positions and theses. Finally, this chapter does not, for a moment, stand as an invitation to establish *majimbo*, but rather devolution of power.

7.2 Decentralisation without devolution: Some conceptual issues

It is surprising that while devolution is perhaps the political buzzword of our time, there is little agreement on the concept and practice. Devolution- like democracy and other similar concepts-remains highly contested, and practices remain variegated across countries and time. Out of popular demands and sometimes external pressures, some states purport to devolve power, yet remain centralized, while in some, variants of administrative or fiscal decentralisation are misrepresented as devolution. In this latter case, power reposes in the centre, with some margin of appreciation given to government and local officials to implement policies and programmes

largely determined by the centre.

But what is devolution, and what distinguishes it from the other forms of exercising power at lower levels of government? The aim of this chapter is not to duplicate debates on devolution and related concepts as this has been done elsewhere.² Following the seminal classification of Rondinelli and Cheema,³ some common definitions need clarification below. Stripped of all technicalities, devolution is a practice through which the authority to make and implement decisions in selected spheres of public policy is conferred to elected lower or sub-national levels of government by law.⁴ The fundamental features of devolution include independence (autonomy, or little or no control) from central authorities, separate or legal status and cooperative or reciprocal governance.⁵ Typically, devolution entails vesting powers, and functions to local governments, regional, provincial or any other forms of sub-national government.⁶

De-concentration, another variant of decentralisation, is the assignment of authority to public servants based in lower spheres or the field to make and implement executive decisions on behalf of the central government in their localities.⁷ Functionally, the object of de-concentration is to transplant the operations or workload of central government to different territories of the state, with residual powers remaining the repository of the central state.⁸ It is a form of administrative decentralisation without devolution, or local administration with[in] centralisation, since the authority to make decisions or exercise discretion remains with the centre.⁹ The case of Kenya illustrates de-concentration, with local (provincial) administration and field administration, comprising staff of ministries dispatched or employed in the field as agents of these central entities. The provincial administration is part of the civil service, but under that veneer, the machinery is not only an administrative but also a political outfit.

On the other hand, delegation is the transfer of selected public decision-making and administration functions to autonomous or semi-autonomous organisations as agents of the central government.¹⁰ As a form of decentralisation, the practice is a response to the limitations on public administration or emerging demands in service delivery, necessitating the delegation of functions to public corporations, special authorities, regional development authorities and

² G S Cheema & D A Rondinelli (eds.) *Decentralisation and Development: Polity Implementation in Developing Countries* (1983); D Conyers 'Decentralisation: The latest fashion in development administration?' (1983) 3 *Public Administration and Development* 97.

³ As above 18-25.

⁴ As above 22-24.

⁵ As above 22-24. See also R Crook & J Manor *Democracy and Decentralisation in South-East Asia and West Africa: Participation, Accountability, and Performance* (1998) 11- 12.

⁶ n 1 above 22-24.

⁷ As above 18-20.

⁸ As above 18-19.

⁹ As above.

¹⁰ As above 20-22

semi-autonomous units.¹¹ Yet others contend that this is not delegation, but delinking, or technical decentralisation.¹²

There are cases where two or more of these types of decentralisation are practised concurrently in the same system. The paradox is that even where this is the case, the system may remain highly centralized, or merely de-concentrated and not devolved.¹³ Kenya's provincial administration and field based ministries alongside a weak system of local government is the best exemplar. While local authorities are legal entities (legislated,¹⁴ and not constitutionally entrenched) with some degree of independence, the government generally retains significant central control over locally elected councils.¹⁵ The chief executives of these councils, for example, are appointed by and responsible to the central government. The central government also provides transfers¹⁶ to meet revenue shortfalls. Local authorities have inadequate fiscal capacities relative to service responsibilities.¹⁷ Local authorities and the provincial administration function within the same sphere, but in a contest over powers and functions, it is not atypical that the provincial administration or central government prevails. It is this bureaucratic system that has been termed decentralisation by the government, yet contested by observers as mere de-concentration of the centralized government.¹⁸

It appears that the bulk of the analysis of decentralisation and its variants are largely functional and structural. Put differently, the concepts are largely discussed in terms of (re)distribution of state power to structures and allocation of functions and authority to institutions. Little attention is paid to the normativity of these concepts, and the ideology and political philosophy that underlie them. This thin view of devolution has divorced it from its potential to nurture constitutional development and democratic constitutionalism. This may explain why the devolution debate in Kenya portrays the issue as that of constitutional choice or constitutional design, and not a site of state formative practices¹⁹ and the inauguration of a new political culture or ideology.

11 As above.

12 See W Oyugi 'Decentralisation for Good Governance and Development' (2000) 21 *Regional Development Dialogue* 3.

13 See J Litvack et al, *Rethinking Decentralisation in Developing Countries* (1998) 4.

14 Local Government Act (Cap 265 Laws of Kenya).

15 R Southall & G Wood 'Local Government and the Return to Multi-partyism in Kenya' (1996) 95 *African Affairs* 501.

16 The main transfer is the Local Authority Transfer Fund Act (Act No. 8 of 1998 Laws of Kenya).

17 P Smoke, *Fiscal Decentralisation in Developing Countries: A Review of Current Concepts and Practice* United Nations Research Institute for Social Development, Democracy, Governance and Human Rights Programme Paper Number 2, February 2001, 9.

18 W Tordoff *Decentralisation: Comparative Experience in Commonwealth Africa* (1998) 32(4) *Journal of Modern African Studies* 555-570-571, W Oyugi 'The Search for an Appropriate Decentralisation Design in Kenya: Historical and Comparative Perspectives' in K Kindiki and O Ambani (eds.) *The Anatomy of Bomas: Selected Analyses on the 2004 Draft Constitution of Kenya* 57 (2004).

19 U Baxi 'Constitutionalism as a Site of State Formative Practices' (2000) 21 *Cardozo Law Review* 1183.

Absent this reorientation on the devolution debate in Kenya, a new constitution will not be different from:

Westminster Constitutions' imported into Africa [which] were almost exclusively concerned with state institutions, power distribution and limitation; none of them contained normative definitions prescribing the purposes of government. Bills of Rights were written into constitutions not as minimum prescriptions of justice and good government but as limitations on governmental power -this notwithstanding the fact that if they survive alteration they might eventually come to perform normative functions, particularly as legitimating factors.²⁰

As the ensuing parts of this chapter will corroborate, unless homage is paid to these conundrums, ours is likely to be a mere perfunctory erection of institutions without ideological foundations or normative processes to nurture them. In this regard, it must be stated at the outset that devolution of power in Kenya must entail a bold but radical restructuring of the Kenyan post-colony and its normative edifice.²¹ This will not be attained through merely importing or creating autochthonous models of devolution. Neither will it be found in a transition or regime change, but rather in a deliberate process of political transformation that is interwoven with the virtues of democratic constitutionalism and normative processes.²²

7.3 Devolution and its promise

Generally, devolution is often associated with the prospects of democratic self-governance, public participation, nation and nationhood building, equalisation and efficient and effective delivery of services.²³ Devolution has also been articulated as a form of sharing economic and political power between central and lower levels of the state and a means of achieving national unity, self-determination, public participation and political stability. Despite these, however, there is a mixed bag of the causes and motives for devolution, some of which may not be congruent with these objectives. Some countries have adopted devolution following pressure from economic crises; as a mimic of reforms in other countries, or experimentation with the 'other way'; as a result of donor pressures and conditionalities; as a means of appeasing ethnic or linguistic groups or local elites; and in some cases, as a result or a mere search for alternative institutions.²⁴ Yet others purport to devolve power, yet practice centralisation. These factors undermine the otherwise potential justifications of devolution.

20 H W O Okoth-Ogendo 'The Politics of Constitutional Change in Kenya since Independence, 1963-1969' (1972) 71 *African Affairs* 9.

21 Y Ghai 'Devolution: Restructuring the Kenyan State' (2008) 2 *Journal of Eastern African Studies* 211.

22 M Mutua 'Putting Humpty Dumpty Back Together Again: The Dilemmas of the African Post-Colonial State' (1995) 21 *Brooklyn Journal of International Law* 505. See also M Mutua 'Breaking the Barriers: Radical Constitutionalism in the New African Century' in J Oloka-Onyango (ed) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* 309 (2001) 322, calling for "norm re-examination and reformulation."

23 n 1 above 14- 17.

24 J C Ribot, *African Decentralisation: Local Actors, Powers and Accountability, Democracy, Governance and Human Rights Paper Number 8*, 2002 7.

While these are broad generalisations, it is important to examine some broad benefits associated with devolution of power in Kenya. Of these, some constitute building blocks of constitutionalism and substantive democracy. As is the central thesis in this chapter, an interest in devolving power in Kenya must be animated by a larger motivation of entrenching the juridical and political building blocks of democratic constitutionalism. These include democratic governance, equitable development and self-governance.

7.1.1 Democratic governance

In response to the democratic deficits of the central state, its declining credibility, and the failures of centralized planning, devolution is increasingly seen as the means of restructuring the state and achieving democratic outcomes. This explains why the clamour for devolution coincided with the “wave of democratisation”²⁵ and pluralism, becoming a staple in subsequent constitution making processes. With the emerging right to democracy and public participation,²⁶ devolution is today viewed as an adjunct of democratic governance, if not a precondition. Through lower or sub-national levels of government, the prospects of devolution are increased opportunities for public participation and greater political representation of diverse political, ethnic, religious, and cultural groups in structures and processes of decision making.

In Kenya, the quest for devolution responds to the failures of the centralized system and its notorious appurtenances- clientelism, patronage, lack of accountability and the running of the state as a private enterprise. Yet other problems relate to the relegation of Kenyan citizens as subjects,²⁷ thanks to state instrumentalities such as the provincial administration; ethnicisation of the state for the benefit of a few; arbitrariness in government and the exclusion of some regions, groups and communities from access to state resources.²⁸ These arguments, together with the limitations of elections in ordaining democracy make a compelling case for devolution in Kenya.

Within the context of Kenya’s political crisis following the disputed 2007 presidential election, devolution can be a device or normative process of de-ethnicising the state and politics, hence reducing ethnic tensions through the creation of various “sites of power for parties or communities which are excluded from the [centre]....”²⁹ Moreover, with devolution,

25 S P Huntington *The Third Wave: Democratisation in the Late Twentieth Century* (1991).

26 T Franck ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46 and H Steiner ‘Political Participation as a Human Right’ (1988) 1 *Harvard Human Rights Yearbook* 77.

27 See generally M Mamdani *Citizen and Subject* (1996).

28 M Githinji and F Holmquist ‘Kenya’s Hopes and Impediments: The Anatomy of a Crisis of Exclusion’ (2008) 2 *Journal of Eastern African Studies* 344.

29 n 20 above 217.

[n]ot all political competition will be focused on one office [the presidency], which is inherently unhealthy...[Devolution] will not only empower communities and regions and give them important powers of self-government, it will also balance the enormous powers which the current constitution vests in the president and which are often exercised under the advice of his cronies, drawn from the president's community.³⁰

7.1.2 Equitable development

The second case for devolution is the ongoing debate over the correlation between devolution and human development: that devolution stimulates equitable development. The argument holds that devolution results in inter-jurisdictional competition, which in turn fosters efficient provision of public services by government.³¹ Devolution also increases the people's understanding and support of socio-economic activities through their participation or influence, making such initiatives more responsive to their preferences.³² This will depend on the design of devolution, and most importantly the attitudes and support by the political elite at the local and national levels. To this add a system of inter-governmental relations, which among other things delineates the powers and responsibilities of the levels of government.

Further, proponents of devolution have canvassed its potential to enhance equitable distribution of resources, efficiency and effectiveness through the principle of subsidiarity and transparency in the management of resources. Through locally elected officials, devolution can enable the management of local resources more efficiently, particularly if there are local systems of monitoring and accountability. The incentive for accountability and efficiency stem mainly from political pressures of satisfying local citizens, to enhance re-election prospects of local leaders.

The Kenyan case of geographical inequalities makes a forceful case for devolution as a means of equalising underdeveloped regions. Kenya's problem of geographic inequality traces its origins in part to the centralisation of government enterprises and decision making in Nairobi, leading to the concentration of economic activities around the city.³³ This has led to a rush to the city, and a pre-occupation to fix the urban problems of Nairobi, at the expense of effective government in other regions. As seen during the near state of anarchy in the first quarter of 2008 after the disputed presidential election, the writ of the Kenyan state is almost non-existent beyond Nairobi, and the argument for a "strong" centre as a means of effective argument can no longer hold. Instead, attention needs to be paid to a "capable," rather than a "strong" centre.

30 As above.

31 C Tiebout 'A Pure Theory of Local Expenditures' (1956) 64 Journal of Political Economy 416.

32 J Litvack & J Seddon, Decentralisation Briefing Notes World Bank Institute Working Papers (1999) 6 -7.

33 n 20 above 218- 219.

7.1.3 Self governance, less government?

Related to the above premise, devolution is justified on the grounds of self-governance as opposed to centralised government. This implies that devolution should enable citizens to determine or influence their policy preferences and results. Otherwise labeled the efficiency and effectiveness advantage, the rationale here is that decisions about local issues should be done by local citizens through a lower level government that is closer to the people and more responsive to local needs.³⁴ Devolution enables the circumvention of the limitations and bureaucratic red-tape characteristic of central planning, by empowering sub-national or local authorities to do so, in accordance with local needs.³⁵ Such decisions are more likely to reflect the demand for local services than decisions made by a distant central government. Moreover, where devolution enhances accountability between the different levels of government *inter se* and towards their constituents, efficiency and transparency is likely to be an incentive.

This question has a particular salience in the case of Kenya, whose history reveals exclusion of citizens from public discourse. From a historical perspective, constitution making must redress these democratic deficits, and enable, not disable self-governance. From the optic of human rights, the right to public participation implies not only engagement of citizens in elections, but also self-governance and self-determination. This implicates the system of government or political structure of a society. Recognising the limitations of public participation in centralised states, it could be argued that the right to public participation requires political pluralism or devolution of power.³⁶ Even so, if devolution of power is one of the objects of the review, a centralized constitution would be void *ab initio* as it would not conform to the meta-constitutional principle of democratic constitutionalism.

7.2 Devolution and its discontents

While devolution has often been presented as a panacea to the pitfalls of centralisation, the idea is not without criticism. Today, after decades of experimentation with the practice across the world, the putative advantages of devolution continue to come under meticulous scrutiny, if not indictment. At the centre of the discontent is the fear that devolution can create ‘localism’ and hence undermine nationhood, particularly where power is devolved to ethnically homogeneous units. The central rhetoric, perhaps self-fulfilling prophecy in Kenya remains: will devolution exacerbate ethnic polarisation? Is it a sure slippery slope towards disintegration?

34 n 31 above 6.

35 n 1 above 14, 15.

36 Steiner n 25 above 103- 104.

Yet another charge is that devolution may merely establish local fiefdoms dominated by political elites ambivalent to democratic rules or citizens' rights. In Kenya, as is elsewhere, the economic perspective has been adumbrated since pre-independence, with claims that devolution is not economically viable. Proponents of this view are well schooled in citing the 'failure' of regionalism at independence, yet the "truth is that [it] was never given a chance, being strangled at birth by the Kenyatta government."³⁷ The economic viability school also poses more questions than answers, considering that the current centralized system may be even more expensive because of the trinity of government entities at the local level: elected local authorities, the provincial administration and central government ministries.

7.2.1 Limitations of local accountability

While implicit in the distribution of power to lower levels of government is the institution of checks on the power of the national government, devolution has often been associated with mere transfer of power without establishing normative processes that ensure democratic accountability. The key causes of this are inadequate or ineffective modes of local accountability as well as the remoteness of devolved governments from the radar screen of national media, hence not being subject to close monitoring and criticism.³⁸ Yet another scenario is the case of concurrent or overlapping functions and powers, making it difficult to attach accountability to any specific level of government. This may in turn make devolution a ground for corruption, inefficiencies and other forms of maladministration associated with centralised systems.

This view is however disrupted by the sub-texts of centralisation. It is clear from the Kenyan experience that while centralization- a "strong" centre- was advanced as a means of fostering national unity, economic development and effective government, implicit were intentions of power consolidation, personal rule, accumulation of property, domination and protection of sectarian economic and political interests.³⁹ This variant of *bourgeoisie constitutionalism*⁴⁰ required the erection of weak oversight institutions, centralized political and economic institutions, strong administrative outfits and decimation of opposition political parties.

Another argument can be made that since devolution brings about closer contact between the leaders of devolved governments and local populations, access to information is likely to be easier and hence accountability. The proximity also enhances electoral accountability, since

³⁷ n 20 above 212.

³⁸ R Simeon, Modes of Devolution of Power, Paper presented at a Workshop on Devolution of Power by the Constitution of Kenya Review Commission on 13-14 December, 2001 at Safari Park Hotel, Nairobi (On file with the author).

³⁹ See Y Ghai 'The Theory of the State in the Third World and the Problem of Constitutionalism' (1991) 6 Connecticut Journal of International Law 411; E S Atieno-Odhiambo 'Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya' (2002) 61 African Studies 223 241, arguing that many of the leaders had no "mental map" of the future of Kenya, but rather their ethnic communities and henchmen.

⁴⁰ For this distinction, see J B Ojwang Constitutional Development in Kenya: Institutional Adaptation and Social Change (1990) 1-12.

local citizens are able to gauge performance of local level leaders. Local accountability can also be enhanced through the process of public participation in lower levels of government, fostered through individuals and groups that monitor government bureaucracies or check maladministration. The emerging discourse on the use of decentralised funds by local authorities and parliamentarians in Kenya is a clear example, with leaders losing their seats during elections for misuse of funds.

7.2.2 Fostering inequities

Another problem associated with devolution is that it can indeed create or exacerbate inequality and inequities if there is no political will among the local and national elite. The argument here is that redistribution or equalisation “should always be placed on the central government, which could effect the desired results through appropriate national tax policies, intergovernmental transfers, and expenditure programmes that target the poorest local governments.”⁴¹ Local elite capture, regional politics, lack of accountability and corruption in devolved governments may also repudiate the putative equalisation potential of devolution. Yet another common scenario is the transfer of functions from the centre to lower levels of government without adequate financial resources or capacities, undermining the object of equitable distribution and the provision of services. A variant of this is the refusal by central government altogether to perform its equalisation functions as was the case in Kenya at independence.

The inequalities and inequities enacted by centralisation in Kenya weaken this charge against devolution. With the dismantling of regionalism, the strengthening of the central government, and liquidation of opposition, political elites became highly predatory, using the same centralised institutions supposedly established to nurture national unity and economic development as instruments of class rule and self-enrichment.⁴² During this period spanning almost four decades, local governments received only token grants, with no transfers for many years, except for some municipalities and needy councils allocated at the discretion of the Minister for Local Government.⁴³ Yet another scheme was the District Focus for Rural Development (DFRD),⁴⁴ advanced as a means of decentralisation, but which turned out to tighten central control.⁴⁵ The centerpiece of the DFRD was the establishment of District Development Committees (DDCs), populated by the provincial administration and government ministry officials to formulate and execute local level development planning.⁴⁶

41 n 16 above 16.

42 J A Widner *The Rise of a Party-State in Kenya: From Harambee to Nyayo* (1992).

43 n 16 above 10.

44 J Barkan & M Chege ‘Decentralising the State: The District Focus and the Politics of Reallocation in Kenya (1989) 27 *Journal of Modern African Studies* 431.

45 n 14 above 508.

46 n 1 above 79- 83.

As it turned out, the DFRD became a tool for “restructuring the base of the Kikuyu-dominated state which Daniel arap Moi had inherited from Jomo Kenyatta. It became an opportunity to increase the flow of resources to the less developed regions...while marginalising the Central Province, Kenyatta’s former political base.”⁴⁷ The upshot of these developments is asymmetrical development across the country, with regions economically endowed or “politically-correct” performing better than their counterparts. Only a decade ago, and recently, did Parliament pass legislation to provide for transfers to local authorities and constituencies⁴⁸ respectively to address these inequities. Under devolution of power, equitable distribution and even development can be achieved through allocation of adequate powers congruent with functions, the enunciation of principles of equalisation and the establishment of a system of inter-governmental fiscal relations.⁴⁹

7.2.3 Capture by local elites

It would appear that there is an assumption that devolved governments are naturally benevolent and understand citizen preferences better than national governments. But yet the experience of local authorities in Kenya reveals a common mismatch between citizen aspirations and these entities.⁵⁰ Also, while devolution is deemed as self-governance, the assumption is tempered by experiences of capture by a few local elites, rendering democratic governance and public participation elusive. Such capture, manifest in clientelism, patronage, corruption and general malfeasance allude to the pitfalls of devolution as a *system* in restructuring the state. In some cases, fears have also been raised about its potential to ordain secession, as attempted by the Kenyan Somalis and coastal Arabs in the run up to independence.⁵¹

Without doubt, elite capture is a phenomenon that pervades all institutions, whether centralized or devolved, formal or informal. The African experience is replete with such cases,⁵² and this caveat must be arraigned in the discussion on devolution of power in Kenya. However, it bears noting that elite capture in Kenya has largely been at the national level, since the dividends there are much higher because of concentration of power. But yet another cause of elite capture in Kenya may relate to their illegitimacy and hence vulnerability, brought about by:

Weakening state structures, political transitions, pressures for political reforms and economic problems. Those who are in power are determined to fend off emerging political

⁴⁷ n 17 above 568.

⁴⁸ The Constituency Development Fund (Act No. 11 of 2004 Laws of Kenya).

⁴⁹ n 20 above 219.

⁵⁰ See for example, the Karen Residents Association vs Nairobi City Council (HCC 2030/98).

⁵¹ Y P Ghai & J P W B Mc Auslan, *Public Law and Political Change in Kenya* (1970)184- 186.

⁵² J C Ribot, *African Decentralisation: Local Actors, Powers and Accountability, Democracy, Governance and Human Rights Paper Number 8* (2002).

challengers and anxious to shift blame for whatever economic and political problems.... Entrenched politicians and aspiring leaders alike have powerful incentives to play the “ethnic card,” embracing ethnic identities and proclaiming themselves the champions of ethnic groups.⁵³

It follows that as long as the Kenyan state remains highly centralized elites are likely to use these charges to polarise the public to their advantage. This weakens the charge against devolution as a recipe for elite capture. However, possibilities of elite capture at the local level, even if speculative cannot be dismissed completely. Recourse should be had in this regard to devolution of power and functions with adequate accountability structures to check the use of these powers. As is the principal argument in this chapter, this also implicates the normative framework of politics and the attitudes of leaders and citizens. Again, the challenge here is to consider devolution not as mere transfer of power, but rather a means of democratic constitutionalism and the construction of norm based local democratic institutions and polities.

7.3 Ethnic nationalism and state disintegration

It is not in dispute that whereas devolution has been viewed as a means of establishing nationhood in a polity, it can instead foster ethnic divisions in multi-ethnic countries. In Kenya, for example, devolution has always been associated with the *majimbo* call in pre-independence and at the height of the return to pluralism in the 90s, when several leaders from the Rift Valley called for the eviction of non-Kalenjin or non-indigenous ethnic groups from the Province. Due to these blemishes, devolution has been viewed suspiciously, especially by communities that have been victims of these evictions.

However, this view must be tempered. Devolution is not coterminous with *regionalism*, or *majimbo*. Neither is it co-extensive with federalism. There can be devolution within a unitary state, such as in the case of South Africa. Conversely, some federal systems such as India are centralized while some such as Ethiopia are highly decentralized. It is therefore misleading to conflate these concepts. Further, the view that devolution or pluralism foments ethnic strife is to fall in the trap of self-fulfilling prophecies by political elites who oppose distribution of power or distributed government, or two centres of power, to use the Kenyan term. To illustrate, in the wake of the clamour for change in Africa, apologists for single-party hegemonies in Africa contended that only these systems could foster national unity. Pluralism and its appurtenances, it was self-prophesied, was a recipe for ethnic strife.⁵⁴ Some of these leaders engineered ethnic strife to vindicate their prophecies, or altogether perpetuate themselves in power.

53 M Brown 'Ethnic and Internal Conflicts' in C A Crocker et al Turbulent Peace 209 (2001) (footnotes omitted) 221.

54 J D Barkan 'Kenya: Lessons from a Flawed Election' (1993) 4 Journal of Democracy 85.

This argument has been lately reintroduced into the devolution debate in Kenya, yet there is no evidence to suggest that highly centralized or single party states have engendered more unified polities.⁵⁵ In fact, closed exclusionist systems are more likely to generate resentment and disintegration over time, “especially if the interests of some ethnic groups are served while others are trampled”⁵⁶ or “central authorities or the dominant community [refuse] to accept autonomy for others...[such as in] Sri Lanka, Indonesia, until recently the Sudan, the Philippines, Russia/Chechnya.”⁵⁷ Following this, violence in Africa, as is elsewhere, is symptomatic of the crisis arising from four structural conditions thus:

...authoritarian rule; the exclusion of minorities [and “outsiders”] from governance; socio-economic deprivation combined with inequity; and weak states that lack the institutional capacity to manage normal political and social conflict...Mass violence, [therefore], is not an independent event. It is an outcome of historically dysfunctional political relationships and structural factors that undermine human [rights].⁵⁸

From the above verdict, peace is achieved sustainably through addressing the structural, political, economic and cultural pathologies of the state and material interests of the dispossessed. *Ergo*, to look at the mere devolution of power as a cause of violence in Kenya is very simplistic, if not flawed. On the contrary, the recognition of diversity and the grant of autonomy- a form of devolution of power- have strengthened national unity, such as in India, Spain, Papua New Guinea, South Africa, and Canada.⁵⁹ Even so, there is also no conclusive evidence- as the case of Indonesia⁶⁰ corroborates- that civic nationalism or civic conceptions of nationalism engender peace. Others also contend that the problem is not ethnicity *per se*, but leadership.⁶¹

Finally, almost half a century after independence, centralisation has not enacted the promise of national unity, development and nation building. It has instead produced regional inequities, ethnic divisions over power and a crisis of governance. In the words of Ghai

[w]e must not forget that ethnic conflicts and displacements that have occurred in Kenya have taken place under a highly centralised and authoritarian state, in which it has been extremely difficult to hold those responsible to them to any sort of accountability as they were part of the structure of the unitary state.⁶²

55 In relation to single party states, see for example PA Nyong'o 'The Failure of One-Party Rule' (1992) 3 Journal of Democracy 90-96.

56 n 52 above 216 (footnotes omitted).

57 n 20 above 219.

58 L Nathan "'The Four Horsemen of the Apocalypse': The Structural Causes of Crisis and Violence in Africa' (2000) 25 Peace & Change 188 189-194.

59 n 20 above 219- 220.

60 n 52 above 216 (footnotes omitted).

61 C Ake 'Rethinking African Democracy' (1991) 2 Journal of Democracy 34.

62 n 20 above 224.

As alluded above, some have even contended that the institutionalisation of inequities, conflicts and state violence was ‘fairly deliberate.’⁶³ Whether or not centralisation needs another chance is an enterprise for another project. Whether or not a “strong” or rather a “capable” centre is needed is yet another conundrum. The point to be noted is that while the pitfalls of devolution cannot be dismissed as mere speculation, centralisation must be considered suspect in this time and age. In a world in which devolution is the trend, an exception can only be ordained by extraordinary circumstances. More importantly, the historiography of the devolution discourse in Kenya must be instructive.

7.4 Devolution of power in Kenya: Some historical antecedents

The devolution debate is not recent in Kenya. In the run up to independence, the *structure of government* and in particular devolution was the most contentious issue.⁶⁴ Devolution, termed regionalism or *majimboism* was a constitutional framework within which the Euro-Asian and minority groups hoped to protect their interests and share power in the post-independence period.⁶⁵ A centralized system of government, it was posited, would promote national unity, development and direct people’s efforts toward nation building. After protracted intrigues, brokering and manipulations by the Kenya African Democratic Union (KADU) and the Kenya Africa National Union (KANU), the final outcome was the Independence Constitution which was essentially a pyrrhic victory for KADU, the proponents of devolution. A major provision of the constitution was the establishment of a devolved system of government with power shared between the center and the seven newly established regions,⁶⁶ each with a Regional Assembly⁶⁷ and elected local government authorities.⁶⁸

While the division of power between the national, regional and local governments was elaborate,⁶⁹ the system of intergovernmental relations was complex and confusing.⁷⁰ Overlapping and concurrent powers and functions between these levels of government were not clear, one notorious case being the unclear accountability and responsibility of the local government vis a vis the regional and national government. Even where these were clear, for instance, in relation to the power of Regional Assemblies to confer functions on local government authorities, the

63 H W O Okoth-Ogendo, ‘Constitutions without Constitutionalism: Reflections on an African Political Paradox’ in D Greenberg et al Constitutionalism and Democracy: Transitions in the Contemporary World 65 (1993) 69.

64 n 19 above 9; D Anderson ‘Yours in the Struggle for Majimbo’. Nationalism and the Party Politics of Decolonisation in Kenya, 1955-64’ (2005) 40 Contemporary History 547.

65 n 50 above 196; n 19 above 12- 14.

66 Section 9 of the Independence Constitution, establishing the Coast Region, Eastern Region, Central Region, Rift Valley Region, Nyanza Region, Western Region and North-Eastern Region.

67 Section 92 of the Independence Constitution.

68 Section 224 of the Independence Constitution.

69 Schedules 1, 2 & 3 of the Independence Constitution.

70 n 50 above 197-201.

central government usurped the role of the Regional Assemblies.⁷¹

The complexity, contradictions and ambiguities of the devolved system was neither an act of God nor an omission by constitutional designers. In the period preceding the publication of the Independence Constitution on 19 April 1963, KANU had unequivocally and overtly opposed devolution, preferring a centralized political and economic system as the most effective means to national unity. In their public debates in the early 1960s, the KANU rhetoric turned “*majimboism* into a slur: [and] *majimboists* were derided as [antinationalist] tribalists who opposed the broader goals of nationalism.”⁷² Devolution, they posited, would shrink the writ of the state and hence nation building. On its part, KADU insisted that *majimbo* was the only means of securing the rights of minorities and sharing power. Land ownership and the fears of political and economic domination by larger ethnic groups became the premises of their campaigns.

In a tactical retreat, after several rounds of talks and rhetoric, KANU accepted the devolution proposals during the Lancaster Constitutional Conference in London, for the sake of “speedy power transfer”⁷³ and knowing that it would defeat KADU in the May 1963 elections. Arraigning the “grand-meta narrative” of nationalism,⁷⁴ KANU and its stalwarts maintained that the Constitution was merely meant to “*lead Kenya to self-government and not independence*,”⁷⁵ it would make substantial changes to the Constitution, in particular the structure of government after the May 1963 elections. After its landslide win in the elections and the formation of an interim KANU government in June 1963, KANU intensified its clamour for changes to the *majimbo* constitution. Its leaders now claimed that the document had been forced upon them by imperialists and their stooges;⁷⁶ while others sang the nationalism refrain, claiming that the Constitution was “practically unworkable,”⁷⁷ expensive,⁷⁸ and an attempt by KADU leaders to create “little kingdoms for themselves under the guise of protecting tribal interests.”⁷⁹

With power firmly vested in KANU after independence on 12 December 1963 and a weak opposition in KADU, the stage was set for major constitutional changes. KANU’s intention of erasing political pluralism- targeting the opposition and the system of government- was no longer secret, but a policy. Even before these formal changes, KANU frustrated regionalism by

71 Oyugi (n 17 above) 69.

72 n 63 above 547.

73 n 19 above 18.

74 n 63 above 547, 548.

75 Mwai Kibaki, quoted in n 19 above 18. Emphasis mine.

76 Oginga Odinga, quoted as above.

77 Jomo Kenyatta, quoted in n 63 above 557

78 Mwai Kibaki, quoted in n 63 above 560.

79 Joseph Murumbi, quoted n 63 above 561.

withholding funds and technical and logistical support from the central government.⁸⁰ Within a year after independence, members of the KADU succumbed to the duress and the trappings of power and dissolved their party on November 10, 1964 to join a “government of national unity.” This marked the beginning of the celebration of naked power by KANU. Having abandoned its rhetoric of regionalism, it also followed that KADU’s clamour for regionalism had nothing to do with the juridical protection of minorities and normative advantages of the system, but more to do with economic interests of white settlers and land.⁸¹

As was elsewhere in Africa, Kenya’s political system became characterized by continuities rather than discontinuities in relation to the colonial state.⁸² In the years between 1964- 1969, regionalism and its appurtenances were dismantled by constitutional amendments superintended by KANU’s leadership and effected by a pliant legislature. In 1970, local authorities were stripped of their three major functions- education, health and roads- and resources relating thereto.⁸³ While these amendments would have been expected to reconstruct the Kenyan post-colonial state to establish new governance ethos and appropriate institutions, the object of the amendments was to establish a strong government coextensive with the presidency. From this menu of constitutional changes, the leadership clearly had no unambiguous ideology or “mental map of Kenya beyond a territory to be governed much as the colonial authorities had done.”⁸⁴

The first amendment declared Kenya a republic, with President as head of state and government.⁸⁵ The second amendment removed all, except specially entrenched powers and functions, from the Regional Assemblies.⁸⁶ Among the key powers and functions divested from Regional Assemblies included local taxation, establishment of regional police formations and local government authorities. These powers were vested in the central government. This amendment also altered the method of reviewing Regional Assemblies by divesting these powers from Regional Assemblies to Parliament. Also repealed were provisions relating to regional taxation, effectively making Regional Assemblies bereft of any source of local revenue, legislative power being their only residue.⁸⁷

In 1965, the third amendment was introduced altering the procedure of constitutional change and abolishing the special entrenchment of certain sections on the executive powers of the

80 n 63 above 562.

81 n 38 above 239.

82 Y Ghai ‘A Journey around Constitutions: Reflections on Contemporary Constitutions’ (2005) 122 South African Law Journal 804.

83 Tordoff (n 17 above) 561.

84 n 38 above 242.

85 Act No. 28 of 1964. See Okoth-Ogendo (n 19 above) and Ojwang (n 39 above) 229.

86 Act No. 38 of 1964. See Okoth-Ogendo and Ojwang as above.

87 n 39 above 1-12.

Regional Assemblies in Schedule 2 of the Constitution.⁸⁸ This amendment also renamed Regional Assemblies as Provincial Councils as had been the case under the colonial system. The amendment further took away the residue of legislative and concurrent powers bestowed in Regional Assemblies, vesting the concurrent powers in Parliament. In keeping with KANU's long-known prayer for political continuity and the retention of colonial systems for post-colonial administration,⁸⁹ the changes accumulated power in Parliament and the executive, particularly the provincial administration, effectively making the state an image of the colonial authoritarian regime.⁹⁰ The merger of the Upper House of Parliament in 1966⁹¹ and the Senate and the abolition of Provincial Councils in 1968⁹² marked the horizon of the devolution debate.

Without any unequivocal political philosophy or ideology of government on which these amendments had been anchored,⁹³ authoritarianism, domination, marginalisation and dispossession had been officially re-inaugurated. The state had been transformed from rational-legal to patrimonial.⁹⁴ In subsequent years, centralisation and oppression of pluralism became state policy. Consistent with the script in many African countries, ethnic hegemony became the norm, even the basis of inclusion and exclusion from government. In the years following, Jomo Kenyatta and later Daniel Moi perfected policies and practices that favoured their own ethnic groups.⁹⁵ Today, the situation remains largely the same, and elections, as flawed as the 2007 presidential poll, are the only trace of democracy or public participation. Clearly, the *fin de siècle* optimism that had marked the end of the colonial project has been squandered.

What accounts for this turn of events? Why did African countries, which gained independence with decentralized systems,⁹⁶ finally end up highly centralized and authoritarian? The answer lies, in part, to a seminal analysis by Okoth-Ogendo, who traces the origin of these developments to some paradoxes.⁹⁷ In his argument, at independence, it appears that the constituted state was based on a general distrust for centralized power, but that distrust was not founded on any clear philosophy or "value-specific function,"⁹⁸ such as the principle of limited government or democratic constitutionalism. The forbearance by KADU to defend the regional system of government is an easy illustration of lack of commitment to the values of devolution, but rather

88 n 19 above 20-21.

89 Anderson (n 63 above) 558-60.

90 n 19 above 21.

91 Act No. 40 of 1966. See also Ojwang (n 39 above) 230.

92 Act No. 16 of 1968. See also Ojwang (n 39 above) 230.

93 n 19 above 22.

94 n 81 above 810.

95 J D Barkan 'Kenya After Moi' (2004) 83 Foreign Affairs 92 88-89.

96 Tordoff (n 17 above).

97 n 62 above.

98 As above 71.

interests. Second, many of the African elites had an appetite to continue with the centralised colonial style of administration, which would enable them as had the colonial elites, “convert the “national” economy” into *some kind of private estate*.”⁹⁹ This greed-thesis postulates that the migration from the rational-legal to the patriarchal state was to enable the *new rulers* access to resources via state plunder.¹⁰⁰ Devolution was incompatible with this goal and the new constitutional order at independence simply a liability for the political elites.¹⁰¹

7.5 Repositioning the debate: Devolution as constitutionalism?

It follows from the analysis above that at independence and during subsequent ‘lost decades,’¹⁰² Kenya has been bereft of a new political culture or ideology. As noted from the devolution debate, there is little, if any genuine value thinking or political education on the virtues and pitfalls of devolution of power. The result is that the devolution discourse has been tortured, even tainted. It has been appropriated by elites, each with their own motives. Yet many also view devolution of power as a primary means of restructuring the Kenyan state and the normative framework of governance.¹⁰³ What then are the implications of this on the ensuing process of constitution making? A few comments are in order.

First, the objects and purpose of constitutional review process must be instructive in the debate. Under section 3 of the Constitution of Kenya Review Bill 2008, constitution making in Kenya is aimed at:

- (a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
- (b) establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action;
- (c) recognising and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;
- (d) promoting the peoples’ participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
- (e) respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;
- (f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national resources;

99 As above.

100 n 38 above 411.

101 n 62 above 71.

102 P Anyang’ Nyong’o 30 Years of Independence in Africa: The Lost Decades (1992).

103 Report of the Constitution of Kenya Review Commission, Volume One Main Report, 2003.

- (g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;
- (h) strengthening national integration and unity;
- (i) creating conditions conducive to a free exchange of ideas;
- (j) ensuring the full participation of people in the management of public affairs; and
- (k) committing Kenyans to peaceful resolution of national issues through dialogue and consensus.

The above objectives reflect a bold move to redress the blemishes in Kenya's political and constitutional history. Without doubt, there is no dispute that the current Constitution of Kenya is a document that lacks legitimacy for its centralisation of power, focus upon the primacy of the presidency and deficiency in the general principles of governance.¹⁰⁴ Recognising that a legitimate constitution must reflect a people's history and aspirations,¹⁰⁵ it follows that whether or not to devolve power, and for what purposes is not the question. The question is how to devolve power, so as to safeguard and guarantee the juridical advantages of the objectives stipulated above. This implies that the debate must henceforth move from devolution per se, but the modes of devolution that would purvey democratic constitutionalism and the normative values that underlie it. As the South African experience with constitution making has shown, the public and constitution makers are enjoined against constitutional choices that would defy these principles.¹⁰⁶ The legitimacy of the new constitutional order will largely depend on whether it espouses these principles.

Second, it is imperative that the contours of the debate now transit from slurs and labels, to the substantive issues. More specifically, if devolution of power is to purvey its promise of democratic constitutionalism as advanced in this chapter, the inter-linkages between the ideas must be unequivocally embedded in the psyche of the public. Absent this repositioning, devolution of power will be a mere, if not perfunctory process of importation and experimentation with institutions, not values of constitutional democracy and democratic constitutionalism. This means viewing devolution not in terms of institutional design and constitutional choices, and the patent outcomes associated with it, but also its role in fostering democratic constitutionalism and constitutional development in general.

But what do we mean by democratic constitutionalism? Is democracy or its building blocks such as devolution of power pre-conditions for constitutionalism, or consequences of it? Is constitutionalism inherently democratic? While there appears to be no uncontested definition of democratic constitutionalism, for the purposes of this chapter, it includes the following

¹⁰⁴ J B Ojwang 'Constitutional Trends in Africa – The Kenya Case' (2000) 10 *Transnational Law and Contemporary Problems* 536.

¹⁰⁵ n 20 above 215. See also Report (n 102 above) 271, detailing the views of Kenyans on devolution of power.

¹⁰⁶ The constitution making process established 34 Constitutional Principles which the final outcome had to conform to. See R Murray 'A constitutional beginning: Making South Africa's final Constitution' (2001) 23 *University of Arkansas at Little Rock Law Journal* 809.

principal elements: popular sovereignty, limited government, separation of powers, respect for human rights and equality, constitutional governance and self-determination.¹⁰⁷ Inextricably linked to constitutionalism is the idea of a system or structure of government that conforms to the dictates of constitutionalism.¹⁰⁸

While devolution of power is not in classical terms an essential element of democratic constitutionalism,¹⁰⁹ the aforementioned values bear common ingredients with the promises of devolution adumbrated in the initial part of this chapter. Taking devolution as a means of democratic governance, the former concept and constitutionalism have one common theme- the centrality of human dignity- but only differ on how to attain this value.¹¹⁰ The thesis here is that inasmuch as devolution of power is a means of distributing power, ensuring public participation, and enabling limited and accountable government, a linkage should be made between the concept and democratic constitutionalism. This point needs some illustration. First,

...contemporary constitutionalism is based on popular sovereignty. “The people” is the locus of “sovereignty”; the will of the people is the source of authority and the basis of legitimate government...[...] government ruled by law and governed by democratic principles. Constitutionalism therefore requires commitment to political democracy and to representative government.¹¹¹

The common strand of thought that needs to be deposited here is that sovereignty reposes in the people and not the government, monarch or any ethnic group. This implies that the modes of exercising such sovereignty ought to be dispersed through devices such as devolution of power.¹¹² As flawed elections and the limitations of our electoral system show, it is not enough to suggest that elections and elected representatives provide adequate avenues for this right.

On its part, devolution has the potential of nurturing democratic skills and attitudes in local masses and elite, which in turn builds interest and support for democratic constitutionalism in the entire polity.¹¹³ The prospect of devolution in redressing public participation deficits, beyond elections buttresses this argument. As has been argued here, devolution could ensure the fulfillment of the instrumental function of participation- influencing public policy and recognition of individual and group interest-¹¹⁴ a rare commodity in centralised systems. If, as

107 SA de Smith ‘Constitutionalism in the Commonwealth Today’ (1962) 4 *Malaya Law Review* 205.

108 M Rosenfeld *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994) 8.

109 See L Henkin ‘A New Birth of Constitutionalism: Genetic Influences and Genetic Defects’ in Rosenfeld (as above 39) 45.

110 See W Murphy ‘Constitutions, Constitutionalism and Democracy’ in Greenberg (n 62 above) 6.

111 n 108 above 41.

112 n 81 above 825.

113 R Mattes and M Bratton ‘Learning about Democracy in Africa: Awareness, Performance, and Experiences’ (2007) 51 *American Journal of Political Science* 192.

114 Steiner (n 25 above) 100.

noted above by Henkin that constitutionalism requires commitment to political democracy and representative government, it follows that devolution of power is normatively a building block of constitutionalism.

Second, it is also the explanation that devolution is a form of pluralism, whose primary concern must be the limitation of power through democratic constitutionalism. Devolution without this latter is normatively deficient. So is constitutionalism, without pluralism, as exclaimed by de Smith thus:

Constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on wide franchise at frequent intervals, where political groups are free to organize in opposition to the government in the office and where there are effective legal guaranties of fundamental civil liberties enforced by an independent judiciary...I am not easily persuaded to identify constitutionalism where those conditions are lacking.²⁹

The other linkage between devolution and democratic constitutionalism is premised on the economic benefits and socio-economic appurtenances that arise from devolution. It now seems clear beyond peradventure that centralisation of power has its sub-texts. The observation made two decades ago seems still apposite, that contemporary political elites continue to resist, pressures for structural transformation and redistribution,¹¹⁵ and are only “preoccupied with the perfection of ways, means and techniques of their own survival and the expansion of opportunities for private accumulation.”¹¹⁶ From the optic of human rights, devolution is a means of self-determination, or better still the ‘enlargement’ of economic political and economic freedoms. In line with the view that the practice may enhance socio-economic protection,¹¹⁷ self-determination,¹¹⁸ equity and efficient service delivery, devolution purveys substantive democracy¹¹⁹- fundamental rights and human development equally throughout society. To the extent that devolution supplies these goods and hence socio-economic wellbeing of all, it is a site of democratic constitutionalism.

7.6 Conclusion

Without doubt, the reform of the democratic process has been the common language in popular pressures for a new constitutional order in Kenya. The menu and impulses for change range from restructuring of government, entrenchment of human rights and social justice, expansion of spheres of public engagement, devolution of power to the institution of accountability and other

115 n 60 above 32.

116 n 62 above 80.

117 n 30 above.

118 n 108 above, referring to the right of “peoples” to choose, change and terminate their political affiliation.

119 C Ake ‘Democracy and Development in Africa’ Washington, DC: Brookings Institution, 1996.

means of benign governance. Of these, devolution of power and democratic constitutionalism are expected to play a key, if not leading role in reordering the political and constitutional culture and redressing some of the pathologies of the Kenyan state identified in this chapter.

What then has tethered Kenya's transition to these values and systems? In Kenya, as is elsewhere, there is a pre-occupation with regime change, or the dislodgment of authoritarian leaders and political parties, as seen by the formation of the National Rainbow Coalition (NARC) in 2002. However, little attention has been paid to the restructuring of systems and the normative structures that launched authoritarian systems and gave them altitude. The ambivalence of the then NARC government towards constitutional reforms explains this point. It is the argument of this chapter that the crisis of governance and normative deficits of the Kenyan state are largely attributable to the lack of a common political ideology, which has led to the centralisation and personalisation of power. Redressing Kenya's political crisis must therefore look at the totality and inter-connectivity of these issues.

Lest we misdirect ourselves, this vision must also be tempered by the now seminal paradox of "constitutions without constitutionalism" in Africa. Following this, it must be acknowledged that a new constitution *per se* will not be an antidote to the pathologies of the predatory state. Neither will devolution of power leap-frog the Kenyan state from the shrinkage of its competence, legitimacy and credibility. As we have learnt over the years, devolution and democratic constitutionalism have become the property of many political systems, with little if any commitment beyond the terms or rhetoric. Whether or not devolution of power and democratic constitutionalism succeed will largely depend on the overall political and constitutional culture nurtured deliberately by the public alongside a committed leadership.

The constitution making process and its outcome must therefore give primacy to norm formulation and value-adherence, democratic constitutionalism being primary. It is for this reason that the constitution making process and the devolution discourse must reconstitute what is now called the Kenyan state. It must not be regarded as a simple erection or reproduction of structures and principles from other constitutional systems, but a means of transforming the Kenyan state. This will obviously face stiff opposition from conservative forces, or gradualists.

To nuance this further, devolution of power must be designed and practiced in a manner that advances constitutionalism and nationhood. It appears that ours is a state of statehood without nationhood, and the primary task ahead is to constitute not only the state and state-society relations in the new constitution, but also nationhood.¹²⁰ There are countries in which

¹²⁰ See E Hutchful, 'Reconstituting Political Space,' in Greenberg (n 62 above) 215.

constitutions have played this social engineering role, and these lessons may be instructive to Kenya.¹²¹ The distinction here needs to be made between classic constitutions content with establishing institutions and consolidating power, and contemporary constitutions, which are “highly [inventive and] interventionist, seeking to change society and the structure of power.”¹²² The latter constitutions are carriers of values and facilitators democratic constitutionalism.

The point to be noted, however, is that the choice of the structure, form and content of devolution of power and the new constitution will signal an endorsement of particular values. The ensuing and subsequent processes and outcomes must be based on an unambiguous ideology or normative political theory. Obviously, while the promise of devolution evokes a lot of prospects, the fears and pitfalls adumbrated in this chapter must be taken seriously and abated. Finally, this may also be an opportunity to break from Africa’s failed post-colonial constitutionalism and transit towards democratic constitutionalism. Anything short of this may well be labeled fiction.

121 Y P Ghai ‘Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy’ 141 (2002) in A Reynolds (ed.) *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*.

122 n 81 above 823.

8. FEDERALISM AND THE ETHNICITY QUESTION IN KENYA: LIMITS, FEARS AND PROSPECTS

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Abstract

This chapter assumes that there is an 'ethnicity question' in Kenya and that it has in large part manifested itself negatively – land clashes and displacement, violent contestation for state power, skewed allocation of national resources among others. The recently enacted National Ethnic and Race Relations Bill, 2008, while limited in scope, is founded on the premise that there is such a problem that needs to be addressed. The chapter takes the view that among other factors, the ethnicity question today is directly linked to the configuration of the state – unitary and heavily centralised. While this may not be directly responsible for the ethnicity problem, the use of ethnicity to access and hold unto the levers of state power results in exclusion of others. The paper identifies federalism – to eschew the much stigmatised term majimbo – as a possible way of accommodating ethnic diversity in Kenya. However, the chapter argues that federalism itself has its limits – and that it will largely depend on the type of form adopted. In this regard, it briefly explores the applicability of these 'types' including an ethnic-based federal arrangement such as that in place in Ethiopia. Partly because of the limits of federalism, the chapter argues that devolution of power to other sub-state entities – in tandem with federalism or independently - may be the answer to an accountable, equitable constitutional dispensation to deal with the ethnicity question in Kenya.

8.1 Introduction

The recent post electoral violence and the conduct of the electoral campaigns that preceded it brought into sharp focus the ethnic fissures in Kenyan society. If it revealed anything new, it was not that ethnicity plays an important role in Kenyan politics.² Further, these events were not some kind of revelation that the constitution and the political process needed to acknowledge ethnicity as a central concern to be addressed in one form or another. Serious debates have been conducted on this issue, albeit, for the most part over the din that accompanies contestation at election times and in the rallies in the clamour for multiparty democracy. The constitutional review process conducted by the Constitution of Kenya Review Commission (CKRC) was perhaps the only organized – although not necessarily systematic - engagement with the issue at the national level.³

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² Commentators and politicians alike have identified ethnicity as a dominant factor in Kenyan politics and electoral processes. See for instance M Bratton and MS Kimenyi 'Voting in Kenya: Putting ethnicity in perspective' Working Paper no 95 Institute for Democracy in South Africa (2008) available at www.afrobarometer.org (accessed on 5 July 2008); generally MS Kimenyi *Ethnic Diversity, Liberty and the State: The African Dilemma, (1997)*; Raila Odinga 'What role does ethnicity play in Africa's elective politics?' available at <http://africanpress.wordpress.com> (accessed 15 June 2008)

³ The constitutional review process was about delivering a new constitution aimed at addressing among others: reconfiguring the state by reducing executive power and possible devolution, distribution of resources and land question. See Constitution of Kenya Review Act 2000. For a description of the process, see AL Bannon 'Designing a constitution-drafting process: lessons from Kenya' (2007) 116 Yale Law Journal 1824-1840; W Mutunga 'Constitution-making from the middle: civil society and transition politics in Kenya' 1992-1997 (1999); PL Onalo 'Constitution-making in Kenya (2004) 205; L Juma, Ethnic Politics and the Constitutional Review Process in Kenya, 9 Tulsa Journal of Comparative International Law (2002) 471.

Away from election campaigns, the political class, in particular the ruling elite had resorted over the years to systematic denial that ethnicity is an issue of serious concern in Kenyan life. Ethnicity or tribe - despite its role in many cases as a determinant about where one went to school, whether one would obtain a job in national service or crucially, the distribution of resources – became one of the deafening silences that punctuated the national debate. As reflected one article published January 2008 and the general tenor of reporting about the violence, the media – perhaps for fear of inflaming or triggering ethnic conflagration or somehow persuaded by *status quo* views - had joined this silence or restored to poitically correct reporting.⁴ In the wake of the violence, these ‘silences’ and politically correct reporting by the media has been questioned.⁵ Clearly, the conduct of the electoral campaigns and the violent manifestations of dissatisfaction with the outcome of the hotly contested presidential election revealed how deeply ethnic sentiment colours political and other relations.

The Constitution of Kenya Review Act 1999 made specific mention of issues of ethnicity. Among others, it provided that one of the objects of the constitutional review process was ‘respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities’.⁶ Further it referred to the need to ensure the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources’.⁷ These provisions reflect the ethnically sensitive thinking behind the need to overhaul the constitutional framework. In any case, opposition to successive regimes – Kenyatta, Moi and the first Kibaki term even when articulated in other terms had ethnic undertones. The current Government of National Unity (GNU) established by agreement between President Mwai Kibaki and Prime Minister Raila Odinga after the disputed presidential elections is for the most part an attempt to accommodate ethnic interests.

Over the years, contestation has pitted on the one hand one side keen to maintain an ethnic hold on state instruments and economic power that comes with that – and on the other hand – those leading the struggle to arrive at some ethnic accommodation at the high table or to replace the ruling group altogether. The first two years of the Kibaki administration were but a short hiatus in this pattern. Despite the fact that the establishment of the GNU has managed to cool tensions, it is understood as a stopgap measure and that far-reaching steps, including

4 Standard Team ‘Political impasse is a class struggle’ Standard 6 January 2008 noting that ‘talk about tribe is a dialogue of the elite’. This suggests that tribe or ethnicity is not a concern of the wider Kenyan society and that somehow politicians evoke ethnic hatred over imaginary problems. See also ‘How politicians use tribal fallacies against you’ The Standard 10 January 2008; see also P Ochieng ‘Kenya: a short history of tribalism - under one roof’ The East African Standard 15 June 2008 referring to tribalism as ‘a deadly elite game’.

5 M Wrong ‘Are editorial practices on ethnicity ill-advised?’ The Standard 10 April 2008.

6 S 2A (e) Constitution Review Act 2000.

7 S 2A (f) Constitution Review Act 2000.

constitutional reforms need to be undertaken.⁸ Many displaced people remain in camps in Kenya and across in Uganda, afraid to return unless their security is assured. Clearly, ethnicity and issues implicated in it in the Kenyan context such as land, meaningful political and economic participation are concerns that require urgent, yet thoughtful attention. Few deny ‘the urgency of now’.⁹

The negative manifestations ethnicity evident in Kenya today have their roots in the independence struggle and the steps taken by the Kenyatta government to dismantle the Independence Constitution as well as controversial land policies adopted by the post independence government.¹⁰ Although the paper has so far referred to ‘ethnicity’ to connote to the various ‘tribes’ in Kenya, it is not an uncontroversial concept and may be subject to contestation.¹¹ What emerges from the literature is that ethnicity encompasses a number of elements and goes beyond some objectively discernible permanent characteristic of individuals and communities having features such as religion, culture, social organization or language to include subjective considerations.¹² Understood as such, the independence settlement that resulted in Independence Constitution that was dismantled by President Kenyatta had embraced ethnic compromise. The federal arrangement, as well as the specific religious-cultural accommodation of peoples of the coastal strip by constitutional entrenchment of Kadhi’s Courts - though partial – was part of recognition of ethnic diversity in post independence Kenya.

The Constitutional Review Commission of Kenya studied and collated views of people across the country. It eventually proposed a constitutional framework that not only sought to accommodate ethnic diversity – culture, language among others, but also a framework of sharing of resources. This paper does not advocate for the adoption of ‘Bomas Draft’, the product of that process, as a panacea of the ethnic question in Kenya. This is a bigger task, clearly beyond the remit of this paper. This process is revisited to only show that the ‘ethnicity question’ is not a fabrication. The denial by post independence leaders, and the myth of national unity kept it off the table.

In this paper, as part of ongoing debate on the question, the issue of elevating ethnicity to constitutional discourse and federalism are considered. As discussed further below, there are

⁸ The negotiations that resulted in the GNU identified constitutional review as a matter of immediate concern and committed the parties to deliver a new constitution within one year. Many reminders have been registered. On 1 August 2008, the government published two bills aimed at taking the process forward.

⁹ See for instance S Mwakale ‘President, PM vow to deal with vicious cycle of ethnic clashes’ The Standard 27 April 2008.

¹⁰ See B Omanga ‘PS blames land woes on Kenyatta’ The Standard 1 August 2008 citing Lands PS Dorothy Angote blaming President Kenyatta and senior members of his government for today’s land problem; see also J Murimi ‘Report queries land settlement’ The Standard 3 Aug 2008 revealing new evidence questioning how \$100 million (\$ 6.7 billion today) given by the British Government at independence to settle the displaced was spent.

¹¹ W Solloros, *Beyond Ethnicity* (1996) 1 noting that ‘no one knows what ethnicity means’.

¹² M Koenig, *Democratic Governance in Multi-cultural Societies* (1999) 23-25 discusses three theories of ethnicity - primordialism, constructivism and instrumentalism.

various models of federalism. Two broad concerns are addressed here: 1) whether federalism is an appropriate, perhaps necessary model of organizing the state; 2) what form of federalism befits the Kenyan situation in order to: contain and reduce ethnic conflicts by promoting participation and equitable distribution of national resources and; to facilitate and promote a democratic system

8.2 From denial of ethnicity to manipulation

Like many post independence African leaders such as Kwame Nkrumah of Ghana and Houphouët-Boigny of Côte d'Ivoire, President Kenyatta was eager to disavow tribalism as divisive. Among these leaders, in part motivated by the need to address the divisive policies of former colonial rulers who often stoked inter-ethnic rivalries, 'unity was postulated in a way that assumed a mythical homogeneity amidst diversity.'¹³ In Kenya, after Kenyatta succeeded in forging a delicate alliance of ethnic groups behind the dominant – and later sole political party – the Kenyan African National Union (KANU), his government portrayed ethnic disunity as a vice to be stamped out of the new nation. In this logic of national unity, the Independence Constitution, which dispersed power to federal units was targeted and dismantled only three years after independence. However, the practices of the Kenyatta government as well as its capitalistic economic policies soon rendered the commitment to ethnic harmony merely rhetorical.

The economic policy of the new government was set out in a 1965 paper entitled '*Africa Socialism and its Application to Planning in Kenya*.'¹⁴ The major intention after independence was not only to mobilize Kenya's resources to attain rapid rate of economic growth but also to 'Africanize' the economy and public service. Focus was trained on growth rather than distribution.¹⁵ The new government soon failed to distinguish itself from the colonial rulers they had replaced. The exclusion of voices of dissent – illustrated by the case of one of the leading lights of the liberation struggle and first Vice President of independent Kenya Jaramogi Oginga Odinga- is perhaps the most significant event in that era that placed the country on the path of economic disparity that exist to date.¹⁶ The process of 'Africanisation' increased tribalism in the manner in which jobs were acquired in the public service and in the manner in

13 Brookings Institution 'Ethnicity as an African Predicament' http://www.brookings.edu/articles/1997/summer_africa_deng.aspx accessed 25 July 2008.

14 Republic of Kenya, Sessional Paper No. 10 African Socialism and its Application to Planning in Kenya, Nairobi, 1965.

15 For instance, barely one year into independence, what would have been the trappings of conflict arising from the politics of cold war would emerge and influence the nature of political relations in the country throughout the first decade of independence (the ideological polarisation within the body politic of the period between the left and the right of the ruling party, KANU, which saw the left receiving support from communists and the right receiving theirs from the West). For an exposition on this, see Walter Oyugi, 'Politicised Ethnic Conflict in Kenya: A Periodic Phenomenon', Addis Ababa, 2000.

16 M Mak'O loo, 'Kenya: Minorities, indigenous peoples and Ethnic Diversity' in Minority rights group international, (2005) 5; W Mutunga 'Constitution-making from the middle: civil society and transition politics in Kenya' 1992-1997 (1999); PL Agweli Onalo 'Constitution-making in Kenya (2004) 205; L Juma, Ethnic Politics and the Constitutional Review Process in Kenya, 9 Tulsa J Comp. & Int'l L (2002) 471.

which other key positions were filled. President Moi's and Kibaki's governments perpetuated pretty much a similar pattern of nepotism and cronyism.¹⁷

The post electoral violence witnessed in the Rift Valley centers on one central issue with roots in the policies of the independence era – land. The early years witnessed acquisition and consolidation of huge chunks of land in the former 'white highlands' by the Gikuyu, Embu and the Meru, much to the chagrin of communities that historically settled in much of the Rift Valley - Kalenjin, Maasai and kindred groups such as the Samburu.¹⁸ This settlement policy was effected against a background of opposition by the indigenous ethnic groups of the Rift Valley. Aware of this opposition, the Kenyatta regime relied on senior members of the Kalenjin community serving in the government notably the then Vice President Moi, to neutralize the political opposition to settlement.¹⁹ The failure to return land to communities from whom it had been taken created deep resentment. Mak' Oloo has argued that this formed a perfect substratum for the incessant haggling by the various communities over natural resources, with the creation of strong and mostly negative ethnic affiliation and identity.²⁰

8.3 Ethnicity and political power play

It is common practice for African leaders to use state power and institutions to promote their own interests or those of their ethnic groups.²¹ This is achieved through intimidation, violence and other forms of terror against real and imagined enemies.²² Nowhere is ethnicity more at play in Kenya than in the political arena. Ethnicity has become, not only a basis of political support, but also of political marginalization.²³ The political class has, since independence manipulated ethnicity in the capture, consolidation and hold onto power.²⁴ All pretence of national unity abandoned – save only in rhetorical pronouncements – Kenyatta built his powerbase among the Gikuyu, Embu and Meru (GEMA) communities excluding the majority not only from the political, but also the social and economic sphere of the state. President Moi, once in power, proceeded to similarly consolidate it with the Kalenjin community resulting in its ethnic domination and hegemony over state institutions. The collapse of the National Rainbow Coalition (NARC) that swept Kibaki into power only two years into the term was largely due

17 See for instance Martin Meredith, *The State of Africa: A History of Fifty Years of Independence*, (2005) 402. Keith Kyle *The Politics of the Independence of Kenya* (1999)

18 Oyugi (n 4 above) 5.

19 As above.

20 As above.

21 PA Nyong'o, (ed.), *Popular struggles for democracy in Africa*, (1987) [London, Zed books 1987].

22 See, G Hyden, *African politics in comparative perspective*, (2005) [Cambridge University Press, 2005].

23 Otiende & Juma; Macharia Munene, 'The Colonial Policies of Segregating the Kikuyu, 1920-1964', *Chemi Chemi* (2002) 2 *International Journal of the School of Social Sciences*, No.1, 36-38.

24 For a discussion of the three stages, see Anthony Otiende and Dan Juma, 'Back to the Future: the 2007 General Election', *Post Election Period Fore-shadows*, 2007 [ClariPress, Clarion, Nairobi 2007].

to exclusion, or perceived exclusion, of non-GEMA players who had been instrumental in the coalition. In the 2007 general elections, both sides appealed to ethnic bases. One need not look further than the provincial outlook of the Constitutional Referendum, and the 2007 presidential election results.²⁵

The clamour for political pluralism was met with brutality and warnings that opening up the political space would breed inter-ethnic conflicts since the people were not cohesive enough.²⁶ Ethnicity has over the years been manipulated for political and economic gains. Because of weak democratic and accountability institutions, the attitude that the elite have towards state power - that it is to be used towards personal aggrandizement, prestige and social status rather than in the service of some ideal or public good has persisted.²⁷

The violence that was witnessed soon after the elections in December 2007 has weighty undertones. There is more to it than a bungled vote-count and the so-called tribal rivalries. Najum correctly diagnoses the problem noting that 'beneath the simplistic tribal battle lines lie the historic patterns of uneven resource distribution in Kenya'.²⁸ Lonsdale correctly argues that the key to post election crisis in Kenya lies in the changing role of the post-colonial state in relation to the country's ethnic terms of political trade.²⁹ Quite clearly, reorganisation of the state must, among other interventions, include a shift in the allocation of national resources and ensure a wider spread of development. This issue is revisited in the last section.

8.3 Understanding federalism

Before proceeding to inquire whether federalism can play a role in addressing the ethnicity issue in Kenya, it is important to outline briefly the meaning and forms of federalism. The term 'federalism' does not lend itself to easy definition. The fact that there are many governments today that profess to have a 'federal' arrangement in one form or another makes this task a lot

25 In the referendum, only one of the 8 provinces, President Kibaki's home base voted YES (98 %) for the adoption of a draft constitution rejected for undermining the will of the majority expressed in an earlier Bomas Draft. In the 2007 elections, President Kibaki won only his home province by huge margins. The main opposition leader Raila Odinga perceived to have greater national and inter ethnic appeal won six provinces. The third, Kalonzo Musyoka who performed dismally nationally won his home Province. On the referendum, see Alicia Bannon (n 3 above) at 1830; Bård Anders Andreassen & Arne Tostensen, *Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution 5-6* (Chr. Michelsen Inst., Working Paper No. 2006:13, (2006), available at <http://www.cmi.no/pdf/?file=/publications/2006/wp/wp2006-13.pdf>.

26 Joshua Osamba, 'Violence and the Dynamics of Transition: State, Ethnicity and Governance in Kenya' *Africa Development*, Vol. XXVI. Nos. 1 & 2, 2001.

27 Anyang' Nyong'o, 'State and Society in Kenya' in Oyugi, Wanyande and Odhiambo (eds.), *The politics of transition in Kenya: from KANU to NARC*, Nairobi, Heinrich-Boll Foundation, 1989, p.20. The argument here is that the exercise of power so long as it is within the law, even if illegitimate or undemocratic, personal and party may prevail.

28 Mushtaq Najum, 'Politics: Kenya's Problem Goes Beyond Ethnicity and Elections', *IPS*, available at <http://www.ipsnews.net/news.asp?idnews=40968> (accessed on June 08, 2008).

29 John Lonsdale, 'Kenya: Ethnicity, Tribe and State', *Open Democracy*, available at http://www.opendemocracy.net/article/democracy_power/kenya_ethnicity_tribe_state (accessed on June 8, 2008). See also, Carol Elkins, 'What's Tearing Kenya Apart? History, for One Thing', *Washington Post*, January 6, 2008

more difficult.³⁰ The author does not enter into this normative debate. Here, the author adopts the working definition suggested by King. According to King, federalism is:

[a]n institutional arrangement, taking the form of a sovereign state, and distinguished from other such states solely on the fact that its central government incorporates regional units into its decision procedures on some constitutionally entrenched basis.³¹

Unlike in a unitary state, a federal state is constitutionally split between at least two territorial levels so that units at each level have final authority and can act independently of others on specific areas of concern. In view of the question at hand – dealing with ethnicity in Kenya – two things are important 1) how the empowered federal units are geographically delineated and; 2) whether ethnic groups (or other groups such as ‘indigenous’ groups) are recognized in one form or another at the constitutional level.

The first aspect is important because once ethnicity is used to demarcate federal units it gives rise to ‘ethnic federalism’ such as the case of Ethiopia, which is considered below for viability as a possible model for Kenya. In this regard, debate revolves around whether the current eight provinces should be the federal units, or whether they should be redrawn, including along some ethnic formular. The second question is perhaps more important – and problematic – depending on how the issue is dealt with. On the one hand, one could argue that the ‘silence’ of our current Constitution and its failure to address issues of ethnicity, culture and ‘ethnic entitlements’ may have brought us where we are. On the other hand, this silent may be the ‘safe’ way to go. The task of defining which ‘entitlements’ to confer on particular groups, or all groups as such is not an easy one. This issue is revisited later.

There are various ‘kinds’ or models of federalism including cooperative, coercive, and competitive federalism depending on the relationship between the central government and regional units with which power is shared. In cooperative federalism, the national, state, and local governments interact cooperatively, working jointly to solve common problems rather than making policy separately but more or less equally (the nineteenth century’s dual federalism) or clashing over policy in a system dominated by the national government (the more coercive federalism of the late twentieth century).³² In the United States, cooperation was most pronounced during the New Deal between the 1930s and the 1950s when the Great Depression and World War II forced states to seek large scale federal assistance including emergency economic measures and job creation, civilian defense and wartime rationing.

³⁰ See Daniel J. Elazar, *Exploring federalism* (1987) 240-44.

³¹ P King, *Federalism and Federations*, 1982; See also Dimitrios Karmis and Wayne Norman *Theories of federalism* (2005) 1.

³² Robert L. Fischman, ‘Cooperative Federalism and Natural Resources Law’, (2006) 14 *New York University Envir. L. J.* 183. See also, Philip J. Weiser, ‘Towards a Constitutional Architecture for Cooperative Federalism’, (2001) 79 *N.C.L Rev.* 663, 671. The following countries practise this type of federalism: Ethiopia, Germany, South Africa, United Arab Emirates, United States of America and Venezuela.

In a coercive kind of federalism, the federal government continues to direct both national and state policy. In this system, the federal government achieves greater involvement in the lawmaking process for constitutive units – states and local government. During the long years of military rule in Nigeria, many of the federal arrangements were abrogated or ignored with the federal government assuming most of these roles. In competitive federalism, the federal government has a reduced role in the affairs of constitutive units – states or regional governments.³³ The states/regional governments have an increased role in managing their own affairs. Examples of countries with this kind of federalism are Pakistan, Belgium and Switzerland.

It is important to comment, albeit briefly, on another relevant concept – devolution. Devolution is the statutory or constitutionally granting of powers of a state from the central government to government at national, regional or local level.³⁴ In essence, federalism is a form of devolution. The main benefits/objects of devolution may be similar to those under a federal arrangement. These include: more efficient provision and production of public services; better alignment of the costs and benefits of government for a diverse citizenry; increased competition, experimentation and innovation in the public sector; greater responsiveness to citizen preferences; and more transparent accountability in policy making.³⁵

8.4 Federalism in practice: Ethnic and multicultural arrangements- Ethnic based federalism in Ethiopia

Ethnic federalism is the formation of a federation along ethnic lines as opposed to territorial basis.³⁶ A united country decides to split so as to loosen a complex situation, frequently related to diversity of nationalities.³⁷ Its proponents have argued that it is a pragmatic solution in a multi-ethnic society that is prone to inter-ethnic competition and conflict.³⁸ Ethnic federalism was introduced by the 1991 Ethiopian Constitution. It provides that ‘all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia’.³⁹ The country is perhaps the only one in the world to use ethnicity as the fundamental organizing principle of a federal system of government. In essence, ethnic-federal government is envisioned as the principal institutional means for accommodating ethnic groups’ cultural, linguistic, and political claims.⁴⁰ This method of locating sovereignty in ethnic communities implies that the new constitutional dispensation

33 As above.

34 See Merriam Webster’s on-line Dictionary.

35 K John, ‘The Devolution Tortoise and the Centralization Hare’ quoted in T Robert, ‘Devolution: the New Federalism-an Overview’, a report of a colloquium organised by the Federal Reserve Bank of Boston and the National Tax Association, 1998.

36 A Abate, ‘Ethnic Federalism in Ethiopia: Challenges and Opportunities,’ Unpublished Masters thesis, University of Lund, 2004.

37 As above.

38 As above.

39 Constitution of Ethiopia, Art. VIII, s. 1.

40 DL Horowitz, *Ethnic groups in conflicts*, (1985) 63.

envision a state in which each of these communities is privileged to decide its own form of governance, identity, future association with the state, and the rights of individuals subject to its jurisdiction.⁴¹

More generally, there has been little discussion as to why the use of territorial decentralization to accommodate ethnic differences has been generally unpopular in Africa, while it is growing in popularity in the West.⁴²

Eight out of the nine ethnic-based federal states is drawn with the aim of making it the principal vehicle for aggregating and expressing the political, cultural, and linguistic identity of the country's major ethnic groups. According to Alemante, the animating idea behind ethnic federalism thus seems to be the desire to foster and nurture the emergence of ethnic-national groups as distinct political, geographical, cultural and linguistic units.⁴³ The Constitution curiously guarantees an 'unconditional right' to secession.⁴⁴ Its inclusion can only be explained by the need to get ethnic groups to buy into the new federal project after many years of dictatorship and conflict. The response of the federal government to the ongoing secessionist movement in Ogaden, the Somali region of Ethiopia indicates that the federal government will not condone secession.

Ethnic federalism has been criticised. Elazar argues that ethnic nationalism is at odds with the principles of federalism. In his view, consent should be the basis of division and sharing of power in federalism, not "language, religious or national myth."⁴⁵ This is a valid observation. Federalism means allocation of real powers to federal units, not merely recognising the language and culture of groups, although such recognition and protection may be an integral element especially where there is a history of suppression. In South Africa, the recognition of languages of all groups as official languages, and the right to culture is partly a response to the history of apartheid.

The federal arrangement in Ethiopia, which is still at its infancy, is faced with the biggest threat of fragmentation. It appears that the federal units exercise no real power – this being in the domain of the federal government. Gebremariam has derisively referred to Ethiopia's ethnic federalism as 'a completely bogus theory unknown in the annals of political science or any of the social sciences... [it is] the old divide-and-rule/divide-and-control theory ... in the garb of intellectual respectability' and that it is meant to entrench a hegemony of one ethnic group over

41 SG Alemante, 'Ethnic Federalism: Its Promise and Pitfalls for Africa,' (2003) 28 *Yale Journal of International Law* 53.

42 D Turton, *Ethnic federalism: the Ethiopian experience in comparative perspective* (Eastern African Studies) [Ohio University Press, 2006].

43 Alemante, (n 40 above) 54.

44 Constitution of Ethiopia Art. XXXIV, s.2.

45 D Elazar, *Federalism and the Way to Peace 1994* [Kingston; Institute of Intergovernmental Relations, 1994].

others.⁴⁶ The viability of ethnic federalism seems to depend on the ability of the federal units to exercise real power. An attempt to placate ethnic sentiment by fashioning territories for them while leaving the federal powers to an unchanged ethnic outfit is not viable. One other danger in ethnic federalism is exclusion of ‘outsiders’ at state level. As is the case in Ethiopia, at state level individuals from other communities are often excluded from certain state positions. The choice by these states to use their ethnic language in all government business may render service delivery difficult for ‘outsiders’, who may actually have no other place to call home.

Ethnic federalism is of particular interest to Kenya, which is embroiled in violent ethnic conflicts for political control and resources. Kenya’s vexed and hotly controversial question of *majimboism* – understood by some as a federal system organised along ethnic lines – is relevant.⁴⁷ What is clear - when one follows the emotional public debates on the issue - is that there has never been genuine engagement with this issue, especially among pro *status quo* members of the political class. Discussions during the campaigns in 2007 attest to this. Seemingly nuanced positions such as ‘economic *majimbo*’ calculated to escape the stigma attached to the term do not help to clarify the pertinent issues. Lack of genuine engagement has resulted in an ill-defined concept that spells ‘deportation’, ‘go back home’ and the dislike for ‘non-indigenous’ residents in various provinces. The Independence Constitution did not provide for an ethnic based federal arrangement. It just happens – by design or otherwise - that in each of the provinces, there is a ‘majority tribe’. Western, Nyanza, Central, Rift Valley (if one considers Kalenjin as one entity) are good examples. In the next section, we consider, in view of this realities and the Ethiopian example, whether ethnic federalism can work in Kenya.

8.5 Other forms of federalism

‘Orthodox’ federalism involves organising the polity along territorial/regional lines rather than ethnic. This form of federalism is characterised by universal protection of individual rights, neutrality of the state with respect to different ethnic/national groups, absence of internal boundary for ethnic groups and regions rather than ethnic group as the basic unity of the federal polity.⁴⁸ The United States and Australia are good examples. While the Indian system also falls in this category, it assumes ethnic an outlook.⁴⁹

In Canada and Belgium, a form of ‘ethnic federalism’ – multinational federalism – is practised. In this system, federal constitutions accommodate concentrated ethnic groups – Flemish Flanders

46 A Gebremariam ‘Why is Ethiopia a failed state?’ at <http://www.ethiopianreview.com/content/2943> (accessed on 7 July 2008).

47 See S Ndegwa, ‘Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics,’ (1997) 91 *American Political Science Rev.* 599, 605.

48 Baogang He, ‘The Federal Solution to Ethnic Conflicts,’ 7 *Georgia Journal of International Affairs* (2006) 29-31.

49 See Y Ghai and YK Pao ‘Legal responses to ethnicity in South East Asia’ paper presented as a Lansdowne Lecture at the University of Victoria, January 1993 at 3.

and French Wallonia in Belgium; and French Quebec and the rest of Canada (Anglophone). Unlike in territorial federalism, an internal boundary is drawn to enable minorities to exercise minority rights and self-determination and to achieve an ethno-national homeland.⁵⁰ Kymlicka's view of multinational federalism mirrors ethnic federalism discussed above. He notes that in multinational federalism, one creates a federal or quasi-federal sub-unit in which the minority group forms a local majority, and so can exercise meaningful forms of self-government. The group's language is typically recognised as an official state language, at least within their federal sub-unit, and perhaps throughout the country as a whole.⁵¹ The difference between the cited examples of multinational federalism and ethnic federalism as practised in Ethiopia is that: there are less national/ethnic groups to be accommodated in the former; and the federal units enjoy greater powers and autonomy than in Ethiopia.

According to He, the key distinction between the two western models of federalism - regional and multinational federalism - is whether the state recognises the ethno-national groups' right to territorial autonomy. In general, nation-states that opt for federalism pursue a style of regional federalism, in which different ethnic groups share a common citizenship in a civic homeland where two levels of government share power. Ethno-nationalist groups, on the other hand, demand exclusive self-rule by ethnicity. The contested issue is whether ethnic identity or universal citizenship should be the basis of a federal unit. In practice, most states tend to pursue a mix of both if the force of ethno-national group is strong.⁵² In the following section, the author considers how - with a bias on ethnic federalism in Ethiopia - these forms of federalism may be applied in Kenya.

8.6 Federalism as a necessary framework for organizing power in Kenya

Lovice argues that the threat of disintegration and the need to maintain unity are the major reasons why unitary states opt for federalism.⁵³ Whether one considers the recent post electoral violence Kenya as harbinger of possible disintegration or not, motivation is made here for some form of constitutional accommodation - whether federal or otherwise - of ethnic and regional grievances. Lovice's statement suggests that the call to 'unity in diversity' must be backed up by appropriate constitutional and statutory mechanisms in order to ensure that the multiplicity of interests - in this case ethnic - are adequately and appropriately protected to preserve that

50 He (n 47 above) 31.

51 See W Kymlicka and B He (eds.), *Multiculturalism in Asia* (London: Oxford University Press, 2005), 23-24 cited in He (n 47 above) 32.

52 He (n 47 above) 35.

53 A Lovice, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience* (2002) 14. See also He (n 47 above) 35 making the same point states that in Asia, federal arrangements have been chosen to deal with ethnic conflict and that the mode towards federalism is related to violence.

unity.

The fundamental problems posed by ethnic heterogeneity have been with most African states ever since the first African country achieved independence.⁵⁴ Today, the failure of national integration and the absence of political legitimacy remain issues of concern.⁵⁵ Examples abound in history tending to show that the failure to accommodate ethnic differences triggered Rwanda's genocide, Somalia's disintegration, Liberia's implosion and Sudan's numerous conflicts – in the South and Darfur.⁵⁶ The crises mentioned here – including the tragic post electoral violence in Kenya - all attest to the importance of coming to terms with the phenomenon of ethnic heterogeneity within a constitutional framework. It is suggested that the model of federalism adopted must be informed by context while paying attention to broad principles – democracy, rule of law, human rights and the need to institute an efficient and effective government.

Inter-ethnic conflict and contestation is not solely a matter of ethnic diversity.⁵⁷ Undemocratic institutions that breed dictatorship and human rights abuse; skewed and inequitable allocation of national resources; absence of rule of law and rampant corruption are but few of the other possible causes. This must be considered in the Kenyan case. Yet the place for ethnic diversity in the quest to achieve a legitimate and cohesive national political order suggests that most African countries' practice of ignoring or suppressing ethnic diversity – whatever the motivations - constitutes a tragic policy failure.⁵⁸

Selassie has lamented the proclivity of African states to deny any constitutional space to claims based on ethnicity.⁵⁹ Kenya today can no longer hide behind such beliefs. The myth of unity as one – especially under current arrangements - is bust. The Rubicon was crossed with the shedding of blood, eviction of people their properties and turning on previous friends, neighbours. Stationing security forces in villages and small towns is quick fix.

Ignoring or suppressing ethnicity will not achieve the goals of national integration and political legitimacy. It will certainly lead, as in the case of Kenya, to militant ethnic nationalism, conflict and political disorder. Commentators agree on the need, in cases of violent ethnic disharmony, for constitutional restructuring in order to accommodate the interests of different ethnic groups in such a way as to integrate ethnically diverse citizens in a broad and inclusive national society

54 H.W.O. Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political paradox', in Douglas Greenberg et al, (eds), *Constitutionalism and democracy: transition in the contemporary world* (1993) 65-66.

55 Alemante (n 40 above) 53

56 As above.

57 See for example J Abbink, 'Ethnicity and Constitutionalism in Contemporary Ethiopia,' (1997) 41 *Journal of African Law* 159, 159 (stating that the phenomenon of ethnicity is being declared by many to be the cause of all the problems of Africa, especially those of violent conflict).

58 Alemante, (n 41 above) 53-54. See also IG Shivji, 'State and Constitutionalism in Africa: A New Democratic Perspective' 18 *Int'l J. Soc. L.* 381, 389 (1990) (noting the glaring absence of recognition of ethnic diversities in the Constitutions of African States). See also Abbink (n 56 above) in this respect.

59 SG Alemante, 'Ethnic Identity and Constitutional Design for Africa' (1992) 29 *Stanford J of international law*.

that ‘shares, represents, respects their ethnicity.’⁶⁰

As compellingly argued by He, India’s federalism demonstrates that the ethnic federal state is capable of containing ethnic discontent. The success of the Indian example is due to several reasons: the claims of minority nationalities were based on language rights and did not pose a threat to the Indian State; collective regional identity did not translate into exclusively ethnic-based national identity, rather regional identity was compatible with the Indian citizenship; the central government was able to deal with internal suppression when one ethnic group dominated. Federal institutions provided countervailing measures to reduce the domination of any single ethnic group, and the centre has been strong enough to protect civil rights in provinces and sub-provinces.⁶¹

As we see below, some of these conditions are replicated in Kenya.

The idea of federalism itself is not alien in Kenyan constitutional discourse. Ghai and McAuslan, note that many of the provisions of the independence constitution were designed to protect the minority from abuse of power by way of establishment of regionalism as vehicle through which power could be shared.⁶² Federal arrangements are particularly appropriate for a multi-ethnic state as they enable ethnic communities to exercise a significant degree of autonomy; can accommodate diverse cultural and linguistic traditions; can provide for parity among ethnic groups; and establish a pluralistic basis for their relationship with the centre. Ghai is of the opinion that federal arrangements may also diminish the significance of various factors, like religion, inequity, which can be deeply disruptive of ethnic harmony in a unitary state.⁶³

8.7 Accommodating claims based on ethnicity

The degree of difficulty in ethnic accommodation depends on the nature of interests the particular ethnic groups seek to assert. Responses on the other hand depend on how ethnicity is viewed, whether as a negative or positive force.⁶⁴ Based on experiences around the world, claims by ethnic groups may take the following forms: claims based on the demand for political power and on representation in state institutions; claims seeking rights that affirm and preserve

60 See D Wippman, ‘International Law and Ethnic Conflict on Cyprus’, 31 *Texas International Law Journal* 141,173 and n.220 (1996). See also P Magnarella, *Preventing Interethnic Conflict and Promoting Human Rights Through More Effective Legal, Political and Aid Structures: Focus on Africa*, (1993) 23 *Georgia Journal of International & Comparative Law* 327,330.

61 B He, ‘The Federal solutions to Ethnic Conflicts’, (2006) 7 *Georgia Journal of International Affairs* 29 at 36.

62 YP Ghai and JPWB McAuslan *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present* (1970) 196. See also, Y. P. Ghai and Y. K. Pao, (n 48 above).

63 Ghai and Pao, (n 48 above).

64 See Ghai and Pao (n 48 above) 3.

their particular identities, cultures, and languages such as in South Africa;⁶⁵ and, claims seeking to establish their own independent nation-states.⁶⁶ In Kenya, it appears that for the majority, claims relate to meaningful political participation and equitable sharing of national resources. As a major resource, land has been central to these debates. The fight to preserve certain institutions – Islamic institutions for Coastal muslims, language and culture and way of life among indigenous/minority groups such as Ogiek are more specific to those communities.⁶⁷ Further, it appears that there is no secessionist movement even in Northern Kenya where the marginalisation of those communities is well known. In the authors' view, it is safe to say that while claims may vary slightly from community to another, all communities want to participate and to be accommodated within Kenyan constitutional framework.

Although it may be true of pre-independence Kenya,⁶⁸ subsequent governments in post independence Kenya have neither sought to assimilate any group into a dominant ethnic identity and culture or prevent expression and practice of the same. Unlike Ethiopia, with its legacy of here Amhara political, 'cultural' and linguistic dominance, no comparable dominant ethnic identity exists in Kenya. The much talked about dominance by the Kikuyu in Kenya is limited to the economic sphere and does not manifest a cultural imperialism. It is safe to conclude that claims related to language and culture only receive forceful articulation by a limited number of communities, notably muslims and indigenous/minority groups such as Ogiek. One therefore understands the central claim of groups in Kenya – and the main source of ethnic strife to be: meaningful political participation, and sharing national resources (including land) and exercise of powers associated with it. This appears to be the starting point when considering the relevance of ethnic federalism.

The question is whether territorial/regional federalism should be adopted as the means of dealing with ethnic discontent and conflict. While this territorial-symmetrical arrangement in which there is equality between states has thrived in United States and Australia, the unique circumstances of Kenya, as the case in Asia, render it unsuitable.⁶⁹ In view of current ethnic sensitivities, and perceived 'hegemony' of particular ethnic groups in the Provinces, a territorial arrangement based on the provinces has little chance of working. For instance, one can foresee nationalistic fervour rising among the Kisii in Nyanza in the face of perceived Luo dominance.

65 The South African Constitution recognises the rights of ethnic groups to their own languages and cultures and reinforces these rights through a highly centralised system, which empowers each province to pursue its own distinctive course in the furtherance of these rights. For a discussion of the South African experience, see V Sacks, 'Multiculturalism, Constitutionalism and the South African Constitution', 1997 Pub. L. 672,676; H Corder, 'Towards a South African Constitution,' (1994) 57 Modern Law Review. 491.

66 The former Czechoslovakia and the continuing feud between Canada and Quebec best exemplify this. The turn of events in the relationship between Dutch Flanders and French Wallonia in Belgium exhibits this claim, especially by Flanders.

67 See Ogiek Declaration at <http://www.ogiek.org> detailing the claims of the Ogiek community around land, political participation (representation), culture and self-determination (role in decision making).

68 See Carter Land Commission Report 1933, section on the Dorobo.

69 Stepan makes this argument compellingly. See A Stepan 'Federalism and democracy: beyond the US model' 1999 10 (4) Journal of Democracy 19-34.

Such an arrangement alone does not solve the Ogiek question in the Rift Valley.

So far, Ethiopia's federalism as described shows that an ethnic federal state can solve or reduce ethnic conflict. First, it may proffer some lessons on the delineation of federal units. Although there are reportedly more than 80 ethnic groups, only nine regions were created. Below this, self-governing ethnic based Districts are established. Smaller ethnic groups considered as minorities are represented at District Council level.⁷⁰ Ethnic interests are represented in District Councils. In Nyanza, if current provincial boundaries are maintained, the Kisii and Kuria would have their own district(s), are where not viable have representation on District Council(s). The Ogiek would finally have the political representation they yearn for.

The stability of a federal arrangement depends on how political and financial powers are distributed. Writing in motivation of a federal government in post war Iraq, Brancati opines that:

By dividing power between two levels of government—giving groups greater control over their own political, social, and economic affairs while making them feel less exploited as well as more secure—federalism offers the only viable possibility for preventing ethnic conflict and secessionism as well as establishing a stable democracy in Iraq.⁷¹

According to Brancati, it requires a particular kind of federal system to accomplish this. It must be one that in which regional governments are granted extensive political and financial powers with borders drawn along ethnic and religious lines that utilize institutionalized measures to prevent identity-based and regional parties from dominating the government.⁷² Ghai and McAuslan argue that federal arrangements must go beyond entrenching the rule of law and human rights. They note that 'it is not enough to be protected from tyrannical rule; it is also important to participate in the process of government. Regionalism would make such participation possible on the part of even the minority tribes'.⁷³ However, to achieve a stable democracy, it may require that central government retains control of vital resources that could inspire secessionist sentiments if administered entirely by the relevant region. What is crucial is that the federal units should have real powers. There are examples of countries where federalism has failed to address inter-ethnic conflicts primarily because the federal government only ceded token powers to states. Nigeria, Indonesia and Malaysia fall in this category. In Ethiopia, there seems to be a vertical imbalance between the federal and regional functions. While the regions have competence to tax, the federal government has reserved the lucrative spheres of taxation,

70 See Abate (n 35 above), 34.

71 D Brancati 'Can Federalism stabilise Iraq?' Washington Quarterly (2004) 7.

72 As above.

73 Ghai and McAuslan (n 61 above) 196.

a fact that has been said to limit regional autonomy.⁷⁴ These examples proffer important lessons for Kenya.

Further, the delimitation of federal units should be such that it does not create huge socio-economic disparities, which could breed not only economic injustice but threatens the viability of those regions. In Ethiopia, where the constitution establishes a symmetrical federal arrangement -constitutionally equality of states - the result has been disproportionately poor regions compared to others.⁷⁵ In Kenya, with the history of dominance in the economic sphere of certain communities may result in such a scenario. There is bound to be internal conflicts pitting clans against each other or ethnic groups. As a matter of fact, there is no equitable distribution of resources in Kenya and creation of member states is likely to leave other states poorer than others from the starting point. That will be the biggest hindrance to limiting the states to ethnic lines in Kenya. Ethnic federalism can only work effectively if power is distributed evenly and there is enhancement of access to power of hitherto ethnically marginalized groups. This may require preferential treatment of previously disadvantaged communities. North Eastern Province – if this system is retained - may require that considerably larger federal funds for a number of years to address existing disparities.

The proven record of federalism to provide a framework for negotiation and compromises is an important task in ethnically divided societies.⁷⁶ Guyo has rightly noted that in countries where there is constant contestation for state power between the government and the people, genuine devolution of power has in many instances provided a panacea for resolving the conflict.⁷⁷ The battle lines for political supremacy in Kenya have been drawn along ethnic lines. It is unlikely that a unitary central government – whether it guarantees fundamental freedoms, and establishes a system of distribution of national resources – is likely to assuage deep-seated ethnic grievances. This is impossible without increased political participation, which can only be achieved through one form of devolution or the other.

At a governance level, federalism makes sense, in the application of the principle of subsidiarity - the idea that power to deal with an issue is held by institutions at a level as low as possible, and only as high as necessary. The efficiency that comes with service delivery, but more importantly the empowerment of people at the lower levels is critical in a diverse society. The inefficiencies of centralized government and the distance from centres of action of policy and lawmakers may be considered sufficient motivation for a federal system. In a diverse society such as Kenya, in

⁷⁴ Abate (n 35 above) 48-49.

⁷⁵ Abate (n 35 above) 47 comparing the poor lowland and richer highland regions.

⁷⁶ Ghai and McAuslan (n 61 above) 196

⁷⁷ M Guyo, 'Could Devolution of Power Resolve Historical Injustices in Kenya?' 23rd May 2008, ISS Today, Institute of Security Studies, Nairobi.

which ethnic interests seem at odds with each other, a federal system must embrace diversity in political views and or ideology.⁷⁸

It was already noted that land – and land economy - is a central issue in ethnic conflict. The resulting pattern of settlement has a bearing on the nature of federalism: if ethnic, whether federal units will be demarcated along or across ethnic lines; and if whether minority groups within these units will be granted special protections –participation, culture and language. The land question may make or break the federal project. The Rift Valley would be a hotbed of contests, if events following the last elections are anything to go by. In view of the necessity to mediate land related conflicts – such a hotly contested and emotive issue in Kenya today -, one may need to decide whether the central government or state government takes overall ‘control’ of land policy.⁷⁹

Federalism is not synonymous with good governance and democracy. While the protection of the rights of groups and individuals in a federal system is important, further measures need to be taken to entrench good governance and a stable democracy, both at the centre and regional levels. Otherwise, the result would be devolving corruption and dictatorship to the sub-federal units.

Bodenhamer has argued that federalism enhances democracy by providing a platform for effective criticism and opposition to governmental policies and practices. A political party out of power nationally still may capture state and local offices that allow it to challenge national priorities or decisions. Effective and necessary criticism of government leads to the strengthening of democracy itself.⁸⁰

8.9 Conclusion

This paper argued that an array of mechanisms is required to deal with the ethnicity question in Kenya and that a federal arrangement does not proffer all the answers to challenges posed by this issue. Apart from an appropriate federal arrangement, a comprehensive bill of individual rights and group rights where appropriate as well as a final solution to the land question need to be adopted. It was argued that federalism offers an avenue to address inter-ethnic conflict. However, it was suggested that the model of federalism adopted is important and that it should take a properly formulated model of federalism that takes into consideration the countries ethnic

78 See R Laming, ‘An introduction to Federalism’, Article No. 1, June 2001, Federal Union.

79 Ghai and McAuslan, (n 61 above) 201 have documented the hesitations expressed by KANU and white farmers at independence that land should be matter of concern of regional units. As opposed to KADU, the two advocated for central control of land

80 DJ. Bodenhamer, ‘Federalism and Democracy’ available at <<http://usinfo.state.gov/products/pubs/democracy/dmpaper4.htm>> accessed 20 July 2008

dynamics. It was concluded that the approach of subsequent post-independence governments that tended to ignore or suppress ethnic diversity are no longer tenable, especially in the post December 2007 era.

Implementing a federal system is a long and slow process – a political learning curve to assure that the system works properly. Some of the factors that contribute to the success of a federal system include: how powers are shared between the central and federal units; the legitimacy of the central government; a culture of dialogue; the manner in which economic resources are distributed; an economic situation favourable to political engineering and the possibility for each region, with its own historical past, to build its own system according to its own realities on the ground.⁸¹

Existing provinces in Kenya were created mostly along ethnic lines. For this reason, a federal government that retains current administrative areas necessarily assumes an ethnic dimension, even when presented as regional or multicultural federalism. It is important in this exercise to consider other factors including expediency in administration must be factored in.⁸² It was concluded that federal units must have real power, an all-powerful federal government can entrench an ethnic hegemony of one ethnic group that the federal arrangement sets out to address in the first place. Further, federalism must be accompanied by guarantees of human rights – individual and groups where appropriate -, establishment of strong democratic institutions and the rule of law. It was also noted that limits must be imposed on the federal government, but it must have sufficient powers to be able to not only perform its tasks, but also coordinate in a non-intrusive way the functions of federal units.

Federalism presents serious challenges. The complexity of the structures can make the decision-making process slow and less efficient. The federal system can also aggravate the ethnic divisions and on a longer term upset the fragile balance between the various ethnic groups within a federal unit. Secession would remain a constant threat.⁸³ Federal arrangements can only thrive where conditions are right. The relationship between the federal and the regional can be a delicate one. The balance of power and responsibilities must be one of co-dependence, not subservience. The objectives of a federal government cannot be achieved without proper institutions.

The degree of success of a federal system does not only depend on the constitutional structure. There must be consensus and buy-in by the people. There must be commitment to the fundamental principles of federalism: the necessity to appreciate diversity and promote mutual

81 B Mesfin, 'The Dangers of Ethnic Federalism', 17 May 2008 ISS Today at <<http://www.issafrika.org>> accessed July 2008.

82 Abate (n 35 above) at 53.

83 As above.

respect and acknowledgement that they can be united in their diversity. In the absence these conditions, the federal constitution may become – as suggested by one author with respect to Ethiopia⁸⁴ - a mask of authoritarianism and centralization bereft of tolerance and compromise.

84 A Gebremariam (n 45 above)

9. ETHNIC CONFLICT IN KENYA: AN ANALYSIS OF THE POLITICIZATION OF ETHNICITY AND THE IMPACT OF FREE MARKETS ON ETHNIC RELATIONS

Sarah Kinyanjui & Grace Maina^{1*}

Abstract

In search for future solutions, this paper engages in a genealogical account of the ethnic conflict in Kenya. It argues that although ethnic diversity predisposes communities to conflict, other factors at play in a given context fuel ethnic conflict. The paper recognizes that these factors may be varied but focuses on two factors that have contributed to ethnic conflict in Kenya. Firstly it examines the impact of the interplay between free markets and democracy in a developing context. Secondly, it discusses the extent to which politicization of ethnicity spurs ethnic conflict. In response, this article makes a case for consociationalism and redistributive approaches as possible solutions to the current ethnic tension. It further argues that policies focusing on developing national cohesion would positively impact on future generations. Although this paper engages with selected ethnic tensions and conflicts, it is argued that the issues discussed cut across the board and the suggestions made are relevant in other contexts.

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Ethnic conflict in Kenya

9.1 Introduction

*The Republic is the people of Kenya. All through the Colonial days, for the purpose of divide-and-rule, we were constantly reminded that we were Kikuyu or Wakamba, or Giriama or Kipsigis or Masai, or English or Hindu or Somali. But now, the Republic has embodied those features of equality and respect which cut through any differences of race or tribe.*²

The grand coalition agreement signed by President Mwai Kibaki and Prime Minister Raila Odinga on 28 February 2008 was a significant step in addressing the violent ethnic conflicts that followed the 2007 general elections in Kenya. However, the subsequent flow of commentaries on ethnic tensions in Kenya suggests that long term solutions are yet to be found.³ Indeed, the words of the first President of Kenya, Jomo Kenyatta, as quoted in the epigraph, were hardly a true reflection of ethnic relations then and can only be said to be an aspiration of the present day Kenya. The 2007 post-election violence in Kenya highlighted underlying ethnic tensions that pose a threat to the stability of the country.

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2 The late President Jomo Kenyatta uttered these words in 1964, one year after Kenya gained her independence. J Kenyatta *Suffering Without Bitterness* (1968) 255.

3 See for example M Oongo and O Wanzala 'Coalition Faces Collapse Says ODM Law maker' (2008) *Daily Nation*; Sunday Standard Reporters 'Okemo Foresees Collapse of Kenya Grand Coalition Due to Mistrust' (2008) *East African Standard*.

This paper argues that ethnic conflict is a result of a complex web of factors. Although this paper acknowledges that it would be a futile endeavor to attempt to establish an exclusive causal link to a particular factor, two issues are identified as playing a major role in fuelling ethnic tensions in Kenya. This paper analyzes, firstly, the role played by the politicization of ethnicity and secondly the impact of free markets in perpetuating economic disparities between ethnic groups hence resulting in ethnic animosity. Drawing from these arguments, the paper further sets out strategies that may contain the ethnic tensions. Appreciating the fact that no single intervention can adequately resolve ethnic conflicts, strategies that would in the long run contribute to fostering national cohesion are suggested. Firstly, it is argued that embracing principles of consociationalism which focus on multiethnic cooperation and equitable distribution of national resources would work towards ameliorating ethnic tensions in Kenya. Secondly, the role of deliberate nation building policies is also highlighted in the paper.

Although the term ‘ethnicity’ is often employed in many commentaries on ethnic relations, its definition is rarely given.⁴ This paper uses the term ‘ethnicity’ to refer to ‘a kind of group identification; a sense of belonging to a people that is experienced as a greatly extended form of kinship’.⁵ Eriksen explains that ethnicity:

...is an aspect of social relationship between agents who consider themselves as culturally distinctive from members of other groups with whom they have a minimum of regular interaction...thus also...defined as a social identity.⁶

In Kenya, ethnicity is defined along tribal lines; a sense of belonging is attached to common tribal roots. This sense of belonging could impact a society positively or negatively. Positive ethnicity would for example divert the focus from ethnic competition to individuals contributing towards developing regions in the country. For instance, where individual members of an ethnic group join efforts to raise funds for development of their rural village it could be termed as positive ethnicity.⁷ On the other hand, negative ethnicity connotes a sense of belonging harnessed to perpetuate exclusiveness in ethnic relations and as a point of competing against other ethnic groups.⁸

4 Fought for example remarks that the term ethnicity is a familiar term to ‘most native English speakers’. C Fought *Language and Ethnicity* (2006) 8. See for example the commentaries in B Berman, D Eyoh and W Kymlicka *Ethnicity and the Politics of Democratic Nation-Building in Africa* (2004).

5 A Chua *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (2003) 14.

6 TH Eriksen *Ethnicity and Nationalism: Anthropological Perspectives* (1993) 12.

7 E Osaghae (n 3 above) 15.

8 Weber defines ethnic groups as: ‘Human groups that entertain a subject belief in their common descent because of similarities of physical type or customs or both, or because of memories of colonization or migration... it does not matter whether or not an objective blood relationship exists’. Cited in C Fought *Language and Ethnicity* (2006) 8.

The term ‘ethnic conflicts’ refers to ‘protracted social and political confrontation’ between ethnic groups.⁹ Violence associated with ethnic conflict often results in violation of human rights. Violent ethnic conflicts often result in loss of life and massive displacement of people from their homes. That in turn leads to a breach of both domestic and international laws. Article 6 of the International Covenant on Civil and Political Rights provides for the right to life which is to be protected by law. Moreover article 12 thereof provides for the right to movement and individuals’ choice of residence. In Kenya, these rights are recognized by sections 71 and 81 of the Constitution respectively. The death toll from the 2007/8 ethnic conflict in Kenya is said to have been over 1000 and up to 500,000 displaced people.¹⁰ These statistics mirror previous ethnic conflicts. For instance, the ethnic conflict in 1992/3 resulted in the death of over 1500 people and the displacement of about 300,000 thousand people.¹¹ The recurring nature of these ethnic conflicts suggests that the core issues leading to ethnic tension have not been comprehensively addressed. Lasting solutions can only be found through engaging with the genesis of these conflicts.

Ethnic identity is not permanent but rather fluid and highly malleable as evidenced by the Kenyan situation where tribal identity shifts from individual tribes to regional identity. In this case the point of identity becomes regional such as western, eastern or central. The underlying factor in all forms of ethnicity is a sense of belonging. According to Horowitz ‘ethnicity in the words of a cynic entails not the collective will to exist but the existing will to collect.’¹² This description illuminates the potential for negative ethnicity. An ‘existing will to collect’ connotes a sense of ethnic identity to the exclusion of others. This sense of identity is frequently manipulated to cause ethnic divisions for particular ends. It is this potential to negatively manipulate the existence of distinct groups in a plural society with earmarked distinct identities, whether cultural or linguistic that presents a potential for societal instability.

A possible explanation for this instability could be that there is an inherent antipathy that results from an individual’s loyalty to an ethnic group to which they belong. In this case, ethnic affinities perpetuate politics of exclusion and may therefore be incompatible with a ‘national goal’. This contention, however, would be interpreted to mean that ethnic conflict in Kenya is the inevitable outcome of ethnic plurality and that the national vision of unity as embodied in the words of the national anthem is unachievable.¹³ Rodney for example concludes rather cynically that Kenyans hold a loyalty to their tribe over the nation and that there exists inherent

9 R Stavenhagen (n 2 above) 284.

10 Human Rights Watch *Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance* (2008) 2.

11 S Brown *Quiet Diplomacy and Recurring “Ethnic Clashes” in Kenya* (2002); L Mulli *Understanding Election Clashes in Kenya in 1992 and 1997* (1997) 1; Human Rights Watch *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* (1993) 98.

12 D Horowitz (n 2 above) 104.

13 The first verse of the Kenya National Anthem exhorts: ‘may we dwell in unity, peace and liberty’.

hostility between the tribes.¹⁴ This argument which establishes a direct causal link between ethnic conflict and ethnic diversity could be challenged on the basis of existing societies deeply embedded with ethnic diversity but without ethnic based conflicts. A case in point is Tanzania, which like Kenya is multi-ethnic but has continued to experience stable ethnic relations.¹⁵ Other countries such as Indonesia and Malaysia have suffered little interethnic violence despite being extremely ethnically diverse. On the other hand Rwanda experienced genocide in spite of the fact that the Hutu and Tutsi are culturally similar and even speak the same language.¹⁶

The first president of Tanzania, Mwalimu Julius Nyerere highlighted an objective of the Tanganyika National African Union as ‘to build up a national consciousness among the people...’¹⁷ Stable ethnic relations in Tanzania support the argument that ethnic conflict is created through social processes as opposed to being an inevitable result of ethnic diversity.¹⁸ Thus the exhortation ‘may we live in unity peace and liberty’ in the Kenya National Anthem is an attainable goal. However, that goal can only be achieved through an understanding of the processes that led to the conflict and identifying strategies that can address the underlying issues.

In support of the trite contention that ethnic pluralism by itself is not the cause of ethnic violence, the next section of this paper discusses processes that have impacted on ethnic relations in Kenya.¹⁹ For a nuanced and deeper understanding of the protracted ethnic tensions in Kenya, this paper engages in a genealogical analysis of ethnic relations in Kenya.

A genealogical method differs from a mere historical account, a distinction that is fundamental in this analysis.²⁰ The crucial distinction is that a genealogy is not an ‘objective history of the present’, describing things as they really are, but rather a history ‘of the objectification of the present’.²¹ While an ‘objective history of the present’ is concerned with setting out an accurate historical account of the current events, a history of the ‘objectification of the present’ addresses itself to a different agenda. It is instead concerned with identifying what is considered ‘obvious’, ‘self-evident’, ‘natural’, the ‘essence’ and proceeds to illustrate the processes through which these were constructed. A genealogical account would therefore ask: firstly what is ‘obvious’? In this case, does ethnic diversity and identity result in ethnic tensions as a matter of course or is

14 W Rodney *How Europe Underdeveloped Africa* (1988) 227.

15 E Miguel ‘Tribe or Nation? Nation Building and Public Goods in Kenya versus Tanzania’ (2004) 56 *World Politics* 327.

16 JR Bowen ‘The Myth of Global Ethnic Conflict’ (1996) 7(4) *Journal of Democracy* 5.

17 JK Nyerere *Freedom and Unity* (1969) 39.

18 E Miguel (n 15 above) 327.

19 A range of authors concur with this contention. See for example: B Berman, D Eyoh and W Kymlicka *Ethnicity and the Politics of Democratic Nation-Building in Africa* (2004) 3; DA Lake and D Rothchild *Containing Fear: The Origins and Management of Ethnic Conflict* (2001) 126; DL Horowitz *Ethnic Groups in Conflict* (1985) 684; R Stavenhagen *Ethnic Conflicts and the Nation-State* (1996) 9.

20 M Foucault *Language, Counter-memory, Practice: Selected Essays and Interviews* (1977) 31.

21 V Voruz ‘The Politics of the Culture of Control: Undoing Genealogy’ (2005) 34 *Economy and Society* 1. Emphasis of the authors.

it possible to have a national identity in spite of ethnic identity. When electing national leaders, is ethnic identity the determining factor as a matter of course? Can other factors determine this decision without taking into account the ethnic background of the contenders?

Foucault, a French philosopher, emphasizes that genealogies are premised on the fact that there is no essence: what is considered 'obvious', self-evident is actually considered so as a result of various processes.²² Therefore, once the 'obvious', the 'self-evident' is identified, a genealogist should then ask: how did the perceptions or practices become 'self-evident'? What processes led to the embracing of the operating rationalities? Genealogies are a useful tool of analysis in that they provide a crucial point of resisting systems of thought that impact society negatively.²³ By breaking down the processes that have produced certain rationalities at play, it becomes possible to radically challenge what has always been considered 'obvious'/'self-evident'.

This paper adopts this genealogical method to challenge the obvious/ self-evident notions that have been constructed around ethnicity in Kenya and how these can be linked to ethnic conflicts in Kenya. Firstly, the paper challenges the construing of ethnic identity as incompatible with national goals and development. In particular, the paper challenges the system of thought that links the ethnic background of political leaders with the development of particular regions. It is argued that this thinking is as a result of historical processes that made it 'obvious' that political leaders were strategically placed to ensure that their ethnic groups benefitted from their positions. The paper highlights that the colonial processes which hinged on a divide-and-rule strategy cultivated tribal mistrust. Therefore self-preservation demanded that the ethnic groups support their own. Taking advantage of this deep seated mistrust, current day politicians use this argument to garner support from their ethnic groups. By challenging this system of thought, it is argued that there can be a different way of thinking: the development of a region should not be determined by the ethnic background of those in power. Instead, the government should be concerned with the equal distribution of resources regardless of the ethnic representation in government. Similarly, the government ought to be put to task about its performance in what are termed 'marginalized' areas. A different system of thought would thus focus on government performance as opposed to the ethnic backgrounds of those in power. This paper therefore argues that just like historical processes placed the focus on ethnic backgrounds, effective and equitable performance of the government would contribute in changing this system of thought.

²² M Foucault *Society Must Be Defended* (1997) 150.

²³ DC Hoy *Critical Resistance: From Poststructuralism to Post-Critique* (2004) 14.

The second discourse that is challenged in the paper is the concept of ‘development’ in terms of global trends. Developing countries, like Kenya, strive to keep abreast with global standards in particular. The paper is particularly concerned with the transplanting of Western economic policies that are largely capitalistic to Kenya. The argument here is not against Western policies. Rather, the paper challenges the premium placed on Western thought without taking into account contextual realities. ‘Development’ in terms of keeping up with global standards is not desirable if adequate mechanisms to deal with negative repercussions are not in place. In particular, the paper examines how these capitalistic policies have benefited the Kikuyu, for example, thus fuelling ethnic tensions between them and other tribes. The argument advanced is that such policies ought to take into account such inequitable outcomes and remedial mechanisms should be set up.

The next section illustrates in detail how ethnic relations were constructed through the colonial process and also how this has been sustained by current day politics.

9.2 Colonial processes in Kenya pertinent to the ethnic question

One of the historical processes that had a profound impact on the structure of social relations in Africa is colonialism.²⁴ With regard to ethnic relations, the British exploited ethnic identities in Kenya to facilitate the achievement of colonial goals. Ethnic stratification during the colonial regime was propagated at two levels. Firstly, administration in Kenya was structured around the pre-colonial units which were organized along tribal lines. On the second level, the colonial government in Kenya collaborated with tribal leaders at an individual level. This collaboration was geared towards strengthening ethnic identity and exploiting it to ensure that strong inter-ethnic alliances were not forged in the struggle for independence.²⁵

Through colonial processes, ethnic identity and loyalty were capitalized to the exclusion of other rationalities. Within this rationality, identity based on ethnicity was made ‘self-evident’. As a result, other tribes were treated with suspicion and it was believed that absolute loyalty could only be obtained from members of one’s tribe. The crucial point on such ‘truths’ produced rationalities is that they are fluid and may be changed through other processes. A good example is the Rwandan experience. The Hutus and Tutsi shared a common language and culture but through colonial processes, the Belgians out rightly favoured the Tutsis thus ‘creating what had not existed before; a sense of collective Hutu identity, a Hutu cause’.²⁶ In Kenya, the colonial

24 For detailed analyses on the impact of colonialism on ethnic relations in Africa see: R Stavenhagen (n 2 above); R Blanton et al ‘Colonial Style and Post-Colonial Ethnic Conflict in Africa’ (2001) 38(4) *Journal of Peace Research* 473.

25 B Berman & Lonsdale John Unhappy Valley, *Conflict in Kenya and Africa* (1997) 328.

26 JR Bowen ‘The Myth of Global Ethnic Conflict’ (1996) *Journal of Democracy* 3.

government capitalized on ethnic differences as a ‘divide and rule’ strategy.²⁷

The impact on the negative ethnicity propagated during the colonial processes was evident in independent Kenya. It must be noted however, that the struggle for independence eventually brought leaders from different ethnic communities in Kenya together. Odinga for example in *Not Yet Uhuru* notes that Omolo Ongiro in all meetings uttered the exhortation: ‘Harambee... Let us all go to Lodwar to pull Kenya from prison, pull together for independence.’²⁸

In spite of the inter-tribal efforts towards independence Odinga narrates how some leaders exploited the issue of ethnicity. He explains that during the formation of Kenya African National Union (KANU), the Kalenjin Political Alliance, the Masai United and the Coast African Peoples’ Alliance contended that the Kikuyu–Luo alliance would dominate them.²⁹ Cognizant of these ethnic overtones, the first cabinet consisted of leaders from different ethnic groups as Odinga explains:

Our new Cabinet reflected something of Kenya’s freedom struggle but we took care to make it fully representative for tribal passions had been whipped to danger point in the year of *majimbo* and we had to show the different regions of Kenya that we had their interests at heart.³⁰

An issue of concern was that after independence the primary allegiance of leaders remained primarily to their ethnic roots.³¹ This explains President Kenyatta’s dilemma as a ‘nationalist’ yet the hero of the Agikuyu people. Whereas he attempted to promote unity through charismatic speeches, he was unable to divorce himself as a tribal leader. He therefore sought to redress the land issues affecting the Kikuyu and chose his political advisers from a group of Kikuyu elites.³² Similarly, the other leaders maintained their identity as tribal leaders prior to and after independence. Odinga for example explains that when the colonial government vetoed his inclusion on the list of cabinet ministers he ‘had to explain to the Nyanza meetings why he accepted his exclusion from the cabinet’.³³ Yet again this clearly illustrates how the colonial process, constructed ethnic identity as a pivotal point of social interaction. As a result it was deemed ‘self evident’/ ‘obvious’ that leaders could not be divorced from their ethnic origin and loyalty even in their national duties.

²⁷ J Kenyatta (n1 above) 255.

²⁸ O Odinga *Not Yet Uhuru* (1967) 238.

²⁹ As above, 207.

³⁰ O Odinga (n 19 above) 237.

³¹ ESA Odhiambo *Ethnicity and the Politics of Democratization* in B Berman, D Eyoh and W Kymlicka *Ethnicity and the Politics of Democratic Nation-Building in Africa* (2004) 178.

³² See G Muigai Jomo *Kenyatta & the Rise of the Ethno-Nationalist State in Kenya* in B Berman, D Eyoh and W Kymlicka *Ethnicity and the Politics of Democratic Nation-Building in Africa* (2004) 201.

³³ O Odinga (n 19 above) 231.

Whereas tribal leadership in itself may not be a source of ethnic conflict, it may perpetuate conflict at the point of interaction with national politics. Bearing in mind that political power is hinged on the competition for the control of resources, construction of national politics along ethnic lines may result in conflict. In this case presidential candidates are endorsed on an ethnic basis with the expectation that the tribal leader would address the needs of his ethnic group. The danger of politics based on ethnicity, is that it promotes maligning of other ethnic groups and as a result leads to ethnic animosity. With the colonial processes having augmented ethnic consciousness, politics in Kenya continue to be organized around ethnic groups thus exacerbating ethnic tension. Moreover, this seems to have been institutionalized through multiparty politics in present Kenya as discussed in the next section.

9.3 Ethnicity and multi-party politics

In multi-ethnic societies, having a multiparty government may result in political parties organized to address the interests of particular ethnic groups.³⁴ This has been the case in various African countries such as Malawi, Zambia³⁵ and Kenya.³⁶ Although political parties may not be exclusively composed of particular ethnic groups, they obtain their support predominantly from identifiable ethnic groups.³⁷ These political parties may also form coalitions with other parties resulting in multi-ethnic coalitions. In Kenya, for example, the major political parties, Party of National Unity (PNU) and the Orange Democratic Movement (ODM) could be termed as multi-ethnic coalitions. As Berman contends multipartism augments ‘politics of primary patriotism’.³⁸ This is particularly so in contexts where other forms of social stratification are harder to exploit for political purposes. In multi ethnic countries, particularly contexts where other forms of social stratification are harder to exploit for political purposes, political mobilization is done on the basis of ethnicity³⁹. For example, in Africa, class ties may be more difficult to manipulate in comparison to ethnicity.⁴⁰ The danger however in organizing party politics along ethnic lines is that it exacerbates ethnic tension. As a result ethnic conflicts are bound to erupt during elections as parties compete against each other since campaigns between parties are perceived in ethnic terms.

The Kenyan context illustrates this interplay between multi-party politics and ethnic conflicts. Incidents of inter-ethnic violent attacks in 1992 were preceded by campaigns to amend Section

34 D Horowitz (n 2 above) 291.

35 BO Hwedie ‘The Role of Ethnicity in Multi-Party Politics in Malawi and Zambia’ (1998) *Journal of Contemporary African Studies* 228; D Horowitz (n 2 above) 300.

36 Human Rights Watch (n 12 above) 4, S Brown (n 13 above) 3.

37 D Horowitz (n 2 above) 291.

38 B Berman (n 2 above) 9.

39 H Bienen, ‘Leaders, Violence and the Absence of Change in Africa,’ (1993) 108(2) *Political Science Quarterly* 271.

40 As above, 271.

2A of the Constitution of Kenya which sought to convert Kenya from a single party to multi-party state. President Moi, the incumbent at the time had assiduously protested multi party politics contending that Kenya was not politically mature to convert to a multi-party State.⁴¹ However, this was seen as a political gimmick to ensure that his government stayed in power, a *status quo* that could be put at stake in a multi-party arrangement.⁴² On inception of multi-party politics, the priority for the incumbent was how to remain in power. Just before the elections in 1992 and 1997, ethnic ‘clashes’ erupted. The coincidence in the timing and the location of the violent incidents raised suspicion as to the government’s involvement in the clashes. President Moi however blamed the clashes on multi-partyism.⁴³

Whereas, the President himself never made supportive statements, officials of the ruling party, KANU were on occasions heard making inciting statements during rallies.⁴⁴ Other accusations were government officials financially supporting the attackers and on some occasions availing logistical support.⁴⁵ Irrespective of the notion of direct government involvement in instigating the clashes, the obvious conclusion is that it conveniently manipulated the clashes to facilitate its success in the 1992 and 1997 elections. By manipulating ethnic overtones, the government managed to apply the historical divide and rule strategy. Ethnicity was raw and the votes were divided along tribal lines.

Having analyzed the strategy that had been employed by KANU in the 1992 and 1997 elections, the opposition parties formed an alliance to remove President Moi from power. Their strategy was to use multi-ethnic cooperation to get into power. The National Rainbow Coalition (NARC), made up of several parties was formed and came into power in 2002. A Memorandum of Understanding (MOU) was signed which sought to allocate the positions of government to the different parties once in power. These allocations were however highly dependent on the ongoing constitutional review process. The coalition reflected a common goal sought by the part of political leaders in NARC and the citizens who exhibited a commendable level of voter decisiveness. The level of ethnic cooperation that came with the NARC euphoria cannot be gainsaid. It suggests that the answer to this paper’s introductory question, whether multi-ethnic harmony is attainable, is in the affirmative. However, as argued in the paper, various processes produce rationalities that make certain practices in society ‘acceptable’. In this particular case, political objectives had made a coalition imperative. Through these political processes, multi-ethnic cooperation was rendered ‘acceptable’. This sums up the thrust of this paper’s argument; ethnic intolerance is a social construction and should not be accepted as an inevitable outcome

41 Human Rights Watch (n 13 above) 9.

42 L Mulli Understanding election clashes in Kenya, 1992 and 1997. Available on <www.iss.co.za> accessed 30 June 2008

43 S Brown (n 13 above) 4.

44 Human Rights Watch (n 13 above) 20.

45 These allegations are outlined in the Republic of Kenya, National Assembly Report of the Parliamentary Select Committee to investigate ethnic clashes in Western and other parts of Kenya, 1992 pp 8-10. See also Human Rights Watch (n 12 above) 37.

of ethnic relations. Instead, strategies to ameliorate ethnic tensions should be sought. The nation should strive to reach the ideals set out in preamble of the Draft Constitution: ‘aware of ethnic, cultural, and religious diversity and determined to live in peace and unity as one indivisible sovereign nation...’⁴⁶ Further, as a national goal the state should seek to promote national unity and develop the commitment of its citizens to the spirit of nation hood and patriotism.⁴⁷

Coalition parties are however, normally a compromise to achieve a mutual objective and do not necessarily imply agreement of issues that existed before. Thus where parties had been formed based on ethnicity a coalition party does not suggest that politics are no longer based on ethnic considerations. Instead, it reflects a compromise between ethnic groups towards a common goal. In effect, the underlying ethnic notions continue to exist and slight misunderstandings may lead to dissolution. Such a result intensifies the ethnic tensions that existed before the coalition and may result in ethnic violence.⁴⁸ NARC in following this trend was short-lived. As the ruling party, it failed to live to the citizens’ expectations. A fundamental campaign policy that was constantly promised by NARC was its commitment to the constitutional review process. The coalition party had been formed on the premise that the Constitution would be reviewed which would essentially provide a power sharing structure between the member parties. As discussed, the political parties had an ethnic base hence in effect power sharing meant incorporating leaders from different regions in the country. However, the government’s commitment to these terms was questioned and the parties’ differences became irreconcilable. Since NARC had been formed on condition that the draft constitution would institutionalize the agreed power allocations to different parties, the collapse of the constitutional reform process marked the end of NARC. Bearing in mind the ‘ethnic base’ of the member parties of NARC, this dissolution led to more divisive ethnic based politics. The incumbent President’s failure to honour NARC’s Memorandum of Understanding fuelled even further existing animosity against his ethnic group, the Kikuyu. Consequently, election campaigns in 2007 revolved around an anti-Kikuyu cause. The rationale for this ethnic motivated politics was that the breaking down of the MOU disregarded the envisaged equitable distribution of power among the ethnic groups. As a result, the 2007 election campaigns were premised upon removing President Kibaki from power to facilitate the rule of a president from a different ethnic background.⁴⁹ This was clearly depicted by the overwhelming victory of the ODM presidential candidate in some regions and especially in the Rift Valley, Nyanza and Western Provinces of Kenya.⁵⁰

46 Preamble, Draft Constitution (2004).

47 Section 13, Draft Constitution (2004).

48 D Horowitz (n2 above) 421.

49 K Korir Kenya: Does Raila Odinga “Hate the Kikuyu Community?” 2006 African Press International. Available from <www.africanpress.wordpress.com>accessed 15 July 2008].

50 Electoral Commission of Kenya. 2007 Presidential Elections Results <www.eck.org.ke> accessed 30 June 2008.

Politicization of ethnicity is made possible by factors that exacerbate asymmetrical inter-ethnic relationships. For instance where certain ethnic groups appear to be advantaged in certain aspects such as economically or politically, this provides a justification for ethnic groupings to struggle for the cause for the aggrieved ethnic groups. In Kenya, for example, the economic dominance of the Kikuyu has been a major point of focus in the politicization of ethnicity as is discussed below.

9.4 Impact of free markets on ethnicity in Kenya

Promotions of free markets and democracy have been prescribed as strategies towards developing the Global South. However, free markets propagate market capitalism which may adversely impact these developing countries if remedial mechanisms are not in place. This section argues that capitalistic policies in Kenya have reinforced the market dominance of the Kikuyu which in turn has exacerbated ethnic conflict in Kenya particularly against the Kikuyu. However, it is not the authors' contention that the market dominance of the Kikuyu is solely as a result of these policies. The authors appreciate the role of other possible factors such as political leverage, cultural factors and in terms of their population. Nevertheless, this paper addresses itself to the impact of free markets in sustaining market dominance and how this may affect ethnic relations. It further argues that increased market dominance by certain ethnic groups on the one hand and the promotion of the democracy on the other hand negatively impacts on ethnic relations.

The term free market is used here to refer to 'an economic system that gives everyone an equal right to transact and to participate in market arrangements'⁵¹ Democracy as used in this paper refers to 'a regime in which rulers are elected through elections and accountability and is enforced by elections'⁵² Therefore, the phrase 'free markets democracy' describes the attempt to have free markets and democracy operating alongside each other in a particular context. Although these may not necessarily be mutually exclusive or incompatible, there exists a tension between their objectives.⁵³ On the one hand free markets facilitate the accumulation of wealth by a few, while democracy on the other hand seeks to empower the deprived majority. Chua argues that in the West this tension is reconciled through redistributive mechanisms that respond to the needs of the lower classes.⁵⁴ Through welfare based services for example, the provision of basic needs for the poor is guaranteed. On the contrary, not only are these redistributive institutions non-existent in developing countries but also the percentage of the poor is much higher in these countries as compared to the West. In effect this translates to

51 R Kass 'Free Markets and Social Justice' (1997) 3

52 A Przeworski et al Democracy, Accountability and Representation (1999) 222.

53 A Chua 'The Paradox of Free Market Democracy: Rethinking Development Policy' (2000) 41 Harvard International Law Journal 287.

54 As above, 287.

a poor majority who can hardly meet their basic needs but who are politically empowered through the ideal of democracy: one- man one-vote.

Introduction of free markets in developing countries thus creates severe tension between the few who accumulate wealth and the poor majority whose conditions remain desperate. This tension takes an ethnic dimension where particular ethnic groups evidently dominate the market. On the other hand establishment of ‘democratic’ institutions promotes awareness of individual rights. The result is that the poor masses are mobilized to access the ‘democratic’ processes to emancipate themselves from poverty and other social restraints. In Kenya, for instance, through civic education, the masses have been educated on their role as voters in choosing their leaders. Thus the voter turn out has escalated over the years; in the 2007 general elections, a high voter turn out of 72% was recorded.⁵⁵ The dilemma lay however on the realization that the supposedly ‘democratic’ institutions do not actually guarantee their intended result hence fuelling violence. In fact, democratic institutions are criticized for creating a mirage of democracy but not delivering the democracy so promised.⁵⁶ These challenges have been blamed on the abrupt democratization as Chua notes:

Sudden, unmediated process of democratization makes the transition to free market democracy particularly volatile and the need for other mediating devices more pressing.⁵⁷

The intended outcome of the free markets and democracy in developing countries is development that ‘would ultimately produce economic, political and social institutions similar to those in the West’.⁵⁸ In essence, the instability caused by factors such as ethnic conflict would be eradicated and third world countries would head towards stability as exhibited in the West. The underpinning ideology in globalization is that markets and democracy would result not only in enhanced cooperation between nations but also individuals within nations that are players within the market. It is argued that enhanced economic growth would facilitate further democracy by meeting the financial demands of establishing requisite institutional framework. The cycle of development is therefore premised on the notion: growth of the markets would make possible the establishment of democratic institutions which would provide the adequate framework to deal with vices such as ethnic conflicts.⁵⁹

This ideal was not met in Kenya and a link can be established between the escalating ethnic violence with the growth of markets. Whereas it is true that ethnic violence cannot be wholly attributed to economic liberalization, it has played a role in sustaining the market dominance of

55 T Weiss ‘The Results of the Kenyan 2007 General Elections’ (2008) 2(2) *Journal of Eastern African Studies* 2.

56 See for example A Chua (n 50 above) 312.

57 As above.

58 BZ Tamanaha ‘The Lessons of Law and Development Studies’ (1995) 89 *The American Journal of International Law* 471.

59 A Chua (n 6 above) 9.

the Kikuyu hence contributing to ethnic envy.⁶⁰ This is because economic liberalization benefits the private sector and hence the Kikuyu who dominate this sector stood to benefit. Although the Kikuyu is the largest ethnic group, it only accounts for 22% of the total population.⁶¹ Together with the closely related Meru and Embu communities the figure adds up to 29%. Whilst they are by no means the majority, the Kikuyu community controls a large proportion of Kenya's economy. Market domination by the Kikuyu must be understood as a product of historical events.

The colonial era in particular played a major role in determining the economic base of the Kikuyu. Colonial settlement in Central Kenya displaced a large number of people from the Kikuyu community. A good number of them were hired by white settlers in the Rift Valley where they settled as squatters and others were later on resettled by the colonial government in that province.⁶² Others had to move into urban areas in search of employment.⁶³ At independence, the redistribution process favoured the squatters who were already settled on the land. Thus some of the Kikuyus who had been squatters in the Rift Valley ended up owning that land through the government redistribution process.⁶⁴ Soon after independence, the government implemented a 'willing- buyer-willing-seller' policy, which saw the formation of land buying companies which enabled citizens to buy off the large scale farms previously owned by the white settlers.⁶⁵ A combination of factors made possible the acquisition of land by the Kikuyu.

Firstly, their attachment with their ancestral home having been weakened by the historical processes, after independence, the Kikuyu continued to buy land in other parts of the country. Secondly, the Kikuyu had traditionally been farmers and hence were interested in obtaining land that was suitable for agriculture. Thirdly the Kikuyu exhibited capitalistic tendencies which saw the formation of land buying companies that enabled them to pull together resources to purchase land.⁶⁶

This historical acquisition of land by the Kikuyu provides a useful axis of analyzing the ethnic conflict issue in Kenya. In the first place, acquisition of land, amongst other factors, played a role in establishing the economic base of the Kikuyu who have now become the market majority. Analyzing the impact of market structures and ethnic relations, Chua contends that free markets lead to the accumulation of wealth by the market dominant groups and tend to benefit

60 A Chua (n 6 above) 107,108.

61 See T Dietz and M Rutten *Kenya and the Tribal Conflict*. (2008) 1; K Kanyinga *Governance Institutions and Inequality* (2008) Society for International Development; CIA *The World Factbook: Kenya* (2008) Available from <www.cia.gov> accessed 20 July 2008.

62 HN Gisemba 'The Lie of the Land' (2008) 2 *Africa Policy Brief* 3.

63 W Oyugi *Politicised Ethnic Conflict in Kenya: A Periodic Phenomenon* (2000) 7.

64 As above, 6-7.

65 HN Gisemba (n 36 above) 2.

66 See Oyugi's historical account of the Kikuyu's land buying companies W Oyugi (n37 above) 7.

the already economically established communities.⁶⁷ Lending support to that contention, the Kikuyu, who already had a solid economic base, benefited from the introduction of a free market economy. In addition to their favourable economic base, cultural values of the Kikuyu community are compatible with demands of capitalism. Therefore it is not only the Kikuyu elite who benefited from the free market policy but also the Kikuyu working class who took advantage of micro-credit financing and engaged in businesses as source of income. At the grass-root level, a large number of Kikuyu locals relocated to different parts of the country to set up small businesses.

The second reason that makes the historical account of the acquisition of land by the Kikuyu relevant relates to the geographical location of the land acquired. Land acquisition in areas that were historically inhabited by other tribes presents a point of confrontation between those other tribes and the Kikuyu. This is especially reflected in the Kikuyu-Kalenjin relations owing to the fact that a large proportion of land acquired by the Kikuyu is in the Rift Valley, the ancestral home of the Kalenjin.

The market domination of the Kikuyu gradually generated resentment from other tribes. The violent ethnic conflicts that occurred in 1992, 1997 and 2007 illuminate the dynamics of the interplay between free markets and democracy. Whilst free markets tend to benefit a minority who dominate the market, democracy on the other hand seeks to empower the majority but who are the market-minority groups. An analysis of the 1992 and 1997 ethnic conflict in Kenya illustrates these dynamics between market dominance and political power.⁶⁸ More specifically, tension arose between the market majority group, the Kikuyu, and the minority group that was in power, the Kalenjin. Using their political power, the Kalenjin sought to reclaim their ancestral land from the Kikuyu. However, the ethnic conflict in 2007 presented different dynamics. At the time, the Kikuyu were not only the market dominant tribe but were also politically powerful. Thus the anti Kikuyu campaign became the focus of the 2007 general elections. The Orange Democratic Movement (ODM) became a platform to oust President Mwai Kibaki from power. This agenda was well illustrated by the 2007 presidential elections results. In Nyanza Province, Western Province and parts of Rift Valley Province, ODM presidential candidate, Prime Minister Raila Odinga had overwhelming success against President Kibaki.⁶⁹

As noted, democracy empowers the majority to have a government of their choice. However, the challenge for democracy in developing countries like Kenya is that state institutions lack the transparency and structures to guarantee democracy. Thus there remains a 'notion of

⁶⁷ A Chua (n 6 above) 9.

⁶⁸ A Chua (n 6 above) 107.

⁶⁹ See the 2007 election results compiled by Electoral Commission of Kenya. Available from www.eck.or.ke accessed 30 June 2008.

democracy' without actual democracy being established. This fact makes general elections highly volatile. When the outcome of the electoral process fails to result in the expectations of the majority, there is a potential for the masses to resort to violence. The situation becomes even more volatile when the institutions that are supposed to guarantee democracy appear incapable of doing so. Thus, the declaration made by the Electoral Commission Chairman that he did not know which presidential candidate won the elections in 2007 confirmed public speculation that the electoral process cannot be relied upon.⁷⁰ Failure of democratic processes aggravates the masses that are ready to do anything to struggle for their rights; in this case their right to democratically elect their government. The consequence of the seemingly flawed electoral process in the 2007 general elections in Kenya was ethnic strife.

It must be noted however, that the existence of a market dominant ethnic group does not in itself lead to ethnic violence. Market dominance presents a point of struggle that can be capitalized on when ethnicity is politicized. In the 2007 general elections the fact that the Kikuyu have dominated the market for many years strengthened the anti-kikuyu campaign. The authors however appreciate the fact that market dominance was not the isolated cause of the politicized ethnicity particularly against the Kikuyu. As discussed in the previous section, the issue of control of the state resources occupies a central place in the politicization of ethnicity. One of the arguments raised during the 2007 election campaigns was that there was inequitable distribution of state resources. Although this paper focuses on the role of economic policies that contributed to market domination of the Kikuyu, it acknowledges that the complex interplay between market domination and the distribution of state resources aggravated the situation. The market domination therefore lent support to the claims of inequitable distribution of state resources and provided an axis for politicizing ethnicity.

The downside to politicized ethnicity is that the repercussions of the generated antipathy become deep rooted and may take many years to address. Indeed, tribal animosity is passed on to future generations making national unity a challenging goal to achieve. However, the intention of engaging in a genealogical analysis was to suggest that the nature of ethnic relations in Kenya is the product of historical processes. The result of these processes has been the perception that having national leaders from a particular ethnic group guarantees the development of a particular ethnic group. This is however a rationality that has been gradually propagated as a 'truth'. By identifying processes through which this rationality has been embraced, this paper challenges this 'truth'. In engaging in a genealogical analysis, the paper sought to illustrate that these perceptions have only been produced as "truths". Without challenging the operating systems of thought, things are only seen as possible through that rationality. To address the

⁷⁰ T Weiss (n 32 above) 1; CNN New Doubts Over Flawed Kenyan Vote (2008).

issue of ethnic conflict, other rationalities have to take pre-eminence. In particular, the role of the government must be seen as equitably share national resources irrespective of the ethnic background of the leader in power. However, as discussed in the last section, these ‘contrasting’ rationalities can only be propagated through deliberate government efforts.

As Kenyatta asserted, albeit in word but not in deed, ‘the Republic is the people of Kenya’.⁷¹ A time must come when all regions in the country must be developed regardless of the ethnic background of the national leaders. Having a president from a particular ethnic group should not be seen as the channel of resources for that particular group. Although it may be necessary to have governments that are representative of the ethnic groups to foster ethnic unity, the access to power by these individuals should not be a prerequisite for balanced regional development.

Chua inspires nation states on a positive note that ‘even in the most severely divided societies, ties of blood do not ineluctably lead to rivers of blood’.⁷² The upshot of that statement and indeed the major discourse in this paper is that ethnic violence is not innocent rather it is calculated and instigated to carry out the objectives of the politics of the day. Appreciating the dynamics of ethnic identity and the potential to politicize ethnicity is national unity an achievable goal? The section below discusses possible strategies to develop national unity.

9.5 Towards national unity: Strategies for promoting ethnic cooperation

At the root of ethnic antipathy is shared apprehension about the future.⁷³ The politicization of ethnicity and animosity against dominant ethnic groups is largely premised on the inherent need to secure the future. Solutions to ethnic conflict must therefore address the collective uncertainty about the future. This article concludes by highlighting strategies to promote national unity. These strategies are by no means sufficient to address the challenge of negative ethnicity in Kenya. It is however suggested that these would play a role in ameliorating ethnic relations in Kenya as Lake and Rothchild aptly assert that:

Managing ethnic conflicts, whether by local elites and government or concerned members of the international community is a continuing process with no end point or final resolution.⁷⁴

The first strategy suggested to promote a sense of national unity is consociationalism. Theories of consociationalism place emphasis on a top bottom approach hence focusing on the role of

⁷¹ J Kenyatta (n 1 above) 255.

⁷² A Chua (n 6 above) 107.

⁷³ DA Lake and D Rothchild ‘Containing Fear: The Origins and Management of Ethnic Conflict’ in M Brown et al *Nationalism and Ethnic Conflict* (2001)126.

⁷⁴ As above, 127.

leaders in containing ethnic conflict.⁷⁵ The relevance of this approach cannot be gainsaid as masses tend to follow key leaders and it is difficult to immediately transform the attitudes of the masses. An immediate response to ethnic conflict therefore requires the involvement of the leaders to influence the conduct of the masses. Consociational regimes seek to guarantee the representation of the different ethnic groups in government and other public offices. Grand coalitions, as already adopted in Kenya, are therefore an instrument of consociationalism. An imminent challenge of grand coalitions is what Horowitz terms as ‘an exchange of incommensurables’.⁷⁶ Grand coalitions are formed on the basis of agreements in which the parties involved benefit from the coalition but also make a compromise on some of their demands. The challenge however lies in the actualization of the gains and losses. Parties are only able to gauge the benefits of their compromise after the coalition is set in motion. Coalitions are unlikely to survive if a party later on realizes the benefits are not what it anticipated. The disintegration of the NARC coalition that was formed in 2002 clearly illustrates this. Moreover a grand coalition that is formed to urgently deal with ongoing violent conflicts may not provide long term solutions. However, they provide a much needed immediate solution.

Principles of consociationalism can and should be incorporated as a long term strategy to facilitate ethnic cooperation. Laws guaranteeing ethnic representation in government and other public offices should be legislated. This paper however emphasizes that consociationalism should only play a symbolic role that would foster national unity. The key to containing ethnic antipathy lies in the distribution of state resources and by embarking on an agenda that guarantees a minimum standard of development in all regions of the country. By challenging the underlying rationality that the needs of members of an ethnic group can only be met if their own is in power, this paper argues that a framework should be put in place for equitable distribution of resources.

Secondly, it is crucial for Kenya to embrace redistributive approaches to ensure that development is achieved with equity. It has been argued in this paper that there is need to allay collective fears of the future. Therefore, it is important to embark on policies that facilitate development across the board as much as possible. Redistribution could be achieved in many ways which include strategic tax regimes, higher resource allocation to underdeveloped areas and adoption of policies aimed to promote ethnic proportionality in economic opportunities. Although it is argued that sometimes cultural factors may affect how different ethnic groups make use of economic opportunities, information should be propagated through local social forums on how best to utilize available resources. Micro-credit institutions and Non Governmental Organizations, for instance promote small scale entrepreneurship. It must be borne in mind

⁷⁵ D Horowitz (n 2 above) 569.

⁷⁶ D Horowitz (n 2 above) 584.

that as long as poverty remains entrenched, politics-related violence remains a threat to peace in Kenya.

The need for deliberate efforts to foster a sense of ‘nationhood’ as a long term strategy is also advocated for. Through identifying processes that have constructed negative ethnicity, the paper sought to emphasize that ethnic relations are social constructions that can be deconstructed. It is however noted that deconstructing negative ethnicity is a challenging endeavor which may only impact future generations. There is need for ‘nation-building’ principles which should be incorporated in as many social forums and institutions as possible. Therefore, institutions such as schools and religious organizations should be harnessed to promote positive ethnicity. The goal of fostering a sense of ‘nationhood’ requires curtailing processes that divide citizens on the basis of diversity. This involves establishing procedures of accountability for people and institutions of influence that propagate positive ethnicity. Therefore not only should political leaders be made accountable for irresponsible utterances that fuel ethnic animosity but the media must also shun explosive commentaries. Vernacular radio stations, for example, must be bound by strict guidelines deterring them from fanning ethnic enmity. The process of rebuilding national unity is extensive and should incorporate diverse strategies. No one strategy can bear the desired effect.

The impact of ethnic violence on community relations cannot be understated. Although this paper highlights the need to deconstruct social constructions on ethnic relations in a bid to address ethnic tension, the immediate needs arising from the previous conflicts cannot be ignored. Moreover, the outcome of processes dealing with the aftermath of the conflicts would impact on the future constructions of ethnic relations. Principles of restorative justice should be incorporated in dealing with the aftermath of the violent ethnic conflicts. The core objective of restorative justice is to bring together people with a stake in a dispute to collectively deal with the harms caused by the wrongdoing. As opposed to focusing on the wrongdoing, restorative justice focuses on addressing the aftermath.⁷⁷ It is a wide concept which includes practices geared towards reconciliation and reparation. By addressing the harms caused, restorative justice has the potential to deal with some of the immediate effects of the ethnic conflict as well as provide a forum for addressing future ethnic relations. Incorporating reconciliation and reparation, the proposed bill for the establishment of a Truth, Justice and Reconciliation Commission envisages restorative justice processes. Although it has been heavily criticized for the amnesty provisions which are in contravention of International law, the proposed processes of reconciliation and reparation are called for in dealing with the impact of the ethnic conflict.⁷⁸

⁷⁷ Indeed restorative justice is not a foreign concept as it guided traditional communities in Kenya. S Kinyanjui *Genealogy of the Criminal Justice System in Kenya* (2007) 1.

⁷⁸ Human Rights Watch Proposed Truth Commission Bill Seriously Flawed (2008).

The suggestion that restorative justice is fundamental to addressing deeply wounded individuals and reconciling the different communities, however, should not be construed as a justification for impunity for those who knowingly committed heinous crimes during the ethnic conflicts.

9.6 Conclusion

The central focus of this paper has been to articulate how politicization of ethnicity and market capitalism play a role in fuelling ethnic conflicts. It has been argued that whilst ethnic diversity in itself does not cause ethnic conflicts, multiethnic communities such as Kenya are faced with the challenge of ensuring ethnic relations are not constructed negatively. Through a genealogical analysis of ethnic relations in Kenya, the article illustrates how colonial and post-colonial political processes played a part in negatively constructing ethnic relations. The paper uses ethnic conflicts involving the Kikuyu as a case study, to highlight pertinent concerns that run across the board. While recognizing that social constructions are difficult to change, it is suggested that embracing of consociationalism and redistributive approaches would gradually counter underlying rationalities that breed ethnic tension. In particular this targets the rationality that relates distribution of national resources to the ethnic background of the national leaders.

The effectiveness of any strategy adopted however is largely dependent on its timeliness. Fostering of national unity must be made a priority before it is too late. Notwithstanding the fact that ethnic violence in Kenya has been on a 'small scale' as compared to some of its African counterparts, such as Somalia, Rwanda, Sudan and the Democratic Republic of Congo, the potential of this violence cannot be overlooked. The success of nation building strategies greatly depends on the timing such that where conflict has already resulted in grave violence the strategies 'sweep only too narrowly.'⁷⁹ Learning from the experiences of countries such as Congo, Rwanda and Burundi that are now attempting a daunting task of being 'nations' again, it is imperative for Kenyans to strive to attain the values of peace, love and unity embodied in the national anthem.

⁷⁹ D Horowitz (n 2 above) 683.

10. CITIZENSHIP AND MINORITIES IN KENYA

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Abstract

The law on citizenship in Kenya is ambiguous and discriminatory both in content and in the manner in which it is implemented. In particular, its impact on minority communities is problematic when considered through the prism of contemporary human rights law. Case studies from the Nubian and Somali communities expose the incapacity and reluctance on the part of the State to meet its domestic legal obligations. Moreover, these examples amplify the dearth of clear institutional arrangements to regulate the entire domain of citizenship at the national level, with serious human rights implications.

10.1 Introduction

There is no universally accepted definition of minorities, partly due to the diverse contexts within which minorities exist globally.² In Kenya, minorities have been described variously as ethnic, religious, gender or other disparate groupings that experience disempowerment and discrimination owing to their social, political and economic positioning within Kenya's social strata.³ This paper makes the case that minorities in Kenya have certain characteristics which, when applied against the legal requirements of citizenship bear negatively on their access to citizenship. These factors are migration and perceptions of indigeneity, contiguity with national

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² See MN Shaw 'The Definition of Minorities in International Law' in Y Dinstein & M Tabory (eds.) *The Protection Of Minorities and Human Rights* (1992) 1. Shaw opines:
While a precise definition may serve to minimize controversy by drawing the bounds in a clear fashion, thus fitting the relevant rights to undeniable claimants, on the other hand, controversy may not be easily avoided in view of the range and extent of the diverse groups that exist across the globe distinguished by factors that are often confused, complicated and contradictory. It thus makes it virtually impossible to list all the minorities that exist;

See also, UN Human Rights Committee, General Comment No 23, para 5.2:

The existence of a... minority in a given state party does not depend upon a decision by the state party, but requires to be established by objective criteria." States are therefore required, to establish objective standards for the determination of existence or otherwise of minorities within its borders Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N.Doc. HRI/GEN/1/Rev.1 at 38 (1994) at <<http://www1.umn.edu/humanrts/gencomm/hrcom23.htm>> (accessed 22 June 2008).

³ Article 306 of the Draft Constitution, Bomas Constitutional Conference, defined marginalised groups as:

- i. A group who, as a result of laws and practices before or after the effective date, were or are disadvantaged by unfair discrimination on one or more prohibited grounds;
- ii. A community which by reason of its relatively small population or otherwise, has been unable to assimilate and has remained outside the integrated social and economic life of Kenya as a whole;
- iii. A traditional community which, out of the need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of the Republic as a whole;
- iv. An indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy;
- v. Pastoral persons or communities, whether they are – nomadic; or a settled community which, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of the Republic as a whole. The Kenyan government normally refers to indigenous and minority groups jointly as 'minorities', 'marginalized' or 'vulnerable communities'. See e.g., 'Report of The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen-Mission to Kenya' A/HRC/4/32/Add.3, 6 (available online at <http://www.daccessdds.un.org/doc/UNDOC/GEN/G07/110/43/PRF?>> (accessed 22 June 2008).

frontiers, gender and political positioning. The first two factors are discussed in some detail while the last two being cross cutting, will appear in the broader analyses.

10.2 Understanding citizenship

One of the conditions for statehood is the existence of a permanent population.⁴ This permanent population would ordinarily constitute citizens of that state. Under the social contractarian theory of the state, John Hobbes posits that state sovereignty is a function of delegated power reposed in the state by individuals in exchange for protection.⁵ Citizenship can therefore be understood as the umbilical cord that links the state and an individual, establishing a reciprocal link of rights and obligations.⁶

While a state is obliged to extend human rights protection not just to its citizens but all persons within its territory, including non-nationals, and to treat them in a non discriminatory manner, reserved for citizens.⁷ Moreover, in Africa,⁸ and Kenya in particular,⁹ rights are in practise only available to citizens, which places a high premium on the importance of having a secure and

- 4 Art 1 of the Montevideo Convention on the Rights and Duties of States, an Inter American covenant of 1933, available at <http://www.yale.edu/law-web/avalon/intdip/interam/intam03.htm>> (accessed 24 April 2008) restates customary international law requirements of constitutive statehood thus: The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.
- 5 J. Hobbes, *Leviathan, or the Matter of, Form, and Power of a Commonwealth, Ecclesiastical and Civil* (1651) available online at http://www.earlymoderntexts.com/f_hobbes.html> (accessed 24 April 2007).
- 6 *Luria v U.S.*, 231 U.S. 9 (1913). The United States Supreme Court in this case defined citizenship as the “right to have rights”. While this position is correct in terms of public international law, human rights law extends rights to persons by virtue of their being human. Both nationals and non nationals are beneficiaries without distinction, of human rights save for some very limited rights. See generally, D Weissbrodt and C Collins ‘The Human Rights of Stateless Persons’, 28 *Human Rights Quarterly* (2006) 245.
- 7 For a precise exposition of this issue see e.g., Office of the United Nations High Commissioner for Human Rights *The Rights of Non Citizens* (2006) available online at http://www.ohchr.org/english/about/publications/docs/non_citizens_en.pdf> (accessed 24 November 2007). See also D Weissbrodt, (n 6 above).
- 8 S Adejumobi, ‘Citizenship, Rights and the Problem of Conflicts and Civil Wars in Africa’, 3 *Human Rights Quarterly* (2001) 148 (for the proposition that identity conflicts in Africa result in part from the bifurcation of citizenship from an individual right enjoyed within a state to a group concept used as an instrument of exclusion). See also A Konneh, ‘Citizenship at the Margins: Status, Ambiguity, and the Mandingo of Liberia’ 39, 2 *African Studies Review* (Sep., 1996) 141-154. The author argues that the ‘Mandingo have stood at the margins of citizenship-always taken to be “something more” than the other indigenous groups of Liberia but “something less” than the full citizens the Settlers consider themselves to be.’ The Mandingo were the specific target for decimation by Charles Taylor’s troops. South Africa, where non citizens have rights including social economic rights, is one of the few exceptions to the citizen and non citizen dichotomy in access to human rights. See e.g., *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC). The Constitutional Court of South Africa found that a non-citizen under the age of 18 is entitled to social economic rights in the Bill of Rights. See also *Patel v Minister of Home Affairs* 2000 (2) SA 343 (D) (for the proposition that aliens have the same rights under the constitution that citizens have, unless the contrary emerges from the constitution).
- 9 Sec 70 of Kenya’s constitution provides in part thus:
Whereas every person (emphasis mine) in Kenya is entitled to the fundamental rights and freedoms of the individual: that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
(a) life, liberty, security of the person and the protection of the law;
(b) freedom of conscience, of expression and of assembly and association; and
(c) protection for the privacy of his home and other property and from deprivation of property without compensation.
See Kenya Constitution, Revised edition 2000 at <http://www.lawafrica.com/constitution/index.asp>> (accessed June 15, 2008). In reality, the rights contained in the Chapter V of the Constitution of Kenya are undermined by innumerable provisos and exclusions as well as specific legislation. See e.g., HWO. Okoth-Ogendo ‘The Politics of Constitutional Change in Kenya Since Independence, 1963-69’ 71 *African Affairs* (1972) 9 at <http://links.jstor.org/sici?sici=0001> (accessed 15 June 2008).

unimpeachable citizenship.¹⁰ It is further arguable that considering the African reality, the rights reserved for citizens, which are largely political rights, are the most crucial, since political decision making is the crucible that informs access to all other rights, be they economic, social or cultural.¹¹

By interrogating the normative and procedural content of citizenship law in Kenya and its implications to minorities, this paper assesses the extent to which the State is congealing into an inclusive polity free of discrimination. The first part of the paper considers the state of citizenship law while the second applies the law and human rights standards to the lived reality of two minority communities, the Nubians and Kenyan Somalis. Conclusions and policy options constitute the third part of the paper.

10.3 Acquisition and loss of citizenship in Kenya

Citizenship in Kenya is governed largely by the Constitution,¹² the Citizenship Act¹³ and the Registration of Persons Act.¹⁴ Other parliamentary enactments that are implicated include the Children's Act,¹⁵ and the Aliens Act,¹⁶ among others.

Under the Constitution, citizenship in Kenya is acquired in three ways: by operation of law, hence *ex lege*, by registration and by naturalization. We shall discuss each of these grounds for acquisition of citizenship in turn.

¹⁰ See S Benhabib, *The Rights Of Others: Aliens, Residents And Citizens*, (2004) 3. The author argues that: The right to political membership must be accommodated by practices that are non discriminatory in scope, transparent in formulation and execution, and justiceable when violated by states and other state-like organs.

¹¹ See High Court (Nairobi) Misc. Civil Application No. 305 of 2004, *Rangal Lemaiguran and Others (on behalf of the Ilchamus community in Kenya) v Attorney General of the Republic of Kenya and Others* (Hereinafter, the Ilchamus Community Case). While not directly dealing with the issue of citizenship, the court in this case held that minorities had a right to be represented in the legislature (political right reserved only for citizens) without which their '... right to influence the formulation and implementation of public policy...' [would be imperilled] " para. 76. See also MO Makoolo 'Kenya: Minorities Indigenous Peoples and Ethnic Diversity' (2005) (where the author inter alia shows the correlation between belonging to certain ethnic groups and access to public sector economic and social resources in Kenya).

¹² Constitution of the Republic of Kenya, n 9 above. Citizenship is located in its own distinct Chapter VI of the Constitution of Kenya. This reveals clear intent on part of the framers of the constitution to distinguish it from fundamental human rights which are found in Chapter V. Textually therefore, it may be said that citizenship provisions may not be subjected to the mediation of the Bill of Rights provisions.

¹³ Chapter 170 Laws of Kenya, enacted in 1967 available online at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 15 June 2008).

¹⁴ Chapter 107 Laws of Kenya, at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed June 15, 2008).

¹⁵ The Kenya Children's Act, 2001 in particular, borrowing from article 8 of the Convention on the Rights of the Child (CRC) incorporates the right of every child to a nationality in section 11 of the Act. The Act is available online at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 15 June 2008). The language of the Act is however weaker than that of article 8 of the CRC which provides for right of a child to identity. Under the Act the obligation of the government of Kenya is limited to provision of "appropriate assistance and protection with a view to establishing his (sic) identity". In the absence of clear framework for ensuring the scope of this appropriate assistance, the provision sounds perfunctory.

¹⁶ Aliens Restriction Act, Cap 173 [Kenya]. No. 5 of 1973, 18 May 1973, available online in UNHCR Refworld at <http://www.unhcr.org/refworld/docid/3ae6b4e438.html> (accessed 26 June 2008). (This is an emergency legislation empowering relevant Minister to impose restriction on aliens including expulsion from the country. No due process clause exists in the Act).

10.3.1 Citizenship by operation of law

Citizenship by operation of law is based on a constitutional proclamation without any accompanying autonomous act on the part of its beneficiaries. Sections 87 and 89 of the Constitution provides for citizenship *ex lege* for the following categories of persons:

- i. All persons born in Kenya before the date of attainment of independence (December 12th, 1963) with citizenship connection with the United Kingdom and colonies or who were British protected person, of parents one of whom must have been born in Kenya;
- ii. Every person born outside Kenya before the date of independence, whose father becomes a citizen by virtue of being a British citizen or a British protected person and one of whose parents was born in Kenya; and
- iii. All persons born in Kenya after the date of independence, one of whose parents is a citizen.

The first group establishes a very onerous chain to access citizenship relying both on the *jus soli* principle (being born in Kenya) and *jus sanguinis* (being connected with a person of a particular parentage, in this case, British citizenship or a recipient of British protection). Citizenship by operation of law targeted children of second generation British settlers in Kenya, whose British citizenship by virtue of the British Nationality Act, 1948 would also be based upon descent.¹⁷

The underlying premise here was that Kenyan citizenship would be predicated not just on the fact of being born in the country, but also on the demonstration of substantial connection, namely, that at least one parent was also born in Kenya. Two questions arise in relation to this category of acquisition of citizenship; first, how does an individual prove that one of their parents was born in Kenya? Second, who in exact terms meets the rubric of 'British protected persons' in the Kenyan context?

In response to the first question, registration of births in Kenya remains inadequate at the present.¹⁸ To imagine that the pre-1963 period would yield better records to prove that an applicant's parent was born in Kenya, would be to invite an impossibility. This is especially so with reference to the African population then ensconced within native reservations. The second question presents even more challenges and its ambiguity is perhaps responsible for some of the interpretive challenges in relation to citizenship as shall become clear later in this paper.

¹⁷ Section 1 British Nationality Act, 1948 available online at <http://www.uniset.ca/naty/BNA1948.htm> (accessed 24 May 2008).

¹⁸ See e.g., L Barasa, 'Row on ID cards tender rages', in Daily Nation, 7 February 2006, available at <http://www.nationmedia.com/dailynation/> or Gitonga Muriuki, 'Demands by officers to see ID cards illegal', in: Daily Nation 2/6/2006, available at <http://www.nationmedia.com/dailynation/> (accessed 24 June 2008).

According to section 32(1) of the British Nationality Act (1948), a British protected person is:

[A] person who is a member of a class of persons declared by Order in Council made in relation to any protectorate, protected state, mandated territory or trust territory to be for the purposes of this Act British protected persons (BPP) by virtue of their connection with that protectorate, state or territory.

A textual reading of the British Nationality Act appears to suggest that legislative intervention is required to facilitate the qualification of a member of a class of persons as BPP, in the absence of which their BPP status will not arise. It is submitted that African populations in British colonies, including in Kenya, fell outside the rubric of British protected persons and were in fact a *sui generis* grouping that were not *per se* entitled to British protection.¹⁹ This view is contrary to that Ojwang,²⁰ but comports with both the interpretation of the British Nationality Act and the reality on the ground. Within this construct, the non status of African populations within colonies would then mean that their status was only defined by the Independence Act, which for the case of Kenya are the constitutional provisions interrogated in this paper.

The second beneficiaries of citizenship by operation of law were persons born outside the country before Independence Day, whose fathers would satisfy the demanding criteria of the foregoing section. This provision de-emphasises the place of birth, implying that it is the *jus sanguinis* principle that holds sway. But even then, the second emphasis here is that it is the paternal connection with Kenya that is relevant for acquisition of citizenship under article 89(2). This is the basis for the assertion that Kenya's nationality laws are paternalistic and discriminatory of women as other sections in this discussion will further reinforce.²¹

Probably, the broadest beneficiaries of citizenship by the operation of law are persons born in Kenya post independence in 1963, '...one of whose parents *is a citizen of Kenya*.'²² Strict construction of the provisions of article 89 suggests though that a person born in Kenya after independence can only be a citizen by the *operation of law* if at least one of their parents has an *active* as opposed to a mere *dormant* Kenyan citizenship. In other words, a parent must already have Kenyan citizenship before having the capacity to transmit it to their child. But then, this invites the question as to how Kenyan citizenship is asserted.

19 It would, be impossible to reconcile treatment of the British colonial government of Africans if at all they had any status analogous to citizenship or were entitled to British protection. For an appraisal of violations of rights of Kenyan groups during the emergency period between 1952 and 1954. See e.g. WO Maloba, *Mau Mau and Kenya: An Analysis of Peasant Revolt* (1998).

20 JB Ojwang, *Constitutional Development in Kenya* (1997) 201. (He avers that British protected persons included African populations in the Kenya colony).

21 See A Chesoni, 'Ethnic Chauvinism, Xenophobia and Gender Inequality in Kenya' in Society for International Development (eds.) *Readings on Inequality in Kenya* (2007) 225. (Author asserts quite strongly that by virtue of article 90 and 91 of the constitution, one is a Kenyan by virtue of their father, emphasizing the discriminatory intent and effect of these constitutional provisions).

22 The affirmative part of article 89 of the Constitution provides thus:

Every person: born in Kenya after 11th December 1963 shall become a citizen of Kenya if at the date of his birth one of his parents is a citizen of Kenya.

The Registration of Persons Act is procedural law which provides a framework for the mandatory registration of Kenyan citizens and their issuance with identity cards.²³ It does not purport, either through the registration process or through the issuance of an identity card to confer Kenyan citizenship. The registration process merely confirms that a registration officer has been persuaded that an applicant has provided documentary and oral evidence required for the issuance of an identity card.²⁴ A register containing the applicant's full name, sex, declared tribe²⁵ or race, date and place of birth, occupation or profession, place of residence as well as applicant's postal address and finger and thumb impressions if any, is required to be kept with the Registrar of Persons.²⁶ It is certain therefore that an identity card that issues out of the process of registration is not a certificate of citizenship as such.

Thus at the point of registration under chapter 107 of Kenyan law giving effect to the provision of article 89 of the Constitution, it appears that Kenyan citizenship is capable of assertion by a person with a range of documentation including but not limited to a birth certificate, an identity card and a passport, as well as similar documentation from one's parents. In practise however, the most important criteria is usually membership of a given ethnic community, as well as the geographical location of the community *vis-à-vis* the centre of the State; hence the challenges faced by minorities in relation to access to citizenship. We shall explicate on this particular dimension in the second section of this paper with respect to both the Nubians and Somali communities.

10.3.2 Citizenship by registration

The substantive law on citizenship by registration is found in the Constitution while procedural law is established under the Citizenship Act.²⁷ The Constitution creates two categories of people who can access citizenship by registration: those with connection to Kenya at independence and those with post independence connection. In relation to the latter category, the provisions of section 92 (2) as read together with section 90,²⁸ seem to be both contradictory and discriminatory of women, but will not form part of the discussion within this paper, save to buttress the assertion already alluded to that Kenya's nationality laws and practise are

23 Registration of Persons Act (Chapter 107) Laws of Kenya, Article 1, available online http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 15 June 2008).

24 Such evidence may include birth certificate, school documents, religious documents and parents' identity cards and birth certificates. See Ministry of Immigration and Registration of Persons 'Information Bulletin', available online at <http://www.Identity.go.ke/index.php> (accessed 15 June 2008).

25 It is not clear what the relevance of tribal affiliation of applicant is to the determination of citizenship. However, this goes to support the idea that in fact Kenyan citizenship in practise is availed on tribal and not necessarily individual basis. See part III below.

26 (n13 above) Art. 5 (1).

27 n12 above.

28 A woman who pursues citizenship under secs 90 or 92(2) will secure citizenship by registration, the nature and character of which is diametrically different from that of her Kenyan husband.

paternalistic. On the other hand, section 88 makes provision for the first category obliging them to pursue registration *within a period of two years after the date of independence*.²⁹ This group is made up of the following individuals:

- i. A person born in Kenya before the date of independence who was a British citizen or a British protected person;³⁰
- ii. A woman married to a would be Kenyan citizen before date of independence;³¹
- iii. A citizen of the United Kingdom who was lawfully resident in Kenya at the time of independence³²

This transitional provision, it appears, was intended to ensure smooth state succession and facilitate access to nationality. Unfortunately, while this provision may have been quite clear with respect to other races, notably the whites and Asians, some of whom took up the offer to be registered as citizens, most African populations in Kenya at independence, considered themselves Kenyan citizens by operation of law, and did not take advantage of this registration window. As would become evident in relation to the Nubian community and others in Kenya, the State did in fact expect them to procure citizenship by registration.³³ However, with this temporal window foreclosed, no mechanism was established to ensure that registration by these categories of persons could still be pursued.³⁴ As a result, a number of groups fell through the cracks of citizenship law, and remain outside it to the present. Moreover, most African populations did not consider seeking citizenship by registration or naturalization since such citizenship was revocable:

The Minister may, by order published in the Kenyan Gazette and after such procedure as may be prescribed by or under an Act of Parliament, deprive of his citizenship of Kenya any person who is a citizen by registration or naturalization.³⁵

Persons of African descent aged at least 21 years who have ordinarily resided in Kenya for 5 years would, under section 2 of the Citizenship Act, be also entitled to citizenship by registration if they demonstrated knowledge of Swahili or English, capacity to be suitable citizens, are of good conduct and upon renunciation of any other nationality to which they may be entitled. This section is remarkable for its lack of clarity as to the meanings of such terms as ‘*of African descent*’, ‘*good conduct*’ or ‘*suitable citizenship*’ which makes it difficult, in precise terms, to determine the actual beneficiaries of this provision. This provision of Kenyan citizenship law

²⁹ (n 8 above) sec 88(6) (1) establishes the time within which applications for registration for specified category of persons was permissible. We note the short time provided for the transition from British rule to the Independence government.

³⁰ (n 8 above) sec 88(1).

³¹ (n 8 above) sec 88(2).

³² (n 8 above) sec 88(4).

³³ See part 2 below.

³⁴ While the Minister responsible for citizenship issues was empowered under sec 16(2)(b) of the Citizenship Act, (n 12 above) to extend time for registration upon application to him by an individual, there is no evidence that any time extension was ever made pursuant to this provision.

³⁵ (n 8 above) sec 94. No specific procedures have been established by legislation to guide ministerial exercise of this discretion, either in the Citizenship Act or Registration Act, opening the window for possible arbitrary application of this authority.

paves the way for problematic administrative discretion in the ultimate determination of who is entitled to Kenyan citizenship. It would also seem to provide a racial basis for acquisitions of citizenship by registration through the introduction of the ‘African descend’ qualification. While such a requirement may have been justifiable during the immediate post-independence period as a means for empowering Africans to access citizenship, its continued existence not only falls foul of the human rights norm of non discrimination but also fails to serve any rational purpose within a democratic state.

Generally, of the problematic hallmarks of the Citizenship Act is the fact that the law gives the Minister responsible for citizenship sweeping powers:

The Minister shall not be required to assign any reason for the grant or refusal of any application under this Act and the decision of the Minister on such application shall not be subject to appeal or review in any court.³⁶

By ousting the jurisdiction of the court from reviewing ministerial decisions with respect to refusal of registration, the legislation deprives an aggrieved party of due process, including the fair hearing imperatives set out in the Kenyan constitution.³⁷ This provision, which entrenches administrative arbitrariness in the grant or deprivation of citizenship, is also a serious infraction of Kenya’s obligations under international human rights law,³⁸ and is a threat to rule of law and transparency in governance.³⁹

10.3.3 Citizenship by naturalization

Article 93 of the Constitution entitles a person aged 21 who has resided in Kenya for an aggregate period of four years within a seven year period to citizenship by naturalization. Such an applicant must also show that they are of *good character*, have *adequate knowledge* of Swahili and intend to continue residing in the country.⁴⁰ A certificate of naturalization is issued to a successful applicant by the Minister.⁴¹ The same criticism with respect citizenship by registration, namely the imprecise nature of the formal requirements also obtains for citizenship by naturalization.⁴²

³⁶ (n 12 above) sec 9.

³⁷ (n 8 above) sec 77 should broadly be understood to be equivalent to the V Amendment due process clause of the Constitution of the United States.

³⁸ Art 15 (2) of the Universal Declaration, a document that has acquired the character of a jus cogens norm provides that: “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), U.N. Doc. A/810, art. 15 (1948), reprinted in 43 American Journal of International Law (Supp. 1949) 127.

³⁹ See e.g., Benhabib (n 9 above) 139-140:

The right to membership entails a right to know on the part of a foreigner who is seeking membership: how can the conditions of naturalization be fulfilled? The answer to this question must be made publicly available to all, transparent in its formulations, and not subject to bureaucratic capriciousness.

⁴⁰ (n 6 above) sec 93 paras d, e, & f.

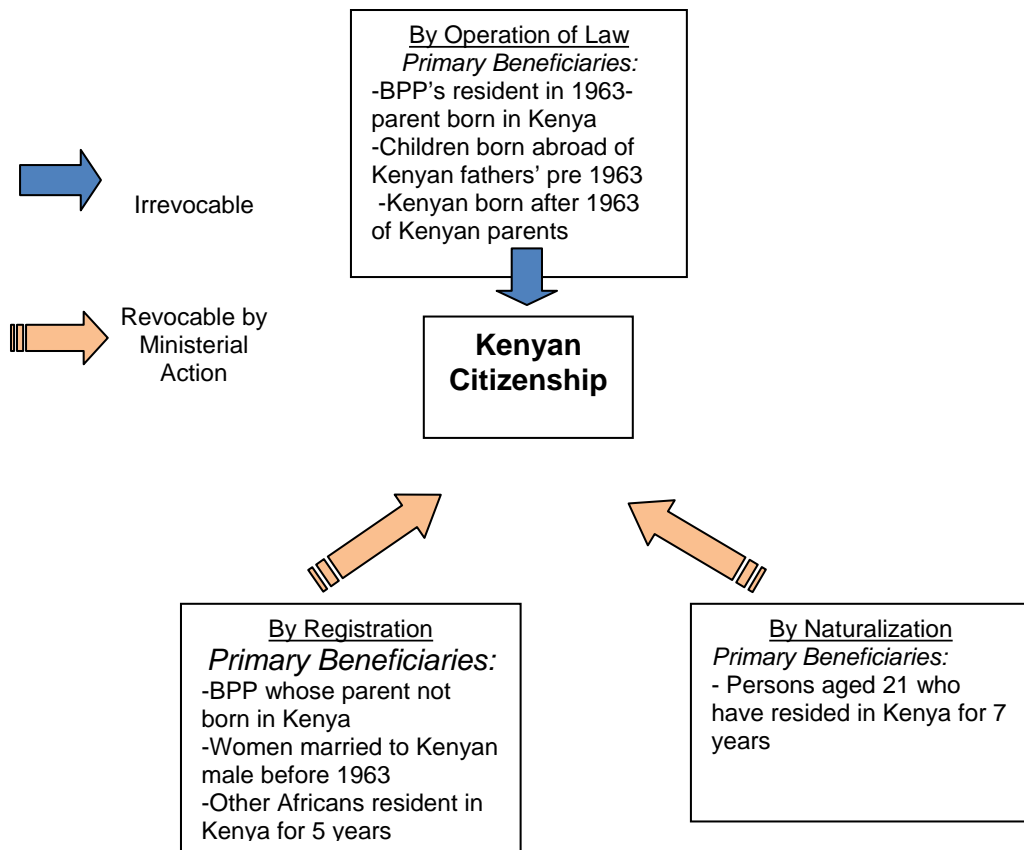
⁴¹ n 39 above. See also 2nd schedule to the Citizenship Act, (n 10 above).

⁴² Benhabib, (n 9 above) 142.

While citizens by naturalization and registration both enjoy similar benefits⁴³ and suffer the same disability- that they can be revoked without due process by a minister- the rules for naturalization appear less stringent, yet the law provides no clear rationale for this distinction.

The complex routes for acquisition of citizenship in Kenya assessed in this part of the paper are synthesized in the figure below.

Figure 1 Routes to Kenyan Citizenship



⁴³ No distinction is drawn in the bill of rights between the various citizenship categories. In theory therefore, one enjoys all the rights set out in the bill of rights so long as they are citizens.

10.4 Minorities and citizenship

10.4.1 Migration and perceptions of indigeneity

Kenya is a composite of 42 ethnic communities,⁴⁴ divided into three broad linguistic groupings; the Nilotes, Cushites and the more populous Bantu.⁴⁵ Kenya's migration history reveals that all these linguistic groups reached modern Kenyan territory sometimes at the turn of the 17th Century.⁴⁶ Kenya, the present territory that straddles 1 00 N, 38 00 E coordinates, and measuring 582,650 sq km was in fact finally consolidated as a territory in 1926, when an entire province in Uganda was annexed to Kenya by the British.⁴⁷ Accordingly, some communities that occupied the Rudolf province of Uganda-stretching all the way to the present Nakuru district-were once governed within Ugandan territory.

We make the above point to illustrate the extent of population flux that obtained in the consolidation of present Kenya, so that a citizenship regime that seems to elevate the position of some ethnic groups as being indigenous to the country, without clear temporal parameters fails to be fair.

We also make this point because, while citizenship law in Kenya does not require membership of any ethnic or linguistic grouping, in practise however, ethnic consideration determines the process by which an individual becomes entitled to identity documents and does play into whether one will be a citizen by the operation of law or whether they will procure the more inferior citizenship by registration or naturalization.⁴⁸ Since one is expected to reveal tribal affiliation in the application for registration preceding issuance of an identity card, a registration officer on the basis of this revelation, would require of an applicant from certain minority groupings supporting documents that go beyond those required of other applicants. This differential treatment cannot be justified in law and can only be rationalised on the basis of the proposition we have suggested here, namely that *indigeneity is the silent consideration in determining status*. As would be illustrated by the following case, communities which have resided in the country for nearly two centuries are still considered to be non indigenes for purposes of their citizenship status is unsupportable.

44 Makoloo (n 10 above) 8. However, the constitution review process in Kenya exposed the complex range of identities that were subsumed under the main 42 communities, concealing the hideous nature of identity politics in the country.

45 See DL Payne, 'Language Families', available online at <<http://www.uoregon.edu/dlpayne.htm>> (accessed 115 June 2008).

46 See generally, AB Ogot, A History of the Western Luo 1500-1900 (1967) 1.

47 See VB Thomson, 'The Phenomenon of Shifting Frontiers: The Kenya- Somali Case in the Horn of Africa, 1800s-1970s', 30 Journal of Asian & African Affairs (1995) 1-40.

48 Ethnicity and identity in Africa has been considered a significant factor in denying or enabling admission to citizenship. See Adejomubi, (n 5 above).

10.4.2 The Nubian case study

When the ancestors of present generation Nubians entered Kenya in late 1800s, Kibera their largest settlement in the country, was a forest and the Kenyan state was emerging from the bowels of its colonial construction.⁴⁹ Deployed in the service of the British crown during the war and inter war periods, the Nubians were bequeathed Kibera as a settlement.⁵⁰ Numbering about 100,000, members of the Nubian Community have since then lived in Kenya and know no other home.⁵¹ Even though the Nuba Mountains is their cradle,⁵² this mere fact cannot be the justification for their exclusion from access to citizenship, particularly if they satisfy constitutional and legal requirements.

The Nubians, while a distinct African community, stand out for not being recognized as a specific ethnic group in governmental processes in Kenya, including national census, the primary statistical instrument for national planning and development. Instead, they are clustered together with immigrant groups under the rubric of “Other Kenyans”.⁵³ In seeking identity documentation, Nubians experience three major challenges, among others. First, their applications for birth certificates, national identity cards or passports are often arbitrarily rejected, and no reason assigned for this refusal.⁵⁴ Second, the documentary proof imposed on them is, more often than not, too onerous as to render them unable to satisfy the requirements, and effectively shutting them from accessing these documents.⁵⁵ Lastly, they experience long

49 The Kenya Colony ‘Carter Land Commission Report’ (1933) 171.

50 See Makoloo (n 10 above) 23.

51 For a more extensive exposition of human rights issues relating to the Nubians in Kenya see KA Sing’Oei & HA. Adam ‘Covert Racism: An Audit of Kibera Clashes and The Manipulation Of Citizenship’ available online at <<http://www.cemiride.info/documents>> (accessed 26 June 2008).

52 (n 50 above) 12.

53 See e.g., J Mbaria, “Meet the Nubians, Kenya’s Fifth Generation Foreigners”, *The East African*, July 15 2002, available at <<http://www.nationaudio.com/News/EastAfrican/22072002/Features/Magazine2.html>> accessed 26 June 2008); See also, RJ Ayugi-Masinde, ‘Africa Citizenship and Discrimination Audit’ (2005) 76, available at <http://www.justiceinitiative.org/activities/ec/ec_africacitizenship> (accessed 15 June 2008). While ethnic communities generally do not enjoy juridical status in Kenya, more recent decisions of the court suggest a changing trend. See *Ilchamus Community Case*, (n 9 above) para 25 (Preliminary objection by state challenging standing of community to pursue human rights under the bill of rights of the Constitution on the grounds that the rights are individualistic was rejected. The court has subsequently retroceded this ground).

54 See KA Sing’oei et al, (n 47 above) 19:

Hawa was born in Nairobi (Kibera) in 1954. Her parents were born in the same place though her grandparents moved from Kibigori in Kisumu to Nairobi. Her daughter, Halima Ibrahim, born in 1978 and in 1999 was required to get hold of her grandfather’s Birth Certificate in order to qualify for issuance of an Identity Card. In addition, Halima, who was never lucky to see her grandfather, does not know exactly where to get this very precious document. Because of lack of the document, Halima has lost several job openings, chances that certainly she will never ever land in life.

55 Adam Muhammed, for example, was asked to produce his grandfather’s, mother’s, and father’s Identity Cards when he applied for a passport. Adam Muhammed believes he was asked to produce these documents because of being a Nubian. His non Nubian friends obtained their passports in two days by producing their Identity Cards without more. According to Khaltuma Ismail Omar, people from other tribes get IDs and birth certificates very easily, “but for Nubians it’s different”. See Adam Muhammed’s Sworn Statement with author at para 7 and Khaltuma Ismail Omar’s sworn statement with author at para 12.

delays and uncertainty in the processing of their applications.⁵⁶

In 2003, the Nubians sought the intervention of the Kenyan High Court, alleging discrimination in the application of the provisions of the Constitution and the enabling legislation relative to citizenship.⁵⁷ Responding to the action, the Kenyan State raised three issues: that the Nubians were foreigners who had never renounced their Sudanese citizenship; that they had been negligent in not pursuing citizenship by registration and lastly that their claim was deficient on the grounds of *laches*.⁵⁸ Further, the High Court, in total disregard of principles of class action,⁵⁹ saddled upon the Nubians the added burden of documenting all the members self identifying as Nubians in order to satisfy the courts that the community was not a phantom.⁶⁰

While the international principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation) constitutes one of the basic procedural and evidentiary bases for legal contestation, it needs to be applied to serve the ends of justice. In a case, such as that of citizenship in Kenya, where conduct of government agents are often covertly implemented leaving no documentary proof of their decisions, the need to shift the burden of proof to the state should be considered.

The requirement that Nubians procure affidavit evidence to prove their identity is also premised on the failure by the judiciary to fully appropriate the concept of indirect discrimination as we will show below. What is clear is that the State's treatment of the Nubians is deliberate and systematic. It is largely based on the notion that the community is non indigenous to the country, a clear derogation from the specific legal demands of citizenship outlined in this paper. Moreover, to require the community to register as citizens is to compel them to acquiesce to an inferior citizenship.

- ⁵⁶ Whilst Khaltuma's daughter got a birth certificate four years after applying for it, it took her Luo friend less than a week to get her birth certificate. Jafar Ahmed Musa, for example applied for a passport on 6th October 1999 but was only successful in January 2004, well over five years later. Mohammed Ramadhan applied for a passport in 2000 but only got it in 2005. This is notwithstanding the fact that he was in possession of his birth certificate, school leaving certificate and parents' birth certificates. He was told to produce a sworn testimony of a Nubian man older than his father to fortify his application. See Khaltuma's Sworn Statement, Id at para14; Jaffar A. Musa's sworn statement with author at paras 4, 11 and Adam Muhammed's Sworn Statement with author at para 7. See also See Mugo Njeru quoting an official of the Immigration Department in his article "Kenya Unveils Tough Rules on Permits", in: the Daily Nation, March 22 2005 (where he confirms that for non Nubians, Identity card is processed within thirty days of application.
- ⁵⁷ Nairobi High Court Civil Application No.256/2003, Yunus Ali and Others (On behalf of the Nubian Community) v Attorney General of the Republic of Kenya and Other. (Entire pleadings relating to this case are with author).
- ⁵⁸ n 56 above. See Affidavit of the Principal Registrar of Persons, Joyce Wanjiru Mugo, in support of government's refusal to grant registration documents to members of the Nubian community at paras 12, 13 and 17.
- ⁵⁹ The representative nature of a class action procedure represents an exception to the general rule that one cannot be bound to a judgment rendered in a proceeding wherein one was not joined as a party. *Hansberry v Lee*, 311 U.S. 32, 61 S.Ct 115, 85 L.Ed.2d 22 (1940).
- ⁶⁰ See African Commission on Human and Peoples' Rights Communication 317/2006, Institute for Human Rights and Development in Africa, Open Society Justice Initiative and Center for Minority Rights Development (On Behalf of the Nubian Community in Kenya), Affidavit of Verification of Korir Sing'Oei Abraham on the Procedural History of the Nubian Case (copy with author).

10.4.3 Human rights impact of denial of citizenship rights of Nubians

The human rights violations resulting from the denial of full citizenship rights to the Nubians are numerous.⁶¹ We shall briefly discuss two contested rights the violation of which is uncontroverted.

First, the deprivation of property rights over Kibera is the most obvious consequence of the arbitrary manipulation of Nubian's citizenship status. It has resulted in forced evictions, and the encroachment and settlement of other communities in Kibera leading to *slumization* of Nubian land.⁶² All these processes have taken place with the tacit approval of the state and without the consent of or consultation with the Nubians, and constitute a violation of their right to property under international human rights law.⁶³

Although both nationals and non nationals may own land in Kenya, the Kibera land is part of "unalienated government land", which makes it State land, the alienation of which is discretionary upon the executive branch of government.⁶⁴ That a community whose citizenship status is in question should be a beneficiary of State owned land at the expense of other more indigené groups, would raise a huge political storm.⁶⁵ Nubian claim to Kibera may also be sustained on the basis of long duration of occupation⁶⁶ and colonial government's licenses,⁶⁷

61 In addition to property rights and discrimination, other rights implicated in the Nubian case include, freedom of movement, infringement of the right to political participation, denial of economic, social and cultural rights, including right to education of Nubian children, right to clean and healthy environment, and right to dignity among others. In a word, Nubians have been denied of an opportunity to pursue "the project of life" in terms used by the Inter American Court of Human Rights with reference to right to life. See e.g., T Melish, 'The Inter American Court of Human Rights: Beyond Progressivity' in M. Langford (eds) *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (2008) 302. See also, East African Standard, "Lack of ID Cost Me Two Jobs and Study Chances" (October 9, 2006) available online at <<http://www.eastandard.html>> (accessed 24 June 2008).

62 See generally, B Mutsoo & S Kinyanjui, 'Ticking Time Bomb: Nairobi's Informal Settlements' (2002). See also, Kenya Land Alliance, 'The National Land Policy in Kenya: Addressing Historical Injustices' Issues Paper No. 2/2004 (2004).

63 (n 8 above) sec 75 provides that no property shall be compulsorily taken unless certain conditions are fulfilled and adequate compensation paid. The Universal Declaration of Human Rights (Article 17), Protocol No. 1 of the European Convention of Human Rights and the American Convention on Human Rights (Article 21) similarly protect property rights. See also, *Martin v. Nicaragua*, Inter-American Commission on Human Rights, Report No. 12/94, case no. 10.770, 1994, at para 13.: "[T]he right to own property can be regarded as inalienable right; no State, group or person must undertake or conduct activities to suppress the... right to own property".

64 See generally, Government Lands Act, Cap 301 Laws of Kenya. Art. 2 of the Act provides that government lands are vested in the president, who, inter alia, has powers to make grants or dispositions of estates, interests or rights in or over unalienated government lands. It has been argued that: as population pressure has increased, there has been a tendency to alienate more and more government land for settlement. See BD Ogola, 'Land Tenure Systems' in C Juma & JB Ojwang, *In Land We Trust* (1996) 96.

65 Kibera is less than 10 miles from downtown Nairobi, and the value of land in this area is extremely high. The salience of land related grievances in Kenya cannot be understated. The post electoral violence confirmed this. See e.g., Country Review Report of the Republic of Kenya, African Peer Review Mechanism, 70 (2006) retrieved online at <http://www.aprmkenya.org/downloads/kenyareport.pdf>> See also C McGreal, "Who's to blame? It Depends Where You Begin the Story" *The Guardian* (February 7 2008) retrieved at <<http://www.guardian.co.uk/print.html>> (accessed 24 June 2008).

66 'Carter Land Commission Report' (n 47 above) 171. The Commission unequivocally called for the reservation of Kibera for the Nubians: The legal position of the occupants of Kibera appears to be that they are tenants at will of the Crown and the tenancy is liable to termination by the Commissioner of Lands. On the other hand we cannot agree that they have no rights in equity. We consider that Government had a clear duty to these ex-askaris (soldiers) either to repatriate them or to find accommodation for them... In our judgment they ought not to be moved without receiving suitable land elsewhere and compensation for disturbance, and we consider that a similar obligation exists in respect of their widows, sons who are already householders at Kibera.

67 As a response, colonial licenses in favour of Nubians were issued, but these did not amount to secure tenure. n 47 above. The temporary occupation license (TOL) is granted by the Commissioner of Lands for a short period and for specific use. See UN HABITAT, 'Kenya Slum Upgrading Programme: Situation Analysis of Informal Settlements in Kisumu' (2005) 62. The fact that Nubians have retained occupation in Kibera under TOL should further be sufficient acquiescence on the part of the state giving rise to freehold tenure.

t can also be argued that their claim to this specific land has solidified on the grounds of longstanding cultural and spiritual connection to Kibera, as their eviction from which would result in the destruction of the community's survival as a group.⁶⁸ Overall it should be apparent that insecure land tenure plays out to the greater disadvantage of minority groups, particularly when their nationality is in question.

The link between secure property rights and the enjoyment of meaningful life has been propounded.⁶⁹ General Assembly Resolution 45/98 (14 December 1990) specifically recommended protection for 'personal property, including the residence of one's self and family'.⁷⁰ The right to property can also be used to protect certain aspects of the right to housing and the right to land.⁷¹ The African Commission on Human and Peoples Rights has held that land can constitute property for the purposes of Article 14 of the Charter.⁷² The Commission has also held that the right to property includes the right to have access to one's property and not to have one's property invaded or encroached upon.⁷³ The Commission has further recognised that "owners have the right to undisturbed possession, use and control of their property however they deem fit."⁷⁴

According to Luis Valencia Rodriguez, an independent expert designated by the UN Commission on Human Rights:

The individual incorporated in a State needs a property sphere that is strongly protected in legal terms so that he can live among his fellow citizens as an individual, i.e., freely and bearing responsibility for himself and does not become a mere pawn of excessively powerful State authority. It is generally recognised that a State has the right to enforce such laws as it deems necessary to control the use of property in accordance with the general interests... It is important that these regulatory powers of the State should not result in seizure of property without compensation and in "arbitrary" and "illegal" seizure.⁷⁵

While international human rights law permits states to interfere with property rights, such intrusion will only be countenanced if defined by law to be proportional to the purposes intended

68 See e.g., *Saramaka v Suriname*, Judgement, Inter American Court for Human Rights (IACtHR), (Series C) No.172 (November 28, 2007), available online at <http://www.corteidh.or.cr/casos.cfm> (accessed June 22 2008). The IACtHR found that descendants of the Saramaka ex-slaves could claim land rights on the basis of cultural connectedness to territory they have occupied since the 1700s. See paras 108-110.

69 F Martin, SJ Schnably & RC Slye (eds), *International Human Rights Law & Practise: Cases Treaties and Materials* (1997) 866 (for the proposition that Property ownership gives individuals the independence and resources to develop in such a way as to render their participation in public life more meaningful).

70 General Assembly Resolution 45/98, 14 December 1990, para 3(a), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/564/87/IMG/NR056487.pdf?OpenElement> (accessed 28 June 2008).

71 T Melish, (n 59 above) 320.

72 *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 & 196/97 and 210/98 (2000), para. 128

73 African Commission, Comm. Nos. 140/94, 141/94, 145/95 (1999), Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, at para 54.

74 African Commission, Comm. No. 225/98 (2000), *Huri-Laws v. Nigeria*, at para 52.

75 Economic and Social Council, E/CN.4/1993/15, pp. 35 and 85, cited in F Martin (n 69 above) 899.

and in the public interest.⁷⁶

Second, the denial of citizenship in favour of Nubians violates the non discrimination prohibition both directly and indirectly. Direct discrimination consists of measures adopted by a state that intentionally disadvantage an individual or group on the basis of a prohibited ground, such as race or nationality. Indirect discrimination occurs when a seemingly neutral provision or practice disproportionately impacts a particular group without objective and reasonable justification.⁷⁷ Both types of discrimination are forbidden, not only by the African Commission on Human and Peoples' Rights,⁷⁸ but also by the Inter-American Court,⁷⁹ the Inter-American Commission,⁸⁰ the Human Rights Committee,⁸¹ the Committee on the Elimination of Racial Discrimination,⁸² and the European Court of Human Rights.⁸³

10.5 Minorities, national borders and citizenship

Laremont⁸⁴ argues that the borders of African states were fixed by European colonialists during a narrow window of time, essentially from 1878 to 1914. These boundaries were ratified by

⁷⁶ See African Commission, Comm. Nos. 105/93, 128/94, 130/94, 152/96, Constitutional Rights Project, Civil Liberties Organization and Media Rights agenda v. Nigeria, at para 69:
The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.

⁷⁷ See, e.g., D.H. and Others v. the Czech Republic, Application no. 5735/00, Eur. Ct. H.R. (13 November 2007) para 184; see also European Union 'Council Directive Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin' 2000/43, Art 2(2):
[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

⁷⁸ See African Commission, Comm. No. 211/98 (2001), Legal Resources Foundation v. Zambia, at para 70 (interpreting Articles 2 and 3 of the African Charter on Human Rights as requiring "the purpose or effect of any limitation. . . be examined") (emphasis added).

⁷⁹ See The Yean and Bosico Children v. Dominican Republic, Judgment, Inter-Am Ct. H.R., (Ser. C) No. 130, (Sept. 8, 2005), para 141 (holding that "the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that . . . States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of the population when exercising their rights").

⁸⁰ See William Andrews v. United States, Case 11.139, Inter-Am. C.H.R., Report N 57/96, OEA, Ser.L/V/II.95, doc. 7 rev. at 570 (1997), para 173 (interpreting Article II of the American Declaration as requiring that "application of the law should be equal for all without discrimination") (emphasis added). Article II reads "All persons are equal before the law and have rights and duties established in this declaration."

⁸¹ See UN Human Rights Committee, General Comment no. 18, Non-discrimination, U.N. Doc. CCPR/C/37 (2000), para 7 (defining discrimination under Articles 2 and 26 of the ICCPR as:
[A]ny distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

⁸² See U.N. Committee on the Elimination of Racial Discrimination, General Recommendation 14: Definition of Discrimination (Art. 1, par. 1), UN Doc. A/48/18 at 114 (1994), para 2 (explaining that in determining whether action "has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin") (emphasis added).

⁸³ See D.H. and Others v. the Czech Republic, Application no. 5735/00, Eur. Ct. H.R. (13 November 2007) para 175 (holding that "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group . . ."). Article 14 of the European Convention on Human Rights states that:
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
The principle of equal protection and nondiscrimination is also embodied in Protocol 12 of the Convention, Article 1 of which affirms that:
The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁸⁴ RR Laremont (eds) *Borders, Nationalism and the African State* (2005) 2.

Africa's political leadership at independence and reinforced more recently.⁸⁵ However, due to the incoherent nature of these borders, community groups across the continent have been separated and divided between several countries, a fact which on its own is a governance challenge on the continent.⁸⁶

It is the policy of the Kenyan government that due to the porous nature of national borders, all contiguous communities, before being granted identity documents should be subjected to a verification process, known as 'vetting'.⁸⁷ While this practise may have a justifiable basis, especially given the security implications of unchecked border crossings, it affects minorities disproportionately because most of these communities-Somali, Borana, Turkana, Pokot-also straddle the national frontiers.⁸⁸ Further, this directive is not applied equally across all transboundary communities. Instead, politically mainstreamed border communities, who invariably are more populous, such as the Luo (Uganda/Tanzania border), Maasai (Tanzania border), and Luhya (Uganda border), are exempted from any vetting process, nor are they required to produce extra documentation to sustain their claim to citizenship. In effect, the differential vetting of border communities is nothing but a political device used to ensure that more marginal communities are further excluded from the polity.

The other problem associated with vetting is its lack of transparency and its proneness to administrative excesses and abuse. While a Vetting Committee, which theoretically exists in every district, is charged with the responsibility of assessing documentary proof of ones citizenship claim, the membership of these Committees and their rules of procedure, if at all, remain shrouded in secrecy. The exact mandate of the National Vetting Committee and its rules of procedure also remain unknown to most Kenyans.⁸⁹

It is clear that border minorities have an onerous burden to prove that they are citizens, while a positive presumption allows other individuals living within Kenyan borders access to citizenship without so much as proof of their parent's identity. The worst form of vetting has been experienced by the Kenyan Somali community in the late 80s and early 90s.

85 The doctrine of *uti possidetis* in para 7 of Preamble to the Charter of Organization of African Unity and Art 4(b) of the Constitutive Act of the African Union confirm the sacrosanct nature of national frontiers as established by colonial powers. See also Case Concerning the Territorial Dispute (Libya v Chad), 1994 I.C.J. 6 (Feb.3) (where the International Court of Justice relied on the doctrine of *uti possidetis* to resolve dispute over Auzou Strip between the two countries).

86 (n 80 above) 15. See also, Dr. Kenneth Kaunda 'Democratization, Development and the Challenges of Africa', Address at Cornell University (May 5, 2003), available online at http://www.einaudi.cornell.edu/Africa/programs/pdf/speaker_sp02.pdf (accessed 22 June 22, 2008).

87 See Ministry of State for Immigration and Registration of Persons National Registration Bureau Department, 'FAQs Sheet' available online at <http://www.identity.go.ke/faqs.html> (accessed on June 15 2008). The full contours of this policy have not been elaborated exposing it to manipulation, disproportionate application and arbitrariness.

88 See e.g., Refugees International, "Kenya: National Registration Processes Leave Minorities on the Edge of Statelessness", (May 23, 2008) available online at <http://www.refugeesinternational.org/content/article/detail/10647/> (accessed 15 June 2008).

89 See generally, EO Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective', International Journal on Refugee Law (March 2007).

10.5.1 The Somali case study

At the turn of Kenya's independence, the Somali community, in the northern frontier district had waged a sustained war of irredentism, during which they sought *enosis* with the greater Somali State.⁹⁰ The firm and brutal force used to suppress the rebellion, as the Kenyan State framed their quest for self determination, led to deaths, destruction and displacement, and deepened poverty.⁹¹ The worst result of this conflict was that the Somali, as a community was considered to have questionable loyalty vis-à-vis the Kenyan State, a fact that thrust them into a geopolitical conundrum from which they have never recovered. Their citizenship challenge and the human rights violations meted against the community must therefore be considered from this context.⁹²

Unlike the Nubians, whose applications for identity documents are subjected to rejection at an individual level, it would seem that the Somali experience takes on a more collective dimension, perhaps, a function of the poisoned geopolitical relationship between Kenya and Somalia, especially in the 60s and 70s.⁹³ The event that most illustrates this assertion is perhaps the group denationalization and expulsions of 1989.

During this period, responding to increased conflicts in Northern Kenya as a result of the proliferation of illegal firearms,⁹⁴ the government required the Somali in northern Kenya to undergo a process of verification to ascertain whether the identity documents in their possession had been procured *bonafides*.⁹⁵ Upon this verification, they were to be issued with a Pink Card, which was demonstrative of one's compliance with the particular State Directive. Those who did not procure the pink card were deported to Somali, without due process.⁹⁶

90 J Drysdale 'The Somali Dispute', 64 *Journal of African Affairs* (January 1965) 55.

91 See A Abdi, "Residents want government to address atrocities committed in north-eastern Kenya", *East African Standard* (March 22, 2008) available online at <http://www.eastandard.html>. (Citing *East African Alternatives*, Sept/October 1999), the article points out that the population of camels, the true barometer of wellbeing in the region, decreased from 750,000 in 1964 to 178,000 in 1968).

92 Nairobi High Court Civil Suit No. 215 of 2005 Salah Abdi Sheikh and others (suing on their own behalf and on behalf of families of victims and survivors of the Wagalla massacre through Truth Be Told Network) v Attorney General and Anor. (unpublished pleadings with author) (The Application seeks to indict the state for mass killings perpetrated by the Kenyan military forces in 1984 against the Wagalla Somali killing well over 1000 people and disappearing hundreds of them. The state has failed to produce any evidence in the case and has strenuously sought the dismissal of the cause of action on grounds of laches and other technicalities). See also Jibril Adan, "Kenya: State sued over 1984 massacre in northeast also Africa" in *East African Standard* (8 May 2007) available online at <http://www.eastandard.html> (accessed 20 June 2008).

93 See, HKB Robb, 'Post-Independence Low Intensity Conflict in Kenya' (United States Marine Corps, Washington DC, 1992) <http://www.globalsecurity.org/military/library/report/1992/BHK.htm> (assessed 19 June 2008). See also KG ADAR., *Kenya Foreign Policy Attitudes Towards Somalia 1963-1983 (1997)* 17.

94 P Goldsmith, 'Rationalization of Conflicts in Northern Kenya' (2005) 56.

95 The justification for the screening of the Kenyan Somalis was contained in a government directive which stated thus:

The Government is to register all Kenyan Somalis and expel those found to have sympathy with Somalia. The Government cannot tolerate citizens who pretend to be patriotic to Kenya while they involve themselves in anti-Kenya activities. The Government has therefore found it necessary to register Kenyans of Somali ethnic group to make them easily identifiable by our security forces.

96 See generally, F Maalim, 'Kenyan Somalis - A Case of Institutionalised Discrimination' (1994) (unpublished copy with author).

It is instructive that the State sought to legitimise its action on the basis of the provisions of section 8 of the Registration of Persons Act (RPA) to carry forward this calumnious design:

In accordance with section 8 of the Registration of Persons Act, the Principal Registrar requires all persons of the Somali ethnic Community resident in Kenya who are of eighteen (18) years and above to attend before registration officers at the centres specified in the second column of the schedule and furnish such documentary or other evidence of the truth of their registration between 13 November, 1989 and 4 December, 1989.⁹⁷

Section 8 merely empowers a Registration Officer to require any person registered under the Act to furnish such documentary or other evidence of the truth of the information given by that person. The Directive by the Principal Registration Officer appears on the face of it to be *ultra-vires* the authority granted vide article 8 of the RPA to the extent that no part thereof can be read to permit the subjecting of an entire community to a verification process. Without clear language, it is no wonder that all those who appeared before the Committee were required to show cause why their previous registration should not be cancelled.

The screening exercise, which was in effect a mass verification process designed to flush out aliens or those owing allegiance to a third state, was carried out through the use of vetting committees composed of politically selected elders and members of the Provincial Administration and Civil Service. Those who satisfied the committee were issued with a pink registration card that bore their names, family, sub-clan, clan and tribe.⁹⁸ Invalidation and seizure of pre-existing documents was the fate of those who were not successful.⁹⁹ It is also on this basis that a number of them were deported to Somalia on the pretext that since they were ethnic Somalis, then they would naturally be more connected to that country.¹⁰⁰

The arbitrary seizure of identity documents belonging to many Somali is a complex confluence of clan based politics,¹⁰¹ religious discrimination¹⁰² and the politicization of access to citizenship

97 Government of Kenya, Kenya Gazette, Legal Notice No.5320 (November 10, 1989).

98 Pink Identity Card of Safia Abdi, now Nominated Member of Parliament, issued November 29, 1989 (copy with author).

99 Report of The Special Rapporteur, (n 41 above) 16.

100 Even if justifiable (which it was not) this action violated the principle that stateless persons should not be involuntarily repatriated to the countries of origin of their ancestors. See 'Prevention of Discrimination, the Rights of Non-Citizens, Report of Special Rapporteur, Mr. David Weissbrodt', U.N ESCOR, Comm'n on Hum.Rts., 55th Session, Agenda item 5 para 15, U.N Doc. E/CN.4/Sub.2/2002/25/Add.1 (2002).

101 The Galjeel, a specific clan of the Somali in Tana River District, were one of the targets of this purge. See e.g., A Mazrui, 'Banditry and Politics of Citizenship', (1999) 15.

102 As Moslems, the denationalization of the Somali in Kenya has often been interpreted within the broader context of discrimination targeted at Moslems generally. In the post 911 period, this distinction is becoming the more salient. See e.g., Daily Nation, "Kenya; Uproar As MPs Allege Bias Against Muslims" (November 17,2006) available online at <http://www.nationmedia.com/dailynation/nmgnews.asp?category>> (accessed 22 June 2008). In response, a tacit admission of state culpability, President Kibaki appointed a Special Action Committee on October 16,2007 to:

1.Receive individual complaints of alleged harassment and/or discrimination in the treatment of persons who profess the Islamic faith with regard to security operations; 2 Ascertain whether there is merit in a complaint and thereafter to act on the complaint appropriately, which may include channelling it to the responsible department of Government for action; 3.Inquire into allegations of wrongful or illegal denial of entry into or exit out of Kenya by Kenyan citizens who profess the Islamic faith; 4. Take immediate action to solve problems encountered by Muslims; and 5. Oversee, co-ordinate, monitor and follow up specific action on identified problem cases.

See, Presidential Press Services, "A special committee appointed to address Muslims' issues", available online at <http://www.kbc.co.ke/story.asp?ID=45789>> (accessed 22 June 2008).

n Kenya.¹⁰³ Ultimately it represents the most egregious infraction of the right to identity, especially of the children involved.¹⁰⁴

10.5.2 Human rights implications in the Kenyan Somali's case

While the Nubian and Kenyan Somali may have experienced suffering arising from the deprivation or manipulation of their right to citizenship,¹⁰⁵ their core experiences vary in quite some fundamental respects. In the implementation of vetting requirements, whatever these may be, it would seem that the Somali community experienced an enhanced form of targeted group exclusion.¹⁰⁶ The fact that a specific administrative order pursuant to the Registration of Persons Act was purportedly used to legitimize the vetting exposes a systematic and institutionalised form of discrimination which goes beyond the more subaltern form pursued in relation to the Nubian community. Further, the specific experience of deportation from Kenya's territory on the part of the Somali seems to suggest that as far as the State was concerned the deportees were aliens. This fact raises serious human rights concerns, which are assessed below.

It has been held even with regard to migrant workers that their deportation involves the potential termination of an individual's substantive rights, including those relating to nationality, residence, liberty and family, to name but a few,¹⁰⁷ and should therefore only be undertaken

¹⁰³ Cases of the politicization of access to citizenship or arbitrary deprivation of thereof are on the increase in the country. In 1992, Ahmed Balala, a fiery coastal politician who sought to establish an Islamic party, was declared a non citizen while on a trip abroad and was denied the right to return to the country. Similarly, in 2007, a journalist, known for satirical political commentary, Swaleh Mdoe, had his citizenship revoked, and his employment with KTN terminated. See Nairobi High Court Civil Application No. 79/2006 Swaleh Mdoe v Republic (judgement pending). See also, John Mwau v Republic [1985] KLR 748 (on the proposition that a Kenyan passport was the property of the state, and there was no obligation on it to issue it to a Kenyan national). Cf *Singh v. Passport*, (1967) 3 S.C.R. at 524 where the Indian Supreme Court held:

The want of a passport in effect prevents a person leaving India. Whether we look at it as a facility given to a person to travel abroad or as a request to a foreign country to give the holder diplomatic protection, it cannot be denied that the Indian government by refusing a permit to a person residing in India, completely prevents him from travelling abroad. If a person living in India, whether he is a citizen or not, has a right to travel abroad, the Government by withholding the passport can deprive him of his right.

See further, Kenya High Court Election Petition No. 15/08 Mohammed Muhumed Sirat v Al Hassan Abdirahman (wherein the citizenship status of a Petitioner in 2007 elections in Wajir South constituency is being contested); J Kadida & N Cheploen, "AG Reply Sought Over Deportation", Daily Nation (June 24, 2008) at <http://www.nationmedia.com/dailynation/nmgcontententry.asp> > (accessed 24 June 2008).

¹⁰⁴ See e.g., D Hodgson, 'The Legal Protection of the Child's Right to Legal Identity and the Problem of Statelessness', 7 *International Journal for Law & Family* (2005) 255,265 (assessing the scope of the right to identity in the Convention on the Rights of the Child).

¹⁰⁵ Both communities have been subject of state neglect in ensuring social economic rights such as education, health, access to water, among others. See generally, Society for International Development (SID) 'Pulling Apart: Facts and Figures on Inequality in Kenya' (2004) (on the proposition that wellbeing in Kenya is geographic).

¹⁰⁶ See generally, M Mamdani, *When Citizens Become Killers: Colonialism, Nativism and the Genocide in Rwanda* (2001) (for the proposition that genocide is a process that starts with the disembowlement of a group's identity, so that violence directed at them would essentially be seen to be targeting foreigners not neighbours).

¹⁰⁷ The Special Rapporteur on Migrants in the Inter American Commission points out that

A decision on the legal status of a migrant worker [affects] his chances of making a living, working under decent conditions, feeding his family and providing an education for his children. It will also affect his right to raise a family and the special protection extended to minors within a family. In some cases, personal liberty may be affected for the duration of the proceedings. Consequently, the value at issue in [exclusion or expulsion] proceedings is similar to liberty, or at least closer to liberty than would be the case in other administrative or judicial proceedings.

Thus, at the very least, [a] minimum threshold of complete due process guarantees should be provided.

Inter American Commission on Human Rights, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, at ¶ 98 (emphasis added). Report is available online at <http://www.cidh.org/annualrep/2000eng/chap.6.htm> > (accessed 22 June 2008). The

after rigorous due process standards have been met. In the Somali case, evidence suggests that the deportation targeted all those who could not procure Pink Cards, and would thus amount to collective expulsion. The standard for determining whether a collective expulsion exist does not turn strictly on numbers of those expelled but rather on whether the decision to expel is based on “group considerations”.¹⁰⁸ One approach to determining whether “group considerations” exist is to look for a pattern where the State has expelled individuals based on membership to a particular group rather than on particular characteristics resulting from a review of the merits of each case.

Such is the approach taken by the International Law Commission (ILC), which has indicated that “collective expulsion” exists in the absence of a procedure to identify distinct and specific reasons for expulsion in each individual case:

[T]he expulsion of even a relatively small number of aliens may violate the prohibition of collective expulsion if the expulsion of each alien is not considered on an individual case-by-case basis. The collective character of the expulsion of a group of aliens as such is the essential element of the prohibition of collective expulsion.¹⁰⁹

The ILC’s analysis emphasizes the “collective character” of the expulsion which “does not take into account the consequences of the presence, the grounds and other factors affecting the expulsion, the procedural requirements for the expulsion or the rules relating to the implementation of the expulsion decision with respect to a single one of these aliens.”¹¹⁰

The African Commission on Human and Peoples Rights has also dealt with the question of collective expulsion of perceived aliens in *Malawi African Association and Others v. Mauritania*.¹¹¹ The communication involved the expulsion by Mauritania of almost 50,000 black Mauritians to Senegal and Mali in April 1989, followed by the seizure of their property. The government claimed that those expelled were Senegalese, while many of them were bearers of Mauritanian identity cards, which were torn up by the authorities when they were arrested or expelled.¹¹² While the African Charter has no specific provision dealing with

African Commission in *John K. Modise v. Botswana*, African Commission on Human and Peoples’ Rights, Comm. No. 97/93 (2000) at para 90 equally held that:

Deportation or expulsion has serious implications on other fundamental rights of the victim, and in some instances, the relatives.

108 (n 106 above) Second Progress Report para 97(5) where the Special Rapporteur on Migrant Workers observed:

[T]here is no magic number separating individual from collective expulsions. We believe that expulsion becomes collective when the decision to expel is not based on individual cases but on group considerations, even if the group in question is not large. It would go against common sense to think that a state could sidestep the prohibition on collectively expelling a large number of persons in a single act by simply expelling a few dozen people at a time until the same large number has been reached relatively quickly. The conclusion is that states must judge each case of expulsion or deportation individually.

109 International Law Commission, ‘Expulsion of Aliens, Memorandum by the Secretariat’ para 985, U.N. Doc. A/CN.4/565 (August 2006) available online at http://untreaty.un.org/ilc/summaries/9_12.htm (accessed 22 June 2008).

110 (n 108 above) para 990.

111 *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples’ Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000), available online at <http://www1.umn.edu/humanrts/africa/comcases/54-91.html> (accessed 15 June 2008).

112 (n 110 above) para 13.

unlawful deportation, the African Commission found violation of articles 12 (1) on “freedom of movement and right of residency within the borders of the state...”, and article 14 on property thus:

Evicting Black Mauritians from their houses and depriving them of their Mauritanian citizenship constitutes a violation of article 12(1)... The confiscation and looting of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed in article 14.¹¹³

Emphasizing the discriminatory nature of the conduct of the Mauritanian State and making reference to the United Nations Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities,¹¹⁴ the Commission asserted:

[F]or a country to subject its own indigenes to discriminatory treatment only because of the colour of their skin is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letter of its article 2.¹¹⁵

Other regional bodies have reached similar conclusions. The European Court of Human Rights (ECtHR)) has for instance determined that a major element of a collective expulsion is a lack of due process for each individual member of a group that has been expelled. In interpreting article 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms,¹¹⁶ the European Court of Human Rights found:

[T]hat collective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (...). That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion order plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4.¹¹⁷

The point made by the foregoing analysis is that even if the Somali were an alien group in Kenya (which they are not), international human rights standards, require the process of expulsion to be transparent, rigorous, exhaustive and unmotivated by discrimination, in view of its ramification on the human rights situation of individuals and groups. Moreover, it would seem that the war on terror has reopened further possibilities for deportations of Kenya Somalis

¹¹³ (n 110 above) paras 126 & 128.

¹¹⁴ Article 1.1 of UN Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities, adopted by the General Assembly of the United Nations in resolution 47/135 (18 December 1992) stipulates:

States shall protect the existence and national or ethnic, cultural, religious or linguistic identity of the minorities within their respective territories and shall stimulate the establishment of conditions conducive to the promotion of such identity.

¹¹⁵ (n 107 above) para 131.

¹¹⁶ Article 4 of protocol No. 4 of the European Convention of Human Rights (European Convention) which prohibits the collective expulsion of immigrants.

¹¹⁷ *Conka v. Belgium*, Judgment of 5 February 2002, para 61S.

to third countries for interrogation,¹¹⁸ warranting more vigilance in this regard.

10.6 Conclusion

This paper has briefly analysed the content of citizenship law in Kenya and exposed its inarticulacy and incoherence. Held against the human rights standards with which the Kenyan state is obliged to comply, the veneer of legitimacy of such laws fall away. The relevance of the current citizenship regime further collapses in view of its negative impact on the human rights of minority groups and women.

The Nubian case has clearly brought to the fore the nature of discrimination, both direct and indirect, visited on a community through the agency of outmoded citizenship law. In the case of the Somali, the broader question of perceived allegiance to another state has dovetailed with the problem of contiguity to expose the flagrant administrative abuse of access to citizenship. The egregious character of collective deportation of the Somali, the salience of which has re-emerged, catapults the community's citizenship issue to the confluence with statelessness, and implicates customary international law prohibitions. In both the Nubian and Kenyan Somali cases, 'judicialization' of citizenship claims has not yielded substantive remedy to the extent that the Kenyan judiciary has failed to interrogate the complex political context within which citizenship based discrimination is played out.

The author has sought to also show that international law and human rights law more specifically indict arbitrariness and discrimination in the dispensation of citizenship.¹¹⁹ Unfortunately, international law has also prevaricated to the extent that it has failed to generate substantive normative content with which to cloth the right to nationality. In the circumstances, one still sees state sovereignty as the *sine qua non* in the determination of the balancing point to access citizenship.¹²⁰

118 18 Kenyan Muslims were, in 2008, allegedly renditioned out of Kenya to Somalia, Ethiopia and Guantanamo Bay in Cuba to be tortured and tried, with the Kenyan state denying that the 18 were Kenyan citizens. See e.g., The East African, "Kenya: Prisoners Transferred Without Court Hearings" (March 27, 2007) at <http://www.nationaudio.com/News/EastAfrican/22072002/Features/Magazine2.html> accessed 26 June 2008); A Amram, "Kenyan president's bid to woo Muslim voters troubled", Sunday Standard (November 11, 2007) available online at <http://www.eastandard.html> (both accessed June 22, 2008). The process of rendition has been recently equated to enforced disappearances. See e.g., 'Report of the Five Mandate Holders on the Situation of Detainees at Guantanamo Bay' E/CM.4/2006/120 para 55.

119 See R Donner, *The Regulation of Nationality in International Law* (1994) 195. See also Convention on the Reduction of Statelessness, art 9: "[a] Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds."

120 See e.g., Y Zilbershats, *The Human Rights to Citizenship* (2001).

10.7 Recommendations

Weissbrodt counsels that the problems of statelessness, which are similar to those of citizenship outlined in this paper, may be addressed in three ways: “pre-emptive remedies, minimization remedies and naturalization remedies”.¹²¹ To these means, we propose a fourth, namely comprehensive law reform to bring Kenya’s citizenship regime under one framework that meets international human rights standards some of which have been elaborated in this paper.

In terms of pre-emptive remedies, the Kenyan State should take action that would foreclose the possibilities of discrimination in access to citizenship. One such action is to secure universal civil registration for all children born in the country. Were Nubian children registered at birth, their citizenship status would have been a lot easier to determine even though the issuance of a birth certificate in Kenya comes with a disclaimer that such a certificate does not constitute a grant of citizenship. Such measure would also comport with the requirements of article 7 (2) of the Convention on the Rights of the Child.¹²²

Minimization remedies should likewise be pursued by issuance of documentation to persons of long residence whose nationality may still be the subject of official inquiry. Considering that documentation is required for the procurement of any commercial transaction in the country, it would be helpful to secure to all persons basic documentation to enable them access their basic necessities of life. The Aliens Registration Act for instance, should be scaled up to ensure that it provides a measure of protection to non nationals and others whose status is still pending. This will be in line with the proposal in article 27 of the 1954 Convention Relating to the Status of Stateless Persons.¹²³

Naturalizing remedies include the elaboration of specific legislation to repair the citizenship denied to Nubians and Kenyan Somali. In this regard, Parliament should enact a special legislation for the speedy access of nationality by the Nubian and Somali communities, setting out clear parameters for these communities, especially their children, to obtain their right to nationality. Such measures would by no means be unique since other states have taken similar steps to remedy past deprivations of the right to nationality.¹²⁴

121 Weissbrodt et al, (n 5 above) 271.

122 See JE. Doek, ‘The CRC and the Right to Acquire and Preserve Nationality’, 25 *Refugee Survey Quarterly* (2006) 27. He argues with regard to article 7 (2) of the CRC that: “The Key to an effective implementation of the right to acquire a nationality is that the child should be registered at birth.”

123 1954 Convention Relating to the Status of Stateless Persons, adopted 28 July 1951, G.A Res. 429 (V), 360 U.N.T.S 117 (entered into force 6 June 1960).

124 BBC Worldwide Monitoring, “Sri Lanka Grants Citizenship to More than 168,000 Tamils” (October 7, 2003) cited in Weissbrodt, (n 6 above) 272. See also, E Poulson, ‘The Citizenship Status of the Urdu Speakers/ Biharis in Bangladesh’, 25 *Refugee Survey Quarterly* (2006) 54-69 (assessing Bangladesh court’s approach to Urdu speakers’ citizenship).

Legal reform should however go beyond addressing the specific cases of the Nubians and Kenyan Somali. It should encompass a total dismantling of the current thinking on access to citizenship; in particular, remedying the challenges associated with *jus sanguinis* requirements for acquiring citizenship,¹²⁵ which more often than not tends to lead to the mutation of citizenship from an individual civil political right to a group right such as in the case of the Kenyan Somali. It should also cure the arbitrary and discriminatory aspects of the current legal framework which run afoul of international human rights standards. Further such legal reform should comprehensively address the question of burden of proof in citizenship discrimination cases in line with well-established practice before the Court of Justice of the European Communities (ECJ),¹²⁶ the United Nations treaty bodies¹²⁷ and many national courts.¹²⁸

Finally, the need to elaborate a comprehensive migration policy in Kenya is crucial in view of the importance of migration at the global level.¹²⁹ While the importance of citizenship may seem to be waning in the wake of globalization and advancement in equality jurisprudence in international human rights law, the reality however is that there is a resurgence of nationalism and identity issues, hence the need for policy options to ensure delicate mediation.

125 Weissbrodt, (n 6 above) 256 argues that article 5 of the Convention on the Elimination of Racial Discrimination arguably precludes *jus sanguinis* nationality laws.

126 Case C-33/89 Kowalska [1990] ECR I-2591, para 16, and C-184/89 Nimz [1991] ECR I-297, para 15; Case 109/88 Danfoss [1989] ECR 3199, para 16.

127 The UN Human Rights Committee has stated that substantive reliable documentation will shift the burden of proof to the Respondent State; Chedi Ben Ahmed Karoui v. Sweden, Case No. 185/2001 of 25 May 2002, § 10. See also Conclusions of the Committee of Economic, Social and Cultural Rights on Luxembourg, U.N.Doc. E/C.12/1/Add.86 (2003) para 10, and Poland, U.N.Doc. E/C.12/1/Add.82 (2002) § 7; Conclusions of CERD, United Kingdom of Great Britain and Northern Ireland, U.N.Doc. CERD/C/63/CO/11 (2003) sec 4

128 See e.g., Canadian Human Rights Act, sec 15; South African Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, sec 13; sec 54A; New Zealand Human Rights Act 1993, sec 92F; United States [in context of indirect discrimination, sec 105(a) Civil Rights Act 1991; and McDonnell Douglas Corp. v. Green, 411 U.S. 492 (1973)]. For the approach in English cases see Neill LJ in King v. Great British-China Centre (1992) ICR 516 at 528, cited with approval by Lord Brown-Wilkinson in Glasgow City Council v. Zafar (1998) ICR 120

129 P Martin, 'Population and Migration', Copenhagen Consensus Working Paper (2004) at <http://www.copenhagenconsensus.com/Default.aspx> (accessed 24 June 2008).

11. CAMEROON'S CONSTITUTIONAL CONUNDRUM: RECONCILING UNITY WITH DIVERSITY

Charles Manga Fombad^{1*}

Abstract

This paper examines how Cameroon has grappled with a complex ethnic and cultural diversity over which is superimposed a potentially explosive Anglophone/Francophone cultural divide. It is argued that all constitutional arrangements since independence in the 1960s were designed to evade rather than deal with the problem and today, the country is caught between two constitutions – a 1972 unitary constitution providing for a centralised system and a supposedly 1996 amendment to the 1972 constitution which reinforces the centralised system but allows discretion for some deconcentration of power. The paper briefly traces the historical background of Cameroon's complex heritage and analyses the different constitutional strategies that have been adopted. It is argued that there is no longer any need to pretend that there aren't deep-rooted centrifugal forces that threaten the country's peace and unity. The only way to avert chaos that has occurred in many other African countries, it is contended, is to critically re-examine and redesign the present constitution to ensure that it accommodates the interests of the diverse ethnic, cultural and linguistic communities, and makes bilingualism and bi-culturalism a reality and not a mere empty piece of political rhetoric. Policies and measures designed to gloss over these differences may achieve unity for some time but not for all times. In this respect, Cameroon provides an excellent example of a comparative law melting pot in which the best of two distinct and potentially divergent legal cultures, the English common law and the French civil law can be amalgamated to set up a solid constitutional framework as well as shape the legal system of the country as a whole.

11.1 Introduction

The difficulties of satisfactorily recognising and accommodating the interests, fears, desires and aspirations of Africa's diverse cultural, ethnic, religious and linguistic minorities in the constitutions of the different countries on the continent has since independence been, and continues to be a major source of conflicts and violence. The considerable advances towards constitutionalism marked by the post-1990 constitutional rights revolution, which saw the incorporation of improved bills of rights in the new or substantially revised constitutions that most countries have now adopted was supposed to address the problems caused by the diverse nature of African societies. The assumption is that a constitution as the founding document must of necessity be designed in a manner that it can protect each country against the likely problems that its history informs it that they can predictably arise in the ordinary political

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process. The critical question that we need to address here is whether the post-1990 African constitutional engineers made sufficient effort to anticipate and address the problems that have usually arisen because of the diverse nature of African societies. Was enough done to pre-empt and guard against the conflicts and violence that has usually been provoked by the difficulties of a harmonious co-existence of so many diverse cultural, ethnic, religious and linguistic communities within the different countries? The main thesis of this paper is that constitutional equality between the diverse communities in any country is not only fundamental to political stability, democracy, unity and progress but is also critical for there to be any prospects for constitutionalism. Cameroon is used as a case study to show what attempts have been made to solve the conflicts and tensions that arise from diversity and what lessons can be learned from this experience.

Although Cameroon, since independence and the reunification of the former British and French trust territories was, until about 1990, considered one of the few stable islands of peace and prosperity on the African continent, the winds of change that blew over the continent in the 1990s almost tore the country apart. Until then, the country had largely escaped from the endemic cycle of political turmoil and economic chaos that had characterised many countries on the continent. This was by all standards extraordinary for a country of enormous complexity and diversity *par excellence*. In fact, Cameroon probably has more ethnic and language groups than can be found in any territory of comparable size. In addition to this, is superimposed a potentially explosive division between a suspicious, restive and assertive Anglophone minority and a domineering Francophone majority. The Cameroonian union, despite its numerous imperfections *ab initio* has endured until now, largely due to the harsh and numbing effects of a repressive and highly centralised and autocratic system of government that has been in place since independence.

Discontent with the harsh system of governance and the debilitating effects of the economic recession coalesced with the wave of pro-democracy demonstrations that swept through the African continent in the early 1990s and caused the authorities to introduce some form of multi-party democracy. Although these upheavals which almost resulted in the disintegration of the country appear to have been checked, the protracted and often violent nature of the campaign for multi-partyism, in which an Anglophone, Ni John Fru Ndi and his Social Democratic Front (SDF) party was at the forefront, unleashed and reactivated certain deep-seated centrifugal forces of fragmentation which lay dormant during the long years of one-party dictatorship. However, the tentative democratic openings till date have not gone beyond the regular staging of elections at the end of which the incumbent and his ruling Cameroon People's Democratic Party (CPDM) have usually declared themselves winners, regardless of the actual outcome of the polls. Popular demands for fundamental constitutional reforms resulted in a 1996

amendment to the 1972 constitution in which the incumbent legitimised his hold on power and reinforced the already highly centralised Gaullist system of government. The total rejection of the federalist system of administration and the castigation of its proponents as unpatriotic and advocates of separatism and secession coming at a time of rising tension between the Anglophone and Francophone communities combined with a general disillusionment at the usefulness of democracy as a means for peaceful change, has put serious question marks over Cameroon's unique African bilingual and bi-cultural experiment.

This paper attempts to show that Cameroon's present political predicament can be traced to the early reunification and post-independence politics. The country's complex diversity is neither singular nor unique, as countries such as Mauritius and India also harbour and have accommodated disparate ethnic, racial and other social groups. Cameroon's problem, it is argued, has been exacerbated by a blind refusal of the ruling elites to come to terms with the basic facts of the country's historical heritage and the need to think creatively and design institutions that will give all the different interest groups in the country the incentive to behave in ways that will enhance national unity, democracy, lawfulness, stability, mutual trust and tolerance rather than suspicion and hatred. Instead, the last 40 years of independence, have been spent running away from this basic reality through futile attempts to eliminate the country's rich diversity. Almost two decades after the democratic process started, there is little evidence that the regime has shed its deeply entrenched authoritarian instincts and practices, nor has it significantly moved towards a more participatory, transparent and accountable system of governance. Various sections of the country, especially the Anglophones have been clamouring unsuccessfully for the right to participate in the governance of the country and the right to be Anglophones and Cameroonians.

It is argued in this paper that the prospects for a genuinely democratic Cameroon built around the much-vaunted rhetoric of 'unity in diversity', 'bilingualism' and 'bi-culturalism' will require the deconstruction of certain myths, prejudices and idiosyncrasies cultivated from the colonial past. This is particularly so with respect to the much-hackneyed dogma that national unity and integration, the elusive political goal since independence, can only be attained through rigid centralisation and the demonisation of federalism. In fact, the broad guidelines of a federal solution recommended here are not based on any assumption that this offers the sole or ultimate solution but that in the present polarised and volatile political climate, and given the depth of disenchantment with the democratic transition, it provides the best framework for promoting and enhancing grassroots democracy and countering the threats of separatism by recognising and building on the country's diversity. More fundamentally, it is contended that constitutional equality of all communities within a diverse society is critical to peace, stability and unity. The discussion that follows is divided into five main parts. The first of this provides a brief

historical background to the Cameroonian situation. The second section discusses how Cameroon today has the unusual distinction of operating under two constitutions. The third looks at the potential sources of fragmentation within the Cameroonian polity. Section four of the paper will consider the elements that are critical for a return to constitutionalism and will be followed by the concluding remarks in which it will be pointed out that constitutional recognition and protection of diversity in Africa can serve as a basis for reinforcing rather than undermining national unity as well as promoting constitutionalism.

11.2 A brief historical background

To understand why a particular set of political institutions exist in a country and how they affect its citizens, one must perforce study its history. Much has been written on Cameroon's post-independence history, the process of reunification of the two former trust territories and the painful first two decades of independence.² It is unnecessary to go into these details here. However, it is important to understanding the quandary in which the country finds itself in today, to highlight certain pertinent aspects of this history.

The Portuguese are considered to be the first Europeans who arrived on Cameroon's coast in the 1500s but malaria prevented any significant settlement and conquest of the interior until the late 1870s. The name of the country is derived from 'Camaroes', meaning shrimps, so-called by the Portuguese explorer Fernando Po who named the River Wouri 'Rio dos Cameroes' (Shrimp river) after the many shrimps. After the Berlin Conference of 1884, all the present-day Cameroon and parts of several of its neighbours became the German colony of 'Kamerun', with a capital first at Buea and later Yaounde. This lasted for 20 years, until 1916 when a combined British and French expeditionary force defeated the Germans in Cameroon and partitioned the territory into two. The British took two small-disconnected portions, which they labelled Northern and Southern Cameroon respectively, whilst the French took the larger portion constituting about four-fifths of the territory. This rather arbitrary and dubious division was later recognised by the League of Nations that conferred mandates on these two countries to administer the territories on 28 June 1919. The mandates were superseded by trusteeship agreements on the creation of the United Nations in 1945. The British effectively administered

² E Ardener 'The nature of the reunification of Cameroon' in A Hazelwood (ed.) *Integration and Disintegration* (1967) 293; E Ardener *Eyewitness to the annexation of Cameroon* (1968); JF Bayart "The Political System" in R Joseph (ed.) *Gaullist Africa: Cameroon under Ahmadou Ahidjo* (1968); JF Bayart *L'Etat au Cameroon* (1979); J Benjamin 'Dix Ans de Fédéralisme Camerounais 1961-1970' in R Seryn (ed.) *Fédéralisme et Nations* (1971) 279-290; J Benjamin *Les Camerounais Occidentaux: La Minorité dans un état Bicomunitaire* (1972); M DeLancey *Cameroon Dependence and Independence* (1989); D Gardiner *Cameroon: United Nations Challenge to French Policy* (1963); W Johnson "The Cameroon Federation: Political Union Between English and French - speaking Africa" in W Lewis (ed.) *French-speaking Africa* (1965); W Johnson *The Cameroon Federation: Political Integration in a Fragmentary Society* (1970); R Joseph *Radical Nationalism in Cameroon: Social Origins of the U.P.C. Rebellion* (1977); R Joseph (ed.) *Gaullist Africa. Cameroon Under Ahmadou Ahidjo* (1978); V Le Vine *The Cameroons from Mandate to Independence* (1964); V Le Vine *The Cameroon Federal Republic* (1971); V Le Vine 'Political Integration, and the United Republic of Cameroon' in D Smock and K Bentsi-Enchill (eds.) *The Search for National Integration in Africa* (1976); and J Takougang & M Krieger *African State and Society in the 1990s* (1998).

its two disconnected portions as mere appendages of its neighbouring Nigerian colony. After a UN-conducted plebiscite of 11 February 1961, the Southern Cameroons voted in favour of reuniting with the former French Cameroon which had already become independent as the Republic of Cameroon on 1 January 1960, while the Northern Cameroons opted to remain and is today part of the Federation of Nigeria. On 1 September 1961, the Southern Cameroons and the Republic of Cameroon were formally married in a union and adopted the name Federal Republic of Cameroon. It is worth noting at this point that the period of the separate existence of the British and French portions of the former German Kamerun lasted from 1916 to 1961, which is 45 years.

In practical terms, prior to reunification in 1961, the two Cameroonian communities had not only gone through two completely different colonial experiences but had lived longer apart, than together as a body politic. There appears to have been no compelling historical, geographical or other reasons for the reunion other than the convenience of the United Nations and the British and perhaps, some nostalgia on the part of some Cameroonian politicians on both sides of the 1916 divide. In fact, it has been shown that there were no great partitioned peoples on the intra-Cameroon boundary of 1916 to lend any weight to the idea of a union based on ethnicity.³ The reunification brought together not only two historically contrasting and conflicting cultural experiences, the English and the French, but also a wondrous mosaic of tribes, estimated at about 250, speaking about 280 different languages in a population now estimated at 18 million (2008 estimates). Colonialism was the only glue that stuck these human units together in any shape recognisable in an atlas. Cameroon is unique in Africa in having within its borders two territories that had undergone two different colonial experiences, with perhaps the exception of Somalia. It was however different from Somalia because the union in July 1960 between the former British Somaliland and Italian Somaliland brought together a people with a strong linguistic, cultural, religious and ethnic bond, elements which were completely missing in Cameroon's case. Confronted with its heterogeneous populations, with varied interests and conflicting demands, the major challenge that the leadership faced at independence and reunification was that of finding a satisfactory institutional framework for creating a sense of common citizenship and common destiny.

11.2.1 The establishment of statist authoritarianism

Although so much has been written about the intrigues of the reunification process that it is unnecessary to go into the details of it here, it is however important to understand the psychology of those who are supposed to have voted in favour of the reunion with the former French Cameroon in order to fully appreciate some of the reasons for the current rumblings of

³ See Ardenner (n 1 above) and N Kofele-Kale *An Experiment in Nation Building: The Bilingual Cameroon Republic Since Reunification* (1980).

discontent with the *status quo*.⁴

Before reunification, French Cameroon had already been granted independence on 1 January 1960 under the leadership of Ahmadou Ahidjo. Its constitution was based on a document produced by a constitutional consultative committee created in 1959. This committee was composed mainly of foreign experts and significantly excluded the banned 'Union des Populations du Cameroun' (UPC) party, the country's largest and most popular indigenous party, which represented a substantial part of national political opinion. The draft constitution that it produced was essentially a replica of the constitution of France's fifth Republic, with a very strong executive and a highly centralised system of government. Although a narrow majority in a referendum later approved it, it is worth noting that this constitution, which has formed the basis of virtually all subsequent constitutions of the unified Cameroon, can hardly be described as a document in which the population participated in its elaboration.⁵ Thus, by the time of reunification, the Francophone sector of the country was not only independent but also had a fully functioning constitution in place.

For the Anglophones of the former Southern Cameroon, there is now sufficient evidence to show that they were placed on the horns of a dilemma and were given practically what amounted to a Hobson's choice. The period of British administration as part of Nigeria was an unhappy experience marked by general neglect by the British and the domineering and often humiliating treatment by Nigerians, especially the Igbos. Contrary to the expressed wishes of the dominant political forces in the Southern Cameroons at the time, the UN, with the complicity of the British refused to put the issue of the desire for a separate existence of the Southern Cameroonians to the voters in the 1961 plebiscite. Although the voters in the Southern Cameroons, unlike those in the Northern Cameroons voted by a seven to three majority in favour of union with the former French Cameroon, there is overwhelming evidence to suggest that if the third alternative of either independence or continued trusteeship had been provided, it would have carried the day.⁶ In fact, the vote in favour of reunification was more of a rejection of continuous ties with Nigeria than a vote for the union with French Cameroon.⁷ French tactics in brutally suppressing the UPC rebellion in their part of the territory and French policies in general had created a deep suspicion and dislike, for the 'French way' amongst Anglophones.⁸ With the intense prodding of the British (influenced by the Sydney Phillipson Report of 1958 that had

4 R Björnson *The African Quest for Freedom and Identity. Cameroon Writing and the National Experience* (1991); DeLancey (n 1 above); Gardiner (n 1 above); Johnson (1963) (n 1 above); Joseph (1978) (n 1 above); Kofele-Kale (n 1 above) *Le Vine* (1964, 1971) (n 1 above); and NN Susungi *The Crisis of Unity and Democracy in Cameroon* (1991).

5 See *Le Vine* (1964) (n 1 above); and JM Mbaku 'Constitutional Federalism and Policy Reform in Cameroon: Lessons for Africa' (1997) 2 *Makerere Political Science Review*. Can be accessed at: http://wsi.cso.uiuc.edu/CAS/Makerere/Vol_2/Chapter_two.html accessed on 20 July 2008.

6 See DeLancey (n 1 above); and Gardiner (n 1 above).

7 A Olinga 'La Question Anglophone dans le Cameroun d'aujourd'hui' (1994) 48 *Révue Juridique et Politique*.

8 DeLancey (n 1 above).

concluded that the Southern Cameroons was not economically viable as an autonomous entity) and the connivance of the UN, the Anglophones were forced to choose the lesser of the two evils. As N.N. Susungi aptly puts it, the reunification episode was far from being the reunion of two prodigal sons who had been unjustly separated at birth, but was rather more like a loveless arranged marriage, courtesy of the UN between two people who hardly knew each other.⁹

In reuniting with the former French Cameroon, the Anglophones had hoped to enter into a loose voluntary association in which they would retain a significant level of political and economic autonomy. However, because of their weak negotiating position, the limited concessions Ahidjo was ready to make were contained in a document called the 'transitional and special dispositions' annexed to the 1960 constitution of the former French Cameroon. The union gave birth to the Federal Republic of Cameroon, a two-state federation consisting of West Cameroon made up of the former Southern Cameroons and, East Cameroon covering the former French Cameroon. Ardener points out that the Francophone sector made very few institutional adjustments, if any, such that the federal and East Cameroon state institutions were basically one in 'origin as well as in function.'¹⁰ Pierre Messmer, one of the last French High Commissioners at the time and a close adviser of Ahidjo, in a book published recently points out that they knew at the time that the so-called federal constitution was 'un constitution faussement fédéral' (constitution containing a sham federation) which was 'sauf en apparence, une annexion' (safe for appearances, was an annexation) of West Cameroon and 'Le Cameroon réunifié est un pays bilingue Francophone' (the unified Cameroon is a country bilingual in French).¹¹ The federation was a sham *ab initio*. And talking about such sham constitutions, Walter Murphy observes that their principal function is to deceive.¹² Under this 'new' constitution, West Cameroon lost most of the limited autonomy it had enjoyed as part of the Nigerian federation. Articles 5 and 6 stated the responsibilities of the federal government in such vague and broad terms as to include any powers that it might wish to assume. By 1965, it had effectively assumed most of the powers previously exercised by the governments of the two states. In fact, soon after reunification, by decree no. 61-DF of 15 December 1961, Ahidjo created a system of regional administration in which West Cameroon was designated as one of 6 regions, basically ignoring the 'federal' character of the country. Powerful federal inspectors, who in the case of West Cameroon, virtually overshadowed the prime minister with whom there were frequent conflicts of jurisdiction, headed these regions. Besides, the West Cameroon government could hardly function properly since it had to depend entirely on subventions from the federal government

9 N 3 above.

10 See n 1 above.

11 In, *Les Blancs s'en vont: Récits de décolonisation* (1998).

12 'Constitutions, Constitutionalism, and Democracy' in Greenberg et al.(eds.), *Constitutionalism and Democracy. Transitions in the Contemporary World* (1993).

that controlled the major sources of revenue.

When in 1972 by decree no DF 72-270, Ahidjo abrogated the federal façade and created the unitary state in disregard of article 47 (1) of the Constitution, which laid down a special procedure for amending the constitution and expressly prohibited any revisions which impaired the 'unity and integrity of the federation', there was in reality little left of the federation except perhaps the name. And in any case, as Linz and Stephen point out, it is not meaningful to speak of federalism under authoritarian or other dictatorial systems.¹³ Ahidjo from the beginning of his political career put national unity as a prerequisite for maintaining peace and promoting national development.¹⁴ To achieve this, he did three things.¹⁵ Firstly, he steadily dismantled any remnants of decentralised powers resulting from the 1961 constitution and progressively created a highly centralised system that outdid any that the French could have conceived. The concentration of power and authority in the hands of the president was so thorough and complete that even ministers were left with little initiative.¹⁶ Secondly, to sustain the authoritarian state as the sole locus of power, he used the enormous resources of the state to build a coalition of supporters throughout the country by creating an elaborate system of patronage to reward his allies and their clients. Through what has come to be known as the phenomenon of 'politicians by decree' he kept potential rivals at bay by regularly appointing academics and bureaucrats, such as his successor Paul Biya, to positions of power, thus blurring the divide between politics and public administration.¹⁷ Many of his adversaries, especially after the imposition of the one-party rule in 1966, were bought off by appointments to positions where they could share in the spoils. Thirdly, through the creation of a highly effective and much feared repressive machinery, all threats to his authority were virtually eliminated throughout his reign until he voluntarily resigned in 1982. Ahidjo in his paternalistic attitude often declared that, he stood between Cameroon and bloody civil war, a common argument often put forward by his contemporaries that Africans had to choose between authoritarian government and anarchy.¹⁸ But for all his authoritarianism and repression, Ahidjo is considered by many analysts to have been a prudent and shrewd pragmatist who not only managed to maintain peace but also ensured a visible measure of social and economic prosperity that made Cameroon the envy of its neighbours. It is no surprise that Williard Johnson was able to suggest in 1980 that Cameroon has 'made great strides in achieving a sense of common Cameroonian nationality among its diverse peoples.'¹⁹

13 Referred to by Davis 'The Case for Chinese Federalism' (1999) 10 *Journal of Democracy* 130.

14 A Ahidjo Contribution to National Construction (1968).

15 J Takougang 'The Post-Ahidjo Era in Cameroon: Continuity and Change' (1996) 10 *Journal of Third World Studies* 268-302.

16 Bayart (1979) n 1 above).

17 D Eyoh 'Conflicting Narratives of Anglophone Protest and the Politics of Identity in Cameroon' (1998) 16 *Journal of Contemporary African Studies* 249.

18 J Derrick 'Cameroon: One Party, Many Parties and the State' (1992) 22 *African Insight* 165.

19 See his chapter in Kofele-Kale (n 1 above).

One of the eminent scholars on Cameroon, Le Vine says:

... it was Ahidjo's tactics that made the difference in the final analysis. He treated his opponents firmly, sometimes harshly, but made sure that even his bitterest enemies had both the chance of joining his side and actively sharing in the perquisites of power. That he was never vindictive is to his credit. The style of the regime appears to have been actively reconciliationist, pragmatic and tactically consistent²⁰

Paul Biya came to power in 1982 on a wave of popular support and did not disappoint with his initial promises of more democracy, 'rigour and moralisation'. He affirmed his commitment to maintain political stability and national unity, which he described as 'the cardinal historic task of highest priority.'²¹ Declaring the 'consolidation of national unity to be the indispensable foundation' to nation-building, he rejected the 'collection and juxtaposition of our diversities' and pronounced himself 'firmly convinced that we should move on a higher level of unification, which is that of national integration.'²² After a false dawn of promised relaxation of some of the restrictions put in place by his predecessor, an attempted *coup d'état* in 1984 was brutally suppressed, and this gave Biya the pretext to reimpose the full repressive machinery that he had inherited. This included transforming the already highly centralised bureaucracy into one of the most bureaucratic, but inefficient, lethargic and corrupt bureaucracies in Africa.²³ What many considered as one of the last visible nominally significant symbols of the 1961 union was removed by law no 84/001 of 1984 abolishing the appellation 'United Republic of Cameroon' and replacing it with 'Republic of Cameroon', which significantly, is the name the French-administered portion of the country adopted when it became independent in 1960. No convincing reasons were given for the change but it left the restive Anglophones jittery. Unlike his predecessor, Biya adopted a management style that allowed little participation in the spoils system outside his own Beti ethnic group and its close affiliates in and from around the Centre, South and East provinces who, although constituting less than 10 percent of the population controlled most of the senior positions in the administration, the military and parastatal. Although Biya to a large extent pursued the same methods and policies as his predecessor, that is, centralisation, co-optation and coalition building and repression, he however lacked the political acumen and savvy of Ahidjo.

By the mid-1980s, the Cameroonian economy went into a steep decline from which it is yet to recover. With the contraction of the economy came increased competition amongst elites

20 (1971) (n 1 above). In fact, M Krieger 'Cameroon's Democratic Crossroads, 1990-94' (1994) *Journal of Modern African Studies* 606 points out that for all his authoritarianism and 'selective' repression, President Ahidjo demonstrated until 1982 when he resigned, good negotiating skills with local elites and marketing skills abroad.

21 In his book, *Communal Liberalism* (1987) 26-30.

22 Azevedo (ed.), *Cameroon and Chad in Historical Contemporary Perspectives* (1988).

23 See further, CM Fombad 'Endemic Corruption in Cameroon: Insights on Consequences and Control' in R Hope and B Chikulo (eds.), *Corruption and Development in Africa. Lessons from Country Case - Studies* (2000) 234-260 ; and CM Fombad 'The Dynamics of Record Breaking Corruption and Political Opportunism in Cameroon,' in JM Mbaku and J Takougang (eds.), *The Leadership Challenge in Africa: Cameroon Under Paul Biya* (2004) 357-394.

and their supporters for the shrinking resources of the state. The corruption that started during the Ahidjo era became pandemic and uncontrollable under Biya. While the deteriorating economic situation caused many people - not just the 'Northerners', castigated since 1984 as the brains behind the foiled coup attempt, and the Anglophones who considered themselves as increasingly marginalised - to say things had been better under Ahidjo, more powerful feelings developed against the whole system.²⁴ Many of them came to see the regime as alien and imposed. As the economic crisis deepened, dissatisfaction and frustrations at the defects and deadlocks in the functioning of the authoritarian system broadened. It was the bold move by Ni Fru Ndi in March 1990, in exploiting the widespread feelings of alienation, especially by the Anglophones, to form and launch his SDF party that set in motion the presently faltering process of democratisation. The events of this period have provoked a voluminous literature.²⁵ What is now very clear is that there is a profound crisis in the country. The term 'crisis' is used in the medical sense described by Habermas as referring 'to the phase of an illness in which it is decided whether or not the organism's self-healing powers are sufficient for recovery.'²⁶ The crisis referred to here is a disruption of affairs that threatens to produce a decisive change.²⁷ In this context, it describes the situation where not only Cameroon's tentative democratic transition is in danger but also the unity of the whole country is at stake.

11.2.2 The faltering democratic transition

In early 1989, there were only 5 countries in Sub-Saharan Africa that could be considered democratic, or at least espoused a multi-party political system. These were Mauritius, Botswana, Senegal, The Gambia and Zimbabwe. Everywhere else, there was either a single party system or no political parties at all. Ever since late 1992, this situation has changed dramatically in most countries, except in Cameroon. A comparative picture of the state of political and civil freedoms in Cameroon can be gleaned from an analysis of the annual assessment of the general state of freedom in the different countries in the world published by the respected body, Freedom House, since 1972. Cameroon is classified amongst the 14 countries in Sub-Sahara Africa that are considered 'not free' and with an average score of 6 for both political rights and civil rights, Cameroon is one of the few African countries where the state of political and civil rights since 1990 has virtually remained the same and for certain years during this period,

²⁴ Derrick (n 7 above).

²⁵ Eyoh (n 16 above); P Konings 'Le Problème Anglophone' au Cameroun dans les Années 1990' (1986) 62 *Politique Africaine* 25 ; M Krieger (n 19 above) ;L Sindjoun 'Cameroun: Le système Camerounais Face aux Enjeux de la Transition Démocratique (1990-1993)' (1994) 60 *Afrique Politique* 35 ; L Sindjoun 'Les Champs Sociales Camerounais: Désordres Inventifs, Mythes Simplificateurs et Stabilité Hégémoniques de l' Etat' (1995) 62 *Politique Africaine* 57 ; J Takougang 'The 1992 Multiparty Elections in Cameroon : Prospects for Democracy and Democratisation' (1996) 31 *Journal of Asian and African Studies* 52 ; Takougang & Krieger (n 1 above); S Tambiah 'The Nation-State in Crisis and the Rise of Ethnonationalism' in E Wilmsen, and P McAllister (eds.) *The Politics of Difference: Ethnic Premises in a World of Power* (1996).

²⁶ Legitimation Crisis (1975) 1.

²⁷ D Kellner, 'Television, the Crisis of Democracy and the Persian Gulf War' in M Raboy and B Dagenais (eds.), *Media, Crisis and Democracy* (1992) 44-61.

actually declined.²⁸ In one of its reports, Freedom House concluded that the measures that have been taken so far by the government are nothing 'more than lip service from one of Africa's most enduring and repressive regimes.'²⁹

Cameroon has probably two main claims to being classified as a democracy: the regular holding of multi-party elections since 1992, and the existence of a 'new' or amended constitution since 1996. Just as the regular holding of multi-party elections is not necessarily a sign of democracy, so too the existence of a constitution is not a sign either of democracy or, constitutional government. In fact, it can be said that a combination of the failure of the Cameroonian electoral system and the failure of the amended constitution to provide a more open, participatory, transparent and democratic system is at the root of the country's crisis. These have exposed and brought to the fore several centrifugal forces of fragmentation, the most potent being the so-called Anglophone problem

All Cameroonian elections since the introduction of multi-partyism have suffered from one major flaw - the absence of a credible and independent body to organise and supervise the process and the total control by the incumbent administration over the process. None of these elections has met even the minimal criteria of freeness and openness. The incumbent has exploited the rigid one party autocratic structures still firmly in place to deny the opposition any chance of winning power. Overall responsibility for the conduct of elections has been undertaken by the highly - politicised and bureaucratic Ministry of Territorial Administration (MINAT), which is inseparable from the centralised and autocratic system that has ruled the country since independence. All the members of the various electoral bodies charged with responsibility for various aspects of the electoral process have been appointed by the government and are therefore far from independent. The introduction of the oddly- named National Elections Observatory (NEO) in 2000 as an election management body provided a more subtle but hardly sophisticated institution for manipulating elections.³⁰ As a result, all the elections since 1992 to date have been plagued by accounts of serious irregularities widely reported by various independent international observer groups.

For example, after the controversial October 1992 presidential elections in which Biya was declared to have narrowly defeated his main rival, Ni Fru Ndi, the Washington-based National Democratic Institute for International Affairs (NDI), which had been invited to observe the elections, in their report pointed out that there had been such 'widespread irregularities' which

28 For an explanation of the methodology of the survey and other details, see generally, Freedom House Country Reports 1972-2007 <<http://www.freedom-house.org/template.cfm?page=22&country=7149&year=2007>> accessed 20 July 2008.

29 CM Fombad and JB Fonyam, 'The SDF, the Opposition and Political Transition in Cameroon' in JM Mbaku and J Takouang (n 22 above) 479.

30 CM Fombad 'Election Management Bodies in Africa: Cameroon's 'National Elections Observatory' in Perspective' (2003) 3 African Human Rights Journal 25.

called the results into question. It suggested that the 'election system was designed to fail' and that the 'overwhelming weight of responsibility for this failed process [lay] with the government and President Biya'. The report noted that, 'the Cameroonian government ... took unusually extreme and illegitimate actions to ensure the president's victory.'³¹

Dissatisfaction over the results of this election led to rioting, violence and the destruction of property in certain parts of the country and its violent suppression and human rights violation resulted in sanctions being imposed against the government by many Western powers including the US, Britain and the European Union. Nevertheless, these results are probably the only ones that have come close to reflecting the general will of the people, as subsequent elections have been marred by elaborate schemes that have disenfranchised voters in opposition strongholds as well as massive fraud and rigging.³²

An important electoral strategy that Biya has extensively used is that of buying off his opponents and their supporters, where he can. He has promoted a zero-sum partisan and patronage-based distribution system in which his opponents and their supporters are excluded from all normal state entitlements. This has made the cost of voting for opposition parties too high, thus today, two provinces, the North West and West provinces, which constituted the lifeblood of the main opposition, SDF have been progressively sidelined and are generally under-represented in ministerial and top-level administrative appointments. There is deeply embedded, a vicious cycle of corruption which has become the only way the system can sustain itself.³³ It was therefore no surprise that Transparency International for two successive years, 1998 and 1999, placed Cameroon as the most corrupt country amongst those surveyed in its Corruption Perception Index (CPI).

The regular rigging of elections in Cameroon has potentially disastrous consequences for its democracy. Firstly, a government that keeps itself in office against the will of the majority of the electorate lacks the legitimacy and moral authority to rule. Without the popular mandate, it is bound to be despised and rejected and can only sustain itself, as the present regime is doing, by the old tactics of repression. With an army of over 25,000 including a 3000 person-presidential guard and a 15,000 national police force, Cameroon possesses one of the largest military machinery for a country of its size and population in Africa. By 1995 estimates, the military and security services were receiving about 30% of the national budget. Secondly, and perhaps the most serious consequence of electoral malpractices, is its capacity to destroy faith

31 NDI An Assessment of the October 11, 1992 Election in Cameroon. Executive Summary (1993) appendix xi.

32 See Commonwealth Secretariat The Parliamentary Elections in Cameroon 17 May 1997. Report of the Commonwealth Observer Group (1997); and ARTICLE 19 Cameroon: A Transition in Crisis (1997).

33 See Fombad in Mbaku & Takougang (n 22 above); Fombad in Hope & Chikulo (n 22 above); and Fombad & Fonyam in Mbaku & Takougang (n 22 above).

in peaceful change through the ballot box and raise the spectre of change by use of force. In the famous and oft-quoted words of the late president J.F. Kennedy, 'those who make peaceful change impossible, make violent change possible'³⁴ or one could suggest, inevitable. The flame of democracy ignited in the early 1990s is giving rise to an uneasy feeling in Cameroon, like in other African countries in a similar dilemma, that at the end of the light is the tunnel.³⁵ Elections would lose their relevance as an effective means of enforcing governmental responsibility and accountability because of the growing realisation that the government can neglect the people's welfare as much as it likes; loot the nation's wealth and ruin its economy and still rig itself back to power against the votes of the majority of the electors. As Nwabueze points out, election rigging is a tragic aberration more for what it portends for the future than for the harm it has done in the past and present.³⁶ It is here that the spectre of Kennedy's theory of making violent change possible becomes ominous. Could constitutional reforms provide some means of restraining the over-bearing weight of the autocratic and centralised system that the electoral process had failed to do in Cameroon?

11.3 The tale of two operational constitutions

Since an authoritarian regime is by definition, one that is inadequately restrained by a constitution having the force of a supreme and overriding law, then a transition from authoritarianism to constitutional democracy perforce requires a fundamental constitutional change.³⁷ Generally, African leaders have hidden behind obsolete laws and constitutions to resist the changes demanded by civil society for greater rights and participation. If there was one thing on which the Cameroonian opposition has been solidly united throughout upon, then it was the need for a profound rewriting of the constitution in which the centralised autocratic system of government will give way to a decentralised system. In lieu of the sovereign national conference for which many Cameroonians fought and died between 1990 and 1991, Biya finally gave in and organised on his own terms what was called a 'Tripartite Conference' in October-November 1991, composed mainly of his appointees and operating within a restricted agenda. After considerable pressure, the conference decided to establish a Technical Committee on Constitutional Matters (TCCM) made up of 7 Francophones and 4 Anglophones, with a mandate to formulate the outlines of a 'new' constitution. This ultimately led to the oddly labelled 1996 'amendment to the 1972' constitution.

³⁴ Cited in B Nwabueze *Democratization* (1993) 80.

³⁵ Derrick (n 7 above).

³⁶ See n 33 above.

³⁷ B Nwabueze (n 33 above).

Tom Paine remarked in the latter part of the 18th century that a constitution is not the act of government, but of a people constituting a government.³⁸ The courts have repeatedly pointed out that a constitution is not a lifeless museum piece but a living document that must be designed in such a way that it reflects as well as embodies the fears, hopes, aspirations and desires of the people.³⁹ If by democracy is meant rule by the people - all the people - then the only certain and stable form of democracy is a constitutional democracy for which the citizens write the rules or play a significant part in writing the rule.⁴⁰ Judged by these standards, the process that led to the 1996 constitutional amendment was a veritable parody of a citizen-driven or influenced process.

The *amendment* process went through three main stages.⁴¹ First, the deliberations of the TCCM, which met irregularly between November 1991 and February 1992, reached a consensus on the decentralisation of political and administrative power and the entrenchment of fundamental rights as cardinal goals of the new constitution. There were however remarkable disagreements between the Francophone majority and the Anglophone majority on details. To the Anglophones, meaningful and effective decentralisation could only be effected by a return to a federal system, whilst the Francophones wanted to restrict this to the devolution of some decision-making powers to provincial and local authorities. After the proceedings of the committee were suspended in February 1992 because of parliamentary elections that were scheduled to be held a few months later, the government published a document purporting to be a draft agreed upon by the committee in which the main features of the centralised system were preserved. Because of the controversy this generated, the process moved into a second stage when a new technical committee was created by a presidential decree in 1993, again with a mandate to draft a 'new' constitution. It was given two weeks and enormous resources to solicit public opinion and proposals. Whilst purporting to solicit public opinion, it effectively worked on the previous draft and submitted its proposals to the President. For 8 months, nothing was heard. Finally, in November 1994, the President appointed another committee to study a document published in December and labelled, 'Proposals of the President of the Republic for a *revision* of the constitution'. It is worth noticing that at this third stage, it was no longer a question of drafting a *new* constitution, but merely *revising* the 1972 constitution based on a proposal from the President! There were spectacular resignations from this committee by the few representatives of opposition parties that had been co-opted at this stage, and significantly, the few prominent Anglophone members, after arguing that the very composition of the committee and its working procedures were designed to prevent a full discussion of their views or alternative

38 C McIlwain *Constitutionalism, Ancient and Modern* (1940) 234.

39 See Aguda CJ in the famous Botswana case of *Attorney-General v Dow* [1992] B.L.R. 119 at 166.

40 D Mueller *Constitutional Democracy* (1996) 59-80.

41 Eyoh (n 16 above); CM Fombad *International Encyclopaedia of Laws: Constitutional Law: Cameroon- Text of the Constitution* (2003); CM Fombad *International Encyclopaedia of Laws: Constitutional Law: Cameroon* (2003); M Kamto 'Révision Constitutionnelle ou Ecriture d'une Nouvelle Constitution?' (1996) 23&24 *Lex Lata* 16-20; and Mbaku (n 4 above).

proposals, also resigned. The committee nevertheless submitted a draft to the president who in turn decided to table it before parliament only at the eleventh hour during an extraordinary session in November 1995. On 18 January 1996, the President promulgated it as 'Law No. 06 of 18 January 1996 to *amend* the constitution of 2 June 1972'.

If we think of a constitution, as we must, as a form of social contract joining the citizens of the state and defining the state itself, it will be clear from the manner in which this so-called amendment was drawn up that, it could hardly have provided a basis for a 'social contract' uniting the Cameroonian citizens after decades of dictatorship. There are several reasons for suggesting that in lieu of promoting and strengthening the democratic process, the constitutional amendment had rather added a near fatal blow to an already stalled democratic transition.

Could there have been some confusion over whether the process was designed to bring about a 'new' constitution or just an 'amendment'?⁴² The difference between the two is not merely semantic. The phrase 'to amend' comes from the latin word 'amendere', to correct. It can be argued that the surreptitious change in the terms of reference, from drafting a new constitution to merely revising or amending the old constitution reflects the real intentions of the regime. Their intention was merely to correct or modify the constitution without fundamentally changing its nature as the pro-democracy campaigners and the opposition had wanted. As a result, the 1996 constitutional amendment, when carefully analysed is essentially negative, and defensive, and a mere protective obfuscation of the *status quo ante*. It suffers from far too many structural weaknesses than can be discussed here.⁴³ However, it substantially compromised the prospects for constitutional democracy in many ways.

First, the pre-1996 highly centralised autocratic state system with the President having extensive powers were reinforced with the creation of what amounts to an 'imperial' president, and a considerable weakening of the powers of the legislature and the judiciary. The President can, without consulting anybody name and dismiss cabinet members, judges, generals, provincial governors, prefects and the heads of the numerous parastatals. He can approve or veto newly enacted laws, declare a state of emergency and authorise public expenditure. He also has extensive powers to legislate and as in the past, can rule by decree. On the other hand, the National Assembly has been transformed into a body with more privileges and prestige than ever, a prudent step to keep the opposition quiet and happy, but with little effective power to initiate or even influence the content of legislation. Obsolete Standing Orders dating back to

42 Kamto (n 40 above).

43 See generally, Fombad (n 40 above); Kamto (n 40 above); Mbaku (n 4 above); F Mbome Les Rapports entre L'exécutif et le Parlement' (1996) 33&24 Lex Lata 22; B Momo Le Parlement Camerounais (1996) 33&24 Lex Lata 25; Olinga (n 6 above).

the era of the monolithic parliament have been left in place to ensure that it remains a body that rubber-stamps legislation prepared by the government. If we consider that the primary aim of a constitution in a democracy is to distribute power and provide checks and balances through the careful distribution of power between the three arms of government, then it is clear that such extensive powers conferred on a President are completely irreconcilable with an intention to institute a constitutional democracy.

Secondly, a constitution is only as good as the mechanism provided for ensuring that its provisions are respected by all citizens and violations of it promptly sanctioned.⁴⁴ Although the constitutional amendment professes to institute for the first time, what it terms 'judicial power', judicial independence is effectively neutralised due to the President's unlimited power to appoint and dismiss judges. Perhaps most seriously, is the fact that the constitution does not have the force of a supreme, overriding law and as a result there is no guarantee for the respect of the rule of law. Only the president and a few specified political elites can challenge the constitutionality of any law, and this before Constitutional Council, (one of the key innovations of the amendment, which like most of the others, is yet to be established); a body composed essentially of his nominees. Given that these are usually the persons who make laws that violate the constitution, it is absurd to expect them to challenge the constitutionality of such laws.

Finally, on the burning issue of decentralisation, the constitution whilst retaining the centralised state structure, provides for the possibility of some deconcentration of powers through the creation of regional and local authorities. These are stated in such dubious, obscure and circumlocutory language that it is doubtful if there was ever any serious intention to implement them. Support for this conclusion is based not only on the fact that none of the so-called new institutions provided for under the constitution have been established but also by a number of official pronouncements. On 25 June 1999, Mr. Samson Ename Ename, the Minister of Territorial Administration in answer to a question in the National Assembly said that the setting up of the new institutions such as the Constitutional Council, and the Senate (a second chamber of parliament) was a tricky issue that needed careful study. He also pointed out that, creating the envisaged regions and local councils required time to ensure that there were no conflicts over jurisdiction.⁴⁵

It is now twelve years since the entry into force of the so-called amendment to the 1972 constitution which its promoters claimed was designed to strengthen Cameroon's democracy, but hardly any of the new institutions contemplated has been created. Perhaps more worrying

⁴⁴ Fombad (n 40 above).

⁴⁵ B Isaha'a Bulletin No 539 (1999) <<http://www.Boh.org/english/cm/1999/0625.529/n3.html>> accessed 30 June 2008.

is that the framers of the constitution decided to introduce institutions with absolutely no idea as to the feasibility of their implementation. Thus, the senate contemplated in articles 20-24, the audit courts contemplated in articles 38-42, the Constitutional Council contemplated in articles 46-52 and the 'decentralisation' of powers through regional and local authorities in articles 55-61 have remained dead letters in the constitution. Besides the fact that none of the very institutions that was used to justify the so-called amendment have been established, in numerous situations over the last twelve years the government has freely referred to and relied on either the unamended or amended 1972 constitution as and when it suited its convenience leading to a situation where it could rightly be suggested that Cameroon is governed by or even between two constitutions, one original and the other purporting to amend the original constitution. It is an anomalous situation that suits the fragile and uncertain political climate prevailing in the country.

History has time and time again shown that bad constitutional structures can have disastrous consequences for a country. The Weimer constitution that Germany adopted after World War I is often cited as the best recent example.⁴⁶ Researches on constitutionalism and constitutional democracy have been carried out for many centuries now and the labours of jurists, philosophers, sages and legislators have been collected and are ready for use. There is clearly no excuse today for purporting to create 'new institutions' or even having a constitution of 69 articles in which 24 articles, that is about 35% of its provisions, have not twelve years since the constitution was supposed to have come into force, been implemented.

There is a growing feeling of 'plus ça change plus c'est la même chose'. (The more things change, the more they remain the same). The 1996 amendment is as remarkable for what it fails to address as for what it addresses. The process used was hardly open or democratic and the final outcome a disappointment, especially to those who had lost their lives or carry the scars of the bloody confrontations of the early 1990s. There are now many who increasingly question democracy as a way of resolving the country's problems and whose grievances can no longer be ignored. Cameroonian democracy and the constitutional process however has the merit that it has enabled these problems to be exposed, even if it has so far been unable to address them.

11.4 Centrifugal forces of fragmentation and the politics of denial

The confused mixture of relaxation and repression that has been the *modus operandi* of both the Ahidjo and Biya regimes has over the years resulted in the build up of anti-regime sentiments amongst certain segments of the population who consider themselves as 'outsiders' in the whole

⁴⁶ Mueller (n 39 above).

set up. Such sentiments are particularly strong amongst the Anglophones and have given rise to the so-called 'Anglophone problem.' This and the related issue of tribalism and ethnicism that pose a serious threat to the country's fragile unity must now to be briefly examined.

The government has refused to come to terms with either the Anglophone problem or the simmering ethnic tensions that lies just beneath the surface, and adopted what can only be described as a politics of denial. Conrad and Milburn have described the politics of denial as a psychological defence mechanism and an unconscious mental manoeuvre which cancels out or obscures painful reality. The government's general attitude is one of 'hear no evil, see no evil, and hence feel no pains or confusion.' Influenced by this denialist attitude, there is a feeling that 'we don't confront or change things that don't exist; we don't have to examine our motives, intentions and actions.'⁴⁷ Based on this psychological state of mind, the Cameroonian authorities impulsively deny the existence of any problem, like the two discussed below or any others such as corruption, electoral fraud and even the natural disasters that sometimes visit the country. This enables them to attempt to ignore the issues or offer the most simplistic solutions to the problems.⁴⁸

11.4.1 The Anglophone problem⁴⁹

Numerous groups have sprouted up amongst the Anglophones since 1990 determined to 'renegotiate' a new federal arrangement in which the Anglophone community will be recognised as a 'distinct society' with a special status. The most radical amongst them are insisting on negotiations for independence, or secession by use of force if need be, against what they perceive as the 'illegal occupation' of the Anglophone territory by the 'Republic of Cameroon'-one argument being that, by adopting the pre-unification appellation, the former French Cameroon had unilaterally seceded.

Cameroon's bilingual and bi-cultural nature, one of its greatest sources of pride has turned out to be its most enduring contradiction. The Anglophones who make up about 20 per cent of the total population and occupy about 9 per cent of the total land surface, have since reunification in 1961 been suspicious of Francophone domination. A perception of Anglophone

⁴⁷ Politics of Denial (1996) 1-3.

⁴⁸ When Cameroon topped the Transparency International corruption perception index in 1998 and again in 1999, the first official reaction was to reject this and castigate it as a conspiracy against the country. Similarly, the response to international observer reports condemning fraud in Cameroonian elections since 1992 has been to again reject the reports out of hand and spend enormous amounts of money to hire consultants to prove that the country is neither corrupt nor are elections regularly rigged. See further, Fombad (n 22 above) and CM Fombad and JB Fonyam 'The Social Democratic Front, the Opposition, and Political Transition in Cameroon' in Mbaku & Takougang (n 22 above).

⁴⁹ A lot has been written on this. Besides some of the works already referred to, see JF Bayart 'The Neutralisation of Anglophone Cameroon' in Joseph (n 1 above) 307; P Konings 'Le Problème Anglophone au Cameroun dans les Années 1990' (1986) 62 *Politiques Africaine*; P Konings & B Nyamjoh 'The Anglophone Problem in Cameroon' (1997) 35 *Journal of Modern African Studies*; E Lyombe 'The English-Language Press and the 'Anglophone Problem' in Cameroon: Group Identity, Culture and the Politics of Nostalgia' <http://findarticles.com/p/articles/mi_qa3821/ai_n9173452/print> VJ Ngoh 'The Origin of the Marginalization of Former Southern Cameroonians (Anglophones), 1961-1966: An Historical Analysis' (1999) accessible at <http://findarticles.com/p/articles/mi_qa3821/is_199904/ai_n8835936/print> FB Nyamjoh *Cameroon: A Country United by Ethnic Ambition and Difference* (1999) 98 *African Affairs* 101.

marginalisation and a deliberate government policy of absorption and assimilation combined with the elimination of Anglophone particularities looms large and goes deep. To many of them, the last straw that broke the camel's back came in 1992 when a sceptical Supreme Court whilst acknowledging gross irregularities in the presidential elections, still proceeded to declare Biya the winner in an election which many, including international observers felt, Ni Fru Ndi (an Anglophone) had won. This, more than anything else, reinforced the long-standing Anglophone feelings that no matter their merits, they are destined to play second fiddle to Francophones. Many analysts agree that Anglophones have had a pretty hard time being both Anglophones and Cameroonians.

Their grievances can be summarised under three main themes.⁵⁰ The first is economic. Anglophones point to the relative economic underdevelopment of their two provinces as compared to the other eight provinces since 1961. The case is particularly painful for the South West province, which in many respects, is not only the country's breadbasket in terms of agricultural produce but is the main source of the country's oil wealth. This has led to a feeling that the two provinces are a mere appendage, useful for their resources but not for its people.⁵¹

The second complaint centres around what is seen as a deliberate policy of 'de-identification' of Anglophones from their separate and distinct heritage and 'persona' through a careful process of 'Gallicising' all aspects of social, economic and educational life to conform to French models. Both Ahidjo and Biya in resolutely pursuing their policies of 'national unity and integration' have seen the persistence of Anglophone 'particularisms' as an obstacle. Thus, Biya has firmly rejected what he terms as the 'collection and juxtaposition of our diversities.'⁵² It has come as a shock to Anglophones that having agreed to join a bilingual union in which inherited colonial differences in language and institutions were to be respected and creatively integrated into a new collective national experience, they were now buried under the weight of the dominant French way of life.⁵³ Thus, the cynical aphorism, 'bilingualism in French'. The intensity of this 'de-culturalisation' has made it hard for an Anglophone to confidently assert himself, especially because this has been marked by derogatory references to them as 'les Biafrais' (that is, Biafrans, evoking memories of the Nigerian civil war) and 'les ennemis dans la maison' (the enemies within the house).⁵⁴ and their demands for federalism dismissed as evidence of lack of

50 JF Bayart 'The Neutralisation of Anglophone Cameroon' in R Joseph (n 1 above); J Benjamin Les Camerounais Occidentaux: La Minorité dans un état Bicommunautaire (1972);Konings (n 47 above); A Mukong (ed.), The Case for Southern Cameroons (1990); F Stark 'Federalism' in Kofele-Kale (n 2 above).

51 Derrick (n 7 above).

52 Biya (n 20 above).

53 Kofele-Kale 'Ethnicity, Regionalism, and Political Power: A Post-mortem of Ahidjo's Cameroon' in M Shatzberg & I Zartman (eds.), The Political Economy of Cameroon (1986).

54 Eyoh (n 16 above); Derrick (n 7 above); Takougang (n 14 1 above); A Mbembe 'Epilogue. Crise de Légitimité, Restoration Autoritaire et Délitescence de L'Etat' in P Geschiere & P Konings (eds.) Pathways to Accumulation in Cameroon (1993).

patriotism and a smokescreen for secession.

Finally, the loss of the very limited regional autonomy in 1972 has been followed by the relegation of Anglophone leaders to inferior and inconsequential roles in the national decision-making process.⁵⁵ Various studies have shown that Anglophones have been consistently under-represented in ministerial as well as senior and middle level positions in the administration, the military and parastatals. The elevations of an Anglophone to the essentially honorific position of Prime Minister in 1992 as a ploy to neutralise the SDF came only after most of the limited powers that his Francophone predecessor enjoyed had been transferred to the Secretary General of the Presidency and to two vice prime ministers who were appointed at the same time. Meanwhile only those Anglophones who have distinguished themselves in their loyalty to the regime's policies have been regularly appointed to the few ministerial and other senior governmental positions that have been given to Anglophones.⁵⁶ A deliberate policy of divide and rule has been the pattern as the government has regularly used ministerial appointments to drive a wedge between the two Anglophone provinces by making it look as if a gain for one province is a price for loyalty which must be bought at the expense of the other province.

Analysts may well debate the extent of these grievances but their existence is a palpable fact. The uneasy co-existence of the Anglophones and Francophones has led one writer to posit that Cameroon is 'two different countries in one.'⁵⁷ Frustrated by the intransigence of the regime and galvanised by the generalised hardship in which most analysts agree, Anglophones have suffered more than any other group, an alarming number of pressure groups, have sprang up since the First All Anglophone Conference (AAC 1) was held in Buea in 1993. Moderate demands pursued by some of them, such as the Cameroon Anglophone Movement (CAM), now Southern Cameroons Restoration Movement (SCARM), and the Southern Cameroons National Council (SCNC), for a return to the federation, have now been brushed aside by emerging radical factions such as the Ambazonia, the Southern Cameroons Liberation Front and the Free West Cameroon Movement which advocate outright secession by use of arms if necessary.

An opportunity was missed to lay this long festering Anglophone problem to rest during the 1996 constitutional amendment process and instead, there was an absurd attempt to create a

⁵⁵ Kofele-Kale (n 52 above).

⁵⁶ For example, in the present cabinet of 62 ministers, only 9, that is just under 15% are Anglophone, and most of them, apart from the honorific position of prime minister, hold junior ministerial position. It must be added that about 20 of these ministers (that is about 33%) come from Biya's Fang-Beti-Bulu ethnic group. As Takougang & Krieger (n 1 above) at 96 quote an analyst who states: 'To be an Anglophone in Cameroon bars you the way to be a Minister of Defence, Minister of Finance, Minister of Territorial Administration and above all the President of the country – no matter how brilliant and gifted you are. The contrary is true with Francophones. You can ascend to the highest office of the country by virtue of the fact that you are a Francophone no matter what a nonentity you may be.'

⁵⁷ Azevedo (n 21 above).

new classification of Cameroonians; those who are 'autochthonous' and those who are not.⁵⁸ No attempt was made to define this bizarre concept but the Anglophone minority problem was carefully fudged. However, in January 1999, Biya for the first time admitted, albeit in dismissive fashion, that such a problem existed, even if he perceived it as one promoted by a handful of hotheads and vandals. Given the intensity of recent debates by Cameroonians within and without the country, it will be foolhardy to underestimate and ignore the dangers that these problems pose to the country's stability, especially when there are other similar issues festering.

11.4.2 The ethnic equation

Much of the voluminous literature on ethnicity in Africa centre around it being one of the major underlying causes of current conflicts in Africa.⁵⁹ In fact, the exploitation of ethnicity and ethnic parochialism has been one of the major constraints on democracy and the democratisation process in Africa. Cameroon's extraordinary diverse ethnic mix has already been noted. Historically, inter-ethnic cleavages in the country have presented a formidable array of social, political and economic tensions and conflicts which, whilst making the integrative efforts of the government difficult, never seriously threatened the peace and harmony of the country as a whole.⁶⁰ Since the introduction of multi-party democracy, the dimensions of the various ethnic cleavages and their resultant tensions and conflicts have exacerbated and added to the increasing socio-political fragmentation and polarisation in the country.

During the Ahidjo era, there was a general feeling that the country was divided into two potentially hostile camps: a North fearful of Southern infiltration and domination, and a South resentful of the northern privileges and political hegemony, resulting in an atmosphere of mutual antagonism between the two camps.⁶¹ Beyond this perception, there is no other concrete evidence of discrimination, besides the deliberate policy of affirmative action introduced by Ahidjo to close the very wide gap that separated the north from the south in terms of socio-economic development and the acquisition of educational and professional skills.⁶² Despite the relatively privileged position of the northerners during Ahidjo's reign, he did attempt to promote an 'ethic of unity' sensitive to regional differences, which he pursued with as much vigour as his policy of neutralising Anglophone particularisms. This he did by trying to ensure a reasonably fair and balanced ethnic representation in his various appointments to the cabinet

58 C Monga 'Eight Problems with African Politics' (1997) 8 *Journal of Democracy* 115.

59 A Kamba 'Tolerance – Africa's Response to the Challenges of Pluralism and Diversity' in UNESCO *Democracy and Tolerance – Proceedings of an International Conference* (1995).

60 W Johnson *The Cameroon Federation: Political Integration in a Fragmentary Society* (1970); Le Vine (n 1 above); N Rubin *Cameroon: An African Federation* (1971); and M Prouzet *Le Cameroun* (1974).

61 V Azarya *Dominance and Change in North Cameroon: The Fulbe Aristocracy* (1976);

62 R Clignet 'The Impact of Education Structures and Processes on National Integration in Cameroon' in D Smock and K Bentsi-Enchill (eds.) *The Search for National Integration in Africa* (1976); Azarya (n 60 above); and Kofele- Kale (n 52 above).

and other positions of power. Biya appears to have continued this policy until after the 1984 coup attempt when it would seem, he has never felt secure without operating with or through his 'Essingan' clique (the 'Essingan' are a close circle of senior politicians, bureaucrats and academics from the Beti [Biya's tribe] and related ethnic groups). Although a few elites from other tribes have been co-opted, they remain on the periphery of power but still reap the fruits of the semi-institutionalised system of plunder and accumulation. The emergence of ethnicity and widespread discrimination against certain ethnic minorities combined with the increasing manipulation of ethnic differences since 1992 is a source of potential disintegration that can no longer be ignored. A few examples of this and the emerging ethnic and cultural regionalism will suffice.

For a while, after 1992, elections showed a strong ethno-regional trend. Support for the main parties, namely the ruling CPDM has come from the Center, South and East provinces; that for the main opposition SDF from the North West, South West, West and Littoral provinces; and for the National Union for Democracy and Progress Party (NUDP) from the Adamaoua, North and Far North provinces. Since 1997, with the massive use of state resources, the ruling party has successfully squeezed the opposition parties to operate mainly from the home province of the leaders of the parties, in the case of the main opposition SDF or the small administrative division from which the leaders comes from, in the case of the other party leaders. There are more than 168 political parties operating in the country, and perhaps with the exception of the SDF, are void of either ideology or programme, and are essentially loose formations along ethnic or regional lines that have coalesced around a local political personality.

Ethnic differences have been constantly manipulated by the various parties particularly the ruling CPDM. Thus, in the very closely fought 1992 electoral campaigns, the local-language broadcasts by the government-controlled regional radio stations repeatedly incited ethnic animosity against the northerners, who were accused of seeking power to revenge for the killings following the failed 1984 coup attempt, and the Anglophones and Bamilikes of striving to add political hegemony to their economic dominance of the national economy.⁶³ Another method regularly used by the government to drive a wedge between the two Anglophone provinces is by playing on the fear that in any political or administrative arrangement, the numerically superior North West province will overwhelm and dominate the South West province.⁶⁴ It is however, the possibilities of inter-ethnic bloody confrontations that pose a serious threat.

63 See, United States Department of State, Country Report on Human Rights Practices for 1998, Cameroon <<http://www.state.gov/g/drl/rls/afdr/2008/104713.html> accessed 25 June 2008.

64 Eyoh's piece (n 16), shows how even academics can unwittingly rationalise this policy.

There have been more incidents of inter-ethnic clashes since the advent of multi-party elections in 1992 than at any time since independence. In the north of the country, traditional rivalries between the dominant Fulani and the minority and disadvantaged Kirdis have resulted in several incidents of bloody clashes in which the government was alleged to have supported the Kirdis as a means of drawing away support from the UNDP party at its natural base. Many of the traditional leaders or 'lamibe' such as the Lamidat of Rey-Bouba have been granted broad and ill-defined powers to act as 'auxiliaries' of central government and have used these powers to repress minorities within their areas and distort election results. In general, extreme human rights violations against tribes in the North known to support the opposition parties have intensified especially during electoral campaigns.⁶⁵ In the southern part of the country, particularly in the Centre, South and East provinces, considered strongholds of the ruling CPDM, there has since 1992 been a permanent state of tension between the indigenous Beti, Bulu and related ethnic groups, who arrogantly assert that it is their turn to enjoy the spoils of power, and other groups such as the Anglophones, Bamilikes and other 'allogènes' (ethnic diasporas) who on account of their numbers could easily influence the outcome of elections in the major cosmopolitan towns like Yaounde and Obala. The policy of exploiting ethnic differences, and playing one group against the other by granting one group superior status over the other found its way into the 1996 constitutional amendment. The preamble proclaims as an official goal, the protection of minorities and the preservation of the rights of indigenous populations in accordance with the law. The constitution itself provides for a distinction at the regional level between 'autochthonous' Cameroonians and those who are not, yet neither the notion of 'minorities' nor that of 'representativeness' is defined. This adjustable citizenship policy has been used to distort election results in the major urban areas, the hot-bed of the opposition, by giving the autochthonous populations of such areas, whom the regime tries to court, built-in advantages, thus creating friction between them and the settlers from other tribes. Now and again, the uneasy peace between the various groups breaks down. The deteriorating economic situation had accentuated the problems of ethnic tensions as the various groups compete for the scarce resources and each feels threatened by the other. This poses a major obstacle not only to the democratic process but also to economic liberalisation. For instance, economic liberalisation has been slow mainly because the regime feels that those who will benefit most from privatisation policies are the Bamilikes and Anglophones whose members tend to be more active in private commerce and industry and who are the mainstay of the main opposition SDF party.⁶⁶

65 Article 19 (n 31 above).

66 The Bamilikes are the dominant tribe in the West province and are the most enterprising tribe in the country. By contrast, although the Biya regime has done everything to promote business amongst his Beti and affiliated tribes, this has failed because of their extravagant lifestyle. See further, N Jua 'State, Oil and Accumulation' in Geschière & Konings (n 53 above) 155.

11.4.3 The heavy colonial baggage

Cameroon's colonial heritage has been more than a mixed blessing in the country's search for internal harmony, peace and stability. The two former colonial masters, whose inexplicable arbitrary decision in 1916 to partition the country in such an absurd manner is at the root of the Anglophone/Francophone divide have in different ways contributed to the stalled democratic process. For the British, this has been by their apparent indifference and the French by their excessive interference in the country's internal affairs.

As pointed out earlier, nobody understands why the British assumed control of what was formerly known as West Cameroon only to show little interest in administering the territory. Shortly after the referendum, it left and did little to assist the inexperienced West Cameroon politicians negotiate the terms of reunification with the Francophones who were throughout advised by the French. Since the 1960s, Britain has maintained a passive and token diplomatic presence in the country and has hardly ever voiced any concerns over the way the people who were once under its administration are faring.

By contrast, the French appear to have transformed Cameroon into the last frontier for asserting its fading power and influence in world affairs. From De Gaulle in the 1960s to Sarkozy today, in spite of recent statements by the latter to the contrary, French policy towards Africa in general and towards Cameroon in particular has hardly changed.⁶⁷ Having grudgingly recognised the fact that democracy was necessary and good for Africa, French support has throughout been ambivalent. France's policy in support of democracy has only gone to ensure that power doesn't pass in any country within its 'horizon réservé' (reserved domain, usually referring to Francophone Africa) into an independent minded leader who will not support or promote French interests. Cameroon has become one of those no-go areas where the French have spared no cost to maintain the dominance of French culture and influence.⁶⁸ It was thus no surprise when the French resisted strong pressure from the Americans and other European countries to support President Biya to hold on to power in 1992 when it was clear to most independent observers that the latter had lost the elections because they could not bear to see an Anglophone John Fru Ndi, leader of the opposition SDF, take over power. In the post-election disturbances that followed, the latter's naivety in calling for a boycott of French products only reinforced

⁶⁷ For some insights into this, see R Marchal 'Sorkozy and Africa: Misunderstanding or Change?' <http://forums.csis.org/afirca> B Mesfin 'Only a Folie de Grandeur? Understanding French Policy in Africa' 17 African Security Review ; and T Chafer 'French African Policy : Towards change' (1992) 91 *African Affairs* 37.

⁶⁸ In 1991 when a nation wide strike labelled 'operation villes mortes' (ghost town campaigns) had so paralysed the Cameroon government for almost three months that it had no money to pay civil servants' salaries, the French government quickly stepped in and saved the regime from imminent collapse. Because of the considerable sacrifice that the people had made, the collapse of the strike left the opposition in such disarray that it has never found any unity of purpose since then.

French misgivings. The policy so far has been to support Biya in spite of his numerous failings because the French have seen no credible replacement. In spite of the recent policy changes announced by President Sakorzy, it is doubtful whether French pride in their 'passé glorieux' (glorious past) and 'grandeur' (a rather distorted self-image of greatness) will allow them to see free and fair elections occur in Cameroon if this means control of the country passing into the hands of a leader whose loyalty to France is suspect. But French interests in Cameroon are influenced by more than a desire to hang on to a fading glorious past. There is also the desire to protect the thousands of French nationals in both the private and public sector (for instance, there are many acting as civilian and military 'advisers'), the huge investments which France has in the country, as well as guarantee a safe passage for its imports and exports. A glaring reminder that in spite of Sakorzy's utterances, no real changes in policy orientation to promote the welfare of the people in Francophone Africa or even spark new life in the fading embers of genuine democracy in these countries is expected, was manifested during the recent amendment of the Cameroon constitution four years before any elections are due, to give Biya another chance to run for president in 2011 by which time he would have been in power continuously for 29 years. This was widely criticised by most Western governments except the French. The willingness of the French to ignore all the excesses by the incumbent regime in Cameroon because they see it as the means through which they can defend and maintain their control over the country and keep it within the 'horizon réservé' regardless of the welfare of the people casts a dark shadow over the country's future.

11.5 Critical elements for a return to constitutionalism

An entirely new constitutional order is needed not only to revive interest in and sustain the democratic process but also to hold the country's diverse groups together into and through the new millennium. The essential elements of this new constitutional vision will now be considered.

It is now abundantly clear that the legacy of statist authoritarianism is too deeply embedded in all sectors and components of the Cameroonian society to be dislodged by the series of half-measures and improvisations that have been attempted since the introduction of multi-partyism. This section briefly explores certain key elements which are considered crucial in the drafting of a new constitution to replace the amended 1972 constitution which, as shown above, has been relegated to a lifeless museum piece, whilst the autocratic and repressive practices and policies of the past, shrouded in democratic mystique, have continued unabated. There are two crucial issues which any new constitution for Cameroon must address. First, it must entrench the core elements of constitutionalism. Second, it must deconstruct the inherited Gallic phobia about federalism.

11.5.1 Entrenchment of the core elements of constitutionalism

A recent study on the prospects for constitutionalism under post-1990 African constitutions concludes that Cameroon is one of the very few African countries where the prospects for constitutionalism is almost nil because the 1996 constitution turns out to be an example of a 'constitutional reform exercise that was carried out to [consolidate] the new creeping phenomenon of autocratic multi-partyism.'⁶⁹ A constitution that does not constitutionalise constitutionalism is as good as no constitution. The distinction between a constitution and constitutionalism, it has been said, is more than a simple exercise in semantics.⁷⁰ Constitutional scholars have had great difficulties defining the concept of constitutionalism. The concept certainly defies any easy and simple definition or description. It clearly means something far more than the mere attempt to limit governmental arbitrariness, which is the premise of a constitution, and which attempt may fail, as it has done several times in Africa. The concept of constitutionalism today can be said to encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations. In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions. Two ideas are therefore fundamental to constitutionalism so defined. Firstly, the existence of certain limitations imposed on the state particularly in its relations with citizens, based on certain clearly defined set of important values. Secondly, the existence of a clearly defined mechanism for ensuring that the limitations on the government are legally enforceable. In this broad sense, constitutionalism has certain core, irreducible and possibly minimum content of values with a well defined process and procedural mechanisms to hold government accountable. The core elements which any constitutions must possess to have any prospects for promoting constitutionalism are:

- i) Provisions that recognise and protect fundamental rights and freedoms;
- ii) Provisions providing for the separation of powers;
- iii) Provisions providing for an independent judiciary;
- iv) Provisions dealing with the control of the constitutionality of laws;
- v) Provisions controlling amendment of the constitution; and
- vi) Provisions providing for institutions that support democracy.⁷¹

⁶⁹ CM Fombad Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism in A Nhema and PT Zeleza(eds.) *The Resolution of African Conflicts: The Management of Conflict Resolution & Post-Conflict Reconstruction* (2008) 196.

⁷⁰ JA Curry, BR Richard & RM Battistani, *Constitutional Government. The American Experience* (1997) 4.

⁷¹ For an elaborate discussion of this, see CM Fombad 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 *American Journal of Comparative Law* 1; and CM Fombad Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism in A Nhema & PT Zeleza(eds.) *The Resolution of African Conflicts: The Management of Conflict Resolution & Post-Conflict Reconstruction* (2008).

The central principle in constitutionalism is the respect for the human worth and dignity. It is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens. It is the institutionalisation of these core elements that matter. The philosophy behind constitutionalism is the need to design constitutions that are not merely programmatic, shams or ornamental documents that can be easily manipulated by politicians but rather documents that can promote respect for the rule of law and democracy.

The experiences of the last four decades of independence amply demonstrate the capacity of Cameroonian politicians and administrative officials to distort and vitiate whatever governmental forms are devised through arbitrary ordinances, decrees and orders that contravene the constitution. The absence of a credible and independent mechanism for controlling the constitutionality of laws in the country has been a major obstacle to checking such arbitrary rule. President Biya, like his predecessor, has repeatedly used his control of the legislature and the legislative process to change the constitution whenever it suits him, even when such changes are in clear violation of the constitution itself. This Gallic culture of abrogating or violating laws is reflected in this oft-quoted French joke. Prior to the advent of the Fifth Republic of 1958, a political scientist is alleged to have visited a bookstall in Paris and asked for a copy of the French Constitution. 'Sorry', was the prompt and plain reply of the proprietor of the bookstall, who added with a sarcastic smile: 'we do not sell periodicals here.'⁷² The absence of an independent judiciary as well as a mechanism for controlling the constitutionality of laws is aggravated by the quasi-absence of any credible constitutional framework for human rights protection.

It may be argued that Cameroon is probably one of the few countries in the world today where only a limited number of human rights are apparently recognised in very obscure language and even then, only in the preamble to the constitution. It is thus no surprise that the present Cameroonian regime is considered one of the most repressive and more people have been killed in Biya's attempts to change a constitutional provision that will enable him to stand for president in four years' time than have been killed in Mugabe's attempt to ignore an electoral defeat in the last presidential elections in Zimbabwe! It is contended that once a country has crossed the constitutionalism Rubicon, the chances of backsliding into anarchy or dictatorship are considerably much reduced. Nevertheless, Cameroonian constitutionalism must be built around a federal constitutional framework which can only happen if the concept of federalism is demystified.

⁷² ZK Maluka *The Myth of Constitutionalism in Pakistan* (1995).

11.5.2 Deconstructing the Federal Myth⁷³

What is needed in Cameroon is a rational consensual constitutional arrangement in which the various centrifugal particularisms within the country can be transformed into a self-conscious united polity that reflects the country's rich and diverse cultural heritage as well as the aspirations of the people. Countries like Mauritius are typical examples of how a full-functioning democracy can operate in what most analysts will consider as one of the most culturally fragmented societies in the world.⁷⁴ What Cameroon needs, is not some abstract and imposed unity but rather an institutional framework that promotes mutual trust, respect and tolerance for diversity and differences, and a propensity for accommodation and compromise. It is argued that radical decentralisation through the introduction of an effective, well-structured federal framework, provides the best formula for enabling the peaceful co-existence of the diverse groups within the country and is vital for the revival and sustenance of its fledgling democracy.

Since the formal dismantlement of the sham federation in 1972, federalism has widely been rejected as alien and synonymous with fragmentation and secession. However, almost 40 years of more or less continuous centralisation has neither brought about the declared goals of national unity and integration, nor economic progress. Instead, it has not only aggravated the country's economic decline but is now completely dysfunctional to, and an impediment to the successful implementation any economic recovery programme. Is there really any reason to fear federalism?

As Smith points out, the term 'federalism' has been the subject of differing meanings and applied to many different situational contexts such that identifying its defining features can be as controversial as evaluating them.⁷⁵ Smith sees federalism in its 'most general and commonly conceived form' as an ideology which holds that the ideal organisation of human affairs is best reflected in the celebration of diversity through unity.⁷⁶ The spectrum of political partnerships to which the term 'federal political system,' applies, is extremely broad indeed.⁷⁷ Federations represent a particular species in which neither the federal nor the constituent units of government are constitutionally or politically subordinate to the other, nor does the centre have the judicial powers to abolish, amend or redefine the territory of the constituent units. Even then, there are significant variations based on or influenced by factors such as the number and relative

73 Most of these points were developed in CM Fombad 'Cameroon's Troubled Democratic Transition and the Deconstruction of the Federalist Problematic' in F Columbus (ed.) 3 Politics and Economics of Africa (2002).

74 R Lemarchand 'African Transitions to Democracy: An Interim (and mostly Pessimistic) Assessment' (1992) 22 African Insight 178.

75 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in G Smith (ed.) Federalism: The Multiethnic Challenge (1995) 4.

76 Smith (n 74 above) 4.

77 For a discussion of this, see RL Watts 'Comparing Forms of Federal Partnerships' in D Karmis & W Norman Theories of Federalism: A Reader (2005) 233-253.

size, population and wealth of the constituent units; the form and scope of the distribution of legislative and executive authority between arenas of government; the allocation of financial resources to governments; the degree of centralisation or decentralisation; the degree of symmetry or asymmetry in the allocation of powers to constituent units; and in the structures and processes relating to the allocation of powers to constituent units.⁷⁸

According to Daniel Elazar, the political theory of federal democracy holds that the way of democracy is constitutionalised partnership and power sharing on a non-centralised basis through discussion and deliberations. He sees a federal democratic polity as one built upon a matrix of constituent institutions that together share power, not through a single centre but in a multi-centred or non-centralised way.⁷⁹ Cameroonian democracy and the decentralisation of governmental institutions through federalism must be considered as complementary trends in which the success of one depends on the success of the other. The highly centralised system is such an inextricable part of the autocratic style of governance that the democratic transition was doomed from the start.

If, as was argued earlier, a constitutional government must be perceived as a limited government, then a federal government is in a very definite sense, a limited government. In the succinct words of Lord Acton: 'Of all checks on democracy, federalism has been the most efficacious and the most congenial.'⁸⁰ Because Cameroon's cleavage groups, particularly the Anglophone/Francophone division is so sharply defined and inter-group insecurities and suspicions so deeply felt, the overriding imperative in any new constitutional design should be to avoid any structure that may lead to an indefinite exclusion from power of any significant group, as is currently the case with the Anglophones. To achieve this requires a federal system with built-in incentives for inter-ethnic and inter-group co-operation and accommodation. Each group must be able to identify with, have a stake and be guaranteed political equality by being able to at least have control over their own local affairs and pursue things that can advance their culture, language and other interests within the bounds of the constitution.

Federalism offers the possibilities and opportunities for constructing a more democratic polity. It has over generations provided the best and most effective institutional framework for regulating deep divisions within society and preventing their spill over into inter-communal violence.⁸¹ Through the balancing of interests, voices and diversity, minority interests can be protected against the tyranny of the majority by ensuring that there is no permanent majority

78 Watts (n 76 above) 234.

79 'Federalism, Diversity and Rights' in E Katz and A Tarr (eds.) *Federalism and Rights* (1996) 2-7. In fact, he argues that federalism is one of the three most important inventions of modern democratic government, the other two being the protection of individual rights and the idea of civil society.

80 G Smith (n 74 above).

81 J March and J Olsen *Democratic Governance* (1995); and Smith (n 74 above).

but rather that all majorities constitute an aggregate of the various minorities. In this way, centrifugal minority and ethnic forces of fragmentation can be kept at bay. Seemingly, those political systems that are imbued with the letter and spirit of federalism have been by far the most stable entities in the modern era.⁸² The 1961 unhappy federal experiment eloquently demonstrates that it makes no sense to talk of federalism under an authoritarian or dictatorial system.⁸³ An effective and democratic federal polity must be built around at least four major pillars:

- 1) A representation that is territorial
- 2) At least two tiers of government - local and regional, with clearly defined constitutional powers and functions.
- 3) Regional governments incorporated electorally into the decision-making process of the central government, and
- 4) Special constitutional protection of the various tiers of government⁸⁴

Federalism in this respect requires devolution of powers; the transfer of powers to a lower level of jurisdiction with clear geographical boundaries, a legal status, specified functions, fixed financial resources and autonomous personnel. African leaders and ruling parties must now accept that power can no longer be concentrated and monopolised as before and must be prepared to share this according to defined and generally agreed upon mechanisms amongst all interest groups in society.⁸⁵

A new federal constitutional dispensation for Cameroon must amongst other considerations contain at least four fundamental elements;

- i) a regional or state structure with an autonomous status for the present Anglophone provinces;
- ii) language rights;
- iii) recognition and protection of bi-juralism; and
- iv) a mechanism for ensuring free and fair elections

These elements will be examined in some depth.

82 Maluka (n 70 above).

83 M Davis 'The Case of Chinese Federalism' (1999) 10 *Journal of Democracy* 124.

84 Smith (n 74 above).

85 M Ottaway (ed.) *Democracy in Africa. The Hard Road Ahead* (1997).

11.5.3 Asymmetrical federation⁸⁶

The problem of how the majority Francophones and the minority Anglophones can live in harmony and still retain their distinctive cultural identities is a complex one. Anglophone particularisms, like ethnicity, are a reality and a fact of life, which almost 40 years of co-existence has neither diminished nor destroyed. A modern democratic vision for Cameroon must be constructed on the premise that unity and diversity can be made not only mutually consistent but also mutually supportive. What is called 'union' in a body polity; Montesquieu wrote instructively about the Roman Empire many centuries ago, is a very equivocal thing. The true kind, he rightly asserted, is a union of harmony whereby all the parts, however opposed they may appear, co-operate for the general good of society - as dissonances in music cooperate in the production of overall concord.⁸⁷

History abounds with examples of failed attempts to artificially create homogenous communities by devaluing and suppressing minority particularities. The current re-emergence and fascination with cultural distinctiveness, it has been argued, is not a rejection of the imperatives of modernity or the modern state but rather an attempt to preserve cultural diversity as a means for people to better understand and accommodate each other.⁸⁸ In present day Cameroon, it is a fact that many of the rights citizens enjoy, the laws they obey and some of the benefits that they receive may depend on whether they are Anglophones or Francophones or whether they live in the Anglophone or Francophone part of the country.⁸⁹ An asymmetrical federal regional arrangement in which the Anglophone regions have a special status and more regional autonomy on the grounds that they as a community constitute a distinct society within the country will do no more than recognise a basic fact of life. There are many, both Anglophones and Francophones who share this vision.⁹⁰

The argument that such a policy may reinforce and even reify divisions has an intuitive plausibility, but these intuitions seem grounded on the motives of fear and suspicion that only promotes ignorance and intolerance. Practical experience suggests that the problems associated with such constitutional arrangements are due more to flaws in design and implementation

86 For a discussion of the difference between symmetrical and asymmetrical federations, see A Stepan 'Federalism and Democracy: Beyond the U.S. Model' in Karmis & Norman (n 76 above). It will suffice to point out that asymmetrical federalism is usually the model followed by most countries that have a multinational polity that enables them to assign different linguistic, cultural, and legal competences to the constituent units. In fact, with the possible exception of Switzerland, all countries that are mononational such as Germany, Austria, Australia and the US have adopted the symmetrical model as opposed to the asymmetrical model that has been adopted by multinational countries such as India, Belgium, Canada and Spain. This makes the latter particularly suitable for Cameroon's bicultural society.

87 D Lowenthal (tr.) Montesquieu, *Considerations of the Causes of the Greatness of the Romans and their Decline* (1965) 18.

88 G Majone 'Preservation of Cultural Diversity in a Federal System: The Role of Regions' in Tushnet (ed.) *Comparative Constitutional Federalism* (1990) 135.

89 CM Fombad 'Cameroonian Bi-juralism: Current Challenges and Future Perspectives' (1999) 5 *Fundamina Journal of Legal History* 22.

90 Olinga (n 6 above).

rather than inherent difficulties with the arrangement per se. Similar experiments have been tried in other countries such as Canada, where Quebec enjoys a special status and in Spain.⁹¹ The present policy of unification by force is a blunder for which the nation may one day pay for in years to come.

International law sanctions positive steps to be taken by states to ensure that persons belonging to minorities are able to exercise their cultural rights. Thus, article 27 of the International Covenant on Civil and Political rights states that persons belonging to ethnic, religious and linguistic minorities 'shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'. It is only, as Habermas argues, through constructing our political communities on the basis of a 'constitutional patriotism' that reflects all forms of cultural differences and the wishes of all groups within the society - ethnic, religious or linguistic - to live as they wish, and to compete politically by soliciting the voluntary choices of individuals, that a federation can act as a powerful antidote to fragmentation.⁹² In short, regional autonomy will probably fulfil the Anglophones' need for identity, affiliation and self-esteem, which in turn will probably enhance their sense of patriotism and security. Ultimately, the exact details of how these have to be done will require inventive thinking and *bona fide* negotiations between the different interest groups in the country.

11.5.4 Language rights

Bilingualism in Cameroon, because of the lack of clear-cut goals, has been more of a vain hope than a practical fact. Despite a vague constitutional provision recognising English and French as official languages, the overwhelming policy of 'Frenchification' has resulted in an asymmetrical process in which Anglophones are required to become fluent in French whilst Francophones barely go beyond understanding basic English, if at all.⁹³

A new constitution must contain language provisions designed not only to ensure equal treatment of both languages but also promote values that transcend language particularisms. The cornerstone of a sustainable and credible language policy needed to transform the present French-language 'bilingual' public services should probably carry a sting, with clearly defined legal sanctions to regulate bilingual behaviour as is the case in Canada⁹⁴ There is sufficient evidence to show that a well-planned, comprehensive and institutionalised bilingual policy,

91 Smith (n 74 above); and C Williams 'A Requiem for Canada?' in Smith (n 74 above).

92 In 'Citizenship and National Identity' in Stanbergen (ed.) *The Conditions of Citizenship* (1994) 343.

93 S Chumbow 'Language and Language Policy in Cameroon' in Kofele-Kale (n 52 above); Clignet (n 59 above); and B Fonlon 'The Language Problem in Cameroon: An Historical Perspective' in D Smock and K Bentsi-Enchill (eds.) *The Search for National Integration in Africa* (1976) 281-311.

94 Williams (n 84 above).

which can prevent one language dominating the other, can succeed. The creation of an agency with pro-active powers to implement this must also be considered.

11.5.5 Recognition and protection of bi-juralism

In my paper, 'An Experiment in Legal Pluralism: The Cameroonian Bi-jural/Uni-jural Imbroglio,'⁹⁵ I point out that the bi-jural experiment was doomed from the start because within the first few years of reunification, steps to unify and harmonise the English law that applies in the two English speaking provinces and French civil law which applies in the rest of the eight French speaking provinces in Cameroon had already been taken. The imposition of a unitary government since 1972 has gone hand in hand with a systematic process of introducing uniform laws which ostensibly and symbolically attempt to harmonise the two legal cultures but are essentially a replica of French law. There is a fear that the progressive elimination of English legal peculiarities from the Cameroonian legal system may ultimately result in the disappearance of the English law tradition in the English speaking provinces.⁹⁶ The admixture of uniform legislation based essentially on French law and the remnants of English law is already causing a lot of confusion and uncertainty as to the law applicable in the two English speaking provinces.

A judicial system built on solid principles of legal pluralism which reflects and takes adequate account of the inherited legal cultures is more viable than the present infatuation with a political doctrine of national unity and integration, which sees legal harmonisation as a logical end product. In fact, the Cameroonian legal system remains a potential comparative-law melting pot and a potential laboratory from which one can profitably learn some lessons on how the common law and civil law can co-exist and cross-fertilize each other. Although there are problems of a purely legal and technical nature but the biggest challenge is that of overcoming political expediency and parochialism. There is therefore more to be gained from maintaining the two legal systems and in fact as Britain and Canada have proven, the co-existence of different legal systems within the same jurisdiction is no impediment to national unity or legal modernisation.

Unlike the bilingual status of the country, which is officially recognised, even if not protected, in article 1(3) of the constitution, there is no similar provision on the legal system.⁹⁷ There is need for a constitutional provision not only to clearly recognise the two inherited systems

⁹⁵ (1997) 16 *University of Tasmania Law Review* 209; and also my paper, 'Cameroonian Bi-juralism: Current Challenges and Future Prospects' (n 82 above).

⁹⁶ Examples of this are discussed in the papers referred to in (n 94 above).

⁹⁷ In one of its transitional and final provisions, article 68, the constitution vaguely alludes to the continuous application of 'legislation applicable to the federal state of West Cameroon,' provided it is 'not repugnant to the constitution or amended by subsequent laws and regulations,' which only adds to the uncertainty because the exact scope of these laws can not be pre-determined.

of law but to go further and ensure that their operation in the two legal districts can not be arbitrarily interfered with or terminated.

11.5.7 A mechanism for ensuring free and fair elections

The greatest threat today to democracy in Cameroon, as in most African countries, is the alarming scale of electoral malpractices, especially vote-rigging and fraud through which governments keep themselves in power against the wishes of a majority of the people as expressed in their votes. The general conclusions as drawn from the various reports of the different international independent observer missions that have observed Cameroonian multi-party elections since 1992 is that credible elections that are free and fair cannot be held in the country until an impartial and independent institution, such as an independent electoral commission (IEC) is established. MINAT and the government in general must cease to have any role to play in the electoral process.

The conditions for a free and fair election are matters of the utmost importance to democracy. All the most important procedures governing the organisation and conduct of elections must be entrenched in a constitutional provision and protected to ensure that they cannot be arbitrarily altered unless special steps are taken. On 19 December 2000, President Biya signed a decree promulgating Law No 2000/016 creating a National Elections Observatory (NEO), to operate as an 'independent body charged with supervising and controlling elections and referendums' in Cameroon. This, it has been shown elsewhere, appears to be a sort of diversion or a mere placebo and an exercise in democratic appeasement because in the final analysis, the NEO turns out to be a shadow of MINAT and a crude disguise for an institution designed to rig elections.⁹⁸

Four key provisions must be included in any future constitutional amendment designed to ensure free and fair elections:

- i) An independent electoral commission that is legally, administratively and financially autonomous.
- ii) An electoral system that provides an effective and expeditious mechanism for handling electoral disputes.
- iii) Regulations on the sponsorship of political parties and candidates.
- iv) Clear rules on the role of, and access of political parties to the public service media.⁹⁹

⁹⁸ Fombad (n 29 above).

⁹⁹ For an elaborate discussion of what the author considers as some of the critical ways in which the democratic impasse in African constitutionalism can be overcome, see the paper referred to in n 69 above.

Political parties are an indispensable feature of modern democratic politics. After the experiences of the 168 or more odd parties in Cameroon over the past few years, it may be necessary for the people to determine by way of a constitutional provision, the number and manner in which political parties are to be recognised and sponsored.

11.6 Conclusion

The record of the Biya's government, like that of most of his contemporaries who have become born-again democrats suggests that the current transition is not necessarily the beginning of a new era of constitutional democracy in Africa, but rather another episode in the long and tortuous process of political transformation. It proves that repressive and autocratic habits nurtured over decades cannot be shed overnight. In a metaphorical sense, Cameroon today stands between constitutional autocracy and quasi-democracy and a system of extreme statist centralisation and highly discretionary deconcentration of powers, all of which are ill-equipped to counter the numerous centrifugal forces that have been building up since independence and reunification. The violent political disturbances of the early 1990s may have been weathered but the uneasy political stalemate of today is due more to the grinding poverty that threatens the very physical existence of many citizens and who are thus preoccupied with the struggle for survival, than any general acceptance of the *status quo*. As Ziyad Limam laconically observed: 'With nothing to eat, the right to vote is derisible'¹⁰⁰ Does Cameroon, or Africa, need a repeat of the incidents of the 1990s to get closer to a system of genuine participatory democracy?

South Africa's successful transition provides many lessons for the rest of Africa. It shows how, against tremendous odds, political leaders, previously sworn to the destruction of each other, were able to set aside their differences, put the interest of the nation first and negotiate a federal and pluralistic constitution that is without doubt a model for all complex multi-ethnic societies. The goal of producing a sense of a common good and common destiny in society in which all citizens can feel free and equal, and actively participate in their governance in an atmosphere of mutual trust and tolerance is one of the greatest challenges that Cameroon faces in this new millennium. Genuine and meaningful democracy can only take root in the country when the repressive authoritarian institutions still firmly in place today are dismantled. It has been argued that the fragile unity of the country can only be maintained through the introduction of a new federal constitution, designed to accommodate as well as reflect the country's cultural and ethnic diversity. As many analysts have rightly opined, it is premature to call what has been happening in Cameroon since 1992 as democratisation and the experiences of the last sixteen years show that further opportunism and oppression will remain the order of the day for some time to come. In confounding all electoral logic and common sense and reducing the opposition

¹⁰⁰ Jeune Afrique (1991) 17.

to such a point that the incumbent could declare landslide victories in the 2007 elections, the ruling CPDM government has demonstrated the extremes to which it is prepared to go to stay in power. The Cameroonian people need an opportunity to decide the basic principles on how they want to be governed, which they have not had since independence.

The past fifty years have witnessed a 'federalist revolution'. According to one estimate, nearly 40 per cent of the world's population now live within polities that are firmly federal; another third in polities that apply federal arrangements in some way.¹⁰¹ A new federal constitutional arrangement for Cameroon, as proposed in this paper, is not a magic or ultimate solution to the country's political problems. It however has the merit that it is likely to be attended with the least or the most pardonable inconveniences than the present harsh statist unitarism. Federalism *per se*, neither guarantees democracy nor constitutional rule. Nevertheless, properly conceived and implemented, it will considerably enhance the chances of both. It will probably provide something for most people, rather than nothing for many people, as presently happens. The Cameroonian renaissance will probably start when the constraints of infantile obsession with Gallic centralist stereotypes are abandoned and the people can be allowed to think constructively and imaginatively about the solutions best suited to the country's socio-cultural heritage. The present rulers must not forget the bitter lesson from Ahidjo's demise. The former created the repressive system, which like Dr. Frankenstein, forgot its place and became instead a monster that haunted him right to his grave.

101 Elazar (n 73 above).

12. FEDERALISM AND ACCOMMODATION OF ETHNIC DIVERSITY IN AFRICA: THE ETHIOPIAN EXPERIENCE

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Abstract

Like most African states Ethiopia is composed of numerous and distinct ethno-cultural groups. The most important institutional design adopted under the 1994 Constitution to accommodate this diversity is federalism. According to the Constitution this is sought not only to promote national cohesion but also to promote the equality of peoples and ensure respect for distinct culture, language and religion. Seen in the light of the failed experience of many African countries with federalism and Africa's unitarist nation-building tradition, this new experiment represents a total break from this tradition. This paper seeks to examine the nature of Ethiopia's federalism and its attractions and limitations as one possible model for accommodation of diversity in Africa. The paper is divided into four parts. Part I introduces the subject. Part II examines the potential of federalism for accommodation of diversity in Africa. In Part III, Ethiopia's federal system and its features are addressed. This is followed by Part IV which identifies the successes and drawbacks of the Ethiopian experience and the lessons that can be drawn for other African countries that may consider the use of federalism such as Kenya. Finally, part V closes the paper with some conclusions.

12.1 Introduction

One of the dominant features of the political history of Ethiopia particularly after World War II has been the struggle between the forces of centralisation and unity on the one hand and ethno-regional minorities that sought the equal recognition of their cultures, political representation and participation and most of all territorial autonomy on the other. This struggle precipitated a civil war involving numerous armed liberation movements organised along ethnic lines.² When these movements led by the coalition Ethiopian Peoples Revolutionary Democratic Front (EPRDF) ousted the military regime of Mengistu Haile-Mariam in 1991, the most dominant agenda of the time had been the resolution of the so-called the nationality question (the problem of minorities) through structural and democratic transformation of the Ethiopian state. Although there was no agreement more on mechanisms for addressing the problem than on the nature of the problem itself,³ for the major political forces of the time the deployment of ethnicity as a principle of political organisation was considered critical.

1 * LLB (AAU), LLM (UP) and PhD candidate (University of the Witwatersrand). This email, emezatia.ethiel@gmail.com; Much of this work draws from research being undertaken by Solomon A. Dersso. I would like to thank him for the discussions and for allowing me to make a liberal use of his materials for this article.

2 On the eve of the fall of the military regime, there were about 17 armed movements mobilized for the recognition and protection of the rights and distinct identity of particular communities. See Ministry of Information BeEthiopia ydemocraciayawi sirat ginbata gudayoch (1994) 26.

3 A Fiseha offers a comprehensive analysis of the various perspectives, their convergences and divergence. See A Fiseha Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study (2005/2006) 52-79.

One issue that should have been decided as part of the process of transformation of the Ethiopian state has been the type of structure of the state that should be designed under a new constitution. For Ethiopia a unitary form of state structure was not an option at all. There were at least two reasons for this, one conceptual and another practical. First, a unitary system cannot coexist with sub-national communities that possess sovereignty juxtaposed alongside with the centre and retain the right to unilaterally withdraw from the union. Thus, Dr Samuel Assefa of Rutgers University, now Ethiopia's Ambassador to the US, aptly captured the anomaly between unitarism and sub-national sovereignty:

The attempt to combine these discrepant constitutional commitments – to vest all authority permanently in the centre, on the one hand, and, on the other, to recognize the right of some or all local units to secession and independence – would yield a most unwieldy hybrid, a genuinely neurotic constitution, one might say.⁴

Second, central to the war that various groups fought against the military regime, as in other African states, is the high degree of concentration of power at the centre and the corresponding political and economic marginalisation and the cultural domination of the various population groups constituting Ethiopia.⁵ After the fall of the Dergue, the mood of the new forces was decidedly for making a sweeping break from the unitarist past and creating a new political system.⁶ One would like to agree with Samuel Assefa's categorical statement that a unitary system 'is not a *live option* for Ethiopia – it does not lie within the horizon of what is actually possible, given where we [Ethiopians] stand today.'⁷ There has been a general agreement across the political divide that there is no alternative to federalism.⁸

As a result, the Constitution 'establishes a Federal and Democratic State structure.'⁹ As Fasil Nahum rightly observed 'We the nations, nationalities and peoples of Ethiopia' is a formula that is applied 'to its fullest extent in the Constitution' to create a multinational federation with the constituent ethnic groups as its foundation.¹⁰

4 S Assefa 'Of Federalism and Secession' in Constitutionalism: Reflections and Recommendations, Symposium on the Making of the New Ethiopian Constitution (1993) 113-125, 115.

5 Fiseha (n 2 above) 11-79; M Gudina Ethiopia: Competing ethnic nationalisms and the quest for democracy 1960-2000 (2003) Chapter 3 & 4; K Mengisteab 'New approaches to state building in Africa: The case of Ethiopia's ethnic based federalism' (1997) 40 African Studies Review 111-132; J Abbink 'Breaking and making the state: The dynamic of ethnic democracy in Ethiopia' (1993) 13 Journal of Contemporary African Studies 149-163.

6 At the Constituent Assembly the dominant view was that given the history of the country the constitutional empowerment of the constituent ethnic groups through the right to self-determination was the only way to redeem and rectify the wrongs of the past. See Minutes of the Constitutional Assembly (Nov. 1994), Minutes No. 20 of Hidar 12 and 13, 1987 E.C. For more see also Be Ethiopia Ye Dimocraci Sirat Ginbata Gudayoch - Issues in the democratization of Ethiopia (Ministry of Information, Ginbot 1994 E.C.) 23-30. According to EPRDF, the policy on the rights of ethnic communities is essentially an expression and guarantee of the freedom and equality of the diverse groups that together constitute Ethiopia. As above, 23-41

7 Assefa (n 3 above) 115.

8 There is however disagreement among various sections of society and political parties as to the form that federalism should take. Many reject ethnicity as the basis for federalizing Ethiopia. The only political party that opposed the federalisation of Ethiopia was the All Amhara People Organisation.

9 Art. 1.

10 F Nahum A Constitution for a Nation of Nations: The Ethiopian Prospect (1997) 52.

This contribution seeks to examine the role of federalism as a mechanism for the accommodation of diversity in Africa more generally and that of Ethiopia's federalism in achieving the above constitutional objects of rectifying historically unjust relationships and building one political community through accommodation of diversity. The next section, Part II, directly investigates the potential and role of federalism to accommodate ethno-cultural diversity in Africa and Africa's experience with federalism. It is argued that federalism is relevant for accommodation of diversity in Africa more particularly in countries where ethno-cultural communities are territorially concentrated and demand for territorial autonomy or in countries that have the history of regionalism and ethno-regional mobilization for regional autonomy. Although Africa's post-colonial experience with federalism was not a happy one, this is not however a result of the non-workability of federalism in Africa but mainly a result of the lack of political commitment to the principle of federalism and the dominance within the post-colonial African state of the forces of centralisation and the homogenous nation-building process. Indeed, the failure of the highly centralised state and the homogenous nation-building process has led to the revival of consideration of federal forms of arrangements by various countries.

In Part III, Ethiopia's federalism and its characteristics are examined from the vantage point of accommodation of diversity. This part shows that under the 1994 constitution of Ethiopia federalism is used as the main constitutional device to address ethno-cultural claims to be included on an equal basis in the political and economic process of the country at the national level and to have territorial autonomy at the regional level. This is reflected mainly through the demarcation of the territories of the units of the federation, the guarantee for self-government structures to groups in multiethnic federal units who seek to have such structures, the nature of the representation in the federal houses, particularly the House of the Federation and in the nature of the division of power.

This is followed by Part IV which identifies the successes and drawbacks of the Ethiopian federal system in accommodation of diversity and the lessons that that can be drawn for other African countries that may consider the use of federalism such as Kenya. From the perspective of the problem of ethnic rivalry and the resultant conflicts for control of state power persistent in the post-colonial African state, one important achievement of Ethiopia's federal system is that it minimized this conflict at the national level by creating multiple centers of power for the different groups. It has also created a framework for the political and socio-economic empowerment of historically marginalized groups of the country. Despite these achievements however, Ethiopia's federal system is fraught with serious problems that militate against the protection of regional minorities and peaceful coexistence and mutual cooperation among various groups. This is mainly due to the fact that the federation assigns federal units to particular groups leading to the creation of a sense of exclusive ownership of those units by

particular groups. It is accordingly proposed that even if the territorial boundaries of federal units are designed in due recognition of territorial settlement of various groups, the federal units should be constitutionally recognized as belonging to all those who reside in those units not just the members of the group that constitute the majority in that region.

Part V closes the paper with some concluding observations on the relevance of federalism to many of the multiethnic African states including Kenya and the precautions that should be taken to avoid its pitfalls in accommodation of diversity and promoting national integration in these states.

12.2 The attractions of federalism as a means for accommodation of diversity and conflict management in Africa

Federalism is a term that signifies an ideological position about how a polity should organize its power structure. As an ideology about organization of power, federalism 'holds that the ideal organization of human affairs is best reflected in the celebration of diversity through unity.'¹¹ As Andreas Eshete rightly points out, however, federalism is not 'a necessary part of an ideal conception or theory of a democratic society.'¹² This means that federalism unlike public ideals of universal reach such as human rights is not something that ought to be applicable to all societies.¹³ Accordingly, 'it is difficult to defend federalism as a free-standing ideology comparable to or separate from liberalism or socialism.'¹⁴ Rather than being a free-standing ideology, federalism is a form of ideal theory that draws its support from existing ideals of universal reach and the particular circumstances of specific societies. It is a situation dependent ideal theory that furnishes the normative bases that support the establishment of federation. An important feature of federalism as such is that it cherishes 'a multi-tiered government combining elements of shared-rule through common institutions for some purposes and regional self-rule' for constituent units for other purposes.¹⁵

A federation on the other hand is a reference to the institutional arrangement that defines a political system as a federation. The most important features of a federation include the (a) existence in a state of usually two spheres of government (one central or federal government and several other governments specific to particular territories of the state but with representation in

11 G Smith 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in Graham Smith (ed.) *Federalism: The Multiethnic Challenge* (1995) 4.

12 A Eshete 'Ethnic Federalism: New Frontiers in Ethiopian Politics' in *First National Conference on Federalism, Conflict and Peace Building* (2003) 142-172, 145.

13 As Andreas observes, 'Violation of human rights justifies condemnation or even coercive intervention. In contrast, rejection of federalism by a regime does not demonstrate imperfection, much less, wrongdoing in the regime.' As above.

14 Smith (n 10 above) 4.

15 See Ronald Watts *Comparing Federal Systems* (1999) 9.

the central government) (b) whose respective powers are constitutionally defined (c) in such a way that not any one of the two can unilaterally abrogate the powers of the other.

A federation can be created either on the basis of administrative/territorial boundaries or on the basis of ethnic, religious and linguistic considerations. Distinction can therefore be made between territorial or administrative and multinational federalism.¹⁶ Territorial or administrative federalism is one that is institutionalised merely on the basis of historic internal boundaries and administrative considerations. American federalism is the first example of territorial federalism. Others include Germany and Australia. As Kymlicka has put it '[f]or a federal system to qualify genuinely multinational, decisions about boundaries and powers must consciously reflect the needs and aspirations of minority groups.'¹⁷ Examples of such federal systems include Switzerland, Canada, Belgium and Spain. Indian federalism has also acquired a multicultural form as new states were created on linguistic and cultural considerations. Unlike territorial or administrative federalism, multicultural federalism has as its object the accommodation of ethno-cultural diversity. This is reflected as indicated by Kymlicka in the determination of the boundaries of federal units.

For the purpose of this contribution the focus is on multicultural federalism. There are several factors that make multicultural federalism attractive as a basis for accommodation of diversity and management of ethnic conflicts in multicultural societies in general and in Africa in particular. The most important aspect is that federalism through shared rule in the common domain and self-rule in the separate spheres balances out the centripetal and centrifugal forces in multiethnic societies. In this sense, federalism is best conceived as 'a compromise, conveyed by the image of checks and balances between unity and diversity, autonomy and sovereignty, the national and the regional.'¹⁸ In the context of Africa where the most important political problem has been the struggle between members of the constituent ethno-cultural groups for control or share of the central government with its unified and centrally concentrated organization of political power, federalism thus offers the leverage for diffusing ethno-cultural rivalry and promoting mutual respect and cooperation among members of different groups. First, as Donald L Horowitz argues, by creating multiple centres of power federalism can disperse conflict more widely and make hegemonic domination by one group more difficult.¹⁹ In other words, as Smith points out federation in effect decentres sovereignty, re-territorialising it along ethno-regional lines in which ethno-regional voices can be articulated and their interests protected.²⁰

16 See W Kymlicka 'Federalism, Nationalism, and Multiculturalism' in Dimitrois Karmis & Wayne Norman (eds) *Theories of Federalism: A Reader* (2005) 269.

17 As above, 276.

18 Smith (n 10 above) 5.

19 DL Horowitz *A democratic South Africa? Constitutional Engineering in a Divided Society* (1991) 217.

20 Smith (n 10 above) 17.

Second, federalism helps to minimise ‘the potential for conflict by empowering territorially-concentrated distinct minorities with the tools to protect and promote their distinctiveness.’²¹ Federations provide institutional arrangements which give all the various ethno-regions with the power and resources to administer their local affairs and the opportunity to participate in national decision-making through representation in national law-making processes. In other words, federations can operate as vehicle for the empowerment of minorities. They ‘create regional political elites where they previously did not exist, establish more civil service jobs for local regional groupings, more opportunities for negotiating territorial distribution of power and more representative institutions.’²² Accordingly, a federal form of state structure offers the framework and institutional incentive to replace the zero sum game politics of the winner-takes-all and its resultant ethnic rivalry prevalent in post-colonial Africa with a politics of inclusion and cooperation and thereby avoids the structural basis of ethnic conflicts in multiethnic societies in general and in Africa in particular. Finally, as ‘toleration, respect, compromise, bargaining and mutual recognition are its watchwords and “union” combined simultaneously with “autonomy” is its hallmark,’²³ federalism enhances tolerance, mutual understanding, inter-cultural dialogue and cooperation.

Although it is clear from the above that federation offers the necessary institutional arrangements to achieve the goals of accommodation and conflict management in Africa, this does not mean that it applies to all multiethnic African states. Federation suits as a framework to achieve these goals in countries with relatively large territories and where ethno-cultural groups live in relative concentration attached to specific territories. This means that a federation would not work in a country that has ethno-cultural groups with no attachment with particular territory. Accordingly, in countries such as Rwanda or Burundi, instead of federalism, other power-sharing schemes are preferable.

Moreover, it is important to note that a federation by itself alone is not enough for ethno-cultural accommodation and conflict management in Africa. Its efficacy is highly dependent upon the political, social and historical conditions of a country. Unless the political and social conditions of a country are suitable to make a federation work optimally, it would not be possible for it to serve as mechanism for accommodation and conflict management. Accordingly, there has to be political commitment to the effective operation of the federation and the values that underline it. In the context of Africa as the federal experience of many countries have shown, the political factors that undermine the effectiveness of federalism include ‘(i) the absence

21 R Simeon ‘Considerations on the Design of Federations: The South African Constitution in Comparative Context’ (1998) 13 (1) South African Public Law 42, 47.

22 Smith (n 10 above) 16.

23 Burgess & Gagnon as quoted in Smith (n 10 above) 8.

of democracy and the prevalence of Jacobin and authoritarian regimes; (ii) absence of elites committed to true federalism; (iii) underdevelopment of constitutionalism and rule of law; (iv) lack of economic capacity to run federal government; and (v) the overarching concern with national unity.²⁴ Accordingly, it is imperative that the necessary political culture and social conditions (particularly subsidiarity, respect for autonomy of constituent units, constitutionalism and rule of law, inclusiveness, tolerance, cultural diversity, commitment to bridge the socio-economic disparities between ethno-regions etc) that support the optimal operation of the federation should also be cultivated and promoted. It is clear from the foregoing that although multicultural federalism has the potential to serve as mechanism for accommodation and conflict management in Africa, it is not however sufficient by its own. Moreover, it must be admitted that although federalism offers the institutional arrangements suitable for accommodation of diversity and conflict management, it can also have the seemingly unavoidable consequence of institutionalising and entrenching ethno-cultural divisions.

12.3 The nature of Ethiopia's federation

12.3.1 The normative foundations

The normative foundation of the Ethiopian federal system is the principle of the self-determination of nationalities. This principle dictates the nature of the federal system, its guiding principles and the design of the federal institutions including the mechanism for adjudication of constitutional disputes. If there is one overriding concept discernable throughout the 1994 Ethiopia's Constitution, it is the concern with the rights of what it calls 'nations, nationalities, and peoples' of Ethiopia.²⁵ In a word, ethnicity is the one issue the Constitution primarily addresses itself to and constitutes the epicentre of the constitutional framework. The Preamble to the Constitution distinctly depicts the place of honour that the numerous ethno-linguistic groups of the country occupy in the new constitutional order. It is not with the familiar words 'We the people...' but rather with 'We the Nations, Nationalities and Peoples of Ethiopia' that the Preamble commences.

The difference between the two formulations is not one of terminology alone; there is qualitative and even paradigmatic difference. Whereas 'We the people' signifies the existence only of one *demos*, 'We the nations, nationalities and peoples' suggest the existence of more than one *demos* constituting Ethiopia. This is essentially a rejection of the monolithic conception of the state as a nation-state – a state with a singular and homogenous identity.²⁶ As Fasil Nahum

24 See EE. Osagheya 'Federalism and the Management of Diversity in Africa' (2004)5 Identity, Culture and Politics 162-178, 172.

25 There are at least 23 articles of the constitution including the preamble that make direct or indirect reference to 'nations, nationalities and peoples'.

26 Fasil puts this when he said 'We the nations, nationalities and peoples' recognizes Ethiopia as a Nation of Nations. Nahum (n 9 above) 51.

put it, these words signify that the Constitution 'is not a constitution of the Ethiopian citizens simply lumped together as a people.' In elaborating this, he said 'the Ethiopian citizens are first categorized in their different ethno-linguistic groupings and then these groupings come together as authors of, and beneficiaries from, the Constitution of 1994.'²⁷

Moreover, whereas in the former individual citizens are the foundation of the society and hence the constitutional order, in the latter the various ethno-linguistic groups are the point of departure. This changes the dominant liberal constitutional definition of the state-society relationship from one between the individual and the state into a relationship mainly between ethnic minorities and the state. Consequently, in contrast to the liberal constitutional tradition in which the individual take a central place,²⁸ in the Ethiopian constitutional model ethnic communities are the ultimate agents and bearers of rights. It is clear from this that the Ethiopian Constitution is more of communitarian in its theoretical premises and content than the libertarian and egalitarian tradition of liberal constitution.

In consonance with the above, Article 8 provides 'All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.' In reaffirming that the constitution is a covenant between the various ethnic communities rather than between citizens as individuals, the second paragraph of this article states 'the Constitution is an expression of their sovereignty.' Once again, the Constitution makes a departure from the dominant constitutional paradigm of the liberal nation-state. Conventionally, popular sovereignty is formulated in a way that ascribes sovereignty to the entire people of a state made up of individual citizens and their shared will.²⁹ In the formulation of Article 8, sovereignty does not reside in the Ethiopian people in their entirety. Instead, sovereignty is shared among, to use the terms of the Constitution, the 'nations, nationalities and peoples' of Ethiopia. It is clear from this that it is not in the Ethiopian state representing the entirety of the Ethiopian people that sovereignty ultimately resides. Primarily and in the final analysis, sovereignty is located in the distinct ethno-linguistic communities constituting Ethiopia. The sovereign power with which the Ethiopian state is clothed is a delegated one. And yet, even the delegation is only partial as the constituent units reserve part of their sovereign power when joined to constitute the Ethiopian state anew. The sovereign power of nations, nationalities and peoples of Ethiopia within the federation is further stipulated under Article 39 of the Constitution.

²⁷ As above.

²⁸ The concern of liberal constitutionalism is securing the rights and liberties of individuals (See G Walker 'The idea of nonliberal constitutionalism' in Ian Shapiro and Will Kymlick (eds.) *Ethnicity and group rights* (1997) 154). As a result, its preoccupation is that of defining the nature of the relationship between the individual and the state. In the words of Buchanan therefore, 'the problem of constitutional design was thought to be that of insuring that such (state) power would be effectively limited' to secure the maximum possible freedom for the individual. See JM Buchanan *Notes on the liberal constitution* (1994) 14 *The Cato Journal* (1993) available at <http://www.cato.org/pubs/journal/cj14n1-1.htm> accessed on 2006/10/24.

²⁹ See for example the popular Sovereignty clause of the US Constitution and that of the Republic of South Africa.

Article 39 of the Ethiopian Federal Constitution stipulates the right to self-determination. It is the most contested article in contemporary Ethiopian politics and constitutional law.³⁰ By virtue of this article, ‘every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination including the right to secession.’ This gives the various ethno-linguistic communities in the country the highest level of constitutional recognition and right that is possible. Viewed from this perspective, ethnicity is established to be a constitutionally valued primary basis for political organization. Thus, the legitimacy of the structures and processes of the state to a large extent depends on the extent to which it reflects the demands of ethno-linguistic diversity in the country. Accordingly, the federal system is designed as means for recognising and accommodating the interests and distinct identity of the various groups, the foundation of the constitution.

In the context of this study, it can be clearly noted that the aim of grounding Ethiopian federation in self-determination and the sovereignty of ‘nations, nationalities and peoples’ is to achieve the accommodation of diversity in a federal union. According to the Preamble to the 1994 Constitution, the objects of the federalisation of Ethiopia with the rights of ethnic minorities as its main organising principle are, among others, to build ‘a political community ... capable of ensuring lasting peace, guaranteeing democratic order, and advancing our economic and social development’³¹ and to rectify historically unjust relationships.³² It is from the vantage point of these constitutional aims that the following discussions explore the structure and various dimensions of the Ethiopian federation.

12.3.2 Member states of the federation

As noted above, the capacity of a federation to accommodate territorially based ethno-cultural diversity depends upon the delimitation of the boundaries of constituent units along ethno-cultural lines. Article 47 of the Constitution of Ethiopia designates as member states of the federation nine *states* or *regional states*,³³ varying enormously in population size, level of development, size of geographic boundary and level of diversity. Since as we have noted above

30 For some article 39 is laid down to constitutionally legitimize the eventual dismemberment of Ethiopia as a state, while for the protagonists of this article it is a guarantee against abuse by the state. But one cannot understand why secession was included in the first place without examining the political reality of Ethiopia immediately after the fall of the dergue regime and its historical origins in the political history of the country. That was a time when the different parts of the country were under the control of various ethnic based armed liberation fronts and one cannot be certain that without the right to secession these forces would have been willing to participate in the ‘Democratic and Peaceful Transitional Conference’ of July 1991 that established the transitional government. In a way, it was a necessary condition to bring all the armed struggle movements to the negotiating table and a means for building their lost confidence and trust in the central government.

31 Preamble to the 1994 Ethiopian Constitution.

32 As above.

33 This is a reduced number from 14 at the time of the Transitional Period.

the main purpose of Ethiopia's federal system is to prevent the recurrence of the civil war which was caused by what it calls 'unjust historical relationships' through accommodation of diversity, ethnicity has been the main, if not the only, consideration in the demarcation of the boundaries of the regional states. Article 46(2) provides that the states are to be constituted 'on the basis of the settlement patterns, language, identity and consent of the people concerned.' These factors to a large extent reflect ethnic factors. Thus, they are substantially similar with the elements of the definition of 'nations, nationalities and peoples' under Article 39(5) of the Constitution.³⁴ Accordingly, Article 47 established nine regional states. Many of the federal states are designated as 'mother states' for the majority ethnic group inhabiting them. The name of the six major groups to which six of the nine states are designated reflects the nomenclature of the six states.³⁵ The remaining three states of the federation are multicultural states inhabited by different ethnic groups.

As several states are composed of diverse groups, to actualise the right of all groups to self-government and the constitutional requirement that autonomous units of government be established at lower levels of government, some of the administrative structures within these states are recognised to serve as self-government structures for the groups that individually constitute these administrative structures. These self-government structures take two forms: for relatively large groups at Zonal level and for smaller groups not less than 100,000 at Woreda (district) level. As they have political power vested in executive and legislative bodies for self-government of the particular community, these Zones and Woredas are qualitatively different from others which simply serve as lower administrative entities of the regional states.³⁶ They are therefore called special Zones and Woredas.

Although the basis for the definition of the boundaries of the regional states was mainly ethnicity, there is however no congruence between the nine states and the constituent ethnic groups. All the nine states are multicultural although the degree of diversity of each varies. Notwithstanding this, it is clear that Ethiopia's federalism is more of multinational than territorial and stands in the rank of the federations of Canada, Switzerland, Belgium and India. The nature of the designation of the federal units has served to fulfil the aspirations of those groups seeking their own self-government and thus addressed the agitation of these groups for their recognition through the provision of such structures. As this is provided on an egalitarian basis for all groups, it is believed that it rectifies what the constitution calls 'unjust historical relationships.'³⁷ But as we will see below this is not without its limits either.

34 The elements of the definition of 'nations, nationalities and peoples under article 39 are a) a group of people; b) possession of common culture or similar custom; c) language; d) identity; e) psychological makeup; and f) territory.

35 These are Tigray, Afar, Amhara, Oromia, Harari and Somali.

36 The nine regional states consist of 70 Zones. The Zones are further divided into about 600 Woredas (Districts). Only some of them serve as self-government structure. Mostly, they are administrative entities without any autonomous political power.

37 Preamble to the Constitution para. 5.

12.3.3 Federal division of power

One of the features of federalism is the constitutional division of power between different levels of government. In the case of multicultural federations, it is important that in the federal division of power federal units are assigned with the powers necessary for an effective exercise of self-government by the community or communities constituting those self-government units. What exactly should this consist of is not generally something that has a universally applicable formula. The most important thing is that the division of powers should allow federal units to exercise self-government over local matters particularly culture, education, language, some autonomy over socio-economic development and provision of basic services including education, health, social welfare etc. This entails those federal units would exercise autonomous control over educational activities, libraries, museums, theatres, electronic media, as well as over family law matters.

This does not however mean that there has to be a watertight division of power between the centre and federal units. Such is neither necessary and nor practically possible. Accordingly, while the respective spheres of competence of the two domains is defined as clearly as possible and guarantee is provided against encroaching upon the powers of either levels of government by either of them, there has to be flexibility and coordination between the two levels for the effective and efficient exercise of their respective powers. It is also more important in the context of developing multiethnic societies such as those in Africa that such autonomy is not of such a nature that undermines the authority of the central government. It is therefore argued that the autonomy that the division of power leaves for constituent units must be wide enough to allow minorities to exercise self-government in those matters that concern them and narrow enough to allow a strong central government.³⁸

Under the 1994 Ethiopian Constitution, Article 50 provides that ‘the federal government and the states shall have legislative, executive and judicial powers.’ Accordingly, under Article 51 and Article 52 of the Constitution the respective powers of the federal government and the states are defined. The most important legislative powers assigned to the federal government under Article 51 include the power to: protect and defend the constitution; formulate and implement the Country’s policies, strategies and plans in respect of overall economic, social and development matters; establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies; formulate and execute the country’s financial, monetary and foreign investment policies and strategies; enact laws for the utilization of and conservation of

³⁸ See A Lewis Politics in West Africa (1965) 55.

land and other natural resources, historical sites and objects; administer the National Bank, print and borrow money, mint coins, regulate foreign exchange and money circulation; determine by law the conditions and terms under which States can borrow money from internal sources; formulate and implement foreign policy; be responsible for the development, administration and regulation of air, rail, waterways and sea transport and major roads linking two or more states, as well as for postal and telecommunication services; levy taxes and collect duties on revenue sources reserved to the Federal Government; draw up, approve and administer the federal government's budget; regulate inter-State and foreign commerce; deploy, at the request of a state administration, Federal defence forces to arrest a deteriorating security situation within the requesting State when its authorities are unable to control it; enact, in order to give practical effect to political rights provided for in this Constitution, all necessary laws governing political parties and elections; declare and lift national state of emergency and states of emergencies limited to certain parts of the country; and establish uniform standards of measurement and calendar. In addition to these, the federal government is additionally assigned with the powers to enact labour code,³⁹ commercial code,⁴⁰ penal code;⁴¹ proclaim a state of war on the basis of a draft law submitted to it by the Council of Ministers;⁴² approve federal appointments submitted by the federal executive;⁴³ and establish federal institutions.⁴⁴

The Constitution establishes a symmetrical federal system. All the states are accordingly vested with equal powers and duties notwithstanding that they have unequal socio-economic conditions, human resources, population size and geographic conditions.⁴⁵ They accordingly have the powers, among others, to: establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution; enact and execute State constitution and other laws; formulate and execute economic, social and development policies, strategies and plans of the state; administer land and other natural resources in accordance with Federal laws; enact and enforce laws on State civil service and their condition of work ensuring that educational, training and experience requirements for any job, title or position approximate national standards; and establish and administer a state police force, and to maintain public order and peace within the State.⁴⁶ States also have the power to determine the working language/s of their respective governments.⁴⁷ In

39 Art. 55 (3).

40 Art. 55 (4).

41 Art. 55 (5).

42 Art. 55 (9).

43 Art. 55 (13).

44 Art. 55 (14) & (15).

45 On the unequal socio-economic and historical conditions see L Aalen *Ethnic federalism in dominant party state: The Ethiopian Experience 1991-2000* Chr. Michelsen Institute Development Studies and Human Rights Report 2002: 2 at 67, 73-74 and 78-79.

46 Art. 52 (2).

47 Art. 5 (3).

addition to these, according to Article 52 (1) of the Constitution, all powers not given expressly to the federal government alone, or concurrently to the Federal Government and the States are reserved to the States. Moreover, states have the extraordinary power of secession from the federal union as guaranteed under the now famous and controversial secession clause under Article 39. Seen from the perspective of the focus of this contribution and in particular the need for not only the protection of minorities through territorial autonomy but also for a strong central government in Africa, this later aspect of the powers of states should be seen as specific to the particular history and situation of Ethiopia arguably with very limited, if any, relevance for other African countries.

By their very nature the powers assigned to the central government relate to matters of common interest including those relating to the economy, foreign relations and the maintenance of uniform national standards, regulation of inter-state relations such as in the field of commerce and communications. As it can however be noted, some of the powers are very extensive that there can only be left, if at all, very limited space for states in respect of those matters. This is for example the case with respect to the powers to formulate and implement the Country's policies, strategies and plans in respect of overall economic, social and development matters and establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies. This essentially covers almost all aspects of economic and social life making the federal government holder of primary power to determine the economic and social policy directions and standards. The effect of this is that it may deny states the necessary policy space provided for under Article 52 (2)(c) for them to be able to experiment their own economic and social policies taking into account their specific local conditions. If the power assigned to the states has to be effectively exercised, it is important that there be collaboration between the two spheres of government on the basis of the principle of subsidiarity allowing states to determine economic and social policies relevant to their specific needs and conditions. It is also in particular important that they enjoy wider control in the area of education subject to certain common standards as this is critical for the development and transmission of the cultures and languages of groups.

It is not however enough that the respective powers and functions of the federal government and the states is constitutionally defined in a way that gives necessary competences that enables states to exercise self-government. It is necessary that the federal units (states) are assigned the necessary financial powers that correspond to the nature and amount of powers and functions assigned to them. Under Article 52 (2) (e), states are vested with the power to 'levy and collect taxes and duties on revenue sources reserved to the States and to draw up and administer the State budget.' The revenue sources assigned to the states include: income taxes on employees of

the State and of private enterprises; fees for land usufractory rights; incomes of private framers and farmers in cooperative associations; profit and sales taxes on individual traders carrying out a business within their territory; incomes from private houses and other properties; profit, sales, excise and personal income taxes on income of enterprises owned by the States; fees and charges relating to licenses issued and services rendered by State organs; royalty for use of forest resources.⁴⁸ States also share concurrent taxation power with the federal government over profit, sales, excise and personal income taxes on enterprises they jointly establish; profits of companies and on dividends due to shareholders; and incomes derived from large-scale mining and all petroleum and gas operations, and royalties on such operations.⁴⁹ It is the House of the Federation, the non-legislative house of parliament that has the power to determine on sharing of these joint powers.⁵⁰

Although these are not insignificant sources of revenue when seen objectively, in the current investment and economic conditions of the various states, they do not provide much income for the states to be financially independent. As a result, currently states depend upon the federal government to finance the activities that fall within the powers and functions constitutionally assigned to them. Although they are expected to achieve greater financial autonomy as their economic bases expand, until that time they will be financial dependent on the central government and this substantially limits the degree of their autonomy. As seen in the experience of Nigeria the danger of the weak financial autonomy of states, seen in the light of the particular African problem of ethnic rivalry for control of central governments, is that it will make the central government a point of contestation between various groups. This is because most of the economic powers continue to be in the hands of the central government.

If federalism is to work in ameliorating contention among members of various ethnic groups for control of central government by creating multiple centres of power, it is imperative that federal units are assigned sufficient financial powers. In other words, in the division of power between the centre and the federal units there should not be huge imbalance that leaves wide power at the centre. It is only if federalism is designed as such that the concentration of power at the centre can be trimmed down and thereby the contentions and conflicts that arise for controlling the central government can also be addressed. In the context of Africa, unless designed as such federalism cannot satisfy to a sufficient degree the aspiration of various ethno-regional groups to control or share the power at the centre and hence cannot serve in ameliorating the ensuing rivalry and conflicts.

48 Art. 97.

49 Art. 98.

50 Art. 62(7).

Another matter that African countries that may consider adopting federal like arrangements should give particular attention is the determination of the percentage of the revenue that regions can keep from the money raised from sources within their respective jurisdiction. This is what is called the derivation principle. This can be particularly contentious in cases where some regions have revenue sources that contribute high percentage to the national economy. This is the case for example if natural resources such as oil constitute the most important sources of revenue for the state as a whole as in Nigeria. The Nigerian experience shows that because the central government takes the bulk of the revenue collected from oil extraction in the oil rich regions one of the controversial aspects of the federal system is over this principle.⁵¹ It is at the root of the Niger Delta crisis in the country. Many of the minority communities in this oil rich region have mobilized themselves in protest against their poor socio-economic conditions and the insignificant level of development in their regions while their land is the main source of revenue for Nigeria. They thus demand to have high degree of control over the natural resources on their land and high share from the revenue collected from the exploitation of such resources. This has not so far been an issue in Ethiopia because most of the revenue comes from imports and exports as well as other activities which are all in the hands of the central government.

It is also necessary that federalism aims at addressing regional disparities. Like many other African countries, there is horizontal inequality between members of various groups and the states of the federation. As a result, despite their formal equality, factually the various states of the Ethiopian federation are in unequal socio-economic conditions. If a federation is to function effectively and operate optimally in the accommodation of ethno-cultural diversity and ethnic conflicts, it is imperative that there is a reasonable degree of balance in the socio-economic conditions or capacities of members of the federation. This in the African condition entails that as part of the federal formula of accommodation of diversity, it is imperative that affirmative measures are taken in support of socio-economically impoverished units of federation to reduce regional disparities. Without such measures the simple provision of regional autonomy would not be enough to make federalism legitimate as a mechanism to address ethnic conflicts in Africa. Indeed, if conflicts such as the ones in Darfur and Ivory Coast are to be avoided, this is another area to which sufficient attention should be paid. In both these cases as well as similar other conflicts in many African countries such as Northern Uganda, the socio-economic marginalisation of the regions has been the underlying factor for conflicts.

Although the Ethiopian Constitution establishes a symmetrical federal system, since several of the states particularly those in the western and eastern lowlands have historically been

51 RT. Suberu Federalism and Ethnic Conflict in Nigeria (2001) 64-65.

neglected and disadvantaged, it envisages special assistance for redressing regional imbalances as part of the federal formula. Accordingly, Article 89 (4) stipulates as expression of solidarity between the various states that special assistance shall be provided by the federal government to those least advantaged in economic and social development. Similarly, Article 94 (2) of the Constitution provides that the federal government may grant development assistance and loans to states. Moreover, in the calculation of the distribution of joint revenues between the federal government and states one of the considerations is the level of socio-economic disadvantage of various states.⁵²

12.4 Achievements and drawbacks of Ethiopia's federalism

12.4.1 Achievements

There are at least four achievements that the Ethiopian federal system has accomplished. Not only has it ended the decades of civil war that afflicted the country but it also prevented the danger of disintegration facing Ethiopia after the fall of the military regime of Mengistu Hailemariam.⁵³ Kidane Mengisteab thus argues that EPRDF's policy measures such as ethnic based federalism were 'essential to stop the perpetual bloodshed, to avert the country's total disintegration and to mend ethnic relations.'⁵⁴ It was a crucial condition for many of the dominant ethnic based forces of the time to abandon armed struggle and accept participation in the unfolding new political system. By dispersing the centres of powers, it also contributed to the diffusion of conflicts to regions and hence preventing the recurrence of the nation wide civil war characteristic of the military era. According to David Turton 'it has provided peace and security for the majority of the population following a violent civil war and laid down, for the first time in the history of Ethiopia, "the legal foundation for a fully fledged democracy."⁵⁵

There is also expectation that the egalitarian orientation of Ethiopia's ethnic pluralism will enhance social cohesion and national integration. Alem Habtu, as some others, hopes that 'the drive toward egalitarian ethnic pluralism has the potential to enhance ethnic harmony based on mutual respect and reciprocity.'⁵⁶ Indeed, with the necessary political will at all levels of government and sustained commitment to address historical inequalities and current patterns of discrimination, this hope can indeed be realised. The yearly inter-cultural festival that regional states host by rotation and the promotional activities of federal institutions also gives further

52 See EJ Keller 'Ethnic Federalism, Fiscal Reform, Development and Democracy in Ethiopia' (2002) 7 (1) African Journal of Political Science 21, 38-41.

53 See J Abkin 'Breaking and making the state: The dynamic of ethnic democracy in Ethiopia' (1995) 13 Journal of Contemporary African Studies 149-163, 151; J Young 'Ethnicity and power in Ethiopia' (1996) 70 Review of African Political Economy 531-542, 532.

54 Mengisteab (n 4 above) 126.

55 D Turton 'Four questions about Ethiopia's ethnic federalism' (2005) 1 (2) STAIR 88-101, 93.

56 A Habtu 'Ethnic Pluralism as an Organizing Principle of the Ethiopian Federation' (2004) 28 Dialectical Anthropology 92-123, 114.

support for the development of inter-cultural mutual recognition and understanding.

Ethiopian federalism also served to end the political and cultural hegemony of the dominant culture. This entailed the demise of the many years of patterns of domination, ethno-cultural assimilation and centralisation. It also marked a rejection of the denigration of the culture, language and history of minorities and the resultant damage to the dignity and self-respect of their members. Most importantly, it also rejected the uneven patterns of development and the socio-economic neglect or marginalization of many of the minorities in the country.

Corresponding to this is the political recognition and institutional affirmation of the culture, language and history of hitherto marginalised minorities and their equality. An important feature of the new constitutional order is its complete break from the centrally imposed singular Ethiopian identity and the redefinition of Ethiopia as a multicultural state committed to the accommodation its diversity. Leenco Leta, prominent figure of the separatist Oromo Liberation Figure, captured this paradigmatic change as follows:

The recognition of the right of self-determination of nationalities was conceptualised and the reconfiguration of the Ethiopian state was to bring about wide-ranging changes. The policy of Ethiopian identity, which was traditionally projected to coincide with Amhara identity, was to undergo fundamental changes. The previous policy of gradual homogenisation through amharaization was to be abandoned. Instead of imposing a single Ethiopian identity, a mosaic was to be projected. Contrary to the previous practice of defining Ethiopian identity in a manner that excluded or failed to embrace the identities of the various nationalities a more inclusive image was to be projected.⁵⁷

Mainly on account of the group based politics of recognition, unlike the imperial and the military regimes, under the current federal system almost all minorities constituting the country are represented in the national political processes. This can be seen in the composition of the Parliament and the federal executive. For the first time in the history of the country, it has now become possible to find members of all linguistic, religious and cultural groups in the federal Legislature and more directly in the HoF. Similarly, despite the perceived or real dominance of some groups, the executive in its entirety is more vividly diverse in its linguistic, cultural and religious composition than at any other time in the history of the country. Institutions of the federal government and the civil service are more and more mirroring the diversity of the country.

57 L Lata 'The Making and Unmaking of Ethiopia's Transitional Charter' in Asafa Jalata (ed.) *Oromo Nationalism and the Ethiopian Discourse: The Search for Freedom and Democracy* (1998) 51.

All these changes are increasingly making it possible for many citizens to experience Ethiopia's diversity on a daily basis and to embrace it comfortably. One can gather the effect of the public recognition of diversity in the social sphere, for example, from the increasing multilingualism and cultural inclusivity of the fast growing music industry. Multilingual and culturally inclusive music productions, which were rare some years back, are increasingly becoming popular. Despite many problems and its down sides on inter-ethnic relations particularly due to the perceived dominance of some groups in national politics, the constitutional change has also at some level contributed to inter-group relations and mutual recognition. The constitutional change has also brought about on the part of most if not all minorities a sense of being included and accommodated in the national project. As a result, many are now able to see themselves as full Ethiopian citizens with equal rights and entitlements. As Assefa rightly pointed out, this contributed to regaining group pride and a sense of self-respect and dignity on the part of members of the various ethnic groups.⁵⁸ Obviously, for those whose Ethiopian identity is intimately associated with their group membership, this has increased their sense of belongingness to and identification with the state. This is expressed not only during peace but also at times of national emergency. For example, some reasonably maintain that 'the sentiment of Ethiopian nationalism exhibited by many volunteers (during the Ethiopia-Eritrea war in 1998-2000) owes a great deal to the institutional recognition and protection that is extended to particularist identities under the new federal arrangement.'⁵⁹

At the local level, it has created a framework for the political empowerment of minorities on the basis of self-government, which also serves as a basis for equitable access to resources and the socio-economic empowerment of historically disadvantaged minorities. According to Dereje, who studied the effect of Ethiopia's constitutional change in one of the historically disadvantaged states, the Gambella Peoples National Regional State (GPNRS), 'the implementation of ethnic federalism has created a new political space and institutional design to further promote local empowerment.... the creation of (the GPNRS) appears to be one of the most visible political steps ever taken by the Ethiopian state to integrate its historic minorities.'⁶⁰ There is also hope that this could enhance the democratic space and enable people to actively participate in the political processes.

One feature of the federal system is also the pursuit of development centred on the principle of revenue sharing and the economic empowerment of minorities.⁶¹ Accordingly, apart from

58 Fiseha (n 2 above) 244.

59 S Assefa 'Two concepts of sovereignty' paper presented at a symposium held in Mekelle on the Occasion of the Twenty-fifth Anniversary of the TPLF, February 2000 (on file with author) 7.

60 D Feyissa Ethnic federalism in Ethiopia: The experience of Gambella Regional State, paper presented at the Seminar on Ethnic Federalism: The Challenges for Ethiopia, Addis Ababa April 14-16, 2004, at 7.

61 See art 43 (3), Art. 62, art. 89(1) (2) & (4) & art. 94(2).

the revenue that states themselves get on the basis of their taxation authority, federal grants and subsidies are also transferred to the states not only to promote the development projects of the various states but also to reduce the existing economic disparities between different regions.⁶² Although this negatively affects the autonomy of states by rendering them dependent on the federal government, it hugely supports their development activities. In the historically disadvantaged regions, this has led to tremendous economic activities involving a huge construction boom and expansion of social services unseen any time before.⁶³ For the first time in the history of the country, not only people at the centre but also those at the periphery are more equitably taking part and benefiting from the development processes of the country.

More and more communities are now being beneficiaries from social services including, health, sanitation and education. Indeed, education is one area that has shown huge expansion in the various regional states. Many minorities whose language has achieved the required degree of literary development have been given support to become medium of instruction particularly at elementary levels. In the Afar, Somali, Beni Shangul-Gumuz, Southern, and Oromia regional states, pilot nomadic schools and boarding schools have been established and/or are planned in order to provide educational access to children in pastoral communities, in most cases for the very first time.⁶⁴ Plans are also underway for Regional Education Media Units to design and transmit educational programs in local languages.⁶⁵ In addition to this, the coverage of secondary and higher education have been expanded, and Ethiopia's higher education institutions are now becoming increasingly diverse in terms of their ethno-cultural representation.

12.4.2 Limitations of the Ethiopian type of federalism

12.4.2 (a) The problem of the protection of regional minorities and the emergence of the indigenous versus settler discourse

Notwithstanding remarkable achievements, Ethiopia's ethnic federalism is fraught with numerous problems. First, contrary to the Constitution's essentialist view that Ethiopia's ethnic groups inhabit ethnically homogenous territories, a long history of population movement and interethnic interactions of various kinds means that all regions of the country are multiethnic, albeit to varying degrees. The use of ethnicity as the only criteria for designating the member states of the federation led simultaneously to both the territorialisation of ethnicity (as self-government structures within a particular territory are assigned to particular ethnic groups) and

62 See Keller (n 51 above) 38-42; Aalen (n 44 above) 79-81.

63 See for example Dereje (n 59 above) 8.

64 Habtu (n 55 above) 104

65 As above.

creates the danger of the fragmentation of the political processes and territories along ethnic lines.

As we have noted above, one of the characteristics of Ethiopian federalism is the designation of states of the federation for particular ethnic groups. This territorialisation of ethnicity has at least three problems. First, it has the danger of freezing and institutionally entrenching existing ethnic divisions.⁶⁶ It also encourages further divisions as ‘citizens who might not have been aware of their ethnicity regroup under its banners purporting to be a distinct people.’⁶⁷ Second, it leads to sticky problems when the territory over which a given state lays claim is contested by another.⁶⁸ It also transforms conflicts between neighbouring ethnic groups for control of grazing lands into a political conflict over ownership of particular lands.⁶⁹

According to Preston King,

The moral propriety of decentralist federalism ... cannot be determined unless or until due account is taken of whether and also of the manner and degree in which such territorial decentralisation prejudices the rights and interests either of non-majoritarian or non-dominant elements within the locality.⁷⁰

Third and most importantly, therefore, the legitimacy of the territorialisation of ethnicity has to be seen in terms of the protection of regional minorities. This is because ‘rarely do the elements of diversity within a federation fall neatly and precisely into geographical units.’⁷¹ The problem in the Ethiopian context is that since the particular territory is designated to particular groups despite the existence of members of various ethnic groups and others who do not identify themselves with particular groups, it creates a constant danger of domination, exclusion and even persecution of regional minorities by regional authorities controlled by the

66 This largely reflects the argument of some scholars that federalism has the inherent danger of fomenting ethnic rivalry and therefore keeping a divided society, if not more, divided. See E Osaghae ‘Federalism and the management of diversity in Africa’ (2004) 5 *Identity, culture and politics* 170. Kymlicka goes as far as arguing that in multiethnic federations such is a necessary evil, a price for justice and peace. W Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995) 182.

67 A G Selassie ‘Ethnic Federalism: Its promise and pitfalls for Africa’ (winter 2003) 28 *Yale Journal of International Law* 51, 86.

68 Border conflicts arouse between Oromia and Somali, Oromia and SNNPRS and Oromia and Harari. See T Girshaw ‘Conflict mapping in the FDRE for the year 1994 (E.C.)’ In *First National Conference on Federalism, Conflict and Peace Building* (n 11 above) 66-75. also see A Kefale ‘Federalism: Some trends of ethnic conflicts and their management in Ethiopia’ in Alfred G Nhema (ed.) *The quest for peace in Africa* (2004) 51, 56-61.

69 This has affected Amhara, Oromia, Somali regional states and SNNPRS. As above.

70 P King *Federalism and Federation* (1982) 55.

71 RL Watts ‘Federalism and diversity in Canada’ in Yash Ghai (ed.) *Ethnicity and autonomy* (2001) 29, 41. This can also be seen from the composition of the members of the Ethiopian federation. The Oromo region is inhabited by a large number of Amhara, people from the South in addition to intra-group cultural and regional variations among the Oromo. Amhara, apart from the majority Amhara (who have different province based historical identities as Wollo, Gonder, Gojam and Showa), is inhabited by Agaw, Oromo, and Argoba peoples. Tigray is composed of the Kunama, Erob, and the majority Tigryan people. The predominantly homogenous Afar and Somali regional (who also have clan based identities) states also have significant number of people belonging to other ethnic groups.

regional majority group, a situation characterised by some as the threat of local tyranny.⁷² This particularly concerns not only the six of the states which are designated for the dominant ethnic group constituting each of them but the multiethnic states particularly Benshangul-Gumuz and Gamella. There are two sources for this. The first is the designation of ‘mother states’ for particular ethnic groups and the resultant sense of such groups that they exclusively own state governments.⁷³ Depriving regional minorities off legal recognition and political membership, this renders them to a status of second class citizenship at best and unwelcome aliens at worst. Second, it is also a result of the failure of the Constitution to take due cognizance of the complexity of ethnic diversity in Ethiopia and its resultant failure to cater for the interests and rights of regional minorities.

Unlike other similar federal systems such as Canada,⁷⁴ Bosnia-Herzegovina and Spain,⁷⁵ the constitution has thus failed to institutionalise the necessary legal guarantees and enforcement mechanisms for the protection of regional minorities. As Paul Henze noted, one manifestation of this is that ‘the resolution of conflicts between individual rights and ethnic pressures, including the protection of individuals within “nations, nationalities and peoples” is not specifically considered.’⁷⁶ Similarly, the Constitution does not envisage rights for regional minorities and how that can be reconciled with the power of regional majorities.

In the existing political framework, this entails a very serious danger. To quote Assefa Feseha, “the danger is that the respective regional states and the dominant ethnic groups consider themselves ‘owners’ of the ‘mother state’. Other citizens of different ethnic background or those who do not like to associate themselves with any ethnic group have politically no place”.⁷⁷ And most significantly one can add legally they also do not have sufficient guarantees against exclusion and abuse of their rights. The lack of independence or impartiality on the part of regional law enforcement organs including the courts means that regional minorities are without clear legal protection. It is clear from this that one of the serious drawback of Ethiopia’s ethnic federalism from the perspective of the focus of this study is its utter failure to provide mechanisms for the protection of regional minorities that its institutionalisation has created and the distinction that it institutionalises between groups indigenous to a region and settlers and the concomitant danger of the exclusion of members of non-indigenous groups.

72 Assefa (n 2 above) Turton (n 54 above). This danger has already materialised in the Oromia Regional State. According to some reports, several lives and properties were lost when the regional authorities employed force to extricate from Wollega members of the non-indigenous highland communities, which are largely people of Amhara origin. See Asnake (n 67 above), 61-62; Tirsit (n 67 above).

73 Assefa (n 2 above) ; Alemante (n 66 above).

74 See Watts (n 70 above) 41.

75 See EJ. Ruiz Vieitez ‘Federalism, subnational constitutional arrangements, and the protection of minorities in Spain’; Jens Woelk ‘Federalism and consociationalism as tools for state reconstruction? The case of Bosnia & Herzegovina’ in G Alan Tarr et al (eds.) *Federalism, subnational constitutions and minority rights* (2004) 133-154 & 177-198 respectively.

76 P Henze ‘Comments on the Ethiopian Draft Constitution of 1994’, Washington, D.C. Unpublished paper quoted in Abbinik (n 4 above) at 171.

77 Assefa (n 2 above) 266.

12.4.2 (b) Horizontal inter-group relationship

One of the consequences of the Constitution's overreaction to the countries politically unitarist and culturally exclusive past has been the limitation of the location of ethnic conflict to the vertical relationship of the state and the constituent minority groups. As a result the Constitution failed to envisage the possibility of ethnic conflict horizontally between these minorities. The result of this is a failure to provide sufficient mechanisms to regulate relations between minorities particularly in the four multiethnic states. The creation of new centres of power without sufficiently defining on how it has to be shared among the various minorities constituting them has induced rivalry for control of these new political structures which has often degenerated into violent conflicts.⁷⁸ It also led to the transformation of existing resource based and territorial conflicts between neighboring ethnic groups into a conflict for control and share of political power at the local level.⁷⁹

Post-1991 Ethiopia has therefore witnessed escalation in regional conflicts within these states. SNNPRS and more particularly Gambella are the worst hit.⁸⁰ In BGRS, the disproportionately small number of Woredas and percentage of representation of Bertas, the largest ethnic group in the region, gave rise to a tension between the Berta and the regional government ultimately leading to minor conflict and the withdrawal of the Berta from the regional government threatening to secede from the regional government.⁸¹ With mediation from the HoF, the immediate tension was resolved with the agreement of the parties to provisionally allocate additional representatives to the Berta in the regional council in exchange for their return to the legislature.⁸²

12.5 Conclusion: Lessons for other African countries

This contribution examined the potential of multicultural federalism as mechanism for accommodation of diversity and conflict management in Africa. Although there is no necessary connection between federalism and ethno-cultural diversity and conflicts, it is widely recognised that federalism offers the necessary institutional arrangements and flexibility necessary to strike the delicate balance between the dictates of diversity and the requirements of shared political union. It has been argued that from the perspective of the nature of ethno-cultural

78 Although Article 39 (3) stipulates for the right of all groups to equitable representation, it gives no guidance as to how this is to be institutionalized in practice within the multiethnic member states of the federation. Part of the problem is also that the Federal Constitution did not establish mechanism for determining what equitable representation means and to verify whether regional states have complied with this requirement.

79 See Dereje (n 59 above) ; Assefa (n 2 above).

80 See See Asnake (n 67 above) 56-61; Assefa (n 2 above) 267-276; Dereje (n 59 above) 8-9.

81 See Asnake (n 67 above) 59-60; Elena A Baylis 'Beyond rights: Legal processes and ethnic conflicts' (2004) 25 Michigan J. Int'l L. 529, 538-539.

82 For details on the process see Baylis (as above) 562-564.

conflicts in African states such as Kenya what makes federalism particularly attractive is that by decentring sovereignty it creates multiple centres of power that empower constituent ethno-cultural communities with the consequence of diffusing the conflicts that result from the rivalry for the control of the central government, hitherto the only centre of power. It gives all groups or ethno-regions their share in the political processes and access to resources. Its inclusivity and flexibility help avoid the zero game politics of winner-takes-all that has been dominant in many African countries for which Kenya is a prime example. As the case study shows, Ethiopia deployed federalism both to recognise the distinct identity and rights of its constituent ethnic groups and to share political power and resources between them. Ethiopia's federal experience, although in a relatively young stage, shows that multicultural federalism indeed serves as mechanism for accommodation of diversity and conflict management. Given that the accommodation of diversity and conflict management are issues that are topical in the current political and constitutional discourse of Kenya, this is accordingly a particularly important lesson for Kenya. Federalism seems to be a very optimal framework for Kenya's political problems of sharing of political power and resources of the country among the different ethno-regions of the country.

As argued in this paper, federalism particularly in its multicultural form is necessary but not a sufficient condition to achieve the objectives of multicultural accommodation in Africa. As the Ethiopian experience shows, multiethnic federalism requires for its optimal operation and efficacy political commitment to its decentring dictates, the thriving of constitutionalism and rule of law and the values underlying federalism. The secession clause should be seen in the light of the particular historical and political conditions that led to its inclusion, and hence it is clearly not something that can be replicated elsewhere in other African countries.⁸³ The commitment for sharing power and for empowering historically marginalised groups and ethno-regions are however important aspects of the Ethiopian federal system that has particular relevance for other African countries particularly Kenya.

It is important however that particular attention is paid in designing a federation not only to the question of the division of power between the centre and the federal units but also and most importantly to the question of the extent to which ethnicity plays a role in the designation of federal units and the political and legal implications to be attached thereto. It may be the case that the need to establish ethno-cultural justice in the processes of the post-colonial state may necessitate the demarcation of federal units in a way that empowers ethno-cultural groups. To avoid the problematic situation of regional minorities as in the Ethiopian federation, this should

⁸³ See SA Derso 'Institutional options of the right to self-determination as a human rights solution to problems of ethnic pluralism in Africa: The Case of Ethiopia and South Africa' in Martin Scheinin & Marku Suksi (eds.) *Human Rights in Development Yearbook 2002 (2005)* 335, 364-365. See also See A Habtu (2005) 'Multi-ethnic federalism in Ethiopia: A study of the secession clause in the Constitution' 35(2) *Publius: The Journal of Federalism* 313-337.

however be done without constitutionally assigning particular federal units as belonging to particular groups. Moreover, there is a need to guarantee that the demarcation of federal units by reference to ethno-regional considerations would not lead to discrimination against people who are not indigenous to the province or the state.

In the case of Kenya, where there are already historical animosity between groups indigenous to particular regions and those that settled in those regions from other places, this is particularly imperative if patterns of exclusion, discrimination and violence against groups not indigenous to particular regions is to be avoided. It is thus imperative that institutional and policy arrangements are put in place to ensure that the rights and interests of all the residents of each federal unit are equally protected not just the rights and interests of members of the majority group in the different units. But this also simultaneously requires the sense of dispossession of land and opportunities that people indigenous to these regions feel must also be sufficiently addressed through various remedial measures that rectify such dispossessions.

13. PROTECTING ETHNIC MINORITIES IN NIGERIA'S NIGER DELTA

ES Nwauche ^{1*}

Abstract

The presence of a natural resource like oil- which is the mainstay of a multi ethnic state in the lands of minority peoples- is guaranteed to generate conflicts as to the ownership, control and benefits of the exploration and exploitation of the resource. These conflicts implicate the human rights of minorities in their individual and group capacities. To resolve these conflicts a number of measures are usually adopted by the State to recognize, promote, and protect the interests of these minorities. This paper reviews the measures employed by the Nigerian State to protect the ethnic minorities in the Niger Delta and interrogates whether measures targeted at these ethnic minorities or the whole country are appropriate against the background of worsening separatist and militant agitation.

13.1 Introduction

A recent headline of a leading Nigerian newspaper titled 'Nigeria haemorrhages'² captures the tragic and alarming situation in the oil sector.³ Since early 2006, the security situation in the Niger Delta has worsened due to increased 'militant'⁴ agitation. A major feature of the deteriorating security situation is the kidnapping of foreign and local oil workers,⁵ government officials and private citizens including members of their family. Although there is official denial, it is believed that huge ransoms are paid for the release of the hostages. Simply put, the Niger Delta which has been impoverished⁶ despite the oil resource in the region has become one of the most dangerous places in Nigeria. It is a region heading into a state of anarchy and dragging Nigeria with it. The oil industry is threatened and if the security situation continues to deteriorate, it is forecast that the industry will collapse as a number of oil servicing companies notable of which is *Willbros* have withdrawn from the Niger Delta.⁷

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² The Guardian, Friday June 20 2008, 1.

³ In the report the newspaper chronicles a number of recent events: The Movement for the Emancipation of the Niger Delta (MEND) claimed responsibility for an attack on an oilfield operated by the Anglo-Dutch Company Shell and that Nigerian loses about NGN10 billion (approx. \$720 million daily).

⁴ The term 'militant' refers to the individuals involved in the armed struggle of Niger Delta people. This violent phase of the struggle can be said to have started in December 2005. Of all the armed groups in this struggle the most organized and visible is the Movement for the Emancipation of the Niger Delta (MEND). It is generally acknowledged that they sprang up after the arrest of a militant leader Alhaji Asari Dokubo in December 2005.

⁵ On a time frame, the kidnapping of foreign oil workers began in January 2006.

⁶ While many development agencies and private sector organizations, including oil companies, have sought to transform the region socially and economically, analyses of poverty and human development paint a dismal picture. The region's human development index (HDI) score, a measure of well-being encompassing the longevity of life, knowledge and a decent standard of living, remains at a low value of 0.564 (with 1 being the highest score). While these ratings put the Niger Delta at a slightly higher level than Nigeria's overall HDI of 0.453, the area rates far below countries or regions with similar oil and gas resources. For example, the HDI for Saudi Arabia in 2000 stood at 0.800, while in 2003 the United Arab Emirates, Kuwait, Libya, Venezuela and Indonesia achieved scores of 0.849, 0.844, 0.799, 0.772 and 0.697, respectively.' See UNDP Niger Delta Human Development Report 2006, 15. Hereafter UNDP Report.

⁷ See '\$1.5m NNPC Bribe Scandal: Willbros Official Pleads Guilty' This Day (Nigeria) 19th September 2006 : 'Willbros announced last month that it was divesting from its Nigerian operations due to violence on oil workers in the Niger Delta.'

Is this situation inevitable? How did this come about? Is the imminent collapse of the Nigerian oil industry linked to the inadequate protection of the ethnic minorities of the Niger Delta? At the heart of the Niger Delta crisis, is the extent of ownership, control and beneficial participation by the ethnic minorities of the Niger Delta in the Nigerian oil industry. It is also about the massive environmental physical human and social under development of the area.⁸ It is important to point out however that the question of the protection of the ethnic minorities of the Niger Delta and other Nigerian minorities in a federal Nigeria precedes the economic dominance of oil. At Nigeria's independence and up to the late seventies when oil became the economic mainstay of the country, the Nigerian State grappled with how to protect ethnic minorities found in all parts of Nigeria.⁹ The economic potential of oil, its underpinning of the Nigerian economy, the environmental impact of oil exploration and exploitation and the general neglect of the ethnic minority oil in producing areas have brought their protection to the fore in more graphic and dramatic terms.

The ethnic minorities of the Niger Delta constitute smaller populations as compared to the other constituent peoples of Nigeria. That has defined the reaction of the Nigerian State to the fears of political domination by the peoples of the Niger Delta and their desire to meaningfully benefit from the presence of oil in this area. It is also the perception of the peoples of the Niger Delta as to how they have been treated as minorities by the Nigerian State that has led to the agitation. The focus this paper is on three themes. First is the nature of minority protection. The paper examines the individual and collective measures by the Nigerian legal system designed for the protection of minorities. Secondly, the paper determines if there are special measures adopted by the Nigerian State to protect ethnic minorities of the Niger Delta. Thirdly, it is also important to point out that the protection of minorities will be problematic if it is undertaken or conceived outside the realities of the country. In other words, it is the prevalent material condition in the country that largely shapes the success or otherwise of minority protection.

The next section sketches a historical background to the minorities question in Nigeria in the context of oil exploration and exploitation. Part three of the paper examines the general measures designed to protect ethnic minorities in Nigeria as well as a number of measures targeted at the ethnic minorities of the Niger Delta. In part four, the paper makes certain recommendations to ensure better protection of the ethnic minorities in Nigeria and then makes some concluding remarks in part five.

⁸ See the Executive Summary to the Niger Delta Regional Development Master Plan which chronicles the developmental challenges of the region as including: Poverty Reduction; Security and Public Law and Order; Diversification and Growth of the Regional Economy; An Efficient and Effective Institutional Structure; Improvements and Maintenance of Infrastructure; Human Resources; and Good and Transparent Governance.' Available at www.nddc.gov.ng/NDRMP%20TOC%20and%20ExecSummary.pdf accessed 25 July 2008.

⁹ Nigeria is reputed to be made of over 350 ethnic communities. See Richard L Sklar 'Foundations of Federal Government in Nigeria' in Adigun A Agbaje, Larry Diamond, Ebere Onwudiwe (eds) *Nigeria's Struggle for Democracy and Good Governance* (Ibadan University Press, Ibadan 2004) 6.

13.2 A brief historical background of the minority question in Nigeria

In response to internal and external demands for Nigerian independence, the British embarked on a series of constitutional reforms. In 1946, the Richards Constitution was introduced and the country was broken up into four regions: Lagos, East, West and the Northern region. These regions reflected the dominant stronghold of the major ethnic groups in reality but for the British it represented homogenous political and cultural entities that would form part of a loose federation.¹⁰ The 1954 Constitution retained the regions created earlier but deepened it by devolving more powers to regional governments which were granted a measure of self government. These regional legislatures reflected the dominant political parties in the region which were in turn composed of the three major groups in the country; the Hausa/Fulani, in the North, the Yoruba in the West and the Igbo in the East.

In each of these regions, there were smaller ethnic groups including the ethnic minority communities of the Niger Delta found in the Eastern and western regions dominated by the Igbo's and the Yoruba's respectively. Accordingly, the domination of a particular ethnic group in the regions created the minorities of Nigeria. The minority groups who were part of these regions were deliberately oppressed and discriminated against in political appointments, provision of socio-economic amenities such as roads water hospitals and educational institutions. Sensing their prospects in post colonial Nigeria, they began a vigorous campaign for the dismantling of the regional system and the restructuring of the federation into a system that would reflect the ethnic make up of the country. They argued for entities that would enable them attain power and administer themselves according to their needs.

In the run up to independence, the vigorous campaigns by minority groups convinced the British to appoint the Willinck Commission of Inquiry in 1957 whose terms of reference were to ascertain the facts about the fears of minorities in any part of Nigeria and to propose means of allaying those fears, whether well or ill founded.¹¹ In its report, the Commission confirmed the fears of the minorities' and noted that discrimination and oppression by the majority ethnic groups were likely to become more serious upon independence.¹²

The Commission recommended the following measures to allay minority fears: the entrenchment of fundamental human rights in the constitution, the continued implementation of legal reforms to protect non-Muslims in Northern Nigeria; the establishment of a national police force; the establishment of minority areas in Benin and Calabar provinces; the creation of the Niger Delta Development Board and the holding of a plebiscite to determine whether the Ilorin and Kabba

¹⁰ See S.G Tyoden 'The Minorities Factor in Federalism' in JI Elaigwu & RA Akindele eds. Foundations of Nigeria's Federalism 1960-1965 (National Centre for Inter Governmental Affairs 1996) 246.

¹¹ H Willinck Nigeria: Report of the Commission Appointed to Enquire Into the Fears of Minorities and Means of Allaying Them, 1958, 2.

¹² As above.

Yoruba minority in the North should be transferred to the western Region. Analysts have been unanimous in their opinion that the Commission's recommendations failed to address the problems that had been their mission. To Rotimi Suberu:

...the Minorities Commission's proposals fell short of the demands of the minorities or of their objective needs as structurally disadvantaged segments of the federation...It overlooked the vulnerability of mere constitutional safeguards for human and minority rights in the face of the increasingly, bitter and intense rivalry and competition for power among regional elites. Above all, the commission evidently shared the colonial Government's thinly veiled opposition to the fragmentation of the redoubtable regional base of the conservative, pro British Northern political class: which inherited the mantle of power from the colonialists at independence.¹³

James Coleman is of the view that 'the major ethnic groups were anxious to defend and preserve the regions which they were beginning to look upon as their patrimonies. The British on their side were committed to upholding the triangular structure they had in their wisdom, decided held the best hope for Nigeria'.¹⁴ To Adiele Afigbo 'the report of the Commission was an exercise in hypocrisy and ostrich-posturism'.¹⁵ Most of the recommendations of the minorities' commission were implemented except the holding of plebiscite in Ilorin/Kabba division.

It is to be noted that the ethnic minorities of the Niger Delta were vigorous in their demand for protection in an independent Nigeria. But who are the ethnic minorities of the Niger Delta? The Niger Delta Development Commission (Establishment) Act¹⁶ recognises the following states: (Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers states) as its member states on the basis of oil production.¹⁷ This definition is not without controversy¹⁸ as there are other definitions of the Niger Delta. There are those who define the Niger Delta by a geographical parameter¹⁹ as comprising of only Rivers Bayelsa and Delta States. The definition in the NDDC Act is preferable, for purposes of this paper since it is the legal one at the moment.

13 Ethnic Minority Conflicts and Governance in Nigeria (Spectrum Books Ibadan 1996) p.8.

14 Nigeria: Background to Nationalism (University of California Press, Berkeley 1958) 390.

15 'Federal Character: Its Meaning and History' in P.P. Ekeh and E.E. Osaghae eds. *Federal Character and Federalism in Nigeria* (Heinemann Ibadan 1989) 14.

16 Cap N86 Laws of the Federation of Nigeria 2004. Hereafter NDDC Act.

17 The Niger Delta is a region, with a total land area of about 75,000 square kilometers and 185 local government areas. The region contains the world's third largest wetland, with the most extensive freshwater swamp forest and rich biological diversity. Over half of the area is criss-crossed with creeks and dotted with small islands, while the remainder is a lowland rainforest zone. See UNDP Niger Delta Human Development Report 2006, p. 15.

18 See the Niger Delta Environmental Survey (NDES) Final Report Vol. 1 Environmental and Socio-Economic Characteristics, Lagos 1997 (Hereafter NDES Report), 7: 'In recent decades the definition of the Niger Delta has been bedeviled by politics. This was not so before the ascendancy of crude oil in the Nigerian Economy... Since the oil boom era of the early 1970s, the definition of the Niger Delta, which has tended to connote some proprietary rights over the oil wealth has become politicized. Political boundaries suddenly have assumed great significance because of their importance in determining which states and local governments fall among the areas of Nigeria with all its implications for revenue sharing.

19 See KSA Ebeku *Oil and the Niger Delta People in International Law: Resource Rights Environmental and Equity Issues* (Rudiger Kopper Verlag, 2006) (Hereafter Ebeku) 18: 'Importantly following the geographical definition of the region, the Niger Delta can be said to be comprised of the land territory and people encompassed in Rivers Bayelsa and Delta States.'

Population has been the fundamental yardstick in determining Nigeria's majority and minority ethnic groups. As noted above, three ethnic groups- Hausa/Fulani, Yoruba and Igbo –are generally considered as Nigeria's ethnic majorities.²⁰ In the Niger Delta there are majority and minority ethnic communities. Rivers Delta and Bayelsa Edo Cross River and Akwa Ibom States²¹ consist entirely of minority ethnic communities while there are majority ethnic communities- Igbo (Imo and Abia States) and Yoruba (Ondo State) also in Niger Delta.²²

13.2.1 Oil exploration and exploitation in the Niger Delta

In 1956, oil was discovered in commercially exploitable quantities in Oloibiri Bayelsa State in the Niger Delta.²³ This discovery, opened up the oil industry in 1961, bringing in Mobil, Agip, Safrap (now Elf), Tenneco and Amoseas (Texaco and Chevron respectively) to join the exploration efforts both in the onshore and offshore areas of Nigeria. It can be asserted that all Nigeria's inland oil is found only in the Niger Delta. It was not until the early seventies that the importance of oil as Nigeria's economic mainstay became clear.²⁴

A fundamental feature of oil exploration and exploitation in Nigeria is the absolute ownership of oil by the Federal Government of Nigeria. Thus section 44(3) of the 1999 Constitution provides that:

‘ ... the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.’²⁵

Section 44(3) of the 1999 Constitution is a constitutional affirmation of the provisions of the Petroleum Decree of 1969.²⁶ The Land Use Act²⁷ which was promulgated in 1978 strengthened the ownership and control of oil by the Federal Government of Nigeria by facilitating access to and acquisition of oil bearing lands. This Act vested all lands in the Governors of states where the land is located to hold in trust for citizens of that state and recognized rights of occupancy

20 The 1999 Constitution recognizes this fact. For example section 55 provides that the business of the National Assembly shall be conducted in English and in Hausa, Ibo and Yoruba when adequate arrangements have been made therefore.

21 See Ebeku, note 18, 20.

22 According to the NDES Report, note 16 143: ‘ The people of the Niger Delta are currently identified under five major linguistic categories : Ijoid, Yoruboid, Edoid, Iboid, and Delta Cross. Each of these categories embraces a large number of ethnic/linguistic communities, most of which extend beyond the boundaries of the Niger Delta.’

23 Nigeria currently has a proven crude oil reserve of 36.22 billion barrels of crude oil and a production profile of about 2.234 million barrels per day. It is the largest producer of oil in Africa. The proven gas reserves of Nigeria stand at 5210 billion cubic metres. Figures obtained from Annual Statistical Bulletin of the Organisation of Petroleum Exporting Countries (OPEC). Available at www.opec.org/aboutus/member%20countries/Nigeria.html accessed 26 July 2008.

24 Oil contributes 95% of Nigeria's foreign exchange earnings. See Mbendi Oil and Gas profile of Nigeria. Available at www.mbendi.co.za/indy/oilg/af/ng/p0005.htm accessed 2 August 2008.

25 See also section 1(1) of the Minerals and Mining Decree, Cap M12 Laws of the Federation of Nigeria 2004.

26 Decree 51 of 1969. This Decree is now republished as the Petroleum Act Cap P10 Laws of the Federation of Nigeria 2004.

27 Cap L5 Laws of the Federation of Nigeria 2004.

as the interest that citizens can hold. More importantly it declares in section 28 that a governor can revoke a right of occupancy if the land is required for petroleum operations.

The combination of the Constitution and the Land Use Act ensure that oil bearing communities are not the owners of the oil found in their land. This is important because land in many of Nigeria's communities is held either as communal or family units. Furthermore, the contractual forms of participation in the exploration and exploitation of oil such as joint ventures and production sharing contracts²⁸ do not permit any oil bearing ethnic communities to be involved in these activities because they are not owners of the oil. It is the feeling of disenfranchisement, that the state has robbed these communities of the benefits of the natural resource occurring in their lands vis a vis other non oil bearing ethnic communities that is at the heart of Niger Delta crisis. Thus, even though the states that govern these communities receive 13% (thirteen percent) of the proceeds of crude oil sales on the principle of derivation, many of these communities continue to press for more entitlements. It is to be remembered that the families and communities of ethnic minorities originally owned the land containing the oil and the ownership of the federal government is cast as an exception to their right to property guaranteed by section 44 of the 1999 Constitution. Therefore, one way of assuaging their misgivings is to address how the right to property of these families and communities can be meaningfully addressed

13.2.2 Measures designed to protect ethnic minorities in Nigeria

In this section, this paper examines two types of measures designed to protect ethnic minorities in Nigeria. The first set of measures is designed for all minorities while the other set are measures targeted at ethnic minorities. The section also highlights the governance capacity of autonomous administrative units created ethnic minorities in the context of Nigeria.

13.2.2 (a) General measures for the protection of ethnic minorities in Nigeria

There are two principal measures presently in operation for the protection of ethnic minorities in Nigeria. These are the entrenchment of a bill of rights in the Constitution and the creation of autonomous administrative units for their governance.

13.2.2 (b) A Bill of Rights in the Constitution

At independence, the principal plank for the protection of minority rights was the constitutionally entrenched bill of fundamental human rights. Starting from the Independence Constitution of

²⁸ For a detailed analysis of these contractual forms, see G Etikerentse Nigerian Petroleum Law (Dredew Publishers 2006).

1960, this protection has been built on the basis of equality before the law complemented by specific guarantee of certain rights. In the Republican Constitution of 1963, chapter three dealt with fundamental human rights. This bill of rights was also a significant part of the 1979 constitution as it is also found in chapter four of the 1999 Constitution.

The rights guaranteed in all these constitutions are civil and political and are for the benefit of all Nigerians. They are not peculiar or limited to members of minority ethnic groups. The increasing militant agitation in the Niger Delta is proof that the entrenchment of fundamental human rights in the Constitution has not been of much assistance in the resolution of the crisis emanating from oil exploration and exploitation. Be that as it may, it is clear that of all the rights in chapter four of the 1999 Constitution, it is section 42 that appears potentially able to assist minorities. This section prohibits discrimination on a number of grounds by requiring that 'disabilities and restrictions' as well as 'privilege and advantage' should apply to all Nigerians²⁹ and there should be no discrimination on grounds of many factors including 'particular community' 'ethnic group' 'place of origin'. While this provision ensures the equality of all Nigerian under the law as it does not in any way single out minorities for special treatment. Its tenor is negative and does not mandate the government to take proactive measures in favour of ethnic minorities.

One way of promoting minorities is to ensure that they participate effectively in governance at both the local and national level. The 1999 Constitution recognizes that it is problematic to treat the three hundred and fifty odd ethnic groups equally and have all of them participate in national affairs. The Constitution therefore prescribes the concept of federal character in section 14(3) to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that Government or in any of its agencies. Section 14 (4) further provides that the composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation. Other provisions of the Constitution make specific provisions which seek to ensure federal character. For example, section 147(3) requires the president to appoint one minister from each state of the federation. To ensure that the concept of federal

²⁹ See the case of *Anzaku v Governor Nassarawa State* [2006] All FWLR (Pt 303) 308, 341-342: 'Fairness and justice demands that people who are similarly circumstanced should be treated equally by the State. Yet there is no discrimination where special restrictions imposed upon a class, or special advantages accorded to it are reasonably designed to reflect real and substantial differences between it and other classes and groups... Protection is not unequal merely because real and substantial differences between classes or groups are recognized by law for purposes of special protection or treatment reasonably related to such differences. Provided therefore that such special protection or treatment is reasonable and not arbitrary, oppressive or capricious, there is no denial of equal protection. A class, e.g, a religious or political group, may be isolated for special treatment if it constitutes a danger to public order, public security, public health or public morality, or if it is so vulnerable by reason of its peculiar circumstances as to require special protection.' See also *Uzoukwu v Ezeonu* (1982) 2 NCLR 552.

character is promoted and implemented, section 153(1)c of the 1999 Constitution establishes the Federal Character Commission. Thus the concept of equality and federal character pull at different ends to ensure that the while the minority is not discriminated against, positive steps are taken to ensure that they participate in the federal government.

In addition to chapter four of the 1999 Constitution, the *African Charter* is applicable in Nigeria because Nigeria is not only a state party, but has also domesticated the treaty. Nigerian courts have in the cases of *Abacha v Fawehinmi*,³⁰ *Ogugu v State*³¹, *Oronto Douglas v SPDC*³² declared that the African Charter is applicable in Nigeria. This a welcome development even as it is to be noted that in *Abacha* the Supreme Court held that the *African Charter* inferior to the 1999 Constitution but superior to all other laws.

13.2.3 Human rights issues in oil exploration and exploitation

This section of the paper examines human rights issues that affect ethnic communities as a result of oil exploitation and exploitation in the context of the rights contained in chapter four of the 1999 Constitution of the Federal Republic of Nigeria and the African Charter on Human and Peoples' Rights³³.

13.2.3 (a) The right to a safe and healthy environment

The effect of oil exploration and exploitation in the Niger Delta is devastating and impacts significantly on the environment.³⁴ On this there is unanimity.³⁵ Protection against environmental harm is one of the key demands of the ethnic minorities of the Niger Delta. To protect the environment, the Nigerian legal system avails complainants of a plethora of statutory remedies found in the Criminal Code³⁶, the Petroleum Act; the Oil in Navigable Waters Act³⁷; the Harmful

30 (2000) 6 NWLR (Pt 660) 228.

31 (1994) 9 NWLR (Pt. 366) 1.

32 (1999) 2 NWLR (Pt. 591) 466. Hereafter Oronto.

33 Hereafter African Charter. See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9 Laws of the Federation of Nigeria 2004.

34 One of the devastating effects of oil production in the Niger Delta is gas flaring. Gas flaring is used to deal with the associated gas that is produced with oil. It is fatal and a major contributor to climate change and global warming. See Climate Justice Program and Environmental Rights Action Gas Flaring in Nigeria: A Human Economic and Environmental Monstrosity 2005. Available at <www.climatelaw.org>

35 See for example UNDP Report, note 5; P.D Okonmah 'Right to Clean Environment: The Case for the People of the Oil-Producing Communities in the Niger Delta' 41 Journal of African Law 43; G Frynas ' Legal change in Africa: Evidence from Oil-related litigation in Nigeria' 43 Journal of African Law 121 (Hereafter Frynas); O. Ibeanu 'Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria' ENVIRONMENTAL CHANGE & SECURITY PROJECT REPORT, ISSUE 6 (SUMMER 2000). Available at www.wilsoncenter.org/topics/pubs/Report6-2.pdf ;D. Moffat & O. Linden ' Perception and Reality: Assessing Priorities for Sustainable Development in the Niger River Delta' 24 (1995) AMBIO 527.

36 See for example section 245 of the Criminal Code which provides that ' any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir or place so as to render it less fit for any purpose for which it is ordinarily used' may be liable for six months imprisonment. See also s 234 (common nuisance) and s. 247 (noxious acts).

37 Cap 06 Laws of the Federation of Nigeria 2004.

Waste (Special Provisions) Act.³⁸ In addition there are common law remedies of nuisance³⁹ negligence⁴⁰ trespass to land and the rule in *Rylands v Fletcher*.⁴¹ There is also a statutory requirement for environmental impact assessment for oil exploration and exploitation related activities.⁴² Furthermore, compensation can be recovered for environmental pollution on the basis of statutory provisions.⁴³ Even though the amount of compensation paid for pollution is increasingly⁴⁴ reflecting the market value of the polluted lands,⁴⁵ there is a general consensus in academic literature that the statutory regime for environmental protection is inadequate because of a weak and conflicting administrative enforcement mechanism; inadequate environmental laws rules standards principles and regulations; inappropriate sanctions; lack of standing to sue for environmental wrongs⁴⁶; and a judiciary sympathetic to government and oil companies.⁴⁷ The shortcomings of a statutory and a common law environmental regime may be remedied by a right to a safe and healthy environment in Nigeria. The existence of this right in Nigeria is controversial because even though section 20 of the 1999 Constitution enjoins the Nigerian State 'to protect and improve the environment and safeguard the water, air and land, forest and wildlife in Nigeria' this mandate is contained in chapter two of the Constitution which by the tenor of s.6(6)b of the Constitution is not justiciable.⁴⁸ The situation would have been different if this mandate is part of the rights contained in chapter four of the 1979 Constitution. Since the African Charter is applicable in Nigeria, it is easy to conclude that the right to environment provided for in article 24 of the African Charter can be usefully deployed in Nigerian courts. It was noted earlier that the Nigerian Supreme Court held in *Abacha* that the status of the African Charter is inferior to the 1999 Constitution. This fact underscores the controversy about the right to a safe and healthy environment. Since it is not contained in chapter four of the 1999 Constitution, can this be a worthy defence that article 24 of the African Charter is similar to section 20 of the 1999 Constitution and therefore not justiciable? On the other hand Nigeria

38 Cap HI Laws of the Federation of Nigeria 2004.

39 See for example the case of *Ejowhonmu v Edok-Eter Mandilas Limited* (1986) 9 SC 41.

40 See the case of *Abusomwan v Merchantile Bank of Nigeria Ltd* (1987) 3 NWLR (Pt 60) 196.

41 (1866) LR 1 Exch 265.

42 See the Environmental Impact Assessment Act, Cap Laws of the Federation of Nigeria 2004. Petroleum is listed in schedule I to the Act which means that the EIA is mandatory.

43 See for example paragraph 36 of the First Schedule to the Petroleum Act.

44 See Frynas note 34, 121, 135.

45 Compare older cases: *Edise v William International Ltd* (1986) 11 CA 187 (NGN 10,000[approx. \$80] awarded on a claim of NGN319,000,00.00; *SPDC v Farah* (1995) 3 NWLR (Pt 382) 148 (NGN 4,621,307.00 [Approx. \$35,000] ; with the recent cases: *SPDC v Adamkue* (2003) 11 NWLR (pt 852) (Court awarded NGN 156, 602, 915 [Approx \$1.2 million] on a claim of NGN 169 243 306 [\$1.4 million]).

46 See Oronto, note 31.

47 See the following O. Adewale 'The Federal Environmental Protection Agency Decree and the Petroleum Industry' 16 17 18 (1992/1993) *Journal of Private and Property Law* 51; *Judicial Attitude to Environmental Hazards in Nigeria* 1989 *Ibadan University Law Review* 29; M.A Ajomo 'An Examination of Federal Environmental Laws in Nigeria in MA Ajomo and O. Adewale (eds) *Environmental Law and Sustainable Development in Nigeria* (NIALS 1993) 11; M.A Ajomo 'Law and Changing Policy in Nigeria' in JA Omotola & AA Adeogun (eds) *Law and Development* (University of Lagos Press, Lagos 1987) 84; KSA Ebeku 'Judicial Attitude to Redress for Oil-Related Environmental Damage' 12(2) 2003 *Review of European Community and International Environmental Law* 199; E.O Nwosu 'Petroleum Legislation and Enforcement of Environmental Laws and Standards in Nigeria' 1998-1999 *Nigerian Juridical Review* 80; and N.L Usman 'Environmental Regulation in the Nigerian Mining Industry' 2001 *Journal of Energy and Natural Resources Law*, 230.

48 See the case of *Okogie v Attorney General of Lagos State* (1981) 2 NCLR 337.

like other state parties to the African Charter undertook to recognize the rights duties and freedoms in the Charter and to undertake legislative and other measures to give effect to them. Furthermore it is a trite principle of international law that States cannot rely on domestic law to avoid their treaty obligations.

The contention that the right to a safe and healthy environment exists in Nigeria is buttressed by two recent cases. The first is *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights*.⁴⁹ In this case the complainants who brought the complaint on behalf of the Ogoni Ethnic peoples in the Niger Delta allege that the Nigerian government violated the right to health and the right to clean environment as recognized respectively under articles 16 and 24 of the African Charter by failing to fulfil the minimum duties required by these rights. The Complainants alleged, the government had breached those rights by (i) directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population, (ii) Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage, (iii) Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations.

The Commission defined the duties and obligations incumbent on a government by the right to a general satisfactory environment and the right to health as requiring the State to take reasonable and other measures to prevent pollution and ecological degradation, promote conservation, and secure an ecologically sustainable development and use of natural resources. The Commission further noted that the State's obligation entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.⁵⁰ In paragraph 53 the Commission noted that Government compliance with the spirit of articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities. *SERAC* is important because it clarifies the content of the right to a safe and healthy environment applicable in a Nigerian court. Furthermore it reaffirmed the

⁴⁹ (Comm. No. 155/96 (2001). Hereafter *SERAC*.

⁵⁰ Paragraph 52 above

point that all rights in the African Charter are enforceable.

Very recently, the possibility of utilizing the African Charter in defining the right to environment in Nigeria was confirmed in *Jonah Gbemre v Shell Petroleum Development Company*.⁵¹ The significance of this case lies in the fact that it recognized a right to environment in the Nigerian legal system through a cumulative reading of the right to life protected by section 33(1) of the 1999 Constitution; the right to the dignity of the human being protected by section 34(1) of the 1999 Constitution; the right to a satisfactory environment protected by article 24 of the African Charter and the right to health protected by article 16 of the African Charter. In this case Jonah Gbemre brought an action on behalf of his community to protest the gas flaring in an oil installation in his community. He sought a number of declarations against Shell Petroleum Development Company that the right to life and the right to human dignity recognised by the 1999 Constitution and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights inevitably includes the right to clean poison-free, pollution-free and healthy environment; that gas flaring is a violation of the aforementioned rights; that the failure of the respondent in accordance with section 2(2) of the Environmental Impact Assessment Act 2004, to carry out an environmental impact assessment of the effects of their gas flaring contributed to a violation of the aforementioned rights; that section 3(2)a of the Associated Gas Re-injection Act 2004 and section 1 of the Associated Gas Re injection (Continued Flaring of Gas) Regulations 1984 are inconsistent with the aforementioned rights. In addition, the applicants sought an order of perpetual injunction restraining respondents from continued flaring of gas in the applicant's community. After a consideration of the case the Federal High Court Benin held that

' (3) The rights to life and the right to dignity of the human person includes the right to clean, poison-free, pollution free healthy environment; (4) the actions of respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community is a gross violation of their fundamental right to life(including healthy environment and dignity of human person as enshrined in the Constitution; (5) Failure of the respondents to carry out environmental impact assessment in the applicant's community concerning the effects of their gas flaring activities is a clear violation of section 2(2) of the Environmental Impact Assessment Act... and has contributed to a further violation of the said fundamental human rights; (6) That Section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and Section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations...under which gas flaring in Nigeria may be allowed are inconsistent with the Applicant's rights to Life and/or dignity of the human person enshrined in Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria and Articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act... are therefore unconstitutional null and void by virtue of section 1(3) of the same Constitution.'

⁵¹ Unreported suit No FHC/B/CS/53/05 (Federal High Court Benin) decided on 14th November 2005. Text of the decision is available at www.climatelaw.org.

In addition, the Court ordered the Federal Attorney General and Commissioner of Justice, to begin, after necessary consultations with the Federal Executive Council, the processes for the enactment of a Bill of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Re-Injection Act and Regulations made there under to bring them in line with the provisions of Chapter 4 of the 1999 Constitution on fundamental human rights.

This case is on appeal and its outcome is eagerly expected even as it must be noted that *Gbemre* has set a general progressive tone. Even though there is little jurisprudence in *Gbemre*, it seems to have been influenced by *SERAC*. Even if this is not the case, the fact is that the combination of the two cases presage a new era of meaningful environmental protection for Nigeria. By their tenor it is no longer in doubt that there is a right to a safe and healthy environment in Nigeria and it is expected that litigation to protect the Nigerian environment will assist in elaborating the contours of this right. *Gbemre* is an example of an integrated approach in the interpretation of human rights. The right to life and the right of human dignity were interpreted to contemplate a right to a safe and healthy environment. By recognising that the right to life and human dignity encompass some protection of the right to environment, the Court was clearly stating a truism. Of what use is a right to life if the environment which is the context of life is inadequate.

It is important to note that the Court accepted the fact that the continuous gas flaring had led to significant health risks including death. It was therefore right to use the right to life and human dignity as basis of recognising one of the significant threats to life which is the environment. If in addition, the court recognised a right to environment by adding that gas flaring amounted to such a breach, it is merely following a legal tradition that had long been in practice in other jurisdictions.⁵²

To sum up this part, it may be stated that a combination of *SERAC* and *Gbemre* establish that the *African Charter* is directly enforceable in Nigerian courts.

13.2.3 (b) The right to freely dispose of their wealth and property

The scope of article 21 of the African Charter was considered in *SERAC*. The complaint alleged breach of article 21 because:

... the Military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in

⁵² See the cases of *Farooque v Bangladesh* 17 BLD (1997) (AD)1; *New Patriotic Party v Attorney General Ghana* [1996-1997] SCGLR 72.

the decisions that affected the development of Ogoniland. The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population may well be said to constitute a violation of Article 21.

In paragraph 58 the Commission held that the Nigerian government had breached article 21 of the African Charter by allowing private actors and oil companies in particular to devastatingly affect the well-being of the Ogonis.

In a seemingly related but belated action, the Nigerian government recently announced that it had revoked the oil exploitation rights granted to Shell Petroleum Development Company (SPDC) in Ogoniland⁵³ The Ogoni's had since the nineties protested against oil exploration by the SPDC. This decision is justifiable under article 21 and SERAC. In its spirit, the Nigerian government ought to consult the Ogoni's and other ethnic minorities in all major decisions concerning oil exploitation in their lands as well as ensure that they enjoy the benefits of oil exploitation.

13.3. Human rights and security

Militant activities have impacted local and international concerns especially in the energy sector. Attacks on gas pipelines have affected Nigeria's power industry causing a massive reduction in installed capacity. Their activities have regional impact because pipeline vandalisation affects gas supply to West African countries and projects such as the West African Gas Pipeline. Western countries and the world worry over the price of oil which is partly fuelled by militant activities.⁵⁴

The nature of the security breaches in the Niger Delta throw up relevant questions as to whether what is being played out is genuine militant agitation or sheer brigandage. It is the whisper of huge ransoms being paid for the release of kidnapped oil executives that sustains this doubt. Even if what is going on is largely criminal, the discontent with companies, government and security agencies rob the latter of considerable public support which is critical in crime containment. The involvement of ethnic minority organizations in the agitation also robs oil companies of their sympathy that may have led them to engage the criminal elements. It is important to note that rise and dominance of ethnic militias like the Bakassi Boys in the South East and the OPC in the South West, controversial as they are⁵⁵ were in response to massive

53 See 'Shell Backs New Plan for Ogoni' The Guardian Tuesday June 17 2008, 3.

54 See Testimony of David L Goldwyn before the Subcommittee on International Economic Policy Export and Trade July 15 2004: 'The 'US energy security depends on access to diverse, reliable, abundant and affordable supplies of oil and gas. But energy security today means more than access to supplies of oil. In a global market, the United States can buy the supply it needs by outbidding other consuming nations. The greatest risk to our energy security today is the volatility of the price of oil.'

55 See Human Rights Watch The Bakassi Boys: The Legitimization of Murder and Torture Vol. 14 (No.5A) May 2002.

security collapse.

The inability of security forces to contain security breaches highlights the collapse of the infrastructure of the Niger Delta States. If the security services are unable to protect the lives and property of ordinary citizens, it is easy to imagine that the oil industry is in serious trouble.⁵⁶ It is also easy to conclude that the solution to the problem lies in massive injection of funds to shore up security agencies. Unfortunately that has been done in the establishment of the Joint Task Force without appreciable results.

13.4 Administrative autonomy in a federal state

Federalism was the system of government adopted by Nigeria at independence. Thus even though the Willinck Commission did not recommend the creation of more states, it was not long before this device was accepted as the best means of protecting Nigerian minorities as the country deepened its federalism. Their marginalization in the regions convinced them that an administrative unit controlled by them would ensure their development. The First Republic which lasted between 1960 to 1966, witnessed the first positive reaction to the demands of the minorities of the country for administrative units that would represent their interest. In 1963, the Mid-West region was created. Even though it may have been for the self serving interests of majority ethnic groups in Nigeria, there is no doubt that it gave them a sense of identity and enabled the minority communities in that region to achieve considerable autonomy. The demand for more minority friendly autonomous units increased after the creation of the Mid-West Region and did not abate until the crisis which engulfed the country in 1966 and ultimately led to the first military takeover and a civil war. In 1967, the Government of (Rtd) Gen Yakubu Gowon created 12 states- including Rivers state- out of the four regions and thus radically restructured the federation. While there was a desire to satisfy minority interests in other parts of the country; in the Eastern part, it was to undercut the secessionist bid of Eastern Nigeria led by the Igbo's between 1967 and 1970. Another major ethnic group- the Yoruba's- threatened to pull out of Nigeria if the Igbo's were allowed to secede. The decision to abolish the regions was therefore to ensure that no part of the country would be so powerful and strong to threaten the nation. Twelve States were created so that there would be no fear of any political domination by any of the ethnic groups.

There is no doubt that whatever the intention of the Federal Government; the creation of Rivers State was well received. The exercise of further state creation did not end there. There have been four exercises so far- in 1967, 1987, 1991 & 1997- bringing the number of these States

⁵⁶ The recent attack on the Bonga Oil Fields of Shell Petroleum Development Company is attributed to lack of essential facilities like a functional radar. See ' Militants Vow to Fight On' The Nation, Tuesday June 24, 2008, p.1.

to 36. By all indications and especially by the response to the public sittings of state creation panels, the demands for more states have not and will not abate.⁵⁷ The attraction of autonomous administrative units within a federal state lies in the endowment of exclusive and concurrent powers that enable these units to decide how to develop.⁵⁸ As Nwabueze notes:

...Federalism is predicted upon the existence of a society composed of various geographically segregated groups divided by wide fundamental differences of race, religion language and culture or economics. Its purpose is to enable each group, free from interference or control by the others, to govern itself in matters of local concern, leaving matters of common interest to be managed centrally, and those which are of both local and national concern to be administered concurrently.⁵⁹

For example within the Concurrent Legislative List of the 1999 Constitution States are allowed to concurrently legislate on antiquities and monuments; archives; collection of taxes; electoral law; electric power, exhibition of cinematograph films; industrial commercial or agricultural development; seismograph and technological research; statistics; trigonometrical, cadastral and topographical surveys; and university, technological and post primary education. These powers potentially ensure a measure of autonomy when they are exercised with residual powers that refer to all those powers that are not reserved for the federal government in the exclusive or concurrent list. It is also to be noted that the States can truly meet the peculiar needs of their people if there is a reasonable balance between the powers exercised by the federal government, the states and the local governments. Years of military rule (1966-1979) (1984-1999) have succeeded in creating a strong federal government which is also reflected in the Exclusive Legislative List which contains 67 items including matters which may be more conducive to state control. To end this part it can be asserted that even in its present imperfect state, federal states are the most important means of minority protection in Nigeria.

13.5 Measures targeted at ethnic minorities of the Niger delta

13.5.1 Development agencies for the ethnic minorities of the Niger delta

As noted earlier one of the recommendations of the Willinck Commission was the creation of a development board to concentrate on the development of the Niger Delta. Consequently the Niger Delta Development Board was established in 1961⁶⁰ designed as an administrative agency controlled by Niger Delta people. It should be remembered that the use of development agencies was an alternative to the creation of states for the minorities. It is ironic that the use of development agencies did not disappear with the creation of the Mid-West Region in 1963 or

⁵⁷ A significant part of the militant struggle is the creation of additional states for the Ijaws that constitute the largest single group in the Niger Delta. See the International Crisis Group *Fuelling the Niger Delta Crisis*, Africa Report No 118, 28 September 2006, p. 10. Hereafter Crisis Group Niger Delta

⁵⁸ See B.O Nwabueze *Federalism In Nigeria Under the Presidential Constitution* (Sweet & Maxwell 1983).

⁵⁹ See B.O Nwabueze *The Presidential Constitution of Nigeria* (Hurst & Nwamife London 1982) 47.

⁶⁰ See the Niger Delta Development Act 1961.

the creation of Rivers State in 1967 or in other state creation exercises.

The belief in development agencies manifested again, in 1976, when the Federal Government established the Niger Delta Basin Development Authority (NDBDA). In the Second Republic, the civilian regime of Alhaji Shehu Shagari created eleven river basin development authorities, several of whom still exist to date⁶¹ and have jurisdiction over the Niger Delta. There is little doubt that these agencies failed in their duties to adequately develop the Niger Delta⁶² such that the discontent articulated in pre-colonial Nigeria was even more so as the Nigeria headed into the nineties.

During the early nineties, beginning from the agitation waged by the Ken Saro –Wiwa led Movement for the Salvation of the Ogoni People (MOSOP) who issued an Ogoni Bill of Rights,⁶³ a number of civil society organizations including the Ijaw National Congress (INC), the Ijaw Elders Forum (IEF), Egbema National Congress (ENC), Ijaw Youth Council (IYC) engaged in an organized and orchestrated demand for a broad number of rights ranging from demand of absolute ownership of oil, demands for participation in the oil industry and criticism of the operations of government and multinational oil companies leading to environmental degradation and social dislocation.⁶⁴ Augustine Ikelegbe states that the response of the Nigerian State to these demands was to: ‘...establish the Oil Mineral Producing Areas Development Fund (OMPADEC) in 1992...’⁶⁵ OMPADEC⁶⁶ charged with inter alia ‘ (a) to receive and administer the monthly sums from the allocation of the Federation Account in accordance with confirmed ratio of oil production in each state- (i) for the rehabilitation and development of oil mineral producing areas; (ii) for tackling ecological problems that have arisen from the exploration of minerals.’ Corruption, the manner of appointment of the Commission members and an unresolved question of the viability of a development agency within a federal set up ensured that the Commission was a limited success and by the end of the nineties was ineffective as the military ushered in the Fourth Republic (1999).⁶⁷

61 These agencies are the Anambra-Imo River Basin Development Authority; the Niger Delta Basin Development Authority; the Benin-Owena River Basin Development Authority; the Niger River Basin Development Authority and the Cross River Basin Development Authority.

62 See UNDP Report, note 5, 30. The report notes that the NDBDA suffered from organizational problems as its members were not from the Niger Delta. The fact that politicians were appointed to run the river basin authorities established in the second republic impacted on their ability to deliver as the politicians were self-serving.

63 Available at www.waado.org/NigerDelta/RightsDeclaration/Ogoni.html. Part of the Bill of Rights demand ‘the right to control and use of a fair proportion of Ogoni economic resources for Ogoni development’.

64 See A. Ikelegbe ‘ Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle’ 39(3) *The Journal of Modern African Studies* 437-469

65 Above at 460.

66 See the repealed Oil Mineral Producing Areas Development Commission Decree 1992.

67 See the UNDP Report, note 5, 30: ‘ Between 1993 and 1997, OMPADEC collected about N17.42 billion, a little over US\$135 million. At first, OMPADEC was allocated three per cent of the Federation Account, but this was raised to 6 per cent in 1995. The Commission did not make any meaningful impact on the lives and environment of the Niger Delta People. It was noted for its profligacy and extravagance. Contracts were awarded in anticipation of funds, with the result that contracts worth billions of naira were awarded that were not eventually backed with cash. At the time it folded, the Commission owed its contractors billions of naira and left the Niger Delta with numerous abandoned projects.’

The first civilian regime of the Fourth Republic headed by President Olusegun Obasanjo established the Niger Delta Development Commission (NDDC) which is charged with the similar functions as OMPADEC.⁶⁸ An examination of the NDDC Act reveals that it is not autonomous; but rather is another government apparatus. Four key features of the NDDC locate it as such. The first feature is that the chairmen and the board of directors of the NDDC are all appointees of the President of Nigeria.⁶⁹ This board consists of a representative of each of the nine states; three representatives of non-oil mineral producing states; one representative of the companies; and one person to represent the federal ministries of finance and environment; the managing director of the Commission and two executive directors. The Board is therefore not truly owned by the people of the region. The president's power of appointment could well be patronage since he is not for example bound by the choice of the people of Delta. His powers perhaps represent the hallmarks of a domineering 'centre' and a control of by hegemonic majority tribes of Nigeria who cannot afford to let go of the Niger Delta. Secondly, the nature of the functions of the NDDC shows clearly that it is conceived as a 'fourth' tier of government. There are flashpoints of duplication and waste as four tiers of government compete to develop the Niger Delta. Indeed it may well be that some of the tiers of government especially the local governments have abandoned their responsibilities because of NDDC's activities.

The Agency has thus become a diversionary device that may have suspended critical rethinking of the role of Niger Delta governments. The recent launch of the NDDC Regional Development Master Plan is directed at ensuring the coordination of the activities of development actors in the Niger Delta leads one to imagine that this may perhaps be a better function for the Agency; rather than acting as a government it may well serve as a conceptual agency developing ideas and coordinating ideas for the region that governments can tap into. Thirdly the funds of NDDC are principally deductions from the Federal and State governments.⁷⁰ It is as if acknowledging

⁶⁸ The Commission is charged with the functions to (a) formulate policies and guidelines for the development of the Niger-Delta area; (b) conceive, plan and implement, in accordance with set rules and regulations, projects and programmes for the sustainable development of the Niger-Delta area in the field of transportation, including roads, jetties and waterways, health, education, employment, industrialisation, agriculture and fisheries, housing and urban development, water supply, electricity and telecommunications; (c) cause the Niger-Delta area to be surveyed in order to ascertain measures which are necessary to promote its physical and socio-economic development; (d) prepare master plans and schemes designed to promote the physical development of the Niger-Delta area and the estimates of the costs of implementing such master plans and schemes; (e) implement all the measures approved for the development of the Niger-Delta area by the Federal Government and the member States of the Commission; (f) identify factors inhibiting the development of the Niger-Delta area and assist the member States in the formulation and implementation of policies to ensure sound and efficient management of the resources of the Niger-Delta area; (g) assess and report on any project being funded or carried out in the Niger-Delta area by oil and gas producing companies and any other company including non-governmental organisations and ensure that funds released for such projects are properly utilised; (h) tackle ecological and environmental problems that arise from the exploration of oil mineral in the Niger-Delta area and advise the Federal Government and the member States on the prevention and control of oil spillages, gas flaring and environmental pollution; (i) liaise with the various oil mineral and gas prospecting and producing companies on all matters of pollution prevention and control; and (j) execute such other works and perform such other functions which, in the opinion of the Commission, are required for the sustainable development of the Niger-Delta area and its people.

⁶⁹ See section 2(2) of the NDDC Act.

⁷⁰ Section 14 of the NDDC Act provides as follows: (1) The Commission shall establish and maintain a fund from which shall be defrayed all expenditure incurred by the Commission. (2) There shall be paid and credited to the fund established pursuant to subsection (1) of this section- (a) from the Federal Government, the equivalent of 15 percent of the total monthly statutory allocations due to member States of the Commission from the Federation Account; this being the contribution of the, Federal Government to the Commission- (b) 3 percent of the total annual budget of any company operating, on shore and off shore, in the Niger-Delta Area; including gas processing companies; (c) 50 percent of monies due to member States of the Commission

the incompetence of state and local governments, a portion of their statutory allocation which is imagined should be dedicated for development is given to NDDC. It is self evident that the factors which have hindered these levels of government from performing also remain a threat to the Agency. As noted earlier these deductions may lull state and federal governments into believing that they represent their development initiative and they may not need to do more. Unfortunately these dependant deductions have threatened even the limited intervention and effectiveness of NDDC in the past year or so. Claiming that the deductions due from the Federal Government has not been paid over to her, many stakeholders have called on the Federal Government to release these funds.⁷¹ The fourth feature is that NDDC is without legislative competence. Its plans must depend for enforcement on the goodwill of the Federal and State governments. This is evident in the Niger Delta Development Master Plan for which legislative backing is being sought.⁷² Given its composition and limited funds, it is clear that NDDC is unable to satisfy the yearnings of the ethnic minorities of the Niger Delta.

13.5.2 Increased share of oil revenue

Another measure targeted at minorities of the Niger Delta is to allocate more revenue to their states than that accruable to non- states using derivation as a principle of revenue allocation. This principle can be said to complement the use of states as a means of protection. It seems plausible that if these minorities are endowed with more resources in administrative units that they control, they should be able to address the developmental issues that confront the region. Thus section 162 (2) of the 1999 Constitution provides that the formula for revenue allocation should take into account the allocation principles of population, equality of states, internal revenue generation, land mass, terrain, population density and derivation of at least thirteen percent of the revenue accruing from any natural resource (oil). Increasing this share of the derivation principle has always been a key component of the agitation in the Niger Delta.

from the Ecological Fund, (d) such monies as may from time to time, be granted or lent to or deposited with the Commission by the Federal or a State Government, any other body or institution whether local or foreign; (e) all moneys raised for the purposes of the Commission by way of gifts, loan, grants-in-aid, testamentary disposition or otherwise; and (f) proceeds from all other assets that may, from time to time, accrue to the Commission.

71 See The Nation, Tuesday June 24 2008 33: 'Setting Agenda for Yar Adua's Niger Delta Summit' The newspaper reports that the National Think tank at a conference organized on June 16 ' called on the Federal Government to release to the Niger Delta Development Commission its statutory funds so as to enable the agency perform its mandate.'

72 National Think Tank Conference as above resolved on this point: ' Equally it was resolved that all stakeholders should support the evolving Niger Delta Development Master Plan and that the Federal Government should initiate an appropriate Legal Framework to back up the actualization of the Master Plan. See also Press Release by NDDC ' NDDC Partners with NBA (Nigerian Bar Association)' : 'The Niger Delta Development Commission, NDDC, has recorded another major development milestone as it inaugurates a joint implementation committee that will serve as the framework for the strategic collaboration of key stakeholders on law and development in the Niger Delta Region. The joint Committee, which is a collaboration of the NDDC and the Nigerian Bar Association, NBA on law and development, is aimed at using law as a classic and time tested tool for social engineering and particularly for the pursuit of peace and security in the Niger Delta Region. Inaugurating the joint committee, the Managing Director and Chief Executive Officer of the Niger Delta Development Commission, Mr. Timi Alaibe said the collaboration seeks to propagate the Niger Delta Regional Development Master Plan as a comprehensive approach to the development of the region, create the requisite legal framework for the effective implementation and enforcement of the Master Plan as well as present various avenues of seeking social redress as a viable and more attractive alternative to militant agitation.' See www.nddc.gov.ng/press%20Releases_NBA%20Partners%20with%20NDDC.html

Their agitation/demand is in consonance with Nigeria's history where at independence when agriculture was the mainstay of the economy the federal government was required to pay fifty percent (50%) of the revenue from natural resources that were essentially agricultural produce to regional governments.⁷³ Over the years the share of derivation in revenue allocation has been progressively reduced since independence thus: 45 percent (1970) 20 per cent (1975); 2 per cent (1982) and 1.5 per cent (1984).⁷⁴ After this period OMPADEC was funded by 3 per cent of oil revenue, while 1 per cent was reserved for derivation. The share of OMPADEC seems to have increased slightly to five per cent before its demise just before the Fourth Republic.

It is widely felt in the Niger Delta that the reduction of the share of derivation in revenue allocation is tied to the increasing prominence of oil in the Nigerian economy. It is also contended that the majority ethnic groups in Nigeria have supported this policy because agricultural produce is no longer the mainstay of the economy.⁷⁵ This feeling was further fuelled when the exact nature of what constitutes the thirteen per cent in s.162(2) became a matter of litigation when the federal government successfully contended before the Supreme Court in *Attorney General Abia State v Attorney General of the Federation [No.2]*⁷⁶ that the offshore areas of Nigeria contiguous to the states (the Territorial Sea, the Contiguous Zone and the Exclusive Economic Zone) did not form part of their territory. The effect of this decision was to introduce a dichotomy of 'offshore/Inshore' in the derivation principle such that the massive oil revenue from the offshore area became the property of the federal government. This suit and the decision was viewed negatively by the states as a ploy by the federal government and other non- states to increase the revenue of the federal government to their detriment. Ultimately the federal government and the states resolved the matter politically by the abolishment of the 'offshore/Inshore' dichotomy through the Allocation of Revenue (Abolition of Dichotomy in the Application of Derivation) Act 2004.⁷⁷

73 See Section 34(1) of the 1960 Federal Constitution of Nigeria, and Section 140(1) of the 1963 Constitution of the Federal Republic of Nigeria: 'There shall be paid by the Federal Government to a region, a sum equal to fifty per cent of the proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region and any mining rents derived by the Federal Government from within that Region.' See Igbo Natufe 'Resource Control And Federalism: A Reply To Mobolaji Aluko' Available at <www.dawod.com/natufe1.htm> : What is at play here is a gross abuse of the power of the majority in denying the minority its rights over control of its own resources, the same rights that the majority accorded themselves in pre January 1966 Nigeria, on the basis of true federalism. It is instructive to note that, since the demise of their respective commodities (ground nuts, hides & skins, cocoa, etc) in the world market, as a result of their neglect, it became expedient for them to use their majority in suppressing the minority ethnic groups of the Niger Delta. The huge number of armed forces stationed in the Niger Delta testifies to this. Nigeria has become a 'prison of nationalities' for the minority ethnic groups. Thus, the struggle for the ownership of their resources is inextricably linked to the question of the self-determination of nations. The refusal of the Federal Government to acknowledge the exclusive jurisdiction of the Niger Delta states over their natural resources, a position backed by the North and the South West, is making instability inevitable in the Nigerian polity.

74 See Ebeku, note 18, 292; See also Rotimi Suberu 'Pseudo-Federalism and the Political Crisis of Revenue Allocation' in Agbaje et al., note 8, 38.

75 See for example Chief Melford Okilo: 'Derivation as a revenue allocation criterion is not new in this country. It featured prominently when cocoa, groundnuts, etc. were the main sources of revenue for the Nigeria. But it has continued to be deliberately suppressed since crude oil became the mainstay of the country's wealth...simply because the main contributors of the oil wealth are the minorities.' Tell, 8 February, 1993, 31.

76 [2002] 6 NWLR (Pt. 764) 542.

77 In 2005 a number of states majority of who were Northern States unsuccessfully challenged the constitutionality of this Act. See Attorney General Adamawa State and 21 others v Attorney General of the Federation and eight others [2006] All FWLR (pt. 299) 1450.

The performance of these states in the utilization of the derivation fund is examined in the next section.

13.6 Minority protection and the governance capacity of states

Since the creation of states for the ethnic minorities of the Niger Delta is a principal means of achieving a meaningful protection for them, it is important to undertake an overview of how these states have fared and are governed. The underlying reason for the autonomy granted by their states is that the resources will be deployed for their development. The ability of the Niger Delta States to do this demonstrates an internal governance capacity. Based on available evidence there is nothing much to show for the huge allocations including derivation funds paid over to the Niger Delta States since 1999. The recent report by the Human Rights Watch on the performance of state and local governments in one of the states of the Niger Delta- Rivers State- titled '*Chop Fine*' is a credible chronicle of organized state corruption mismanagement of resources and a collapsed social and economic infrastructure.⁷⁸

The widespread corruption in the Niger Delta states is a key governance issue and evidence of lack of capacity in these States. It is likely that increased oil revenue as presently sought by the militant agitation will fuel more corruption in a classic 'dutch disease' bind. Along with an insensitive federal government, an underperforming NDDC, and heartless multinational oil companies, the governments of Niger Delta States share the blame for the ineffective protective measures directed at their peoples' development. Part of the reasons for this state of affairs is a structural problem. The Nigerian political system has no credible basis for holding governments accountable for the funds that they receive. It is true that in chapter two of the 1999 Constitution, the political, social economic, educational, environmental, cultural objectives of the Nigerian State is articulated. However these objectives are merely directory as they cannot be enforced in a court of law. Furthermore it may be asserted that even though the Nigerian legislature has an oversight function⁷⁹ that is capable of ensuring the governments deliver on the objectives articulated by the Constitution, a combination of factors such as inexperience, immaturity and party loyalty combine to ensure that the oversight function is more imagined than real. If the truth be told the widespread poverty in the Niger Delta manifesting in different forms can be traced to a lack of socio-economic infrastructure and the skills needed to turn these infrastructure into wealth creation so that ethnic minorities can lead a dignified life.

⁷⁸ See Human Rights Watch Vol. 19 No. 2 (A) *Chop Fine: The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers State, Nigeria*.

⁷⁹ See section 88 of the 1999 Constitution which enables the National Assembly to conduct investigation into (i) any matter or thing with respect to which it has power to make laws and (ii) the conduct of affairs of any person, authority, ministry or government department charged or intended to be charged with the duty or responsibility for executing or administering laws and for disbursing or administering moneys appropriated or to be appropriated by the National Assembly.

Widespread poverty as well as corruption and treasury looting is not peculiar to the Niger Delta as it is a Nigerian problem. Unless it is dealt with decisively no manner of protective measure will succeed in the Niger Delta. Dealing with corruption will enhance the governance capacity in Nigeria as it is also a significant cause of the ineffective environmental protection regime in Nigeria. Corruption undermines the rule of law making Nigerian governments unable to hold multinational oil companies to the letter of the law.⁸⁰ It is difficult to conceive of a Niger Delta where good governance works within a badly governed Nigeria. Since the nature of federalism is such that the central government and other constituent parts influence each other, it is likely that if this 'Nigerian'⁸¹ problem is not solved, the Niger Delta States like the rest of the country may make no headway since the states are a principal basis of minority protection. Even if it is true that the fight against corruption is gathering momentum, more needs to be done to hold Nigerian leaders accountable for the huge resources that they receive.

13.7 Measures to improve the protection of ethnic minorities of the Niger delta

13.7.1 Governance capacity - Towards a Nigerian State committed to social justice

Since the states as autonomous units is a principal means of minority protection, it is important to examine how the governance capacity of the Nigerian State can be significantly improved so that all levels of government will apply appropriated funds for development. For the Niger Delta states and local governments, this will enable them to address the massive poverty and other peculiar problems emanating from oil exploration and exploitation. It will enable the Nigerian government to uphold the rule of the law consolidate Nigeria's democracy and facilitate the economic development of Nigeria. In this way, ethnic minorities will benefit qua Nigeria.

A key missing component of the governance capacity of the Nigerian state is the lack of an enforceable set of socio economic rights.⁸² Making these rights justiciable as well as creating the structures for their implementation will truly complement the civil and political rights that ethnic minorities like all Nigerians enjoy. Socio economic and cultural rights frame entitlements standards benchmarks and indicators for the provision of infrastructure - roads, water, educational facilities, health care, housing and transport- at the heart of militant agitation.

80 See generally Olufemi O Amao 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria' Vol. 52 (2008) Journal of African Law 89.

81 Item 60 of the Exclusive Legislative List of the 1999 Constitution empowers the Federal Government to establish and regulate authorities for the federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles of State Policy. Relying on this provision the federal Government established two anti corruption bodies; the Independent Corrupt Practices Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC) pursuant to section 15(5) of the 1999 Constitution which obligates the State to abolish all corrupt practices and abuse of office. In a number of cases brought by state governments to challenge the constitutionality of these bodies, the Nigerian Supreme Court has held consistently that these bodies are legitimate. See Attorney General of Lagos State v Attorney General of the Federation (2003) 15 NWLR (Pt 842) 113; Attorney General Ondo State v Attorney General of the Federation (2002) 9 NWLR (Pt 772) 222.

82 See S Ebobrah 'The Future of Economic Social and Cultural Rights Litigation in Nigeria' Vol 1(2) 2007 CALS Review of Nigerian Law and Practice 108. Available at <www.afrilegustudies.com/calsreview>.

Without these infrastructure people are likely to be poor. Poverty renders people unable to enjoy their rights of association speech mobility and a fair adjudicatory process.⁸³ Eliminating or reducing poverty should be the goal of social justice. With these socio-economic and cultural entitlements Nigerians will be able to hold their governments to account, and also subject government actions to judicial review. Governments challenged by socio-economic rights will formulate plans and actions that seek to enforce these rights just as they have all these years done. The difference will be that citizens can seek judicial review of their plans.⁸⁴ If it was the case that the thirteen percent derivation funds accruable to states since 1999 were utilized in the provision of socio-economic infrastructure in the Niger Delta, the region would have witnessed significant advances that would have addressed many of the issues that stoke militant agitation. It is hoped that the on going constitutional review process will ensure that the new constitution has a set of justiciable socio economic rights.

Civil and political rights in Nigeria have encouraged development without real growth leaving a vast number of Nigerians including the ethnic minorities of the Niger Delta mired in unacceptable poverty. This is not to assert that these rights have been meaningful protected. It is encouraging that an integrated approach has been embraced by Nigerian courts as shown in *Gbemre*. Even if *Gbemre* does not survive the appeal process, it seems that an irreversible path has been laid for Nigerian courts to follow in interpreting the human rights protected in the 1999 Constitution in an interrelated and indivisible manner.⁸⁵ In this regard the right to the dignity of the human person protected by section 34 of the 1999 Constitution presents exciting theoretical potentials for Nigerian courts to protect the ethnic minorities of the Niger Delta. Poverty is demeaning and strikes at the dignity of those who are held in its vice. A combination of the right to life and right to human dignity should lead a court to decide that Nigerian governments are under an obligation to take measures to fight poverty. The Nigerian judiciary must be able to use the provisions of chapter two of the 1999 Constitution aptly titled Fundamental Objectives and Directive Principles of State Policy as a fundamental value for constitutional interpretation. All government developmental activities should be judged on their ability to meet the objectives and policy contained in chapter two.

To fully realize the potential of an enforceable set of socio economic rights or a set of civil and political rights, it is evident that judicial review is important and that citizens and their representatives and other organizations that act in the public interest should be able to approach Nigerian courts. For long, standing rules in Nigeria have been interpreted to necessitate

83 See Yash Ghai 'Human Rights and Social Development: Towards Democratisation and Social Justice', UNRISD Working paper Oct 2001.

84 A good example is the struggle waged by the Treatment Action Campaign in South Africa to ensure an effective treatment regime for HIV-AIDS patients. See *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).

85 See Okonmah, note 34

some personal connection.⁸⁶ There seems to be some relaxation of this requirement. Recently the Nigerian Supreme Court in *Owodunni v Registered Trustees of the Celestial Church of Nigeria*⁸⁷ changed the test of standing to that of ‘sufficient interest’. The test of ‘sufficient interest’ seems to be very flexible and this is beginning to manifest in recent judgment such as the recent decision of the Court of Appeal that a lawyer has the standing to challenge breaches of the Constitution.⁸⁸ This is a welcome development in the relaxation of the standing rules in Nigeria. It means individuals can approach Nigerian courts without having to show how personally connected he is to the complaint. This decision along with *Gbemre* should make it possible for more environmental infractions in the Niger Delta to be challenged in Nigerian courts.

13.7.2 Increased revenue for the Niger Delta states

As noted above during the years of military rule Nigeria was effectively a unitary state. In the 1999 Constitution there is abundant evidence of a strong central government. The present federal system can be restructured by increasing the revenue due to states so that they are able to better discharge their constitutionally endowed functions.⁸⁹ For the ethnic minorities of the Niger Delta, ongoing physical environmental and social degradation coupled with a difficult terrain necessitate an increase of the present thirteen per cent derivation fund as provided for by section 162 of the 1999 Constitution. There is no doubt that this entitlement is not acceptable to the people of the Niger Delta who continue conduct a vigorous campaign of ‘resource control’ in the wake of the 1999 Constitution. In recognition of this campaign, a report by the Special Committee on Areas⁹⁰ recommended an ‘immediate upward review of the minimum thirteen per cent derivation to not less than 50 per cent.’⁹¹

It is important to note however that without the growth of the internal governance capacity as outlined above, whatever increase that is added to the derivation fund will be of little consequence for the peoples’ of the ethnic minorities of the Niger Delta.

13.7.3 Rethink the role of development agencies

If development agencies are to play a meaningful role in the development of the Niger Delta, they must not be cast and perform the traditional roles of governments. Instead they concentrate

86 See the case of *Adesanya v President of the Federal Republic of Nigeria* 1981 2 NCLR 358.

87 [2000] 10 NWLR (Pt. 675) 315.

88 See *Gani Fawehinmi v President Federal Republic of Nigeria* (2008) 23 WRN 65.

89 See B.O Nwabueze *How President Obasanjo Subverted Nigeria's Federal System* (Gold Press Ibadan 2007) 411.

90 According Fn 79 of *CrisisGroupNigerDelta*, note 56, p. 12: ‘The Report of the Oil Security Committee on Areas was submitted to President Obasanjo on 19 February 2002.

91 Excerpts of the report as quoted in *CrisisGroupNigerDelta*, above.

on coordination and development of ideas. In this regard the funding profile of the NDDC should be reviewed to remove the contributions from the federal and state governments. The budget of NDDC can be a modest one percent of the oil revenue charged to the consolidated revenue fund. Furthermore a development agency must be completely owned and controlled by the people of the area. Development agencies such as NDDC will perform better if they are exclusively controlled by the ethnic minorities of the Niger Delta.

13.7.4 Communal family and individual ownership control and participation in the Nigerian oil industry- Re-configuring the right to property

The collective protection of the ethnic minorities of the Nigeria Delta is inadequate and must be supported by other measures. One good way is to focus on the beneficial participation of the individuals, families and communities on whose land oil is found. Since the Federal government is the owner of the oil these non State entities cannot participate proprietarily in oil exploration and exploitation. Restoring a right or an interest in the oil by either recognizing their ownership of the oil found in their land or some interest in the oil will enable these non state entities to participate in the oil industry. Recognising their participation will certainly find justification in Article 21 of the *African Charter* and *SERAC* and also enhance their right to property under section 44 of the 1999 Constitution. The modalities for this type of participation are explored below in more detail.

13.7.4 (a) Community control of the proceeds of oil exploitation

The many sources of revenue accruing to the Federal Government include application and renewal fees for licenses and leases⁹²; annual rents;⁹³royalties;⁹⁴ and signature bonuses⁹⁵ in addition to the cost of the crude oil can be reserved for the use of non-state entities according to the production from their oil fields which can be ascertained with accuracy. The key point here is that these representatives should be completely autonomous of the state and local governments. Their autonomy should enable them to apply the allocated funds to key development issues. Some of the ethnic minority states such as Delta have constituted agencies similar to NDDC dedicated to developing their areas since oil is not produced in the whole state. Just like NDDC,

92 See Petroleum Drilling and Production Regulations (PDPR) made pursuant to the Petroleum Act.

93 See Paragraph 59(2) of the PDPR calculated at the rate of USD 10 per square mile or part thereof of an OPL

94 Royalties are fixed percentages of the value of the quantity of oil produced from an oil field. See paragraph 60(1) above.

95 On the grant of an Oil Prospecting Licence (OPL) the grantee pays a signature bonus which is a commitment fee to the Federal Government. The amount of the bonus depends on the size of the oil block. In *Federal Republic of Nigeria v Zebra Energy Ltd* (2003) FWLR (Pt.142) 154, it is revealed that the signature bonus of the oil block in contention in that case was USD 20 Million Dollars. An official of the Department of Petroleum Resources recently revealed that the Federal Government made USD 2.187 Billion from the sale of 152 Oil Blocks between 1990 and 2006. See news item available at www.nnpcgroup.com/news/oilblocks.htm.

there is significant state government control. While the concept is good, these agencies will be more productive if they are completely outside government control constituted by an enabling charter.

13.7.4 (b) Participation in the ownership structure of oil companies

Another meaningful way of involving communities' families and individuals in the oil industry is through equity participation in the oil companies that operate in the Niger Delta. Since the Minister of Petroleum is endowed with a wide discretion in the grant and/or renewal of Oil Mining Leases (OML), it will greatly assist communities if making them shareholders of the companies winning oil from their lands is a condition for the grant and renewal of extraction leases. Involving non state entities in the oil industry should be a logical extension of the process of Nigernisation by which Nigerian companies are encouraged and empowered to participate in the industry. Until recently the Nigerian petroleum industry was the preserve of foreign oil companies. From the late eighties, Nigerian oil companies were awarded OPLs and OMLs. Furthermore the federal government created the Marginal Fields Initiative by which unviable areas within the leases held by foreign oil companies in joint venture with the federal government are farmed out to Nigerian indigenous oil companies.⁹⁶ In 2003 thirty one companies- including companies owned by the Governments of Akwa Ibom Bayelsa Delta and Rivers States- were awarded a total of twenty four marginal fields in the Niger Delta. It seems equitable that contiguous communities to the Marginal Fields should be allocated specific shares in the marginal fields companies. The same recommendation applies to oil companies operating in other fields.

13.7.5 Enhanced corporate social responsibility

It is widely accepted that the involvement of companies in the development of the environment they operate in, is a good example of corporate social responsibility. Accordingly, oil companies operating in Nigeria are constantly monitored for their corporate social responsibility activities. One of the conditions for winning a contract to exploit oil in Nigeria is that the company should be registered under the Companies and Allied Matters Act 2004. As such companies, traditional corporate law principles require these companies to be managed for the benefit of the shareholders.⁹⁷ However, section 279(3) and (4) of the Companies and Allied Matters Act impose a duty of the board of directors of a company to manage the company according to the best interests of the company determined entirely at their discretion. Engaging in development projects of their host communities is certainly a good interest of oil companies in the Niger

⁹⁶ See Etikerentse 27, 97.

⁹⁷ See *Hutton v West Cork Railway Co* (1883) 23 CH.D 654 (CA).

Delta. There is no doubt that being at peace with their host communities is important in the long term sustainability of an oil company.

Thus, even though there is no legal obligation to engage in community development projects, all the oil and gas companies are engaged in one form or the other. However this is done entirely at their discretion. Thus if a company neglects to engage in this type of activity there is not much that these communities can do legally even though it is well known that they have peacefully and violently picketed these companies shutting down their operations and causing considerable damage. As a matter of practice, oil companies working in the Niger Delta negotiate a memorandum of understanding with host communities by which a number of projects are agreed to be executed by the oil companies. For long it was thought these agreements are not enforceable because there is no intention to create legal relations between the parties and there is no consideration from the host communities. The Nigerian Court of Appeal in a recent decision has held that these agreements are enforceable. In *SPDC Ltd v Allaputa*⁹⁸ the Court held that these agreements are enforceable. The facts of the case are that in March 1999 the Bonny people in Rivers State went into negotiations with the SPDC to renegotiate the rent paid by SPDC for the Bonny terminal land made in 1958. SPDC indicated that they were not yet ready to renegotiate or tamper with the 1958 agreement and offered to pay a lump sum of N505 Million Naira as a lump sum gratuity to the Bonny Kingdom for development projects in view of their numerous oil interest in pipeline, gas line, oil wells, flow stations, in-shore and off-shore loading facilities and storage and residence in the Bonny Kingdom. The Bonny people agreed and this agreement was reduced into writing and signed by a director and manager of SPDC on one hand and representatives of Bonny people on the other hand. At the High Court of Justice Port Harcourt Rivers State, representatives of the Bonny people sought to enforce this agreement in 2001.

The High Court entered judgment in favour of Bonny people and ordered SPDC to pay the sum of N405 Million Naira as well as interest. Dissatisfied with this judgment SPDC appealed to the Court of Appeal and argued amongst other things that the offer to make a donation to the Bonny people was not enforceable in law because there was no consideration for the offer to make the payment. A unanimous Court of Appeal held that the consideration given by Bonny people was their consenting to put off the renegotiation of the 1958 agreement and it was sufficient consideration even though it was in kind. Even though the issue of an intention to create legal relations was not openly canvassed, it seems that this was the undertone of the argument that the offer was a donation. It may therefore be contended that where consideration is present, a court may find a memorandum of understanding and the like enforceable as contracts because

⁹⁸ [2005] 9 NWLR (Pt. 931) 475. Hereafter Allaputa.

there is an intention to create legal relations. The consideration offered by host community was in kind and included a friendly working environment.

The point still remains even with *Allaputa* there is no legal compulsion for the oil companies to enter into a memorandum of association. It is this fact that the Nigerian National Assembly wants to change. The Senate recently debated the general principles of a bill seeking to establish the Corporate Social Responsibility Commission.⁹⁹ The bill, is seeking to provide for comprehensive relief to communities which suffer the negative consequences of the industrial and commercial activities of companies operating in their areas. The bill also seeks to create a specific body for the execution of social responsibility by corporations. The proposed commission will make it mandatory on companies to formulate policies that affect the host community positively. The proposed bill provides a penalty for any company that fails to comply with the statutory requirement.

13.8 Conclusion

One of the initiatives of President Musa Yar' Adua in response to the worsening militant agitation is the convocation of a Niger Delta Summit in 2008. The idea of the summit has elicited mixed reactions from Nigerians. While many see it as another talk shop with no fruitful prospect, others welcome it as another attempt in the resolution of the Niger Delta crisis. This paper identifies with the latter group and considers the idea of the summit as credible if it will at least facilitate a review of over forty-eight years – since independence in 1960-of the protection of the ethnic minorities of the Niger Delta. It is often forgotten that oil is a finite resource and Nigeria's reserves are forecast to last not more than four decades given current production.¹⁰⁰ Furthermore the world is engaged in a race to ensure less dependence on fossil fuels as the energy crisis bites harder. The need for a quick and comprehensive resolution of the crisis cannot be overstated. If the past five decades of an inadequate protection of the ethnic minorities of the Niger Delta is anything to go by, the prospects that this resource will dry up leaving a devastated environment and a traumatized people is more real than imagined.

Another reason why the crisis must be resolved quickly, is that it has regional and international security dimensions. One of the leaders of MEND- Henry Okah- who is on trial in Nigeria for treason and other crimes is alleged to have plotted a violent coup in Equatorial Guinea.¹⁰¹ The resources to engage in this and other types of activity can be traced to the massive stealing of Nigeria's oil. It is alleged in many quarters that the militant agitation is a cover for the

99 See 'Senate Considers Corporate Social Responsibility Bill' The Punch 3rd July 2008

100 See Ambrose Okar 'Nigeria to exhaust Oil Reserves in 29 Years'

101 See 'Asari Dokubo: Me, Henry Okah 'Jomo Gbomo', Judith Asuni and the Niger Delta Insurgency.' Available at www.saharareporters.com/www/interview/detail/?id

stealing of Nigeria's oil. Recently Nigeria's President Yar Adua asked the G8 meeting in Japan to consider the stolen oil as similar to 'Blood Diamonds' and institute a 'Kimberley'¹⁰² style process for stolen oil. It is equally important to note that stopping the stealing of oil will increase Nigeria's oil revenue as well as that of oil producing states. Winning the support of the ethnic communities in the Niger Delta is fundamental to containing the security problem. When the people feel a sense of ownership of the oil, they will become stakeholders in oil exploration and exploitation and therefore fight to protect their property. Dialoguing through the Niger Delta Summit is preferable to military action against the militants that can result in a civil war.

The protection of the ethnic minorities is a fundamental challenge to Nigeria because it questions the survival of the country, is a crisis of governance and has international consequences. Its resolution is inextricably tied to Nigeria's development. The Niger Delta is Nigeria's open sore that can only be healed by the recognition that human rights should be the means and end of development¹⁰³ and that the rights of the peoples' of the Niger Delta is the guarantee of peace and security.

¹⁰² The 'Kimberley Process' is a government certification procedure that requires every diamond producing nation to certify that all rough diamond exports are produced through legitimate mining and sales activity. For a deeper analysis of this process see K.N Schefer 'Stopping Trade in Conflict Diamonds: Exploring the Trade Human Rights Interface with the WTO Waiver for the Kimberley Process' in T. Cottier, J. Pauwelyn and EB Bonamoni (eds) *Human Rights and International Trade* (Oxford University Press 2005) 391.

¹⁰³ See Amartya Sen *Development as Freedom* (Oxford University Press 2001).

14. EXPLAINING AND MANAGING THE POLITICS OF ETHNIC DIVERSITY IN SOUTH AFRICA

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Abstract

One of the major issues that many, academics and politicians alike, grappled with as South Africa moved away from the apartheid era was the role and place of ethnicity in post-apartheid South Africa. The central issue was whether the ethnic identity that the apartheid government attempted to promote continued to be muted or would emerge with the end of the white domination. Related to this is also how the institutional model adopted by South Africa responds to the multi-ethnic reality of the South African society. Does it still simply try to build a single national identity or provide adequate recognition and accommodation to the ethnic diversity that characterises the society? This article argues that South Africa has shied away from the policies of both suppressing ethnic identity and actively promoting ethnic diversity. It is submitted that the South African constitutional approach goes in line with both the political relevance of ethnic identity among the South African society and the general principles pertaining to the accommodation of ethnic diversity.

14. 1 Introduction

Many depict South Africa as a country of minorities. This may not always be easily subscribed to as there is little agreement about the cleavages of South African society. As Maphai commented, ‘there are as many groups as there are group ideologues in South Africa’.² Some may base their analysis on the race divide and reject the conclusion that South Africa is a country of minorities. This frame of analysis considers black Africans as an undifferentiated homogenous group, making them a numerically dominant segment of the society.³ Those that regard South Africa as a country of minorities adopt, by contrast, ethnicity as the relevant fault line, which, in the South African context, is, more or less, identified with language groups. Analysis of South African society based on this fault line would indicate that no single ethnic or language group commands a numerical majority.⁴ This contribution focuses on ethnicity.

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2 V Maphai ‘Liberal democracy and ethnic conflict in South Africa’ in H Glickman (ed.) *Ethnic conflict and democratization in Africa* (1995) 78.

3 Racially speaking, the country has been divided into four racial groups: Blacks, Coloureds, Indians and Whites. Black, which is interchangeably used with Africans, refers to people of solely African ancestry. Coloureds are usually people of mixed race though it includes people of Khoi origin who are not of mixed race. Whites refer to people of European origin, who are mainly of Afrikaner or English origin, but also including Germans, Portuguese and other people of European origin. Indians are largely of South Asian descent, largely descended from ‘indentured servants’ brought from the Indian subcontinent by the British to work in the sugar plantation of Natal. According to a recent census, 79.3% are regarded as African, 9.3% White, 8.8% Coloured and 2.5% Indian (Stats in Brief 2006).

4 Justice Sachs, based on the same frame of analysis, depicted South Africa as a country of minorities. ‘[T]here is no clear majority population in South Africa....Linguistically and culturally speaking, there are only minorities’ (In re: the School Education Bill of 1995 (Gauteng), 1996 (4) BCLR 537 (CC)). In terms of religion, the Christian community, which is composed of Protestant, Roman Catholic and African Independent Churches, is numerically dominant. It accounts for 84% of the population with the African Independent Churches being the largest group of Christian churches. Muslims and Hindus each account for 1.5 and 1.2% of the population respectively. 0.3% of the population ascribe to traditional African beliefs (Statistics South Africa: Census 2001).

Eleven major languages are spoken in South Africa. According to the 2001 census, Zulu speakers, the largest linguistic group in the country, account for 22.87% of the population followed by isiXhosa (17.89%), Afrikaans (14.45%), Sepedi (9.19%) English (8.59%), Setswana (8.21%), Sesotho (7.72%), Xitsonga (4.37%), siSwati (2.52%), Tshivenda (2.18%) and isiNdebele (1.46%).⁵ Others account for 0.57 of the population.⁶ The African language groups in South Africa at the same time refer to ethnic groups. This is not, however, the case with Afrikaans and English speakers. Afrikaans speakers, for example, includes both white Afrikaners, who can be defined as ethnic Afrikaners, and members of the Coloured community, who do not necessarily share an ethnic attachment with white Afrikaners. The English category similarly includes people other than English-origin.

This article has two main objectives. First, it traces the role and place of ethnicity in South Africa's constitutional and political development. By discussing the role and place of ethnicity in South Africa's constitutional development, it serves to bring the present political and constitutional development in South Africa into perspective. Second, it focuses on the constitutional framework of post-apartheid South Africa, particularly on the current constitution, and examines its response to the demands for the accommodation of ethnic diversity. The general objective of this article is to determine and assess the position of South Africa in the continuum of states that are engaged in a nation-state building project, on the one hand, and those that readily recognise their ethnic diversity and organise their state accordingly, on the other.

14.2 Ethnicity in South Africa's constitutional and political development

The birth of the Union of South Africa was realised when the four British colonies (Cape, Transvaal, Orange Free State and Natal) were merged in 1910. With the view to establishing a strong union between the four colonies, especially between the British colonies (Cape and Natal) and the two recent additions (Transvaal and Orange River Colony), the white elites established a strong unitary state as opposed to a federal state.⁷ This was despite the fact that the Natal delegation, in the 1909 Convention that led to the formation of the Union, demanded a federal structure. The demand for a federal state was a manifestation of the anxieties of English speakers in Natal that they would be dominated by the numerically dominant Afrikaners.⁸

⁵ Statistics South Africa: Census 2001.

⁶ This includes the Indian community. The conglomeration of these groups makes South Africa a country of huge diversity. It is a racially, ethnically and religiously diverse country. Sachs thus describes South Africa as a 'multi-lingual, multi-faith, multi-cultural, and multi-political' country (A Sachs Protecting human rights in a new South Africa (1990) 23).

⁷ The state generally established 'an all-powerful government consisting only of white men' and eventually withdrew voting rights from blacks in 1936 and from Coloureds in 1956 (H Ebrahim *The Soul of a nation: Constitution-making in South Africa* (1998) 10).

⁸ H Klug (2000) 'How the centre holds in South Africa' in Y Ghai (ed.) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states* (2000) 100.

The dominance of Afrikaners came to fruition only in 1948 when the National Party ascended to power. The Afrikaners gained political control by the ethnic mobilisation of their community.⁹ The National Party, which projected itself as the representative of Afrikaner national interests since its founding in 1914, immediately began a process of Afrikaner upliftment by reinforcing Afrikaner ethnic identity and promoting Afrikaner interests. Afrikaans replaced Dutch as an official language alongside English in 1926. After 1948, it became the openly favored language.¹⁰ With the help of state powers, Afrikaners, within a few decades, were also brought to almost equal socio-economic status with their English-speaking compatriots.¹¹ The dominance of Afrikaners in the political arena was firmly established.¹²

With the introduction of the homelands, the apartheid government divided the black African community along ethnic lines. The Preamble to the Promotion of Bantu Self-Government Act (Act 42 of 1959) read: ‘The Bantu people of the Union of South Africa do not constitute a homogenous people but form separate national units on the basis of language and culture’. The idea was that each homeland, demarcated along ethnic lines, becomes an independent state and establishes itself as a nation-state, with its inhabitants eventually losing their South African citizenship. Ten homelands, based on ethnic lines, were established. Only four of them – Transkei (26 October 1976), Bophuthatswana (6 December 1977), Venda (13 September 1979) and Ciskei (4 December 1981) – infamously known as the ‘TBVC’ states – became nominally independent. Other six were considered as self governing homelands.¹³ The ethnic basis of the homelands was further strengthened by the juxtaposition of their creation with the empowerment of traditional authorities.¹⁴ The close association of the homelands with traditional authorities had the effect of strengthening the entrenchment of ethnicity in each homeland.

The apartheid government justified this grand apartheid in terms of the right to self-determination. In a letter submitted to the United Nations’ Security Council, it argued that the aim of the homeland policy is ‘to make it possible for each of the various nations, black and white, to

9 Many authors trace the origin of Afrikaner ethnic consciousness to the second half of the nineteenth century and relate its hasty development to the British rule and the impact it had on the Dutch speaking colonists who later became known as Afrikaners. The Great Trek and the Anglo-Boer war are especially regarded by many as the defining milestones in the history of Afrikaner ethnic nationalism.

10 See generally P Silva South African English: Oppressor or liberator available at <http://www.ru.ac.za/affiliates/dsae/MAVEN.HTML> accessed on 10-10-2006.

11 H Adam and H Giliomee Ethnic power mobilised: Can South Africa change? (1979) 169.

12 Along with ethnic nationalism advanced by the National Party came racial ideology, which, in the form of apartheid, introduced race-based group classification as an official policy of the state. The National Party, with its series of complex statutes, institutionalised the practice of apartheid. It divided the population into four major racial groups: White, Coloured, Indian and African. Every South African was compulsorily categorised as belonging to one or the other race, which determined all future rights and entitlements. In 1983, the National Party government introduced a new constitution, which introduced a tri-cameral parliament: the House of Representatives (for Coloureds), the House of Assembly (for Whites) and the House of Delegates (for Indians). The scheme excluded black Africans, claiming that they are accommodated through the homelands. Each parliament had jurisdictions over ‘own affairs’ of the community it ostensibly represents while a joint house of the three parliaments had to deliberate over ‘general affairs’.

13 According to the national policy, all black African people must be allocated to their ‘own’ ethnic Bantustan, irrespective of the fact that they never lived there (A Lijphart Power-sharing in South Africa (1985) 37).

14 J Leatt; T Kniefel and K Numberger Contending ideologies in South Africa (1986) 127.

achieve its fullest potential, including sovereign independence, so that each can enjoy all the rights and privileges which his or her community is capable of securing'.¹⁵ A serious evaluation of the homeland policy would show that the policy did not muster the self-determination test. First, the homeland policy, as pointed out by many, did not entail an equitable division of resources.¹⁶ Only 13% of the total land area of South Africa was allocated for the homelands despite the fact that black Africans constituted over 70% of the total population.¹⁷ Added to this was the fact that only less industrially developed parts of the country were left to the homelands.¹⁸ The other problem was lack of territorial contiguity or fragmentation of most homelands. KwaZulu, with its 48 separate territorial components, was the most fragmented homeland. Some referred to countries like Indonesia, West Berlin (during the Cold War era) and USA (considering Alaska, Puerto Rico, Hawaii, and the Virgin Islands) and argued that 'noncontiguity' is not necessarily bad.¹⁹ While one may, with great degree of reluctance, accept the argument that the lack of territorial contiguity was not necessarily unique to South Africa, this belies the reality that the fragmentation had deeply afflicted the homelands. More importantly, this line of argument simply confuses the accidental and historical products of territorial non-contiguity with the deliberate and manipulative construction of non-contiguous homelands.²⁰

Yet the major shortcoming of the policy lies in the fact that it was a unilateral policy of the apartheid government that was simply imposed on black Africans. Without engaging those affected, the government simply ascribed identity and accordingly divided the inhabitants of South Africa into various groups and decided for those groups where they should have their own territory. The inescapable conclusion is that the homeland policy was not an exercise in self-determination. This becomes clearer when one considers the fact that the self-determination principle was not even applied consistently. The ethnically segmented white community²¹ was not, for example, subjected to ethnic divisions. This grotesque distortion of the policy of self-determination is laid bare by Archbishop Tutu when he said:

Blacks find it hard to understand why the whites are said to form one nation when they are made up of Greeks, Italians, Portuguese, Afrikaners, French, Germans, English, etc.; and then by some *tour de force* Blacks are said to form several nations – Xhosas, Zulus, Tswanas, etc. The Xhosas and Zulus, for example, are much closer to one another than,

15 As quoted in R McCorquodale 'South Africa and the right of self determination' 10 *South African Journal on Human Rights* (1994) 13.

16 S Biko *I write what I like: selected writings* (2002).

17 Lijphart (n 12 above) 40.

18 A Egan and R Taylor 'South Africa: The failure of ethno-territorial politics' in J Coakley (ed.) *The territorial management of ethnic conflict* ((2003) 105.

19 ES Munger 'Prognosis: the United States of South Africa' in R Ian and W Phillip (eds.) *Race and politics in South Africa* (1978) 260.

20 White farmers benefited from the fragmentation of the Bantustans as it made it possible for them to keep their profitable lands. See Biko (n 15 above) 86. See also Egan and Taylor (n 17 above) 114.

21 Lijphart noted a higher level of ethnic voting among white voters in South Africa than ethnic voting in plural societies like Belgium, Canada Switzerland and Cyprus (Lijphart (n 12 above)).

say, the Italians and the Germans in the white community.²²

The prime objective of the homeland policy was to ensure ‘white rule over white South Africa’. Safeguarding white rule by driving out black Africans from the geographical and eventually political terrain of South Africa was the main objective of the policy. Black Africans who were deemed to belong to one of the homelands would, according to this policy, eventually lose their South African citizenship and accept citizenship of the homelands. They had to exercise their political rights in the homelands. What occurred in South Africa, as aptly pointed out by Beran, was thus a case of ‘expulsion’ rather than an exercise of the right to self-determination: ‘If the parts of the state which challenge its unity include the central government and lays claim to the legal identity of the existing state, we have a case of expulsion rather than [self-determination]’.²³ A concrete manifestation of the ‘expulsionist’ nature of the homeland policy was that black Africans, who were living in the urban areas, were denied political rights. Black South Africans became foreigners regardless of their place of birth or preference. As Dugard has succinctly put it, this was a resort to ‘international–law fictions as a substitute for constitutional–law solutions’.²⁴

In view of the foregoing discussion about the homeland policy, the question arises as to whether the government succeeded in creating a strong ethnic identity among black African communities. Some authors tried to gauge the effect of the homeland policy by examining the responses of political actors and especially homeland leaders to the policy.²⁵ The other major manifestation often mentioned to indicate the success of the Bantustan policy in fostering ethnic identity relates to the ethnic discrimination that was reportedly prevalent within the Bantustans. Members of an ethnic group that do not belong to the major ethnic group for which the Bantustan was established were often subjected to discrimination in terms of access to jobs and social services. This was, for example, the case in the Winterveld area of Bophuthatswana where the non-Tswana population was constantly subjected to harassment by Bophuthatswana police on the grounds of being ‘illegal squatters’.²⁶

22 D Tutu *The Rainbow people of God: The making of a peaceful revolution* (1994) 8. Some may argue that most of the ethnic groups within the white community could not be regarded as a nation. This may be true except for the Afrikaners. But the same can be said of the ethnic groups in the black African community. The contradictory nature of the policy is also evident in the fact that the system created two homelands for Xhosas: Transkei and Ciskei. This flies in the face of the claim advanced by the government that the aim of the policy is to create one homeland for each ethnic group.

23 H Beran ‘A liberal theory of secession’ 32 *Political Studies* (1984) 21.

24 C.J.R Dugard ‘Political options for South Africa and implications for the West’ in R.I Rotberg and J Barratt (eds.) *Conflict and compromise in South Africa* (1980) 26. The Security Council of the UN issued an extraordinary statement calling all governments ‘to deny any form of recognition to the so-called ‘independent Bantustans’ (McCorquodale (n 14 above) 13). Only South Africa recognised these homelands as independent states.

25 For some in the Transkei, the independence of the Transkei state was a reaffirmation of their existence as a nation, which, they claimed, existed long before the formation of the Union of South Africa. A similar sentiment resonated among the leaders in the Ciskei homeland. Multiple identities seem to be identified by some of the leaders of that homeland. Sebe said: ‘We Ciskeians are not prepared to lose that which identifies us not only as Ciskeians, but in the broader context as South Africans. Indeed, I know positively that the aspirations of my people are to achieve nationhood for themselves as Ciskeians and citizenship for themselves as South Africans’ (Leatt et al (n 13 above) 127).

26 Lijphart (n 14 above) 41.

Measuring the success of the homeland policy in entrenching ethnic identity by looking at the positions of the leaders of homelands could be tricky. For most of these leaders, the homelands policy gave them a material basis to advance ethnic claims. They developed benefits and stakes in the promotion of ethnic-based national identity.²⁷ The major beneficiaries were the chiefs, Bantustan political and business elites. The desires of these leaders could, for obvious reasons, be at odds with the wishes of the majority of the population. The same is true even in the case of those that rejected the homeland policy or claimed to have adopted it for strategic reasons to fight apartheid. These leaders quickly rallied around ethnic identity when they perceived a threat against their political power. It was, for example, the same leader of Bophuthatswana, who allegedly accepted independence for strategic reasons that presented strong resistance to the re-incorporation of the homelands into the new South Africa. This shows the difficulty of relying on the statements of the leaders of the homelands to determine the effect of the Bantustan policy on the formation of ethnic identity. Of course, individuals who were not 'indigenous' to the homeland they inhabited were, on occasion, subjected to discrimination in terms of access to jobs and social services. This, however, does not tell us much about the political mobilisation of ethnicity. At best, they point to the prevalent ethnic stereotypes and prejudices which are rather common in many ethnically plural societies.

The weight of evidence on the impact of the homeland policy tends to suggest that most black Africans, the artificially designated 'citizens' of the Bantustans, had rejected the homeland policy. Sociological research and public opinion surveys revealed a widespread opposition to the homelands.²⁸ The opposition was strongest amongst anti-apartheid activists and major African movements including the ANC, Pan-Africanist Congress and Black Consciousness Movement, for whom the policy was only a means to continue the policy of apartheid and suppress the emergence of a common resistance front.²⁹ It would, of course, be naive to categorically suggest that the homelands and their leaders did not make any contribution to the creation of ethnic politics. The apparent utilisation of the homelands for ethnic mobilisation was evident in KwaZulu where the major work of ethnic mobilisation around the Zulu ethnic identity was done by the IFP under the leadership of Chief Mangosuthu Buthelezi since 1975. Buthelezi, despite his claim for non-racialism, mobilised around ethnicity and his party used the KwaZulu homeland for political gain.³⁰ As the discussions that follow will reveal, the appeal to ethnic sentiment among the Zulus by the IFP forms a central part of the identity politics that emerged in the early transition process.

27 A Butler 'The state of the African National Congress' in S Buhlungu; J Daniel; R Southall and J Lutchman (eds.) *State of the Nation: South Africa* (2007) 35-52.

28 Leatt et al (n 13 above) 134.

29 The leader of the Black Consciousness Movement, Steve Biko, wrote in the 1970s: '...At this stage of our history we cannot have our struggle being tribalised through the creation of Zulu, Xhosa and Tswana politicians by the system' (Biko (n 15 above) 86).

30 Egan and Taylor (n 17 above) 105.

14.3 Towards post-apartheid South Africa: The emergence of politicised ethnicity?

Following the dramatic announcement of the release of Nelson Mandela and other prominent political prisoners from prison in February 1990 along with the unbanning of the ANC, the stage was open for negotiating the future of South Africa. One of the major issues that many academics and politicians grappled with, and continue to grapple with, as South Africa moved away from the apartheid era, is the role and place of ethnicity in post-apartheid South Africa. The central issue at the time was whether the ethnic identity that the apartheid government attempted to promote would continue to be muted or would emerge with the end of the white domination.

For some, the conflicts that engulfed the country in the transition process suggested the resurgence of ethnic mobilisation. In the early 1990s transition process, the country was marred by conflicts which were cynically referred to as ‘black on black’ violence. It is estimated that more than 14,000 people were killed in political violence in the four year period spanning from the beginning of the negotiations until the elections were finally held in April 1994. Guy provides a vivid picture of that period:

In recent years ...ethnic conflict has moved from remote rural areas, the alleyways in South African slums, and the inaccessible compounds, onto the streets and the homes of the world in newspaper photographs and on the television screen. These pictures of ethnically organised bands, their ‘cultural weapons’ in their hands, pursuing their enemies through the streets with horrifying results, is now a familiar image of South Africa in many parts of the world.³¹

These major conflicts in black communities were considered by some as ethnic conflicts between the Xhosas and the Zulus. Although originally confined within the regional boundaries of KwaZulu–Natal, the conflict later spread to the Pretoria–Witwatersrand–Vereeniging area. The conflicts were regarded by some as the early signs of the political mobilisation of ethnicity and ethnic conflicts. Ethnic mobilisation was especially evident among the Zulus. In making an appeal for ethnic sentiment among the Zulus, the IFP and particularly its leader, Chief Mangoothu Buthelezi, heavily relied on the history of the Zulu Kingdom. What might have possibly fed into the emergence of ethnic mobilisation was the claim that the ANC was a Xhosa organisation. Of course, this is not without merit. The most prominent ANC leaders predominantly have been Xhosa–speakers.³² It was not only the ‘Zulu question’ that drove the

31 J Guy Debating ethnicity in South Africa Paper presented at a conference on ethnicity, Society and Conflict in Natal, Pietermaritzburg (1992) 2-3 (unpublished).

32 Despite the fact that Chief Albert Luthuli, President of the ANC from 1952 to 1967, was a Zulu, both Nelson Mandela and the incumbent president of the country, Thabo Mbeki, are Xhosas. The other prominent leaders of the ANC, including Oliver Tambo, Walter F. Sisulu and Chris Hani, were Xhosas. In the early 1990s, the composition of the ANC’s national executive Committee displayed a disproportionate representation of the Xhosas. Of the twenty black members of the ANC’s national executive committee, ten were Xhosa with the other ten divided between Tswana (5), Pedi (4) and Zulu (1). See D.L Horowitz A democratic South Africa? Constitutional engineering in a divided society (1991) 48-54. See also A Lemon ‘Ethnicity and political development in South Africa’ in D Dwyer and D Drakakis-Smith (eds.) Ethnicity and development: Geographical perspectives (1996) 96.

muted ethnic question home. Like the IFP, Afrikaner based right-wing parties mobilised around ethnic identity. When it eventually became clear that apartheid was coming to an end, right-wing parties, which started to become more militant, demanded an 'Afrikaner' homeland.

The ethnic mobilisation that was evident among members of the Zulus and Afrikaners was also reflected in the constitutional options proposed by those that claimed to represent the interests of these communities during the negotiations for a new South Africa.³³ The National Party initially argued that the accommodation of the heterogeneous South African society in some form of countermajoritarian settlement was a constitutional imperative.³⁴ Rejecting a pure majoritarian system, the party proposed a number of countermajoritarian principles, which could generally be couched in terms of power-sharing and self-determination. Supported by similar demands of the leaders of the homelands, especially Ciskei and Bophuthatswana, the party also called for strong regional units.³⁵ The strongest demand for federalism as an instrument to protect territorially based ethnic interests came rather from the Zulu-based Inkatha Freedom Party (IFP), which proposed an 'extreme form of federalism' that would involve the devolution of extensive powers to the provinces.³⁶ The party also demanded a special recognition of the Zulu monarchy and threatened secession if its demands for the political recognition of the 'Zulu Nation' in a federal arrangement were not met. The Afrikaner based right-wing parties also sought for the establishment of a separate Afrikaner homeland, a *Volkstaat*. These parties were later joined with leaders of some of the homelands and the IFP to establish a loose coalition known as the Freedom Alliance in 1993. The objective of this alliance was to reject the individual-rights based new democratic constitution and advocate for the inclusion of ethnic identities in the Constitution.³⁷

As a direct result of the experience of the Bantustans, the ANC, on the other hand, expressed a great deal of objection to the idea of adopting a federal constitution that institutionalises

33 The negotiations for the future of South Africa in the form of the Convention for a Democratic South Africa (CODESA) started on 20 December 1991 but ended without agreement in May 1992. One year after the collapse of CODESA, negotiations were resumed at the Multi Party Negotiation Process (MPNP), which finalised a negotiated settlement on 18 November 1993. It was agreed that the non-elected negotiating political parties would draft an Interim Constitution which would govern the country during the transitional phase. Afterwards, a democratically elected Constitutional Assembly, composed of the upper and lower houses, would determine the 'final Constitution'. The drafting of the 'final Constitution' would have to comply with 34 Constitutional Principles which were agreed upon by the negotiators. For the 'final Constitution' to come into effect, it was agreed that the Constitutional Court would have to certify that it was in conformity with all the Constitutional Principles. As noted by Currie, the challenge of accommodating diversity was one of the most crucial questions that 'dominated the lengthy constitutional negotiations' (I Currie 'Minority rights: Culture, education and language' in M Chaskalson et al (eds.) *Constitutional law of South Africa* (2002) 35.2.

34 Klug (n 7 above) 104.

35 Some, however, emphasised that the National Party's focus was primarily on shared rule and specifically on securing a power-sharing deal rather than self rule as its supporters were not territorially concentrated (N Steytler and J Mettler 'Federal arrangements as a peacemaking device during South Africa's transition to democracy' 31 (Fall) *Publius: The Journal of Federalism* (2001) 93-106.

36 B Manby 'South Africa: Minority conflict and the legacy of minority rule' 19 *Fletcher Forum of World Affairs* (1995) 42. The hallmark of the model of federalism proposed by the IFP was that member units of the federation decide the nature and scope of the powers of the national government. This led authors like Klug and Ellmann to conclude that what the IFP was proposing was confederalism although it was presented as a form of federalism (Klug (n 7 above) 104; S Ellmann, 'The New South African Constitution and ethnic division' 26 *Columbian Human Rights Law Review* (1994) 166).

37 Ebrahim (n 6 above) 163.

ethnic differences. Proposals for the devolution of power to strong regional governments in the form of federalism was seen as a neo-apartheid scheme that could be used to thwart majority rule by drawing boundaries along the lines of race and ethnicity to maintain ‘white minority privileges’.³⁸ The ANC rather reiterated its long-standing commitment to develop a state that is racially and ethnically neutral. It emphasised a policy of nation-building based on common citizenship and national identity, protected by a system of individual rights that is enshrined in a constitutional bill of rights. It considered the establishment of a unitary centralised state essential in order to transform South African society into a non-racial society and to address the legacies of the apartheid state.³⁹

As the foregoing shows, ethnic claims have dominated the early transition process. Ethnic mobilisation was notable among members of the Zulu and Afrikaner ethnic community. It is also clear that the major forces that dominated the transition process had divergent conceptions of South African society. This begs the question of the political relevance of ethnicity in post-apartheid South Africa, which is the focus of the next section. This section brings together the discussions on the general implications of the actions and policies of the apartheid government by focusing on the debate on ethnicity and its relevance in modern day South Africa.

14.4 The political saliency of ethnicity in post-apartheid South Africa

Discussing the concept of ethnicity and posing claims based on the same is one of the most onerous jobs that any politician in South Africa can ask for. Anyone who wants to analyse ethnicity and champion ethnic identities can easily be mistaken for a neo-Bantustan architect who attempts to reintroduce ‘the ugly past’ under the guise of accommodating diversity. The past, with its dire connotations of ethnicity, has caused ethnic entrepreneurs in South Africa to be looked upon with suspicion. As Maphai aptly points out, ‘ethnicity seems to have become a euphemism for racism’.⁴⁰ The question, however, remains whether ethnicity is a politically relevant divide in post-apartheid South Africa.

Many scholars and politicians, despite the great deal of reluctance to engage in any serious discussion of ethnicity, insisted on the relevance of ethnicity in South Africa. Horowitz was, for example, confident enough to prophesies that ethnicity will become the central question

³⁸ Creating strong federal units, the party argued, ‘would legitimate the homelands and create a separate white Volkstaat’ (N Steytler ‘The Republic of South Africa’ J Kincaid and G.A Tarr (eds.) *Constitutional origins, structure and change in federal countries: Global dialogue on federalism* Vol. 1 (2005) 316. See also R Simeon and C Murray ‘Multi-sphere governance in South Africa: An interim assessment’ 31(fall) *Publius: The Journal of Federalism* (2001)316).

³⁹ Steytler (n 37 above).

⁴⁰ Maphai (n 1 above) 73.

in post-apartheid South African politics.⁴¹ Lijphart made similar predictions. For him, the most 'accurate view of the South African plural society' is one that views South Africa as a state that is characterised by a multiple division of ethnic groups. When the white domination comes to an end, he predicted, the black African society of South Africa can be divided into ten ethnic segments and the whites into Afrikaners and English-speakers.⁴² This position is also shared by David Welsh who, writing back in 1980, predicted the weakening of black solidarity in the post-apartheid South Africa: 'It may very well occur that ethno-linguistic differences among Africans will become politicised'.⁴³

Others relied on the experience of heterogeneous countries and similarly argued that South Africa cannot be an exception to the saliency of ethnicity in ethnically plural societies. Giliomee, for instance, argued that 'studies of other African societies show the persistence of ethnicity despite the absence of any policy resembling apartheid'.⁴⁴ He, supporting his argument with data collected among black people in South Africa, expressed strong doubt about the assumption that the distinctive ethnic identities nurtured by the apartheid government and institutionalised by the homeland policy would 'promptly fade away'. Arguing against what he called the 'end-of-ethnicity myth', Lijphart also relied on comparative observations:

Ethnicity and ethnic divisions are facts of life in South Africa. It is tempting to play down the ethnic factor both because it superficially appears to have been declining in importance during the last decades and because it would be much easier to find a democratic solution for South Africa if the country were a basically homogenous or an only mildly divided society. Unfortunately... the latter image *does not stand up to sober comparative scrutiny*. South Africa's ethnic divisions cannot be wished away.⁴⁵ (Emphasis added).

Many thus predicted that with the dismantling of apartheid, the common oppression that muted intra-group rivalries among the different ethnic groups in the black community will fade away. The offshoot of this argument is that the architects of post-apartheid South Africa must guard themselves from the wrong assumption that the tensions that exist between black Africans are too insignificant to serve as raw material for ethnic mobilisation. More importantly, however, it suggests that the post apartheid government cannot avoid the entrenchment of ethnic identities in the Constitution. Those who predicted ethnic-mobilisation in post-apartheid South Africa felt vindicated by the major events that unfolded in the early 1990s transition process discussed above. The conflicts confirmed, for them, the prediction that ethnic mobilisation and ethnic

41 Horowitz (n 31 above) 1991.

42 Lijphart (n 12 above).

43 D Welsh 'Inter-group accommodation' in H.W Van Der Merwe and S Robert (eds.) *Race and ethnicity: South African and international perspectives* (1980) 161.

44 H Giliomee 'Building a new nation: Alternative approaches' in F Cloete; L Schlemmer and DV Vuuren (eds.) *Policy options for a new South Africa* (1991) 66.

45 A Lijphart 'The ethnic factor and democratic constitution making in South Africa' in E Keller, and L Picard (eds.) *South Africa in Southern Africa: Domestic change and international conflict* (1989) 22-23. See also Lemon (n 31 above).

conflicts are an inevitable spin-off of the fall of the apartheid system. For some, '[n]ow that the possibility of the end of apartheid is a reality...the ethnic divisions in South Africa will emerge, and we are now seeing the first signs of this fight between the Xhosa and Zulu on the reef'.⁴⁶

Others simply rejected ethnicity as a relevant factor in South Africa. Sparks, writing in 1990, predicted that ideologically defined political bases rather than ethnic power bases will be the rallying point for any power struggle within the black community in the post-apartheid South Africa.⁴⁷ A good number of liberal scholars have also considered 'the structural inequality of wealth, status and power' and the statutory racial system as the most important divide and not the ethnic diversity that characterises South African society.

It is submitted that the conflicts in the early transition, adduced above to support the emergence of ethnic mobilisation, do not necessarily substantiate the claim that ethnicity is a politically relevant factor in post apartheid South Africa. To begin with, a closer scrutiny would reveal that the categorisation of the conflicts in the early transition period as ethnic conflict between the Xhosas and the Zulus is a mere simplification. As Maphai aptly comments,

[o]riginally the violence was confined to the Kwazulu-Natal region, almost an exclusively Zulu speaking area. Most of the non-Zulus who settled there have virtually been assimilated. How anyone could objectively describe this as a Zulu–Xhosa conflict, defied imagination.⁴⁸

The conflict was largely between members of the same ethnic group: 'Between rural, often, older, Zulus committed to their tribal identity and traditional systems of government, and those younger, township-based Zulus, less strongly tied to ethnic loyalties, who supported the ANC's demands for modernisation and homogenisation of the South African people'. As some aptly commented, the conflicts were more of a 'Zulu civil war'. Related to this is also the revelation of the existence of a 'third force' behind the conflicts witnessed in the early transition phases. A judicial commission of inquiry revealed that members of security police were involved in engineering the conflicts.⁴⁹ The revelation of the 'Inkathagate', as it came to be known, cast doubt on the position that claimed the potential resurgence of ethnic identity in the new South Africa and vindicated the view that the conflicts were not ethnic conflicts *per se*.

The ANC's overwhelming victory in the general election of 1994 also shows that ethnicity is not the most relevant political divide in South Africa. In as far as the black African communities

46 As quoted in Guy (n 30 above) 84.

47 A Sparks *The mind of South Africa* (1990) 391.

48 Maphai (n 1 above) 91. Maphai also objected to the categorisation of the conflict in the Witwatersrand area in the Transvaal as a Xhosa–Zulu conflict. He argued that this conclusion is based on the wrong assumption that the townships are exclusively or predominantly dominated by Xhosas while the townships which were close to the hostels where Zulus dwelled were ethnically heterogeneous.

49 Ellmann (n 35 above) 1994. See also Manby (n 35 above).

were concerned, the election results tended to suggest less ethnic divisions.⁵⁰ The ANC received its strongest support, 91.6%, from a region where there are hardly any Xhosa speakers: The Northern Transvaal Region which is composed of Pedis, Shangaans and Vendas. The party garnered 83.3% of the vote in the North Western Regions which is dominated by Tswana-speakers. Likewise, it polled 76.6 and 80.7% of the vote in the Sotho-speaking Orange Free State and the Eastern Transvaal respectively. The latter is home for the Ndebele and Swazi speakers. Despite the fact that the ANC's leadership, as noted above, is dominated by Xhosa speakers, the 1994 elections indicated that the party enjoys a great deal of support across ethnic groups. This left little substance in the claim that the ANC is a 'Xhosa organisation'.

Equally notable is the fact that parties which contested the election on an ethnic ticket performed poorly in the elections. The Luso (Portuguese)-South African Party, representing the approximately 500,000 South Africans of Portuguese ancestry, failed to gain a single seat in Parliament. Similarly, the following ethnic parties were not able to secure significant place in Parliament: the Minority Front Party (Indians in the Kwazulu-Natal region), Dikwankwelta Party of South Africa (Southern Sotho in the Orange Free State), African Democratic Movement (Xhosa in the Eastern Cape) and Ximoko Progressive Party (Shangaan in the Northern Transvaal).⁵¹

The revelation of the 'third forces', together with the winning of elections by the ANC across ethnic groups and the poor performance of ethnic parties in the elections confirmed the prediction that 'Blacks will not vote with their tribal feet'. To be precise, however, the voting trend was not entirely ethnically neutral. Voting patterns, to some extent, have also been partly ethnic. This is especially true in KwaZulu-Natal where the IFP received the majority of the votes (i.e. 50.8%), with 83% of the vote coming from the Zulus. Another ethnic-based party is the Freedom Front, Afrikaner-based party, which received 83% of its votes from Afrikaners although it only garnered only 2.7% of the national vote in a country where Afrikaners account for almost 5.5% of the population.⁵² More Afrikaners voted for the National Party whose votes, however, came from other population groups as well. Of the 20.39 % of the national vote that the National Party secured, only 30% came from Afrikaners, another 30% from Coloured, 20% English-speaking white and the rest from other groups.⁵³ Yet these figures suggest that the exceptions to the 'ethnically neutral voting pattern' are limited.

50 Maphai (n 1 above) 95.

51 As above.

52 Of the 9.3% white population in South Africa, approximately 550,000 are Portuguese speakers and people who speak other European languages. The rest includes Afrikaans and English speakers in the ratio of approximately 60:40 (see Lemon (n 31 above).

53 Republic of South Africa 1994 General Election available at <http://www.electionresources.org/za/1994/> accessed on 03 June 2008.

The solidarity of the black communities that, to a large extent, has muted inter-ethnic rivalry seems to have persisted into post-apartheid South Africa. Mobilisation around ethnic identity is rare among the different ethnic groups within the black community. This, some may argue, does not necessarily rule out the argument that relied on comparative observations (i.e. experiences of other ethnically plural societies) and predicted the politicisation of ethnic differences among the black community. It might only mean that it is too early to expect the weakening of black solidarity and the revival of ethnic rivalry in the state of affairs where race and class divides reinforce each other, thus, making the statutorily determined and historically reinforced racial cleavage sharp and very strong.

A more plausible explanation for the gap between the widely held predictions and the actual societal reality lies, however, in the limitations of the arguments based on comparative observations. The argument simply suggests that ethnic divisions will necessarily be reproduced in the political arena. It fails to consider the role of historical and political circumstances in bringing parallelism between social cleavages and political mobilisation. The political experience of the different ethnic groups in South Africa has created solidarity among the different ethnic groups within the black community. The absence of ethnic traits in the identity and organisation of the post apartheid state seems to have further contributed to the rarity of ethnic mobilisation. It may not thus be surprising that ethnic mobilisation is rare in a situation where political and historical experiences have resulted in the emergence of solidarity across the ethnic divide and where there is no particular pattern of state-driven ethnic stratification. There are important exceptions. Ethnic demands were articulated and vociferously pursued by groups belonging to the Zulus⁵⁴ and Afrikaners. The question is whether the constitutional framework of post-apartheid South Africa has accommodated the demands of the different ethnic groups. The next section focuses on the Interim Constitution of South Africa, with the view to examining its implications for the accommodation of its ethnically diverse population.

14.5 Accommodating ethnic diversity in the Interim Constitution

The Interim Constitution is dubbed by many as the ‘negotiated revolution’.⁵⁵ Of course, there is no clear agreement about the kind of state established by the Interim Constitution. Some regarded it as a federal structure while others referred to it as a unitary state. What is, however,

⁵⁴ It is, however, important to note there is not even clear support for the political party that appeals to ethnic sentiment among the Zulus. This is evident in the not-so-strong support that the IFP secured during the first election and in the successful incursion of the ANC in the IFP’s traditional power base, which eventually resulted in the dominance of the ANC in KwaZulu Natal in the elections that followed.

⁵⁵ Owing to the significant changes in the position of the parties that was the result of painstaking negotiation process, the first political deal was signed between the ANC and the National Party on 2 December 1993 at Kempton Park. This was then adopted as an Interim Constitution after securing legal form’ by the tri-cameral parliament. The deal was, nevertheless, rejected by the major proponents for the recognition of ethnicity, namely the IFP and the Afrikaner right-wing parties. They refused to take part in the elections. In view of the political violence that these organisations were associated with, their decision to abandon the process was not to be taken lightly. Eventually, with the view to accommodating the demands of these two groups, amendments were made to the Interim Constitution in March and April 1994.

clear is that the form of state introduced by the Interim Constitution, as amended in March 1994, had important federal features. More importantly, for the purpose of this article, it presents a difficult balance between the centralists who sought to establish a common national identity, on the one hand, and the federalists who insisted on the distinctiveness of their respective ethnic identity and the protection thereof, on the other. Aspects of self rule and shared rule that were incorporated in the Interim Constitution support this conclusion.

As indicated earlier, the ANC was strongly opposed to the idea of federalism. As a result of the negotiations, however, the ANC softened its position on federalism, which eventually made the introduction of federal elements into the system possible. One of the fundamental self rule elements of the Interim Constitution pertaining to provincial powers was contained in the provisions relating to provincial constitution-making power. The Interim Constitution, even in its original form in 1993, allowed the provinces to draft and adopt their own constitutions. The contents of provincial constitutions were, however, extensively regulated by the Constitution. The March 1994 amendment relaxed the regulation by providing provinces a measure of discretion in structuring their legislative and executive branches. Furthermore, the April 1994 amendment, driven by the demands of the IFP, explicitly permitted provincial constitutions to provide for the institution, authority and status of a traditional monarch in provinces anywhere in the country; it even made the establishment of such institutions for the Zulu King in the province of KwaZulu-Natal mandatory.⁵⁶ This symbolic but very important addition to the Interim Constitution gave the province of Kwazulu Natal the right to adopt a constitutional monarchy within the Republic of South Africa.

The Interim Constitution clauses relating to the Volkstaat and self-determination were also important safeguards that the Interim Constitution provided to the Afrikaner-based right wing parties that perceived a threat to their ethnic identity and insisted on the establishment of an Afrikaner homeland where whites would be a majority. When the Interim Constitution was amended in March 1994, provisions were made for the establishment of a 20-member Volkstaat Council who were 'elected by members of parliament who support the Volkstaat idea'. As was stated under section 184B (1), the major objective of the Council was to serve as a constitutional mechanism to enable those who support the Volkstaat idea to 'constitutionally pursue the establishment of such a Volkstaat'. This represented a demonstration of the good will of South Africa's new leaders and their 'desire for domestic peace and their willingness to fashion compromises to achieve that goal'.⁵⁷ The incorporation of the Volkstaat clauses undoubtedly went a long way in terms of managing a potential ethnic conflict and succeeded in bringing some elements of the Afrikaner-based right-wing parties into the negotiation process.

The establishment of a government of national unity with executive power-sharing at its centre was also an important concession to those who relied on shared rule to promote the interests

⁵⁶ Section 1 of Act 3 of 1994.

⁵⁷ Ellmann (n 35 above) 32. This was objected by the CP 'as inadequate provision for the establishment of the Volkstaat. They were seeking their own territory, constitution and government. They wanted a guarantee prior to the election that they would receive their own state' (Steytler and Mettler (n 34 above) 97).

of the community they represent. First, any party winning at least one-fifth of the seats (i.e. 80 seats) in the National Assembly was guaranteed the position of an executive deputy president.⁵⁸ It was as a result of this rule that F.W.De Klerk, the last president of the apartheid government, became a second executive deputy president and joined President Mandela and his deputy, Thabo Mbeki, in government. Second, the proportional representation system was applied in the Cabinet where, according to the Interim Constitution, every party that won 20 seats in the National Assembly (that is, essentially, at least 5% of the vote) was entitled to representation in proportion to its seats in the Assembly.⁵⁹ Furthermore, the constitution instructed the cabinet to seek consensus in making decisions.

The general assessment is that the Interim Constitution had, more or less, fashioned a compromise that balanced the demands of those that perceived a threat to their identity, on the one hand, and those that sought the centralisation of power under a unitary state, on the other. There is no doubt these aspects of the Interim Constitution went a long way in quelling the anxieties of those who perceived a threat to their ethnic identity. Furthermore, by including a set of 34 Constitutional Principles that the 1996 Constitution had to comply with, the drafters ensured that the inclusive elements of the Interim Constitution were not lost in the final compact, which is the focus of the next section.⁶⁰

14.6 Recognition and autonomy in the 1996 Constitution

This section focuses on the 1996 Constitution (Hereafter Constitution) and examines how it seeks to manage the tension between national unity and ethnic diversity. It first seeks to determine how the Republic of South Africa views itself, as manifested in the Constitution and other major legislation. Does it recognise its multi-ethnic character or present itself as homogenised society that seeks to transform itself into a nation-state? The section then proceeds to the issue of autonomy and examines the South African constitutional perspective on providing ethnic communities with autonomy to manage their own affairs.⁶¹

⁵⁸ Section 84 Interim Constitution.

⁵⁹ Section 88(3) Interim Constitution.

⁶⁰ The Constitutional Principles guaranteed, among other things, the recognition of languages and cultures, provincial constitutions and traditional monarchs. Constitutional Principle XXXIV specifically provided for self-determination that implied a measure of territorial autonomy for any community sharing a common cultural and language heritage. It further stated that 'the Constitution may give expression to any particular form of self-determination, provided there is proven support within the community concerned for such form of self-determination.' More importantly, it guaranteed the entrenchment of a territorial entity in the final constitution if it is established in terms of the Interim Constitution in order to give expression to the notion of the right to self-determination. As noted by Hendricks, '[b]y not closing off the avenue to ethnic groups who seek self-determination, and instead, to assert that they need to show proven support, the state effectively accommodated ethnic demands without running the risk of every ethnic group seeking secession' (C Hendricks 'The National question, ethnicity, and the state: Some insights on South Africa' in GN Nzongola-Ntalaja and MC Lee (eds.) *The State and democracy in Africa* (1997) 100.

⁶¹ It is understood that an examination of institutional response of a state to the multi-ethnic challenge cannot be complete without examining the constitu-

14.7 Recognition of ethnic diversity

The opening paragraph to the preamble of the South African Constitution begins with the homogenisation solution of 'We the people of South Africa'. It presents the Constitution as a social contract entered into by South Africans acting in their capacities as individuals, unconstrained by their ethnic or other group allegiances. Far from viewing South Africa as a state divided into different groups, section 1 of the Constitution describes South Africa as '*one, sovereign, democratic state*' (emphasis added). A clear emphasis on the promotion and achievement of national unity is also visible both in the preamble and other parts of the Constitution. The preamble, seeking to achieve national solidarity, identifies 'building a united...South Africa' as one of the principal objectives of the Constitution. Section 41 (1) (a) also enjoins all spheres of government and all organs of state to preserve 'the national unity and the indivisibility of the Republic'.

Given the political history of South Africa, the preamble's emphasis on national unity should not come as any surprise. The preamble and the various sections of the Constitution that emphasise national cohesion represent a clear break from the previous dispensation that segmented the population into different groups. This, for example, explains why the Constitution needed to explicitly describe South Africa as 'one state', a direct rejection of the bantustanisation of the South African state. That also explains why it eschews the apartheid style identity ascription and the expression of diversity in terms of explicitly identified groups and corresponding territories. The Swiss and Ethiopian model, which, through the preamble to the Constitution (i.e. 'we the people of the cantons' or 'we the nations, nationalities and peoples of Ethiopia'), recognise the division of the population into different territorial groups, is rejected as it would echo the old apartheid dispensation. It is based on this perspective that some considered the emphasis on national unity as the only sensible option in the context of South Africa. Brown commented that 'a simple retreat from nationalism into multiplicity, division and difference can be immensely disabling in contexts, such as [South Africa], in which the rebuilding of society requires a common commitment and a shared sense of responsibility'.⁶²

Many may readily interpret the emphasis on national unity as a reluctance to fully recognise the internal diversity that characterises the South African society. The preamble does not, however, go without acknowledging the multi-ethnic character of South African society, albeit with no reference to territoriality. It explicitly declares that 'South Africa belongs to all who live in

tional rules that promote national unity or provide for the co-management of the society, usually referred to as shared rule in federalism literature. Owing to the constraint of space, however, the discussion in this article does not include elements of shared rule that are incorporated in the Constitution. It suffices to say that the institutional design of the South African state incorporates important institutions and process of shared rule in the legislative and executive arms of government.

62 D Brown 'National belonging and cultural differences: South Africa and the global imaginary' 27 (4) *Journal of South African Studies* (2001) 757-758.

it, united in their diversity’, the catchphrase being ‘united in their diversity’. This recognises that South Africa is composed of diverse peoples. Out of this has also developed a commonly used phrase in South African constitutional discourse: ‘Unity in diversity’. Archbishop Tutu’s description of South Africa as the ‘rainbow nation’ is also often used to describe the diverse character of the South African society.⁶³ Although the description of South Africa as the ‘rainbow nation’ embodies an element of togetherness, it does not envisage the realisation of national unity at the expense of diversity. In fact, it represents the possibility of building national unity without destroying cultural distinctiveness and diversity.⁶⁴

The preamble to the Constitution emphasises national unity and the indissolubility of the state while at the same time recognising the diversity of its population. The Constitution therefore mirrors the Spanish constitution which attempts to maintain the difficult balance between unity and the need to recognise diversity. The South African Constitution, unlike the Spanish constitution, does not explicitly refer to the different groups that make up the South African society.⁶⁵ Its recognition of the diverse character of the society, however, represents an implicit acknowledgment of the fact that South African society is divided into different groups. The nation-building discourse one often encounters in South Africa also indicates a tacit recognition that South Africa is not a nation, although the emphasis on national unity and nation building might suggest an aspiring nation-state.

The symbolic codes of the South African state reinforce the ‘unity in diversity’ theme adopted by the preamble of the Constitution. The national anthem and the flag of South Africa, for example, represent the recognition of the diverse communities of the country. The national anthem⁶⁶ is a combination of the African hymn *Nkosi sikelel’ iAfrika* (God Bless Africa) and the old national anthem, *Die Stem van Suid-Afrika* (the Call of South Africa). The African song *Nkosi sikelel’ iAfrika* was usually referred to as the unofficial anthem of South Africa during the apartheid era and it was sung at all anti-apartheid rallies and gatherings. The first part is sung in isiXhosa or isiZulu and then in Sesotho. The old anthem is sung in Afrikaans and finally a verse in English. By merging the two old anthems and using four languages, the Constitution has recognised both sides of South African history as well as the different linguistic groups that inhabit the country. The new South African flag, which is provided in Schedule 1 of the Constitution, is also envisaged as an attempt to bring together the past and the present. The colours of the National Flag include the colours of the old South African flag with the superimposition of the colours of the ANC flag. This makes the current flag a national

63 Tutu 1994.

64 P Lenta ‘Rainbow Rhetoric’ in M Du Plessis and S Pete (eds.) *Constitutional democracy in South Africa 1994-2004* (2003) 15-32.

65 The Spanish Constitution refers to nationalities and regions.

66 Section 4 Constitution; see also Government Gazette 18341 of 10 October 1997.

symbol that combines the past and the present.⁶⁷ These symbolic codes are seen as representing the coming together of the diverse population groups in South African society, which then take the road ahead in unison.

The recognition of diversity is also evident in the Coat of arms that the country has adopted. The current Coat of Arms is a series of elements organised in two distinct circles placed on top of one another. Relevant to the purpose of this article is to note the theme it embodies. In the Coat of Arms are included two human figures from Khoesan rock art. The figures are depicted as facing one another in greeting and in unity. Below is the motto that is written in the Khoesan language of the /Xam people: *!ke e: /xarra //ke*. Literally interpreted, it means diverse people unite.⁶⁸ It is also important to note the symbolism of choosing the Khoesan language, spoken by a mere 12,000 people. This choice of unofficial language reinforces, on the one hand, the constitutional ideal that everyone has a place in South Africa. On the other hand, it may represent a deliberate decision by the government to avoid the language problem it would have likely faced if it had used any of the eleven official languages. It is, however, important to note that unlike the national anthem and the flag, the Coat of Arms, which was only adopted in 2000, four years after the Constitution was enacted, does not include symbols that signify the representation of Afrikaners and other members of the white community.

Other symbolic codes that affect inter-ethnic relationships include public holidays which sometimes may represent the cultural, political and historical experiences of different ethnic communities. In this regard, it is important to note that South Africa provides a creative approach towards managing public holidays. For example, in the apartheid South Africa, December 16 represented a commemoration of the Voortrekkers victory over a Zulu army in 1838 in what is usually referred to as the Battle of Blood River.⁶⁹ December 16 is also the day on which the ANC began its armed struggle in 1961. In the post-apartheid South Africa, the government maintained December 16 as a public holiday. In view of the nation-building and reconciliation spirit it seeks to promote, however, the government declared December 16 as the Day of Reconciliation. This marks a departure from ‘divisive symbolism’.⁷⁰ This unique adoption of a public holiday in a manner that is inclusive and reconciliatory of the warring factions of the past represents a very good example of ‘accommodative symbolism’.

67 National Flag available at <http://www.info.gov.za/aboutgovt/symbols/flag.htm> accessed on 16 May 2008.

68 National Coat of Arms available at <http://www.info.gov.za/aboutgovt/symbols/coa/index.htm> accessed on 15 May 2008.

69 For a detailed discussion, see A Ehlers Desegregating history in South Africa: the case of the covenant and the battle of Blood/Ncome River available at http://academic.sun.ac.za/history/dokumente/Covenant_2000.pdf accessed on 20 February 2006.

70 Ehlers (n 68 above) 17-18.

Each symbolic code that celebrates the diversity of the South African society equally presents a countervailing concern for national unity. The symbolic codes do not present South Africa as a mere collection of diverse groups (living in their enclaves) but as diverse groups that seek to live in unison. Its decision not to abolish a public holiday that was celebrated by a particular group of the society but to turn that holiday into a day where the different groups come together to reconcile their differences and thereby promote national unity is an illustration of the state's choice for inclusive symbolism. The decision to recognise diversity while desisting from encouraging ethnic particularism is also reflected in the nomenclature of the state which does not describe the country as a federal country despite the fact that the state reflects many of the characteristics of a federal state. The aversion to using the 'F' word (i.e. federalism) while incorporating important federal features indicates a decision to recognise ethnic diversity without encouraging centrifugal tendencies.

Some suggest that the symbolic codes do not adequately accommodate all communities. This point is, for example, raised in reference to the national anthem: 'Now this might satisfy speakers of those four (or five) languages, but what about the other seven official languages not represented?'⁷¹ Obviously, it is not practicable to ensure the representation of each and every community in the symbolic codes of the state. What is important is that the state, to the extent possible, has strived to ensure that its symbolic codes, including the national anthem, reflect the cultures, histories and identities of a wide range of communities. No particular group should prevail at the symbolic level as doing so would alienate other ethnic groups from the state. Although the national anthem does not make use of all official languages, the use of four official languages by itself represents a creative approach towards ethnic accommodation. The point is that the symbolic code the state adopts signifies an attempt to represent a broader range of communities as opposed to a particular group of the society gaining prominence in the designing of national symbols.⁷²

The symbolic role of language is also recognised by the Constitution, which recognises the eleven languages as the official languages of the Republic while at the same time expressing provincial preferences in language usage. The conferring of official status on all eleven languages sends the message that all linguistic groups are regarded equally by the South African Constitution. Symbolically, it reinforces the normative guide set by the preamble that 'South Africa belongs to all who live in it'. The conferring of official status to all the eleven languages is criticised by some as counterproductive. They argue that this policy is not practically realisable and may

71 B Neethling 'The Rainbow Nation: Can we sing together' Centre for Advanced Studies of African Society (CASAS) Occasional paper No 10 (2001) 6.

72 Counter indications are moves afoot to remove the part reflecting the old anthem (i.e. the Afrikaans and English sections), which may prove to be divisive. As above.

eventually result in unilingualism; they consider the policy as an ‘impractical egalitarianism’.⁷³ This fear is compounded by the fact that the Constitution subjects the equal treatment and use of all eleven languages to a plethora of practical considerations. Although scholars like Alexander concede to the unavailability of the use of such ‘safety clauses’, he strongly warns that clauses, which are ‘allegedly based on technical and economic grounds, are more usually the perfect loopholes for reducing the principle of equal treatment to mere lip service’.⁷⁴ The practice reveals a trend that reinforces the suspicion of the critics of the officialisation of all eleven languages. Despite the multilingual reality that characterises South African society and a Constitution that declares official multilingualism, mono-lingualism with its promotion of English as the sole language of communication seems to be the emerging trend.⁷⁵

In conclusion, the South African Constitution portrays a state that seeks to build a common national identity; a state that emphasises national unity. It does not, however, portray a state that aims to promote national unity at the expense of ethnic diversity. With its central theme of unity in diversity, it assures those with ‘ethnic anxieties’ that it does not aim at conflating all identities into one whole and mould a new common national identity. It rather recognises that sub-national identities are an important part of the South African make-up. In the arena of recognition, this is especially visible in the image of the state that the various state symbolic codes portray. They reflect an image of a state that strives to build national unity based on the premise that ‘South Africa belongs to all who live in it’. In as much as the Constitution does not portray a state that seeks to suppress ethnic diversity, it does not, however, present a state that actively promotes ethnic diversity. South Africa is not presented as an amalgamation of politically relevant ethnic or national groups. The preamble does not portray a case of different territorial groups coming together to draft the South African Constitution. In so far as ethnic relationships are concerned, South Africa is presented by the Constitution as one state that happens to be composed of eleven linguistic groups. This vision of the state does not officially recognise ethnicity as an organising principle of society.

There are, however, notable discrepancies between the constitutional narration of recognition and actual practice. This, as discussed earlier, is evident in the area of language where mono-lingualism is the emerging trend despite the constitutional declaration of official multilingualism. This is, however, countervailed by the fact that the emerging dominant language, which is English, is a culturally neutral language except, of course, for the Afrikaners for whom the dominance of English is reminiscent of the ‘British cultural hegemony’. A general evaluation of elements of the Constitution that impact on the vision of the state suggests that the different

⁷³ V Sacks ‘Multiculturalism, constitutionalism and the South African Constitution’ (winter) *Public Law* (1997) 683.

⁷⁴ N Alexander ‘Language and the national question’ in W James and G Maharaj (eds.) *South Africa: Between unity and diversity* (1998) 16.

⁷⁵ The practice of monolingualism has caused an outcry from communities, especially the Afrikaner community.

ethnic groups that inhabit the country have received affirmation in the public sphere.

14.9 Autonomy

The focus of this section is to evaluate how the South African constitutional framework dealt with the issue of sub-national autonomy. The institutional arrangements through which self rule or autonomy finds practical expression include the territorial structure of the state, the division of powers and financial autonomy. It is against these same institutional arrangements that the South African approach is examined.

14.9.1 Geographical configuration of the state

The making of the final map of nine provinces of South Africa involved the splitting of the provinces that constituted the original Union of South Africa (i.e. Cape, Transvaal, Natal and Orange Free State) and the incorporation of the homelands.⁷⁶ The Cape Province was partitioned into the Western Cape, Northern Cape, and Eastern Cape, with the latter incorporating the former homelands of the Transkei and Ciskei. The Transvaal was divided into the Northern Province (renamed Limpopo), Gauteng (the Johannesburg-Pretoria-vereniging area) and Eastern Transvaal (renamed Mpumalanga), and its western parts were merged with parts of the northern Cape and the former homeland of the Bophuthatswana to become the province of the North West. Natal became KwaZulu-Natal, and the Orange Free State was simply renamed the Free State.

Many scholars regard the present provincial delimitation as the rejection of ethno-national politics.⁷⁷ They remark that ‘there is no ethnically contrived pattern’ in the delimitation of the provincial boundaries. This, according to them, is visible in the fact that most of the provinces are heterogeneous. The consideration of ethno-national politics in provincial boundary delimitation, they argue, would have brought quite a different territorial configuration of the state.⁷⁸

Although it is true that the provinces in South Africa are characterised by heterogeneous population, this should not be overstated. While overt ethnic consideration might not have been the primary motivation in the making of the provinces, most of them are nevertheless inhabited by an ethnic group that is numerically dominant. There is a clear concentration of each ethnic group in a particular province. While pockets of Xhosa speakers can be found in the Free State, Northern Cape and Western Cape, it is in the Eastern Cape that they have

⁷⁶ Egan and Taylor (n 17 above).

⁷⁷ As above.

⁷⁸ As above, 110.

disproportionate concentration. The same applies to the Zulu-speakers who are numerically dominant in KwaZulu-Natal, although they are dispersed throughout the country. In fact, over two-thirds of the residents in the Eastern Cape, KwaZulu-Natal and the North West speak a single language.⁷⁹ The numerical dominance of the Sesotho speakers in Free State (64.4%) and Sepedi speakers in Limpopo (52.1%) cannot also be disputed. The majority of ethnic groups in South Africa thus have a 'mother province' with pockets of their 'cousins and nieces' scattered in other provinces. It is only Afrikaners and people of English-origin that are dispersed throughout the country without being numerically dominant in any of the nine provinces. Although Afrikaans speakers dominate the Northern Cape and Western Cape, it is the Afrikaans-speaking Coloured community that are numerically dominant in those two provinces. Provinces that lack a dominant ethnic group and which can be characterised as truly heterogeneous are Gauteng and Mpumalanga.

Furthermore, some scholars indicate that technical considerations relating to natural and economic resources were not given any specific priority over other considerations in the South African provincial boundary demarcation.⁸⁰ The political gerrymandering, which was allowed as a result of the critical role played by the negotiation council in the demarcation process, has, in fact, allowed ethnic consideration into the making of provincial boundaries. As noted by Lemon, '[t]he process was far more complex, and strategic calculations of the potential for racial and ethnic regional bloc voting and electoral alliances did play a part' ... there was little attempt to territorially divide the Bantustans'.⁸¹

The tendency on the part of many scholars to regard the South African provincial boundary demarcation as a rejection of ethno-national politics seems to be based on the assumption that ethno-national political considerations necessitate the absolute coincidence of ethnic groups and provincial boundaries. Although the consideration of ethno-national politics might entail a congruence of ethnic groups and territory, it should not result in or require the adoption of the principle of ethnic-exclusivism. It does not necessarily imply the segmentation of the territory by granting each ethnic group one exclusive territorial 'homeland'. What it may require is that ethnic groups, to the extent possible, have a province in which they are in a majority, that they are provided with a territorial space that is necessary to advance their interests in areas of language, culture and education. The two major regions in Belgium are not ethnically microcosm regions as they have important minorities. The same is true of subnational states in Spain and Canada. After all, it is not even practically possible to carve out an ethnically pure province.

79 Simeon and Murray (n 37 above) 2004.

80 C De Coning 'The territorial imperative: Towards an evaluation of the provincial demarcation process' in B De Villers. (ed.) *Birth of a constitution* (1994) 189-222.

81 Lemon (n 31 above) 112.

Be that as it may, the fact that most provinces are dominated by a single ethnic group has not yet given rise to strong exclusive provincial identity. This is demonstrated by the fact that the recent protests against the decisions of the government to transfer certain municipalities to other provinces were not motivated by a provincial identity but rather by concerns related to service delivery. Residents of the Matatiele community applied to the Constitutional Court protesting their incorporation into the Eastern Cape from KwaZulu-Natal. They wanted to be incorporated back into KwaZulu-Natal because of the perception that KwaZulu-Natal offers better services than the Eastern Cape. The same is true about Kutsong municipality whose residents objected to their transfer from Gauteng, the wealthiest province, to the resource-poor North West.⁸²

Generally speaking, ethnic considerations might not have played a larger role in the geographical reconfiguration of South Africa. It must, however, be conceded that the present territorial configuration of the state can potentially be used to promote the self-management of most ethnic groups. This also means that the demographics of most of the provinces make them potentially amenable to the often emotionally charged and contrived appeals of ‘ethnic brokers’. As the foregoing discussion indicates, however, the potential amenability of the territorial structure to the manipulation of ethnic brokers has not translated the provinces into bedrocks for advancing demands that are centrifugal in nature. By contrast, the current territorial matrix of the South African state have provided ‘regional elites’ with the means for political participation and representation in the leadership structure of their respective provinces, promoting the self-management of communities. This is further facilitated by the Constitution that allows regional preferences in language usage.

In conclusion, it can be argued that the current territorial structure of South Africa has given the various ethnic groups a territorial space to manage their own affairs without posing a threat to the territorial integrity of the state. The territorial configuration works to restrain centrifugal tendencies and encourage the presentation of territorially based ethnic/regional demands in a ‘centripetal spirit’. Given the current review of provincial boundaries, which is currently underway,⁸³ the fear is rather that should a decision be taken to abolish provinces, regional elites and others with vested provincial interests will pull out the ethnic card, introducing explicit ethnic mobilisation in the political arena. Take provinces away, and there is a likelihood that ethnic concerns will rise to the surface.

82 D Atkinson ‘Taking to the streets: Has developmental local government failed in South Africa?’ in S Buhlungu, J Daniel, R Southall and J Lutchman (eds.) *State of the Nation: South Africa* (2007) 53-77.

83 A document prepared by the Department of Provincial and Local Government (DPLG), which sets out the policy process on the review of provincial and local government, states that the ‘government does not have a position or foregone conclusion on this matter. It has not taken a decision on reducing or rationalising the number of provinces’ (DPLG Policy process on the system of provincial and local government: Background: Policy questions, process and participation, available at www.dplg.co.za, accessed on 19 May 2008).

The discussion of autonomy often brings to the fore issues about the right to self-determination. Constitutional Principle XXXIV of the Interim Constitution provided for self-determination of a community sharing a common cultural or language heritage. It further bound the 1996 Constitution to 'give expression to any particular form of self-determination'. The Volkstaat Council, which was established to explore the idea of a Volkstaat (i.e. an Afrikaner homeland) and provide alternatives for its implementation, failed to come up with 'a viable blueprint for an independent Volkstaat'.⁸⁴ The Constitution then simply implemented the promise of the Interim Constitution by reproducing the same Constitutional Principle in section 235:

The right of South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

Many regard this specific constitutional stipulation as ineffectual. First, the section does not recognise the right to self-determination but the *notion* of the right to self-determination. The implication is that self-determination is not recognised as a constitutional right. Second, national legislation has to be enacted to give effect to the notion of the right to self-determination.

Strydom argues that this section imposes on the government the duty to enact legislation to give effect to the right to self-determination.⁸⁵ It is not clear, however, if the wording of the section does indeed suggest so. The Constitution merely emphasises the non-preclusion of the recognition of the right to self-determination. This is not the same as obliging the national government to give effect to the right to self-determination. The Constitution simply keeps the door open for the national government to recognise, in its own terms, the right to self-determination through national legislation, putting 'the ball of the right to self-determination' in the national legislature's court. The implication is that the Parliament, if it so wishes, cannot only overburden the conditions under which the right to self-determination can be exercised but it can also refuse to give effect to this right. The permissive nature of section 235 must thus be noted. Although the government may not necessarily take the 'outright rejectionist route', that remains a constitutional option. In this regard, Steytler and Mettler commented aptly when they wrote:

The right to self-determination, in the legal sense, was reduced to, at most, a political claim. Any federating process along the route of self-determination would not be in the

⁸⁴ Currie (n 32 above) 35-34.

⁸⁵ H Strydom International standards for the protection of minorities and the South African Constitution' (2002) available at http://www.fwdklerk.org.za/download_docs/02_05_Int_Standard_Minorities_Publ_PDF.pdf accessed on 20 March 2007.

hands of any self-selected community, but will be governed by the Parliament itself.⁸⁶

The Constitutional Court, when it responded to a submission made by the Volkstaat Council and the Conservative Party in the certification process of the 1996 Constitution, also confirmed the permissive nature of section 235. The Volkstaat Council and the Conservative Party argued that the 1996 Constitution failed to fulfil the expectation established by Constitutional Principle XXXIV ‘about the creation of a Volkstaat among a significant number of Afrikaners; it has subjected the internationally recognised right to self-determination to the discretion of Parliament’.⁸⁷ The Constitutional Court, however, regarded Constitutional Principle XXXIV as a permissive rather than an obligatory provision.⁸⁸ Furthermore, had a territory that gives effect to the right to self-determination been established in terms of the Constitution, the Court stated, the situation might have been different as the Constitutional Principle XXXIV required the entrenchment of such territory in the 1996 Constitution. In the absence of such territory, the Constitution, the Court concluded, had fulfilled the promises of Constitutional Principle XXXIV by keeping the door on the right to self-determination open through section 235.

The Constitution does not as such provide for the right to self-determination. Neither does it shut the door for self-determination completely. It rather leaves it open for the exploration of the possible realisation of the right to self-determination for those that insist on going that route. It is important to note that the Constitution recognises the possibility of expressing the right to self-determination both in a territorial form ‘within the Republic’ and in ‘any other way’, thus, suggesting that self-determination can be exercised in a non-territorial form, which may include what is usually referred to as cultural-based non-territorial self-determination. In fact, the potential implementation of the right to self-determination within such a non-territorial framework is already envisaged in section 185 of the 1996 Constitution, which provides for the possible establishment of cultural councils. What section 235 brings to the table is an element of territorial self-determination. The enforcement of this constitutional stipulation depends on the interplay between the level of support for a claim of self-determination in any of South Africa’s ethnic groups and the government’s disposition towards the politics of accommodation. For now, the doors for a politics of self-determination and autonomy designed in either territorial or non-territorial framework are left open by section 235 of the Constitution.

⁸⁶ Steytler and Mettler (n 34 above) 102. Strydom suggests that the Constitution does not attach importance to the right to self-determination by indicating that section 235 ‘falls under the sub-heading ‘other matters’ in a chapter entitled ‘general provisions’ rather than in the Bill of Rights (Strydom (n 84 above) 27).

⁸⁷ Steytler and Mettler (n 34 above) 101.

⁸⁸ Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC), 1996 BCLR 1253 (CC).

14.9.2 Powers and functions of provincial governments

The potential relevance of the provinces in responding to particular ethnic claims and, hence, accommodating ethnic diversity, cannot be solely based on the nature of the territorial configuration of the state but also on the powers and competences that the Constitution accords to provincial governments. The provinces in South Africa have both a constitution making and law making. The general observation is, however, that the provinces enjoy limited legislative autonomy. First, they are provided with a limited area of exclusive legislative competence. Most areas of competences are included in the category of concurrent competences including matters like education, media service, indigenous law and language policy, which are all relevant for promoting ethnic identity. The long list of concurrent competences and the limited exclusive provincial powers attest to the integrated system of government adopted by the Constitution which ‘places less emphasis on geographical autonomy and more on the integration of geographic jurisdictions into separate functionally determined roles in the continuum of governance over specifically defined issues’.⁸⁹ The minimal emphasis on provincial autonomy is also apparent from the fact that the national government enjoys overriding power over almost all legislative areas of provincial government. This position of provinces is a reflection of the ANC’s political aversion against the notion of provinces, which, it feared, could be used to promote ethnicity or ‘tribalism’ as it often referred to by ANC officials. It is also a manifestation of the constitutional emphasis on national unity. The predominant position of the national legislature in the law-making arena is further strengthened by the fact that the provinces have not exploited their competences. Except for the early years of the transition (and even then limited to the provinces of Western Cape and KwaZulu-Natal) provincial law making is almost non-existent. Western Cape and KwaZulu-Natal⁹⁰ were the only two provinces that were engaged in drafting provincial constitutions and using their provincial legislative competence.⁹¹

Notwithstanding the failure of the provinces to make use of their legislative powers, it must be admitted that the South African system of provinces does offer a framework that can absorb greater ethnic demands for autonomy, if necessary. The identity-related and other relevant competences entrusted to the provinces, albeit limited, coupled with the relative concentration of ethnic groups in the provinces put the latter in a position to absorb ethnic claims as they arise.

⁸⁹ Klug (n 7 above) 114.

⁹⁰ Prior to the 2004 elections, the only two provinces that were not controlled by the ANC were Western Cape and KwaZulu-Natal. It is these two provinces that challenged the national government on matters of legislative competence, with some of the legal disputes ending up in the Constitutional Court. It was also these provinces that drafted provincial constitutions. While the Western Cape constitution has been certified by the Constitutional Court with some amendments, the draft constitution by KwaZulu-Natal, as mentioned in the previous chapter, was rejected by the Court on the ground that it usurped national powers.

⁹¹ With the ANC consolidating its hegemony in all provinces, the provinces have limited themselves to implementing legislation passed by the national legislature rather than engaging in law making in their areas of legislative competence (Simeon and Murray (n 37 above).

More importantly, the constitutional and territorial framework within which the distribution of powers and functions is outlined serve as a safety valve for accommodating emerging ethnic interests and responding to ethnic-based claims that have territorial dimension

Considering the scheme of distribution of power as it is currently adopted, however, it would only be fair to conclude that provinces enjoy a circumscribed legislative autonomy, which is further weakened by the passive role the provinces have assumed in the arena of law-making. The limited legislative autonomy of the provinces is watered down by a lack of financial autonomy. The national government has extensive taxation powers. The provinces, on the other hand, have little own source of revenue, which collectively account for less than 4% of total provincial revenue.⁹² The inadequate own-source revenue has compelled provincial governments to rely heavily on transfers from the national government, which account for 96% of provincial government revenue.⁹³ The total dependence of the provinces on intergovernmental transfers is further reinforced by the fact that the provinces have little control over the use of the transfers. The provinces have thus little or no financial autonomy. Yet the absence of strong exclusive provincial identity has made financial autonomy a non-issue in so far as inter-ethnic relationships are concerned. Of course, the likelihood of financial issues emerging as a heavily contested area in the event that provinces become custodians of ethnic interests cannot be ignored. For now, however, the impact of financial autonomy or the lack thereof on the accommodation of ethnic diversity is not significant.

14.9.3 The system of provinces as a safety net for emerging ethnic claims

Although the territorial configuration of provinces in South Africa does not purely coincide with the ethnic division of the country, it can still be used to accommodate the demands of particular ethnic groups for self-management. It is, for example, conducive to promote the languages of the respective ethnic groups. It also creates, as it does now, the opportunity for ethnic groups to be represented in provincial legislatures and executives. Of course, the adopted system of distribution of powers might suggest a constitutional system that is less bent on subnational autonomy. Yet the exclusive provincial competences and the long list of concurrent powers, considered with the Constitutional Court's analysis of concurrent powers, indicate room for provinces to assert their power and entrench their autonomy.⁹⁴

92 B Khumalo, H Amusa, and N Madubula 'Assessing provincial own revenues in South Africa's intergovernmental fiscal relations system' in J Josie., B Khumalo and T Ajam (eds.) Review of transfers in the intergovernmental fiscal relations system in South Africa: Research reports in support of the FFC submission for the Division of Revenue 2007/08 (2006) available at <http://www.ffc.co.za/docs/submissions/dor/2006/may/review/prelims.pdf> accessed 20 April 2007.

93 As above.

94 The Court is, of course, criticised for its narrow interpretation of provincial powers. For more on this, see R Malherbe 'The role of Constitutional Court in the development of provincial autonomy' 16(2) SA Public Law (2002) 255-285. Yet its rejection of pre-emption has left enough space for active law making for both spheres of government.

Although the powers and functions entrusted to the provinces do not make the latter engines of ethnic expression, they provide them with a scope, albeit limited, to enact on identity-related matters.

The self rule elements of the Constitution do not encourage the expression of ethnic sentiment or reward the political mobilisation of ethnicity. However, neither do they preclude the accommodation of ethnic diversity. They rather provide an institutional framework that can be used and, when necessary, readjusted, as in the case of the self-determination clause, to give ethnic sentiments a sense of accommodation. In the context of South Africa where the significance of the political role of ethnicity is not widespread, the fact that there are provinces with a relative concentration of ethnic groups and a system that prefers regional use of language goes a long way in managing ethnic anxieties. That is also why any decision to trample the provinces can be dangerous as it might take away an important institutional bulwark against the emergence of politicised ethnicity.

14.10 Conclusion

The post-apartheid South Africa, compared to other multi-ethnic societies, has a unique advantage in so far as ethnic relationships are concerned. The majority of the populations of South Africa, despite their ethnic diversities, seek to belong to one political unit. The majority of the black community that belong to ten different ethnic groups and whose ethnic identity the apartheid government promoted have refused to champion political parties that invoke ethnic identities. As the increasing incursions of the ANC into the traditionally power bases of the IFP reveals, even among members of the Zulu ethnic group, there is no clear support for those that use ethnicity for political mobilisation. The power base of Afrikaner parties that claimed to promote Afrikaner identity has also diminished over time as they failed to convince their constituency to rally behind a nationalist agenda. The incremental gain of white and especially Afrikaner voters by the Democratic Alliance (DA), a party with no nationalist agenda, implies the unpopularity of centrifugal demands among Afrikaners. It indicates the decline in support for a separate Afrikanerism. There is thus no single political organisation with a nationalist or separatist agenda that commands significant support from any particular section of the South African society.⁹⁵ This provides South Africa with an important ingredient of national cohesion. The issue is how the institutional model adopted by South Africa responds to this social reality.

⁹⁵ The Freedom Front Plus, despite its reconstitution as the Alliance of three Afrikaner parties, was only able to increase its support from a dismal 0.80% in 1999 to 0.89 in the 2004 election despite the fact that almost 60% of the 9.3% whites in South Africa are Afrikaans speaking. The same is true about the United Christian Democratic Party (UCDP), which claim to represent the Tswana ethnic interests. In the North West, where almost two-thirds of the population belongs to the Tswana ethnic community, the UCDP's support in the 2004 election stood at 8.49%. The Minority Front, which claim to represent the Indian community, secured only one seat in the National Assembly in 2004. See T Hoeane 'Under strain: The racial / ethnic interpretation of South Africa's 2004 election' 3(2) *Journal of African Elections* (2004)1-26.

Does it still simply try to build a single national identity or provide adequate recognition and accommodation to the ethnic diversity that characterises the society?

Few general observations can be made with regard to the institutional model that South Africa has adopted in response to the multi-ethnic challenge. First, the Constitution gives recognition to the ethnic diversity that characterises South African society. It has provided for the introduction of projects that signify the recognition of the diverse ethnic groups that inhabit the country. The preamble, the national anthem, the flag and the official recognition of all the eleven languages is indicative of a state that wants to build national unity out of its ethnic diversity. Notwithstanding its emphasis on promoting national unity, the South African approach does not deny or suppress ethnic diversity. An important aspect of the Constitution is also that it refrains from actively promoting ethnic diversity. It does not use ethnicity as a constitutional organising principle of state institutions. It eschews the territorilisation of ethnic differences. In a nutshell, it does not reward political mobilisation along ethnic lines.

Second, territorial autonomy does not figure prominently in the South African multi-sphere government. This is not so much because of the geographical configuration of the state which does not provide for territorial expression to ethnic diversity as it is because of the limited legislative role that provinces are made to assume in the political process. It is important to note that the system still provides room for ethnic accommodation. The provinces play an important role in providing the different ethnic groups representation in the leadership structure of the provinces. In most respects, the door for using the provinces to accommodate ethnic interests is also kept ajar. The open system of provinces allows the latter to serve as a safety net, which, with some adjustments, can respond to new ethnic challenges. It is also important to note that the seemingly limited role of provinces has not made the latter less significant for political parties that want to capture the provinces.

What becomes clear from this review of the South African constitutional approach is that South Africa has shied away from the policies of both suppressing ethnic identity and actively promoting ethnic diversity. The South African response goes in line with both the political relevance of ethnic identity among the South African society and the general principles pertaining to the accommodation of ethnic diversity. The decision to avoid ethnicity as the explicit principle of political organisation is consistent with the fact that ethnicity in South Africa is still not the most relevant political divide, which warrants an explicit constitutional recognition. The emphasis on shared rule as opposed to self rule is also consistent with the prevailing desire of belonging to one state. On the other hand, the decision not to adopt a policy against ethnic diversity but rather to leave space for ethnic accommodation represents the recognition of the reality that there are groups, albeit numerical minorities, that demand the recognition of

their ethnic identities. Moreover, it represents the basic principle that any multi-ethnic country, like South Africa, needs to recognise and be sensitive about ethnic diversity. Generally, the approach adopted in South Africa, which refrains from actively encouraging ethnicity while at the same time falling short of totally shutting down avenues for ethnic accommodation, resonates of a cautious pragmatic approach towards ethnic diversity; an approach that has set South Africa on a pedestal of prevention, the basic aim of which is to protect the mushrooming of conditions that precipitate the emergence and consolidation of strong centrifugal tendencies. In the context of South Africa, where centripetal forces are strong, the decision of the state to manage the emergence of centrifugal tendencies by using the constitutional and legislative framework as a 'preventive tool' seems appropriate.

Of course, as the result of the failure to be consistently directed by the same spirit of accommodation that made the political transition possible, the constitutional representation and commitment is, on occasions, at odds with the political practice. There seems to be a widespread tendency to regard the 'accommodationist elements' of the Constitution as transitory measures. This sentiment seems to partly underlie the current debate about the future of provinces. Accommodationist elements of a constitution can be used to reach a peace compact and bring together the protagonists. That may make a constitutional arrangement more like what Steytler and Mettler referred to the Interim Constitution as a 'peace treaty'.⁹⁶ However, an 'accommodative constitution' goes beyond the settlement of conflicts and guides the continuing management and resolution of ethnic conflict in a multi-ethnic society like South Africa. Unlike a peace treaty, accommodationist elements of the constitution should not be transitory in nature. They are built based on the premise that a multi-ethnic society must always ensure that the different groups are provided with the means for autonomy, political participation and representation. Of course, the degrees of autonomy and representation may vary depending on the realities of the society at a particular point in time. With the dynamics of ethnic identity and ethnic relationships, the rules may have to be adjusted here and there. However, the basic principles of recognition and accommodation in a multi-ethnic society and the rules that translate these institutional principles into a reality must, by and large, remain in place. Regarding the provinces as a product of compromise that are no longer relevant reveals a failure to note the important role that provinces play in providing the different ethnic groups a means for political participation, representation and hence self-management.

The disposition to regard the accommodationist elements of the Constitution as temporary measures seems to also partly explain the failure to adequately act on or give effect to the promises of the Constitution. A case in point is the failure of the government to apply the

96 Steytler and Mettler (n 34 above) 93-106.

language clause. The constitutionally declared official multilingualism has become a mere lip service to linguistic equality as English becomes the lingua franca of government business and education. The reluctance of the government first to establish and then support the activities of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities reveals the lack of political will to give effect to the constitutional promise of accommodating identity-related concerns. The failure to give practical effect to these and other inclusive elements of the Constitution represents a disquieting departure from the constitutional commitment to build a state that belongs to all who live in it. More importantly, it risks rendering the constitutional recognition of ethnic diversity a hollow gesture.

South Africa has to capitalise on the lack of strong centrifugal forces in its endeavor to build a state that 'belongs to all who live in it'. Yet, it must continue to guard itself from the tempting obsession of implementing a nation-building project that is insensitive towards ethnic accommodation. Increasing insensitivities towards issues of ethnicity and ethnic identity might create room for ethnic tension to replace racial division.

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