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**Ethnicity, Nationhood, and Pluralism**



*Yash Ghai*

## **State and Constitution**

This chapter considers the challenges of constitution-making in respect of ethnicity, nationhood and pluralism: a problem that has long troubled Sri Lanka. Sri Lanka is by no means unique – many countries have faced or are facing similar problems. Most countries have resorted to reviewing or replacing their constitutions to establish new frameworks for the peaceful and fruitful co-existence of their diverse communities. The contexts in which multi-ethnic states seek these solutions are remarkably similar in most countries; and centre round the capture of the state, due to its dominance of local society, engagement with the international community, and its predatory and coercive tendencies, as elites use it for ‘primitive accumulation.’

I use the Kenyan context as an example of how one country dealt with the consequences of a devastating ethnic conflict, following rigged elections, dominated by ethnic competition, in which, over less than a week, over 1500 people were killed in the most brutal way, and 500,000 people were driven out of their homes and communities, incited by ‘ethnic leaders.’ Though the factors which drive multi-ethnic societies to hatreds and violence are often similar, each country has its own historical, societal and economic context. But I hope that Sri Lankans readers will find of value one country’s attempt to bury the consequences of incitements, over decades, of hatreds among its people and to search for a constitutional framework which attempts to promote unity and integration among its diverse people by adhering to fundamental values of respect for difference, promotion of human rights, striving for the dignity of all human beings and the communities to which they belong, and pursuing social justice, within an overarching national identity and purpose.

James Madison, justifiably regarded as the father of the US constitution, distinguished two steps in establishing a state, following Rousseau’s analysis of the social contract. The first is a compact, mostly unwritten, among the people, diverse as they may be, to form one society, with common values. The second, necessarily following from the compact, is an agreement on how they would be governed, which Madison regarded as the constitution proper. He thought that the people of the former 13

British colonies had already achieved the first compact when they set out to write the constitution towards the end of the 18<sup>th</sup> Century.<sup>1</sup> True, a minimum degree of social consensus and solidarity is necessary for the governance of society. But he exaggerated the extent of consensus in the 13 former colonies. The assembly of 55 male drafters, drawn from broadly the same social strata, might have appeared to represent consensus, but it was only by the exclusion of slaves, indigenous peoples and women from the political sphere.

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

#### *Liberal State*

When loyalties are dispersed and competing, there are at least three broad approaches to constitution-making.<sup>2</sup> The first is liberalism. The liberal state is marked by its concern for the individual. The rights of the individual are more central to it than

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<sup>1</sup> W. Berns, ‘*The Making of the Constitution of the United States*’ in R.A. Goodwin & A. Kaufman (Eds.) (1988) ***Constitution Makers on Constitution Making*** (Washington, DC: American Enterprise Institute): pp.121-2.

<sup>2</sup> For a more detailed examination see Y. Ghai, ‘*Constitutional Asymmetries: Communal Representation, Federalism and Cultural Autonomy*’ in A. Reynolds (Ed.) (2002) ***The Architecture of Democracy*** (Oxford: OUP); Y. Ghai, ‘*The Relationship between the State and Minorities*’ in N.P. Wanasundera (Ed.) (2004) ***Protection of Minority Rights and Diversity*** (Colombo: ICES); J. McGarry, B. O’Leary & R. Simeon, ‘*Integration or Accommodation? The Enduring Debate in Conflict Resolution*’ in S. Choudhry (Ed.) (2008) ***Constitutional Design for Divided Societies: Integration or Accommodation?*** (Oxford: OUP). See also, in this volume, N. Haysom, ‘*Constitution-making and Nation-building in Divided Societies*’ and L.C. Arulpragasam, ‘*Democracy, Nationalism and the Nation-State.*’

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

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

This description of the liberal state might give the picture of a polity which is hostile to minorities. This picture is far from the truth – or at least from the aspirations of the liberal society. Although politically the state operates on the majoritarian principle, by insisting on the neutrality of the state as among communities and religions, liberalism seeks to protect minorities from the values or preferences of, and ultimately oppression, by the majority. The liberal vision of a multi-ethnic society is that of a tolerant and pluralistic society, in which all cultures may flourish and members of minorities may freely pursue their goals. An extensive bill of rights, concentrating on civil and political rights, is central to this protective framework, guaranteeing various rights, such as the right to association, the freedom of expression, the use of languages, the freedom of conscience, protections of due

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

In recent years the liberal approach has come under considerable attack.<sup>3</sup> It is argued that the modern liberal state, with its lineage of the market-oriented and homogenising regime, built on the principle of individualism and equal citizenship, is inherently incapable of dealing with ethnic and social diversity that characterises most countries. Constitutionalism associated with the modern state was concerned at first with limits on power and the rule of law, to which were later added democracy and human rights. Noting different communities or groups who are seeking constitutional recognition of their cultural or social specificity – immigrants, women, indigenous peoples, religious or linguistic minorities – James Tully concludes that what they seek is participation in existing institutions of the dominant society, but in ways that recognise and affirm, rather than exclude, assimilate, and denigrate, their culturally diverse ways of thinking, speaking, and acting.<sup>4</sup> He says that what they share is a longing for self-rule: to rule themselves in accordance with their customs and ways. The modern constitution is based on the assumption of a homogenous culture, but in practice it was designed to exclude or assimilate other cultures and thus deny diversity. One might add

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<sup>3</sup> See B. Parekh, 'Cultural Diversity and the Modern State' in M. Doornbas & S. Kaviraj (Eds.) (1997) *Dynamics of State Formation* (New Delhi: Sage).

<sup>4</sup> J. Tully (1995) *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: CUP).

that the distinctions between the public and the private are difficult to maintain, especially in multi-ethnic societies, where consciously or unconsciously there is the desire for the political recognition of the fundamental values or symbols of the community, as well as dominance of even the private domain by the politically and economically powerful. For reasons explained below, the traditional version of liberalism seems unsuited in all aspects in countries like Kenya, with its colonial background, economic and social inequalities, the dominance of the state, with exclusionary policies, etc. Migration into Europe of groups with a different culture from the majority has also created some sort of a crisis for liberalism.

*Nationalist, Hegemonic State*

The ‘nationalist’ state is based on the theory of nationalism – that each nation/people is entitled to its own state. I use the expression ‘nationalist’ rather than the more usual ‘national’ state to convey the impression of an ethnically-based leadership actively engaged in establishing a state on the principle of the supremacy of one ethnic group over others. The essence of the ‘nationalist’ state is well captured by the preamble of the 1990 Constitution of Croatia after the collapse of the Yugoslav Federation:

*“The Republic of Croatia is established as a national state of the Croat nation and a state of members of other nations and minorities, who are its citizens: Serbs, Muslims, Slovaks, Italians, Hungarians, Jews and others.”*

The preamble also has a brief history of Croats from the seventh century. As Zoran Pajic says, “This historical saga reads as an argument in favour of continuous Croat statehood, irrespective of long periods of consociation with others in wider, pluralistic entities.”

The 1991 Constitution of the Republic of Slovenia describes the state of Slovenia as an entity stemming from:

*“The basic and permanent right of the Slovene nation to self-determination and from the fact that the Slovenes have formed, over*

*many centuries of struggle for national liberation, their own national identity and established their own statehood.”*

And Article 3 of the constitution:

*“Slovenia is a state of all citizens, based on the permanent and inviolable right of the Slovene nation to self-determination.”*

Pajic is thus able to say of these and other constitutions in Eastern Europe that, “the tendency towards an ethnically ‘pure’ state is easily noticeable. The common starting point in most of these constitutions is the idea that the *raison d’etre* of the state is to serve the nation and not the citizens...If an individual belongs to a small group that cannot qualify as a ‘national minority’, there is very little possibility to claim rights on the basis of citizenship alone.”<sup>5</sup>

There is no single mould in which all nationalist states fall. But certain common characteristics may be identified. The most important point is the dominance of one ethnic group. Thus the Jews dominate in Israel, the Malays in Malaysia, the whites in apartheid South Africa, and, for the most part, indigenous Fijians in Fiji (as a few illustrations). The symbols or language or religion of the dominant group are frequently also the symbols of the nation, or dominate the public discourse. These symbols are very important because they seek to signify the character and orientation of the state and acknowledge the superior claims of the dominant group. More concretely, the law acknowledges or provides for a privileged position for the dominant group – in electoral arrangements, some times through over-representation (e.g., Fiji’s 1990 Constitution which is the most explicit of all its constitutions about indigenous Fijian supremacy),<sup>6</sup> special land rights (Israel, Fiji and Malaysia), the political recognition of its institutions, etc. In this way rights are tied to a considerable extent to membership of communities. Many rights are group

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<sup>5</sup> Z. Pajic, ‘*Bosnia-Herzegovina: From Multiethnic Co-existence to ‘Apartheid’...and Back*’ in P. Akhavan (Ed.) (1995) *Yugoslavia – the Former and Future: Reflections by Scholars from the Region* (Geneva: UNRISD): p.161.

<sup>6</sup> J. Cottrell & Y. Ghai, ‘*A Tale of Three Constitutions: Ethnicity and Politics in Fiji*’ in Choudhury (2008).

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

The imagery of the guest is powerful in putting minorities in their place, indicating that any 'rights' they have are contingent, really a matter of grace and favour. Indigenous Fijians want Indo-Fijians and other communities to acknowledge that they are 'guests,' and then, as good hosts, indigenous Fijians would accord them the status and 'rights' that guests deserve. By a stroke of the pen, the South African apartheid regime turned the indigenous South Africans into 'guests' in their own ancestral lands, by declaring them citizens instead of 'Bantustans.' The rights of Arab Israeli citizens are limited by the necessity to acknowledge the supremacy of the Jews.<sup>7</sup> Much is made of the Malays as *bhumiputras*, a concept carrying greater weight than citizenship.

It is obvious that in such a state, public authorities cannot stand aside from matters cultural or ethnic. The state has to define the criteria by which people are to be classified into ethnic categories. It has to undertake the task of promoting the different cultures. So curiously, at least in some instances when the state advances the pre-eminent claims of one community, there is also the political recognition of a culture of other communities, and an interest in maintaining these cultures – because it is precisely the *distinctiveness*

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<sup>7</sup> Y. Peled, 'Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State' (1992) *American Political Science Review* 86: pp. 432–443.



of cultures which justifies the cultural foundation of the state. The apartheid government manifested great, indeed scrupulous interest in the culture of indigenous people and ultimately granted each major 'tribe' its 'state.' Indigenous Fijians have been very scrupulous about maintaining Indian culture because it was the very presence of a very different culture within Fiji that advanced the claims of ethnic Fijians. Israel recognises 14 religious groups, each with its own system of religions or personal law, and its own judicial institutions to administer these laws.<sup>8</sup> It is another matter that a culture which is so managed loses its authenticity, or more likely, is reconstructed to suit the interests of the rulers. What matters is that it sustains the ideological basis of the state.

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

#### *Consociational or Multinational State*

The third major approach, of the multi-national or multi-ethnic state, shares features of both the liberal and the 'nationalist' state.<sup>9</sup> It aims at liberal values of democracy and rights, but is based on the view that in multi-ethnic states the institutions and procedures

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<sup>8</sup> M. Edelman (1994) *Courts, Politics and Culture in Israel* (Charlottesville, VA: Univ. of Virginia Press); G.J. Jacobsohn (1993) *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton, NJ: Princeton UP).

<sup>9</sup> See the leading authority on the subject, A. Lijphart (1977) *Democracy in Plural Societies: A Comparative Exploration* (New Haven, CT: Yale UP). See also, in this volume, S. Tierney, 'Sub-state Nations and the Constitutional State: Embedding Normative Principles within a Plurinational Constitution.'

of liberalism are incapable of achieving them. The emphasis on citizenship has to be moderated through the political and constitutional recognition of groups, based on the explicit acknowledgment that the state consists of diverse cultural communities and that they all have the right to the recognition of their diversity. In theory the essence of multinational states is that different ethnic groups or 'nations' have agreed to live as one polity where there is the recognition of their distinctive character and corporate status. A multinational state differs from the 'nationalist' state in that the purpose of the recognition of ethnic groups is not the subordination of some, but to accord to all an equal standing and respect.

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

Consociation has enjoyed considerable popularity in recent decades: Spain, Northern Ireland, Bosnia-Herzegovina, Belgium, Sudan (2005-2012), Kosovo, Malaysia, and Iraq; and has been often an interim solution while longer-term solutions are worked out (Sudan, Kenya, Zimbabwe). But it is not without its critics.

When there is a dominant group, consociation can turn into a hegemonic state. The tendency of consociation is to solidify ethnic differences, and slow down national integration. It often takes the form of inter-elite negotiations, at the expense of the interests of the less privileged sectors of society. And it undermines the primacy of human rights, due to the importance attached to cultures and their collectivist tendencies, and subjects vulnerable or disadvantaged members of the group to social hierarchies under which they are subordinated and exploited by upper caste or elite groups.

Thus an important distinction between consociational and liberal states is not only that the former is not concerned merely with the relationship of the state and the citizen (albeit that it is often mediated through the group), but also that between the state and groups, and of groups among themselves. Inevitably they produce political and constitutional complexity.

#### *Mixed System?*

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

prevails over features drawn from another tradition. Today it is hard to make a constitution which has a linear consistency, especially as constitutions are now negotiated documents, with a host of participants, internal and external. But what is clear is that none of them can avoid the centrality of the state, in the face of a fragmented society.

### **Kenya: Background**

It is hard to assess the relevance of these approaches until we examine the problem of 'ethnicity/tribalism' in Kenya. Kenyans are extraordinarily fortunate that no tribe can ordinarily dominate others; though at district and constituency levels, some groups are dominant. There are over 40 tribes (and significant groups of South Asian and European origin), although among them are five 'big' groups with considerable leverage.<sup>10</sup> It is usual for the census authorities to divide Kenyans into 42 or so ethnic groups. They are of uneven size – varying from 6.6 million to 5208. No single group dominates others, the largest group (Kikuyu) being about 17%. However, five ethnic groups (Kikuyu, Luhya, Luo, Kalenjin and Kamba) account for 65% of the population and tend to dominate politics and public offices. Three groups (Kisii, Meru, Somali, and the Mijikenda) represent 16% of the population. Thus about eight groups account for about 86% of the country's population, while many groups are less than 1%. Members of the bigger groups have distinct advantages over those of the smaller groups.

To a considerable (but perhaps declining) extent, there is congruence between territory and ethnicity. Most groups live in their 'homeland,' where they enjoy a measure, albeit declining, of security and self-government. There are disparities in distribution of resources, but not beyond amelioration by sensible policies.

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<sup>10</sup> See also the map depicting the territorial location of ethnic groups in Kenya on the Unitarian Universalist Service Committee website, available at: [http://www.uusc.org/content/map\\_ethnic\\_groups\\_kenya](http://www.uusc.org/content/map_ethnic_groups_kenya) (last accessed, 14<sup>th</sup> September 2012).

Communal lifestyles have adapted to climate and terrain, easing tensions between communities.

Kenyans are able, and content, to communicate with others, and conduct the business of state, in Swahili and English, and are spared divisive language politics. Though they have several religions, they have no conflicts based on belief (at least not until recently). If anything, religions, transcending tribe and territory, bring Kenyans closer. We have a common colonial experience and legacy that have shaped our educational system, ideas and moral standards, so there are few differences in our perceptions and values. Urbanisation has mixed cultures and tribes, with which for the most part Kenyans have coped well. We are able to work amicably in professional, business and social organisations (overcoming the colonial divide and rule legacy). People marry across racial and tribal lines, and live happily ever after. There have been few demands from ethnic groups to the Constitution of Kenya Review Commission (CKRC) or the Committee of Experts for special rights or institutions, beyond the claim for basic justice and respect for difference.

#### *Ethnicity in Kenya*

And yet the public discourse and politics are replete with tribalism, due to the style of politicians, ignoring policy issues and playing on ethnic emotions. Prevalence of ethnicity in public life is major political and social problem facing Kenya.<sup>11</sup> Our politics have become largely the politics of ethnicity. Politicians find that an easy way to build support is by playing on ethnicity, by stirring up ethnic loyalties on one hand, and ethnic animosities on the other. Sometimes they incite people against other tribes, even to violence, as is well demonstrated by the Waki Commission (Waki Commission Report 2008).<sup>12</sup> They promise their tribe development and other benefits if they have their vote. They claim political monopoly over 'their tribal area' and insist that no

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<sup>11</sup> Y. Ghai, 'State, Ethnicity and Economy in Africa' in H. Hino, J. Lonsdale, G. Ranis & F. Stewart (Eds.) (2012) *Ethnic Diversity and Economic Instability in Africa: Institutions and Policies for Development* (Cambridge: CUP).

<sup>12</sup> Waki Commission (2008) *Report of the Commission of Inquiry into Post Election Violence (CIPEV)* (Nairobi: Government Printer)

outside politician can enter or exercise control over it without their permission. Tribe is set against tribe, no matter that politicians are able to change their own strategic tribal alliances routinely. The politician's principal interest is to grab state power, for only in this way can he or she accumulate wealth and influence. Through politics of stealing public resources, and patronage for cronies, successive presidents and their associates have corrupted public morals, and given the impression that the advancement of a tribe is through the capture of presidency (though the only beneficiaries are the president's relatives and cronies). Many people respond to ethnic appeals because of their vulnerability, brought about by the market and the state, which have fundamentally disrupted the rhythm of their traditional life, and exposed them to the vagaries of mechanisms they neither control nor understand. Negative ethnic feelings then spill over into other spheres of lives.

The country has paid a heavy price for the politicisation of ethnicity.<sup>13</sup> Tribal politics are based on patronage which is one cause of corruption, whether in the form of money transfers, grants of land, contracts, evasion of bureaucratic procedures, or jobs for relatives and friends. It has led to the abuse of the electoral process, bussing in voters from outside, using state agencies to rig elections or declare fraudulent 'results.' The obsession with ethnicity means that it becomes the sole criterion for judging people. Very little attention is paid to social, economic and environment policies (other than on how they impact on one's tribe). Some people are all too eager to defend their ethnic 'leaders' against even well-founded allegations of corruption or violence; and in this way the whole question of illegality is transformed into an issue of 'harassment or guilt of tribe,' and weakens the entire concept of guilt and accountability.

Ethnic politics have influenced people's attitude to state institutions: either they are 'ours' or they are the enemy.' There is no loyalty to the state: theft from or abuse of state authority is fair game. The lack of trust in government is pervasive. Many communities, often justifiably, feel they have been deliberately marginalised, denied opportunities of education, ignored in

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<sup>13</sup> Ghai (2012).

recruitment to public service jobs, discriminated when they tender for government contracts, their land illegally taken away from them. The notion of equal citizenship, the foundation of justice and unity in any state, is greatly debased. All these unequal policies and practices lead to ethnic tensions and conflicts. As we saw in the 2007 elections and the subsequent election violence, they have become a major threat to human security, and ultimately to national unity.

### *Making Constitutions and Dealing with Ethnicity*

There were two phases in the making of the Kenyan constitution. The first, between November 2000 and April 2004, was conducted by the Constitution of Kenya Review Commission (CKRC) and the Kenya National Constitutional Conference (popularly known as Bomas). It produced a draft constitution whose adoption was sabotaged by President Kibaki and his faction, itself an ethnic reaction to the attempt at a non-ethnic political order. Two major proposals were seen by the Kikuyu faction around Kibaki as undermining Kikuyu hegemony, the abolition of the 'imperial presidency' and the devolution of some state powers to provinces. Nor did it support proportional representation as recommended by the CKRC. A referendum in 2005 held by the Kibaki regime on a constitution bereft of these features was heavily defeated.<sup>14</sup>

The second phase, between early 2008 and August 2010, was led by the Committee of Experts (CoE), which resulted in the current constitution. The first phase was driven by the search for democratisation and human rights; the 2008-10 phase, in the wake of ethnic violence, by the need for national unity and reconciliation. It is therefore somewhat ironic that the CKRC paid much more attention to causes of ethnic conflict and how it could be overcome than the CoE, which retained the executive presidency, a largely centralised state, and first-past-the-post electoral system.

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<sup>14</sup> Y. Ghai & J. Cottrell, 'Constitution Making and Democratisation in Kenya (2000-2005)' (2007) *Democratisation* 14(1): pp.1-25.

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

It is not my intention to analyse the emergence of the ethnic factor in politics. The CKRC analysed ethnicity not as deriving from some form of primordialism or ancient hatreds,' but from historical and political causes. Its provenance was modernity, central to which was the colonial state, in both the pre-independence and post-independence periods.

#### *The Kenyan State*

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

The growth of the colonial state was not gradual or organic perhaps as in Europe. It was not, as there, rooted in local



developments but imposed, designed to suit colonialism.<sup>15</sup> It was not, as there, a reflection of civil society and the dominance within it. The colonial state was exclusionary, built on racial and ethnic distinctions, the bureaucracy rooted in the imperative of the domination of the various societies that made up the colony, on the close relationship between the colonial administration and the foreign, business community, and its resistance to democracy. This system was buttressed by a battery of repressive laws and a repressive legal system, reinforced by control of armed forces. Its impact on African society was massive. It destroyed the rhythm and autonomy of traditional social systems, brought different communities together within common borders, under foreign sovereignty, and colonial domination, kept them apart and competing (in typical forms of divide and rule), and produced new forms and division of labour. With its magical doctrine of *bona vacantia* and legislation on land, it appropriated huge tracts of land, transferred some of it to promote colonial objectives. However, the effect of the colonial state was uneven as between different communities and regions, which left a difficult legacy resistant to the postcolonial project of nation-building.

Despite Kenya's independence and its grand constitution, the colonial state was not transformed in its essence. It continued to dominate society and to rely on coercion. Its superficial democratisation did not lead to the practice of democracy or respect for human rights. Its principal role in the accumulation of wealth continued unabated, but now took crude and personalised forms. With universal franchise came not genuine democracy but the ethnicisation of politics, accompanied by violence, serving to obscure the underlying process and reality of inequality and powerlessness. The state is now closely connected to the politics of eating (which is not, as Jean-Francois Bayart clarifies, merely gastronomic, but aspires to a network of relations, patronage, incentives and sanctions that sustain an individual or group's hegemony).<sup>16</sup> The state became the principal terrain of political competition. It has been monopolised by ethnic cliques close to

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<sup>15</sup> Y. Ghai & P. McAuslan (1970) *Public Law and Political Change in Kenya* (Nairobi: OUP)

<sup>16</sup> J-F. Bayart (1993) *The State in Africa: The Politics of the Belly* (London: Longman).

the presidents (under all the three presidents we have had). Ethnicity led to corruption in at least two ways: it led to patronage type of politics requiring some measure of transfer of money; and it led to the neglect of areas whose people were seen as antagonistic to the ruling elite. The state came largely under the domination of one group leading to the marginalisation or exclusion of many others, and their increasing deprivation of property and opportunity.<sup>17</sup> Ethnic consciousness became so dominant that it hid the formation of new classes, built on the back of the state. But Kenyans now increasingly realise that politicians have become a class of their own, with a common interest in the colonial state.

### *Restructuring the State*

The CKRC aimed through the new constitution to provide a basis for diminishing the importance of tribalism/ethnicity in Kenyan politics and economy, and to deal with corruption. It rejected consociational solutions, which focussed on the political and economic accommodation of ethnic groups as such (under the theme of power-sharing). Although there were no majorities or minorities in numeral terms nationwide, there were plenty of groups which could be considered as minorities in sociological and economic terms. For them traditional minority rights were less important than rights to participation and inclusion. The very presence of numerous ethnic groups, differing in size and economic salience, ruled out power-sharing at the political level, which would most probably generate into alliances between the five or so major ethnic groups. Instead, the constitution had to deal with the colonial roots of ethnicity.

This required a major restructuring of the state. This in turn necessitated, on the one hand, the cultivation of new national values, aspirations and identity, and on the other hand, institutions which would support their achievement and provide an acceptable constitutional framework for constructive ethnic and personal relationships. It was essential to re-establish trust in

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<sup>17</sup> Society for International Development (2008) *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* (Nairobi: SID).

state institutions, the lack of which had in itself had led many to seek support and refuge in their ethnic community. The state had to be humanised, recognising the dignity of both individuals and communities. Consequently my argument is structured around two axes: values and institutions. In regard to the first, the 2010 constitution reflects the CKRC/Bomas draft; less so as regards the second.

### **Values: Nation Building**

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

The 2010 constitution is based largely on the approach developed by the CKRC for the balance between the respect for ethnic diversity and the promotion of a Kenyan identity and national unity, and protection of individual rights. In a multi-ethnic state it is important that each community should feel, or be made to feel, that it is part of the wider nation and be accepted as such. It should be able to practise its culture, including religion and language. All citizens should enjoy equal rights and equal opportunities. All communities should be included in state institutions and other spheres of life. If a community has been disadvantaged in the past, (like Nubians and residents of the North East) they should be compensated. In this way a state may be able to promote social solidarity which is essential to the running of the country and effectiveness of the state.

However, in fashioning such a state and constitution, the authors are confronted by several dilemmas.<sup>18</sup> Human rights are normally universal, though norms for diversity are developing. There is conflict between personal choice (a highly desirable aspect of pluralism) and community's claims on norms for its members (thus individual choice, a highly desirable aspect of pluralism; and community norms, also an aspect of pluralism). There is also the paradox that sometimes for pluralism, significant interventions by the state in society are necessary when communal and cultural claims are advanced or more likely, when they are challenged as barriers to pluralism. When social justice, especially in the form of affirmative action, is necessary for pluralism and harmony, it often involves differentiation of citizenship. But affirmative action generally identifies communities as beneficiaries, and thus ignores the fact that even within the generally well off communities there will be poor and marginalised groups. And an aggressive form of state sponsored pluralism may provoke resistance and revolt from the dominant group. There is no easy way around these dilemmas broadly implicated in nation and state building, as the CKRC discovered.

#### *Fundamental Principles*

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

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<sup>18</sup> Y. Ghai, 'Universality and Relativism: Human Rights as a Framework for Negotiating Inter-Ethnic Claims' (2000) *Cardozo Law Review* 21(1): pp.101-143; Y. Ghai, 'Constitutionalism and the Challenge of Ethnic Diversity' in J. Heckman, R. Nelson & L. Cabatingan (Eds.) (2010) *Global Perspectives on the Rule of Law* (London: Routledge).

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

Article 10 values include national unity, sharing of power, social justice, inclusiveness, equality, human rights and human dignity, and protection of the marginalised – and hints at the complexity of the task promised in the Preamble.

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

### *Citizenship*

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

Most of these weaknesses have been remedied by the constitution and subsequent legislation, if not always in practice. However, the judiciary has taken a strong view on compliance by the state authorities.<sup>19</sup>

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<sup>19</sup> See the judgment of the Mombasa High Court in *Muhuri v. The Registrar of Persons*, Petition 1 of 2011.

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

How citizens relate to the state, whether directly or through the community, is another important issue, for if they all related in an identical way, abstracted from the community, the element of pluralism is likely to disappear to some extent (as we shall see later in the discussion on customary or religious regimes of personal law).

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

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

#### *Human Rights and Social Justice*

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

Pluralism or the recognition of diversity is seen as part of the broader project of social justice, which is the leitmotif of the constitution (as in redress of past injustices, socio-economic rights,

notion of marginalisation/disadvantaged communities.<sup>20</sup> The scene for social justice is set in considerable part by establishing concepts of marginalised community, marginalised group, disadvantaged group, and minorities. Minority and disadvantaged groups are not defined, but ‘marginalised community’ and ‘marginalised group’ are. The recognition and rights of these groups are considered later. Article 10 aims at fairness and national integration, which are essential for the recognition of diversity. Article 6(3) requires the state to ensure access to services throughout the country (unlike in the past when some areas were gravely neglected).

Social justice aims at equality, but given past and existing inequalities, the attainment of social justice requires, often on a temporary basis, special provisions for the disadvantaged. This is strikingly illustrated by the formulation of equality: Article 27 guarantees equality and freedom from discrimination (direct or indirect discrimination is prohibited on any ground including race, ethnic origin, colour, religion, conscience, belief, culture or language); but also requires that affirmative action *must* be taken to redress past disadvantages due to discrimination (see also Article 56). Affirmative action is defined to include “any measure designed to overcome or ameliorate an inequity or the systematic denial or infringement of a right or fundamental freedom” (Article 260).

As an example of how the constitution tries to balance individual and collective rights is the way in which it defines the scope of the freedom of expression. The right is very broad (Article 33) as is the freedom of the media (Article 34). But in respect of both rights, the freedom does not extend to propaganda for war, incitement to violence, hate speech or the advocacy of that hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any factor in respect of which discrimination is prohibited.

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<sup>20</sup> Y. Ghai, ‘Justice: Leitmotif of the Constitution’ (2011) *Awaaz* 8(1): pp. 10-12.

### *Language*

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

There is no provision that a person not speaking either of the two official languages can deal with state officials in their own language (although in courts, translation is provided, and should be consistent with the right to access courts and to justice). It seems that local languages (“vernaculars”) are used among staff in some ministries (a result of ministers employing people from their own communities) but this is officially frowned upon. It is likely that the use of the dominant local language in official business at the county level will arise, and could lead to a measure of exclusion of county minorities.

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

### *Religion*

Article 8 declares that there is no state religion – no more. Presumably an implication is that all religions must be treated equally. Constitutionally Kenya is now a secular state but not an atheist state. The freedom of all religions is respected, and the constitution provides ample freedom to religious groups for worship (Article 32), though the scope of guaranteed activities (e.g., about establishing educational institutions) has been narrowed.



What might be its significance? In recent history the Christian religion has played a central role in state celebrations and ceremonies. At state lunch or dinners under Moi, the musical accompaniment comprised non-stop singing of Christian hymns, by members of the armed forces! This even on the occasion when Professor Wade of Senegal, a Muslim, was the chief guest – talk of symbolism!

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

### *Culture*

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

However, several other provisions recognise the more traditional aspects of culture. Article 44 guarantees every person the right to use the language as well as participate in the cultural life, of his or her choice; no one can compel another to perform, observe or undergo any cultural practice or rite (a classical case of pluralism based on the individual). But the same article also recognises community-based rights: a person, together with community to which he or she ‘belongs’ is assured the right to enjoy the person’s

culture and use the person's language. All persons and communities have the right to form, join and maintain cultural and linguistic associations and other organs of civil society.

Another aspect of the protection of culture is the recognition in Article 45 of marriages “concluded under any tradition, or system of religious, personal or family law.” More broadly, a family is entitled to have its internal relationships governed by its personal law,<sup>21</sup> by the recognition of “any system of personal and family law under any tradition, or adhered to by persons professing a particular religion.”

However, marriages and personal laws apply only in so far as they are consistent with the constitution. Any inconsistency that may arise is likely to be in respect of fundamental rights and freedoms, often involving inferior status of women: through this formulation the constitution places human rights over traditional (customary) or religious rules or practices. The application of this principle to the Islamic personal law raised considerable controversy. Suffice it here to note that the exemption restricted to “personal status, marriage, divorce and inheritance” before the Kadhi courts was granted (Article 24(4)). Article 170 provides for Kadhi courts to apply Muslim law, only on matters of personal laws. Although it has upset some Christian clergy, it seems eminently compatible with respect for diversity and pluralism. But the reaction also shows how differentiation is often resented by the majority group, seemingly giving others a special status, or enabling them to opt out of the law closely connected to the values of the dominant group.<sup>21</sup>

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

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<sup>21</sup> On legal pluralism and regimes of personal laws, see International Council on Human Rights Policy (ICHPR) (2009) *Plural Legal Orders and Human Rights* (Geneva)

### *Lifestyles*

The previous paragraph alerts us to the erosion of traditional values and life styles. Chapter 5 (on land) while not directly addressed to minority rights, will vest trust land directly in the communities whose lifestyle is tied to forests or grazing or hunting-and-gathering (Article 63(2) (d)). In the past such land was held in trust by local authorities, but was frequently appropriated by influential councillors and massively by the president who had authority to alienate such land. The effect of this type of land grabbing has seriously threatened the traditions and lifestyle of these communities which they have been anxious to maintain.<sup>22</sup>

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

### *Minorities*

Although no community is a ‘majority,’ there are certainly are minorities: communities too small in size to negotiate with the larger, dominant communities or marginalised through the last hundred years or so. The designation ‘minorities’ is used mostly in the context of the marginalised and disadvantaged, their rights requiring protection and promotion. The discussion above indicates that the constitution recognises their marginalisation and seeks to redress past injustices, assures them special remedial policies, access to the state and more generally the promotion of their interests.<sup>23</sup>

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<sup>22</sup> K. Singeoi (2012) *Kenya at Fifty: Unrealized Rights of Minorities and Indigenous Peoples* (London: Minority Rights Group International)

<sup>23</sup> Ibid.

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

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

Legislative representation of ethnic, minority and marginalised communities is to be promoted through laws to be passed by Parliament (Article 100). There is particular concern with minorities at the county level, since many counties will have a clear majority community, which will be tempted to monopolise the government. The constitution requires legislation to ensure that the community and cultural diversity of a county is reflected in its county assembly and executive but no proportion is specified (Article 197(2)(a)). More generally, Parliament is obligated to legislate for members to represent marginalised groups (Article 177(1)(c)). However it should be noted that no specific figures or proportions are provided in the constitution, in contrast to those for women.

All state organs and officials must “address the needs of the vulnerable groups within society,” including members of minority or marginalised communities and members of particular ethnic, religious or cultural communities (Article 21(3)).

### *Power-sharing and Devolution*

Political dimensions are crucial in the scheme of diversity. The new constitutional principle is that the sovereign power of the people is exercised at the national level and the county level (Article 1(4)). The decentralisation and sharing of power ranked high among constitutional reforms. A major problem with Kenya's political order has been the centralisation of state power in the national government, exercised largely out of Nairobi. The independence constitution had provided for the sharing of power at three levels: national, regional and local, but one of the first acts of Jomo Kenyatta as prime minister was to ensure the deletion of regional and local government from the constitution (and though local government survived under legislation, it was gradually deprived of most powers and resources). The centralisation of power meant effectively that one tribe exercised authority over all communities.

One of the objectives of devolution under the new constitution is to recognise and empower communities, which may be easier at the level of the county than the national ("to recognise the right of communities to manage their own affairs and to further their development"), but also to "protect and promote the interests and rights of minorities and marginalised communities" (both in Article 174). Devolution is also a form of power sharing with counties as the base of authority of local communities ("to foster national unity by recognising diversity," Article 174(b)). The constitution requires but does not directly provide for special representation of marginalised communities (Article 177(c)).

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

### *Representation*

The constitution describes Parliament as a body which “manifests the diversity of the nation” (Article 94(2)). The first-past-the-post electoral system (FPTP), which Kenya adopted at independence, has worked against smaller ethnic groups. In hardly any constituency do they have enough members to make a difference, much less that one of them might be elected. Consequently political parties did not have much incentive to recruit members of small communities, much less adopt them as candidates.

Among the factors for drawing electoral boundaries is “community of interest, historical, economic and cultural ties” (Article 89(5)(a)). Often it led to ethnically homogenous constituencies but it rarely resulted in the election of a member of a really small community. The new system is still the FPTP but adjustments have been made to ensure some representation for marginalised communities, but are restricted primarily to women.

For the National Assembly, out of a total membership of 349 members, in 47 seats (one from each county) only women can be candidates (Article 97(1)(b)) but the voting is open to all registered voters.<sup>24</sup> Twelve seats are reserved for “special interests including the youth, persons with disabilities and workers,” nominated by political parties in proportion to their share of the national vote (Article 97(1)(c)). The Senate consists of 67 members, of which at least 20 must be women: 16 nominated by parties proportional to their national votes, and one of two to represent the youth and one of two to represent persons with disabilities (Article 98). The general principle for each list “reflects the regional and ethnic diversity of the people of Kenya” (Article 90(2)(c)).

The Constitution does not specify the number of members of the county assembly (this is done in legislation). Like the National Assembly, the majority of the members are elected in single member constituencies (wards). But members of each gender must

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<sup>24</sup> See also, in this volume, S. Williams, ‘*Gender Equality in Constitutional Design: An Overview for Sri Lankan Drafters*’ and M. Wickramasinghe & C. Kodikara, ‘*Representation in Politics: Women and Gender in the Sri Lankan Republic*.’

be at least one-third (for the time being this means women), so that if enough members of a gender are not elected in this way, additional necessary members of that gender are nominated by political parties in proportion to their county vote. There is to be special representation of “marginalised groups, including persons with disabilities and the youth” as prescribed by national legislation. Like gender representation, the groups would also be nominated by political parties (Article 177).

Basic requirements for political parties include to “respect the rights of all parties to participate in the political process, including minorities and marginalised groups” (Article 91(1)(e)). Parliament has been given the obligation to promote through laws representation of special groups, including ethnic and other minorities, and marginalised communities (Article 100(d)-(3)).

### *Political Parties*

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

The constitution seeks to change all this. Article 91 specifies that political parties must have a ‘national character’ (presumably meaning that they must have members from all over the country and in their governing bodies), must uphold national unity, cannot be based on bases of religion, language, race, sex or region, and must not advocate hatred on any of these grounds. The aim here is the political integration of the people. They must abide by democratic principles of good governance, promote and practise democracy through fair internal elections, and must not engage in

or encourage violence and intimidation (which often takes ethnic colouration).

### *Proportionality*

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

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

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

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

### *Financial and Other Resources*

Although not often discussed in these terms, provisions for socio-economic rights (health, housing, food, clean and safe water, education, social security (Article 43) and clean and healthy



environment (Article 42)) are designed to bring about a major redistribution of resources, especially since over 60% of Kenyans live below the poverty line, and extreme poverty is in many areas exists among particular communities.

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

### **Institutions: Missed Opportunities?**

One concern mentioned earlier is the lack of trust in state institutions. If these institutions can be more representative of the diversity of Kenyans and if their members and staff can be prevented from using the state as a resource to be plundered, that trust might begin to be build. Mindful of this, the constitution, as in the CKRC draft, sets out very clearly the values of honesty, competence, and responsibility in public life, including the statement that public office confers the responsibility to serve rather than the power to rule (Article 73)(1)). And it lays down the general principle that holders of a state office must not permit their personal interests to conflict with their public duties (Article 73)(2); Article 75)(1)). In fact it specifies in some detail ways in which personal interest may conflict with public duty, such as that a gift on an official occasion must not be retained by an individual, and that a person holding a full-time state office must not at the same time be otherwise employed (Article 76(1)); Article 77(1)). The state is to reflect as never before the diversity of the people in its institutions. The state is no longer to be the preserve of one or

two dominant tribes. Favouritism towards one's tribal or family members is unconstitutional, as is showing lack of integrity and inclusiveness, as well as conflict between personal interest and duty.

In three major respects there are important differences between the CKRC draft and the new constitution as regards recognition of diversity or the promotion of pluralism. The CKRC advocated a system of government which would promote inclusion, so that state power would not be monopolised by one or two ethnic communities. For this purpose it proposed a parliamentary cabinet system, where power would be exercised collectively. In the 1990s the 'imperial presidency' was criticised not only for violations of rights, but also for the monopolisation of the state by one ethnic group (in truth, one man and his cronies). The president would be largely ceremonial, as is common in parliamentary systems, but the CKRC draft gave the president special responsibility for the protection of minorities, and for the respect for human rights. In the constitution the connection between the executive presidency and ethnicity was ignored. Although the CoE's harmonised drafts had largely adopted the CKRC model, the Parliamentary Select Committee inserted an executive presidential system, and the CoE did not claw this back, as it did some other provisions. So the presidency remains the one big political prize that all communities covet (urged on by manipulation by politicians), for which people are willing to kill others (as most past presidential elections have shown). Already it is clear that the politics of accession to the presidency remains the major pre-occupation of politicians, the media and to a lesser extent general public. The presidency would most likely remain the foundation of ethnic hegemony and exclusion. It is true that there is now a greater separation between the president and the legislature, and perhaps greater presidential accountability – and that to succeed to the presidency, a candidate must secure at least 25% support in at least half the counties at the first vote (Article 138 (4)). It remains to be seen whether the aura and ethos of the presidency will survive these modifications.

The second departure from the CKRC draft is in respect of the system of voting. The CKRC had proposed, for the legislative bodies, a proportional system, based on a Mixed Member

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

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

The third departure from the CKRC is in the modification of devolution provisions. There has long been a strong feeling that far too much power is concentrated in Nairobi, and decisions that affect people have been made far away from them. Local governments have been weak and very much under the control of the national government. Power has been highly centralised. The central control of money and other resources has been used to penalise districts that have refused to support the President. Powers of appointment have been used to bring people from other regions under control. So devolution was an important means of self-government for communities.

At present, the main mechanism for decentralisation of the things that have to be done under national law is the Provincial Administration, with its Provincial Commissioners, through various levels to the chiefs and assistant chiefs. For example, chiefs now have the duty 'to maintain order' in the area for which they are appointed; they have functions in connection with disease control, can issue orders 'prohibiting or restricting the...manufacture, transfer, sale and possession of noxious drugs or poisons,' 'preventing the spread of disease,' they deal with registration of births and deaths and so on.

The Provincial Administration has been a very 'top-down' system: a method of control originally set up by the colonial power, which now has its apex in the Office of the President. It has become an object of suspicion in some ways, accused of being not just an arm of the government, but also an arm of the party in power. And there is no democratic control over the provincial administration, at least not from the people in the area concerned. They do not choose their PCs, DCs, DOs and chiefs; there is no accountability of these officials to the people. Many people have wanted the system abolished. The CKRC would have abolished the system of administration; the constitution now says merely that it would be restructured.

Kenya became independent with a system of 'regional government.' There were to be 8 regions with elected Assemblies and Regional Executives. Each was to have the power to make laws including on some aspects of education, health and agriculture. There were to be regional contingents of the police. And the regions were to be able to tax incomes of residents, impose land rates, and raise certain taxes. The regional governments would not have been very strong, but the system was essentially abolished before it had started to work.

The question of 'devolving' power to lower levels of government has another importance: what is reserved to the local levels of government is not within the power of the national government. This would have the effect of reducing the power of the national government and its head the President.

However it is disappointing to look at the actual powers given to counties. There is already national law on all, or virtually all, of

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

## **Conclusion**

If there is one fundamental theme of the new constitution, it is justice. The CKRC heard from people many stories of injustice going back a century and half: theft of land and other property, communal violence, politically motivated killing and displacement of people, torture, discrimination against and exclusion of minorities, a perverted political and legal system under which impunity flourished. They wanted the constitution to redress these past and continuing injustices. But Kenya has inherited a colonial legacy, which created differentiation (and conflict of interests) among its people as a matter of policy (people now covering communities from India and Britain). It led to uneven development of regions and communities. The new government inherited a state built on coercion and a perfect instrument for primitive accumulation which still remains its task, and which makes so hard the establishment of a truly national or democratic or honest or accountable government.

Kenya's history, the diversity of cultures, religions and ethnicities, and the clash between traditional and modern values, often within the same community, alerted the CKRC that the worth of particular rules, rituals and practices can be perceived differently by its communities or social groups. This fact assumes a special importance in the Kenyan context where the state has been used, from colonial times to the present, to privilege some communities and religions and to marginalise others. This has caused great resentment among the marginalised, who feel alienated from the state, and arrogance among the privileged, who think the state belongs to them. I have already said that the constitution had to address justice between communities, not just individuals. Kenya's

constitution needed to serve two critical functions: nation-building and state-building. Questions of justice belonged to the former, in terms of values, rights, citizenship and relationship among communities, while to the latter belonged institutions for representation, power-sharing, accountability, litigation and so on. Conceived in this way, justice is not only about the claims of individuals, but about the building of national solidarity, bound by common values and a commitment to fairness for all, and institutions faithful to these principles and goals. With that aim the constitution tried to create and promote a common understanding of justice and fairness, and to disallow certain forms of loyalties (e.g., tribalism, or impunity) or some local ideas of justice; and produced a vision of Kenya as “an open and democratic society based on human dignity, equality, equity and freedom” (Article 20(4) (a)).

To a considerable extent, the constitution was a negotiated document, at different stages, which introduced a degree of pragmatism, through concession and compromise. But it was not often necessary to stray far from the initial agreement on values and principles, worked out largely by civil society organisations, and incorporated into the legislation for the review process. So now the alert reader of the constitution will notice that many articles, as the preamble itself, are a careful balance of the general and the particular (for example, national identity with local affiliations), of the parochial and the national (as in devolution), the respect for difference and the necessity of universal norms (as in arrangements for the application of Muslim law), and equity and efficiency (as in land policies). So the state is neither fully consociational, or multi-ethnic, or liberal.

There is no doubting the commitment in the constitution to justice. But a constitution cannot guarantee its own effectiveness. Kenya’s constitution was imposed by the people on a recalcitrant legislature and government. They are still sitting in seats of power, entrusted with the responsibility for its implementation. They will do everything in their capacity to sabotage implementation. They control not only the state, but also key sectors in society: through bribery, commercial and financial empires, manipulation of ethnicity, intimidation, armed force, and more. The constitution does however offer openings and opportunities for people to bring

about change, such as participation, petitions, sensible use of the vote, contesting for public offices, resort to courts, and solidarity. Who will win the battle? It is too early to say, but people seem to regard the constitution as their friend, and show some determination to implement and protect it.