Ethnic Minorities in Kenya’s Emerging Democracy: Philosophical Foundations of their Liberties and Limits

by

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A thesis submitted in fulfillment of the requirement for the Degree of Doctor of Philosophy in Philosophy at the University of Nairobi, November 2011
Declaration

This thesis is my original work and has not been submitted for the award of a degree in any other University.

Signed

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This thesis has been submitted for examination with our approval as the University supervisors.

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Dedication

To my academic mentor, Dr. Aloo Osotsi Mojola, from whom I have drawn inspiration and insight for almost a quarter of a century.
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Abstract

This study focused on the problem of the domination of Kenyan ethnic minorities by their majority counterparts. Its objective was to undertake philosophical reflection, with a view to providing a rationale for a set of moral principles to serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy. Its theoretical framework comprised of John Rawls' two principles of justice, namely, the principle of equal liberty and the principle of difference, with their emphasis on the need for society to be ordered in such a way as to cater for the interests of the least advantaged in it.

The study proceeded from the assumption that political philosophy can provide a rationale for a set of moral principles upon which to build a just constitutional order. It employed two methods of inquiry, namely, description and philosophical reflection.

The main finding of the study was that contrary to the liberal democratic orientation of Kenya's constitutional order since the attainment of independence in 1963 to date, there is a sound rational basis for the constitutional protection of ethnic identities and interests due to the need to mitigate the economic, social and political domination of ethnic minorities by their majority counterparts. The study concluded that this would be best achieved by re-ordering John Rawls' two principles of justice, so that the principle of difference takes precedence over that
of equality. In addition, a third principle, that of the recognition and protection of ethnic identities and interests, ought to be upheld. It recommended that the three principles be incorporated into the country's constitution as part of the national values and principles of governance.
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Chapter 1: Introduction

1.1. Background

From its beginnings in ancient Greece, democracy has enjoyed a number of victories and suffered many defeats. Nevertheless, from the 18th century C.E., a series of significant developments have contributed to the worldwide spread of democratic ideas. Among these were the American and French revolutions in the 18th Century, the emergence of various European nation-states in the 19th Century, the 20th century decolonisation movements, the liberation of Eastern Europe from Soviet domination, and most recently, the abolition of the one-party system of government in many sub-Saharan African states (Dunn Ed. 1992; Stronberg 1996).

However, together with the spread of democratic ideas, the world is today acutely aware of ethnically inspired minority-majority tensions. Ethnic minorities have risen up to demand a fair share of the state’s political and economic resources. Many countries, among them the former Yugoslavia, the United States of America, South Africa, Rwanda, Nigeria and Kenya, have experienced this kind of social strain. In some instances, these tensions have culminated in genocide - an attempt at eliminating a whole cultural group. The term “genocide” was coined by the Polish legal scholar, Raphael Lemkin (1944), to describe Nazi Germany’s annihilation of groups by direct murder and indirect means during World War II.
(1939-1945). During that war, about two out of every three Jews in German-occupied and allied Europe, nine out of every ten German Roma ("Gypsies"), half of all captured Soviet prisoners-of-war, and 10 to 20 percent of other peoples in Eastern Europe lost their lives (Bauer 2002). Moreover, it has been estimated that more than ten million lives were lost between 1945 and 1975 as a result of ethnically inspired violence, and another approximately two million lives lost in similar circumstances between 1975 and 1998 (Kellas 1998, 1).

Over the centuries, majority ethnic groups have sought to obliterate the ethnic identities of their minority counterparts. They have done this through conquest, assimilation and even elimination (genocide). However, with the spread of democratic thought and the attendant demands for respect for human rights, ethnic minorities in many parts of the world have asserted their right to a communal identity. It is this struggle that Charles Taylor (1994) referred to as "the politics of recognition".

After the First World War, several treaties were signed to secure the rights of ethnic minorities in Europe. Thereafter, the subject of the protection of ethnic minorities dominated the field of international human rights between the two World Wars. However, following the Second World War, there was a drastic shift away from ethnic minority rights. The prevalent opinion was that once individual human rights were fully respected, group rights of minorities would become redundant. The then dominant view was reflected in the conspicuous absence of explicit provisions for the protection of ethnic minorities both in the 1948 *Universal Declaration of Human Rights* (United Nations 1948) and in the 1950
European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1950). Only with the adoption of Article 27 of the United Nations (UN) International Covenant on Civil and Political Rights in 1966 (United Nations 1966a) was the trend arrested. With the turmoil that followed the breakdown of the former Soviet Union, and with ethnic minorities all over the world clamouring for recognition, the awareness grew that irrespective of the observance of the fundamental freedoms of individuals, ethnic minorities have their legitimate interests that must be appreciated and accommodated (Dinstein 1992, p.xi).

In sub-Saharan Africa, large-scale ethnic minority-majority conflicts can be traced back to the 19th Century, when Africa was arbitrarily truncated among European imperial powers. One of the consequences was the separation of members of specific ethnic groups into two or even three different imperial territories, so that a single ethnic group was a majority in one territory and a minority in two or even three others. At the dawn of political independence, minority ethnic groups easily lost crucial elections in a number of countries, and consequently saw themselves as being trapped in unfavourable political circumstances, with no hope of redress except violent resistance. Such minority groups suffer social and economic injustices, as ethnic majorities successfully use their numerical strength to pass legislation which promotes their material advantage to the discomfiture of the minorities. This situation was aggravated by the fact that most first generation constitutions in post-colonial Africa pretended that ethnicity, cultural and religious diversity did not exist, and that what was important was the so-called quest for nationhood (Ihonvbere 2000a).
Consequently, a number of African countries, among them Sudan, Nigeria and the democratic Republic of Congo have witnessed ethnically inspired civil wars. Other countries, among them Kenya, have so far barely escaped large-scale ethnic bloodbaths. Even the return of multipartism in many of these countries has seen the formation of political parties mainly along ethnic lines (Widner 1997, 65-66), so that the minority ethnic groups continue to be discontented with their lot in the unfolding political scenario.

At the dawn of its independence in 1963, Kenya, like many other African countries, adopted a constitution that focused on the rights of the individual rather than on the rights of communities. Thus the Bill of Rights in the Independence Kenyan Constitution (see Republic 2008a), which remained in place until August 2010, had no place for group rights, and only spelt out the entitlements of the individual. This outlook was in line with the Western liberal democratic tradition, whose belief in the autonomy of the individual was articulated by the ancient Greeks, but came to prominence with the Age of Enlightenment, finding significant practical expression in the American and French Revolutions.

Nevertheless, despite what was officially an "ethnicity-blind" constitutional order, the politicization of ethnicity quickly became one of the most intractable problems in independent Kenya (Oyugi 1998; Mute 1998; Livingstone 2005). Consequently, it is extremely difficult for the very small ethnic groups to win elections. What is more, political power is often tied up with access to resources such as land, public jobs and business opportunities, so that the lack of one often
implies the lack of the other. The tragic case of the systematic dispossession of the Ogiek ("Dorobo"), a hunter-gatherer Kenyan ethnic minority in the Rift Valley, highlights the crucial role of politics in the economic status of an ethnic group (Kamau 2000). Consequently, the quest for political power is often perceived as a desperate struggle for survival. Thus the grievances of Kenyan ethnic minorities against their majority counterparts are not only a potential source of socio-political instability, but also give rise to pertinent theoretical questions regarding the nature of democracy.

In view of the foregoing considerations, the present study seeks to provide a rationale for a set of moral principles that could serve as a basis for the constitutional protection of Kenyan ethnic minorities. As such, it is a work in political philosophy. The essential nature of the task of political philosophers is to take what is known about human societies and the ways in which they are governed, and then to ask what the best form of government would be, in the light of aims and values that they believe their audience will share (Miller 2003, 14-15). The assumption is that the said audience is one which is able and willing to engage in incisive philosophical reflection. De Crespigny and Minogue (1976) point out that political philosophy is the natural product of a society in which men relate to each other not as kinsmen, fellow-subjects, or comrades, but as citizens. For De Crespigny and Minogue, political philosophy is needed in communities whose cohesion depends upon the recognition of officers (such as king, prime minister, strategos, consul) possessing defined authority. Such a community is sustained by a continuous activity of accommodation which we call (following the
Greeks, and particularly Aristotle) "politics" (de Crespigny and Minogue 1976, p.vii).

Berlin (1962, 7-8) points out that when we ask what is perhaps the most fundamental of all political questions - "Why should anyone obey anyone else?" - we are asking for the explanation of what is normative in such notions as authority, sovereignty, liberty, and the justification of their validity in political arguments. For Berlin, what makes such questions *prima facie* philosophical is in the fact that no wide agreement exists on the meaning of some of the concepts involved. So long as conflicting replies to such questions continue to be given by different schools and thinkers, the prospects of establishing a science in this field, whether empirical or formal, seem remote. Thus as Berlin explains, it is clear that these differences are not, at least *prima facie* either logical or empirical, and have usually and rightly been classified as irreducibly philosophical. Although their prescriptions have varied, political philosophers have shared the conviction that their task is to distinguish between what is and what ought to be, that is, between existing political institutions and potentially more humane ones (Pocock 1962, 190).

According to Miller (2003, 3-4), among the questions that political philosophy asks are the following:

- Does it really make a difference to our lives what kind of government we have?

- Do we have any choice in the matter, or is the form of our government something over which we have no control?
• Can we know what makes one form of government better than another?

Historically, political theory has been closely associated with philosophy, as is evident in the work of Plato (1945), Aristotle (2000, 2009), Augustine (1887, 1955), Locke (1960) and Mill (1972, 1999), among others. Political philosophy and moral philosophy are also closely related, as political philosophers through the centuries have presupposed moral values such as freedom, responsibility and justice. Thus for both Plato (1945) and Rawls (1971), the goal of political organisation is the facilitation of justice. Consequently, this study investigates the moral implications of the aspirations of Kenyan ethnic minorities. Lentz (1995, 303) predicted that in the years to come, ethnicity, in whatever concrete forms and under whatever name, will be so important a political resource and an idiom for creating community, that today’s social scientists and anthropologists have no choice but to confront it: this imperative equally applies to political philosophy. By exploring constitutional means of guaranteeing the political rights of Kenyan ethnic minorities within a moral framework, this study has endeavoured to contribute to the enhancement of democratic theory in political philosophy within an African context.

1.2. Statement of the Problem

The theory of democracy, as widely understood, is based on the principle that the majority view is adopted and implemented as public policy, with the minority conceding defeat and refraining from obstructing such implementation. The assumption underlying this view is that the citizens’ choices, expressed through the ballot, are made individually, and based on transient opinions on socio-
economic considerations. It is therefore expected that there are almost infinite permutations of voting patterns, resulting in victory or defeat for different groups of citizens at different times (Hoor 1954, 83-108).

However, a major shortcoming of the majoritarian theory of democracy as described above is its disregard of the fact that the minority view is often based on certain unique characteristics shared only by the members of a specific group - ethnicity, race, religion, or disability, among others (Wagley and Harris 1964, 1). Minorities formed on the basis of such enduring features are what Christiano (2006) refers to as “persistent minorities”. In circumstances where a society has such a minority, the majority is very unlikely to adopt the minority view, as the majority has nothing to gain from doing so. As Castelino (1999, 392) puts it, “Minorities differ from the majority, with interests that cannot always be fulfilled by a majority government that does not, in a literal political sense, need to understand their peculiar desires. They therefore remain relatively voiceless even in a democratic society, leading to feelings of exclusion.”

The aforementioned shortcoming is partly due to the fact that classical Western political philosophers such as Aristotle, John Locke, Jeremy Bentham and John Stuart Mill rarely addressed the question of the rights and obligations of ethnic minorities in pluralistic democratic states. This was partly due to the fact that they worked in a European context, and during centuries in which European societies conquered, subjugated or assimilated ethnic minorities. For example, ancient Athens only granted citizenship to native Greek males, relegating women, immigrants and slaves to the periphery of her political life (Held 1996, 23-24).
Similarly, nineteenth century Europe, while claiming to espouse liberal democracy, marginalised ethnic minorities such as Jews, Gypsies, Poles and Turks (Panayi 2000; Brustein and King 2004). Consequently, in countries such as Germany, France and Britain, public affairs in the nineteenth century were conducted as though those societies were considerably ethnically homogeneous contrary to the facts, so that difference of opinion was assumed to be a purely individual matter. Yet studies in the social sciences attest to the fact that the individual's point of view is significantly influenced by his or her social environment, whose major feature is often ethnicity (Jenkins 1997; Kellas 1998).

One of the most influential schools of thought in Western political thought is utilitarianism, which advocates for public policy that promotes the greatest good of the greatest number (see e.g. Bentham 1996; Mill 1890. 1899, 1972). Yet such a policy is overtly dictatorial, as it denies minorities a significant say in decisions that affect their lives. Indeed, this defect of utilitarianism was recognized by one of the greatest utilitarians, the English philosopher John Stuart Mill. Although he was committed to the liberal democratic ideal of the individual as the basic component of a democratic society, Mill's caution concerning the undesirability of disregarding the minority opinion is relevant to the concern of this study. Mill distinguished between true democracy in which all are represented, and false democracy in which only the majority is represented (Mill 1890, 126). Nevertheless, Mill assumed that the minority opinion would be based on an aggregate of individuals not influenced by considerations of ethnicity, and that there would be innumerable permutations of minority-majority opinions as
different matters arose. Indeed, Mill assumed that an ideal liberal democratic state would of necessity be a mono-ethnic society (Mill 1890, 285-288).

Furthermore, while in contemporary African scholarship there are a number of empirical studies on inter-ethnic relations from the perspective of the social sciences (see for examples Abwunza 1993; Ake 1993; Mbaku 2000a; Isa and Arowosegbe 2002; Atieno-Odhiambo 2002), similar studies utilising the tools of philosophical reflection (see 1.8) are relatively few. More specifically, in the recent debate on a new constitutional order in Kenya, the need to safeguard the rights of ethnic minorities received inadequate attention not only from politicians, but also from scholars.

In view of the foregoing observations, there is need to undertake philosophical reflection, with a view to providing a rationale for a set of moral principles to serve as a basis for the constitutional protection of Kenyan ethnic minorities against undue subjugation by their majority counterparts. The inclusion of such a set of principles into the country’s constitution would be in line with the developing norm of spelling out the guiding principles of constitutions (see 7.3). Thus the present study seeks to answer the following four questions:

1.2.1. What are the political aspirations of Kenyan ethnic minorities?

1.2.2. Are there any conditions under which a Kenyan ethnic minority may be morally justified to disregard the authority of the Kenyan state?

1.2.3. Are there any conditions under which the Kenyan state may be morally justified to quash the aspirations of a Kenyan ethnic minority?
1.2.4. To what extent could John Rawls' principles of liberty and difference serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy?

1.3. Operational Definitions

1.3.1. Ethnic Group

Scholars are not in agreement concerning the distinguishing features of an ethnic group (see for example Okombo 1996, Jenkins 1997 and Kellas 1998). They nevertheless widely agree that ethnic groups are complex and contested social constructions, perpetually in the process of creation (Lynch 2006, 50). Furthermore, politicians often define ethnicity according to expediency (Mafeje 1971). Nevertheless, Schermerhorn (1996, 17) seems to capture the essential features of the concept, when he defines an ethnic group as a collectivity within a larger society having real or putative common ancestry, memories of a shared historical past, and a cultural focus on one or more symbolic elements defined as the epitome of their peoplehood. Thus for the purpose of this study, we define an ethnic group as a collectivity of people who share a common history, conceptual and material culture, and who see themselves as distinct from all other collectivities of people organised on the basis of similar criteria.

Consequently, in a typical ethnic community, citizenship can best be characterized as illiberal and republican. Whereas liberalism is centered on the individual, an ethnic group is centered on the idea of community, and it discourages its members
from claiming rights that would jeopardize group aspirations. Thus within an ethnic group, individuals are not “sovereign” or “morally autonomous”, but instead gain rights and deserve defense only as active members of the community (Ndegwa 1997, 601).

1.3.2. Ethnic Minority

The term “ethnic minority” was originally derived from the European experience, particularly after the emergence of the nation-state and the rise of nationalism in the late eighteenth and early nineteenth centuries. In that context, it was used to characterize cultural groups that had, through the imposition of or shifts in political boundaries, become subordinate to another cultural group or cluster of cultural groups. Subsequently the term has been applied to a diversity of groups and social categories (Yetman and Steele 1971, 3). According to the Encyclopedia Americana (2011), a group qualifies as a minority if it is characterised as having lower social status, possessing less power and prestige, and exercising fewer rights than the dominant group or groups.

Wagley and Harris (1964, 10) suggest five distinguishing characteristics of ethnic minorities:

- Ethnic minorities are subordinate segments of complex state societies.
- Ethnic minorities have special physical or cultural traits which are held in low esteem by the dominant segments of the society.
Ethnic minorities are self-conscious units bound together by the special traits which their members share and by the special disabilities which these bring.

Membership in an ethnic minority is transmitted by a rule of descent which is capable of affiliating succeeding generations even in the absence of readily apparent special cultural or physical traits.

Members of ethnic minorities, by choice or necessity, tend to marry within the group.

Ghai (2000, 7) asserts that ethnic groups can be defined by their political aims: "They are content to be called minorities if their aspirations do not extend beyond special linguistic or educational or religious facilities. They proclaim their ethnicity if the goal is some form of autonomy. Further along the line, they may designate themselves 'nation' or 'nationality' if they aim to set up a separate state of their own." Nevertheless, Ghai goes on to caution that the utility of these distinctions is doubtful since there is an easy progression from one to another. Furthermore, in each country, the notion of an ethnic minority, even when used routinely, reflects a complex and distinctive history of political debate, conceptualization and administrative codification (Crowley 2001, 100). Yet more than two decades of debate on ethnic minority rights has produced some degree of consensus on empirical and normative points of contention. According to Schermerhorn (1996, 17), in order to circumscribe the meaning of the term "minority group", we must look at the two dimensions of size and power as characteristics of groups in a larger society. This gives us the paradigm
represented by Schermerhorn in Figure 1, whose bottom cell is slightly adapted here to enhance clarity.

**Figure 1: Size and Power as Characteristics of Groups in a Larger Society**

*(Adapted from Schermerhorn (1996, 17))*

<table>
<thead>
<tr>
<th>Dominant Groups</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Size</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Power</td>
<td></td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Terminology</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group A</td>
<td>+</td>
<td>+</td>
<td>Majority Group</td>
</tr>
<tr>
<td>Group B</td>
<td>-</td>
<td>+</td>
<td>Elite</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Subordinate Groups</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Group C</td>
<td>+</td>
<td>-</td>
<td>Mass subjects</td>
</tr>
<tr>
<td>Group D</td>
<td>-</td>
<td>-</td>
<td>Minority group.</td>
</tr>
</tbody>
</table>

Characteristics of Groups A+D and Groups B+C constitute Typical Intergroup Configurations

Combining the characteristics of size, power and ethnicity, Schermerhorn uses the phrase “minority group” to signify any ethnic group in category D. This implies that it forms less than half the population of a given society, but is an appreciable subsystem with limited access to roles and activities central to the economic and political institutions of the society (Schermerhorn 1996, 18).

Schermerhorn’s analysis is valuable in pointing out that number alone cannot determine whether or not a group is a minority. Indeed, a numerical minority is
usually expected to be politically or economically less influential than the majority group in a society. However, a group may be dominant numerically, and yet be so economically or politically disendowed that it is as disadvantaged as a minority group. A numerically inferior group may be the dominant economic, political or cultural player in a society. In such a case, the majority group is termed a sociological minority group, as were the indigenous South Africans under Apartheid (Mute 2002, 146).

However, the Western insistence that a majority group constitute more than 50% of a population, as espoused by Schermerhorn (1996) above, is a result of specific Western socio-political realities. A number of Western countries (Germany, France and Italy included) were each almost entirely occupied by a population belonging to one ethnic group, with a minute population of people from other ethnic groups. Nevertheless, most African countries, Kenya included, are multi-ethnic.

Francesco Capotorti, former Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, proposed the following definition of a minority:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language (Capotorti 1979, 96).

The gist of mainstream definitions of “ethnic minorities” is captured in Åkermark’s definition of an ethnic minority as “a non-dominant, institutionalized
group sharing a distinct cultural identity that it wishes to preserve” (Åkermark 1997). This implies that the term “ethnic minority”, as used in this study, does not include politically and economically dominant but numerically disadvantaged groups such as the Boers of South Africa during the Apartheid era. While some might exclude Kenyan Asian communities from the category of ethnic minorities in view of their economic prosperity, their political marginalization still warrants their being included in this category (see 2.5.2 below).

1.3.3. Kenyan Ethnic Minorities

While the previous sub-section has outlined the meaning of “ethnic minorities” as understood in the literature generally, there is need to elucidate the way in which it is understood in the Kenyan context. According to the 1989 Kenya National Population Census, the largest Kenyan ethnic groups were the Kikuyu (21%), Luhya (14%), Luo (12%), Kalenjin (12%), and Kamba (11%). These groups made up about 70% of the country’s population. Other significantly large groups were the Kisii (6%), Meru (5%) and the Mijikenda (5%). These three groups accounted for only 16% of the country’s population. Together, the eight groups constituted about 86% of the population. Thus none of the groups was numerically large enough to dominate the others. The remaining thirty-four groups were numerically insignificant, making up about 14% of the population and, individually, many were less than 1% of the country’s population. These included the Elmolo, Malakote, Ogiek, Sanye and Waata, among others (Republic 1994, Table 6-2).

During a visit to the Kenyan Central Bureau of Statistics on 29th September 2005, the present researcher was informed that the Government decided to refrain from
publishing the findings of the 1999 Population Census (Republic 2001) disaggregated by ethnicity because of ethnic sensitivities in the country. That decision is typical of the approach of many African regimes, which prefer to deny the reality of politicized ethnicity, while they themselves vigorously pursue ethnic politics in practice (Ake 1993; Oyugi 1997; Oyugi 1998; Mbaku 2000a). Furthermore, the 1999 census was more politicized than the preceding ones, so that it would have been difficult to ascertain the accuracy of data disaggregated by ethnic groups (Kanyinga 2006, 354).

The findings of the 2009 Kenyan National Population Census indicated that while the five largest ethnic groups generally maintained their numerical supremacy (except for the Luo who were displaced from the third position by the Kalenjin), ethnic groups such as the Elmolo, Malakote, Ogiek, Sanye and Waata continued to be grossly numerically disadvantaged (Republic 2010b). Even among ethnic minorities, some are more disadvantaged than others. Thus the Elmolo, whose total population is less than a thousand persons, are evidently more disadvantaged than the Ilchamus, whose population is several thousands, enabling them to have greater influence in the polity than the Elmolo.

However, As illustrated later in this study (3.2), the official number of Kenyan ethnic groups as forty-two is quite arbitrary, having been arrived at by the colonialists out of expediency. Thus several of the communities listed are actually clusters of ethnic groups. The sixteen communities known corporately as “Luhya”, the nine groups collectively designated “Mijikenda” and the approximately eight jointly referred to as “Kalenjin” are all cases in point.
Furthermore, as earlier indicated (1.3.1), the whole question of ethnic identity is itself a contested one, because there is no consensus on the indicators to be considered in determining an ethnic group. For example, while language is often seen as an indicator of ethnic identity, there is no agreement among linguists on the difference between languages and dialects (Jenkins 1997; Kellas 1998). Indeed, there is no distinct Luhya, Kalenjin or Mijikenda language, although the languages spoken by each of these clusters of communities are related. Furthermore, some Kenyan communities that insist on being considered as distinct ethnic groups, such as the Ogiek and Mukogodo, do not currently speak languages of their own (Kamau 2000; Cronk 2004). Nevertheless, as the rest of this chapter and the following one illustrate, many Kenyans view themselves as belonging to specific ethnic groups, and the country’s political life is dominated by ethnicity, giving rise to discontent among ethnic minorities.

Despite the fact that no single Kenyan ethnic group is large enough to enjoy long term dominance of the country’s politics on its own, minority-majority ethnic conflicts are a reality in the country. This is due to the fact that the larger ethnic groups form alliances which give them the advantage of majority status, as was the case in the alliance between the Kikuyu and the Luo on the eve of independence in 1963, and again during the transition elections of 2002 (Ndegwa 1997; Oyugi et. Al. eds. 2003). On the other hand, the very small ethnic groups do not have the leverage with which to negotiate to be part of the ethnic cluster enjoying majority status. The Ilchamus of Baringo Central, who have been consistently ignored by the majority Turgen in the constituency, are a case in point
(High Court 2006). It is such communities that this study refers to as “Kenyan ethnic minorities”.

Kymlicka (1995) distinguishes two types of ethnocultural groups - national minorities in multination states, and ethnic groups in polyethnic states. For Kymlicka, national minorities are groups that have in common some or all of history, community, territory, language, or culture. Each of these may have become a minority involuntarily through conquest, colonization, or expansion, or it could have voluntarily agreed to enter a federation with one or more other nations, peoples, or cultures. This first category of non-dominant groups is what Campbell (2004) refers to as “indigenous groups”. For Kymlicka (1995), “ethnic groups” refers to immigrant communities. In the African context however, this distinction seems inapplicable in view of the continent’s colonial history, which has resulted in states that contain numerous ethnic groups (see 1.1 above). Consequently, in line with current usage in Kenya, this study simply refers to both categories of numerically disadvantaged groups (indigenous communities and national minorities) as “ethnic minorities”.

1.3.4. Liberty

Despite the efforts of Pitkin (1988) to make a distinction between liberty and freedom, political philosophers usually consider the two terms to be synonyms, understanding both to refer to a condition in which an individual or a group can determine the direction of their own future through their own decisions, without interference from external forces, while refraining from inconveniencing others.
In this light, G.B. Madison’s definition of a person who has “freedom” is also an apt definition of one who enjoys liberty:

Politically speaking, ..., a person is free if and when other people (governments in particular) are prohibited by law from imposing their will on him and coercing him to act as they desire (Madison 1986, 73).

Following Isaiah Berlin (1969), and in line with a number of other theorists, Carter (2007) has made a distinction between negative and positive liberty:

Negative liberty is the absence of obstacles, barriers or constraints. .... Positive liberty is the possibility of acting — or the fact of acting — in such a way as to take control of one's life and realize one's fundamental purposes. While negative liberty is usually attributed to individual agents, positive liberty is sometimes attributed to collectivities, or to individuals considered primarily as members of given collectivities (Carter 2007).

In view of the fact that the present study seeks to provide a rationale for a set of moral principles for the constitutional protection of ethnic minorities in Kenya’s emerging democracy, it will consider both aspects of liberty.

1.3.5. Limit

In everyday usage, limits are boundaries, constraints, borders, parameters or frontiers. In the political context, limits refer to restraints imposed on individuals and groups, clearly defining what kinds of actions they are prohibited from pursuing. For example, the Constitution of Kenya has stipulated a two-term limit for anyone occupying the presidency. It is therefore evident that limits are restraints on liberty as previously defined.
1.3.6. Democracy

As is now well known, the word “Democracy” comes from two Greek words, namely, *demos*, meaning “the people”, and *kratein*, meaning “to rule”. Nevertheless, as Held (1996. p.xi) explains, “Democracy, as an idea and as a political reality, is fundamentally contested. Not only is the history of democracy marked by conflicting interpretations, but also ancient and modern notions intermingle to produce ambiguous and inconsistent accounts of the key terms of democracy, among them the proper meaning of ‘political participation’, the connotation of ‘representation’, the scope of citizens’ capacities to choose freely among political alternatives, and the nature of membership in a democratic community.”

Despite the multifaceted controversy on the nature of democracy, this study subscribes to the view that democracy is a political system in which the people of a country rule through any form of government they choose to establish. It may involve direct participation of the members of a society in deciding on the laws and policies of the society, or it may involve the participation of those members in selecting representatives to make the decisions (Christiano 2006). In present day types of democracy, supreme authority is exercised for the most part by representatives elected by popular suffrage. The representatives may be supplanted by the electorate according to the legal procedures of recall and referendum, and they are, at least in principle, responsible to the electorate. All these features of democracy are aptly encapsulated in Robert A. Dahl’s definition of democracy as a system of governance entailing “processes by which ordinary citizens exert a relatively high degree of control over leaders” (Dahl 1956, 3).
1.4. Research Goal and Objectives

The over-arching goal of this study is to undertake philosophical reflection, with a view to providing a rationale for a set of moral principles for the constitutional protection of ethnic minorities in Kenya’s emerging democracy. Consequently, the following are the objectives of the study:

1.4.1. To identify the aspirations of Kenyan ethnic minorities.

1.4.2. To determine the conditions, if any, under which a Kenyan ethnic minority may be morally justified to disregard the authority of the majoritarian Kenyan state.

1.4.3. To determine the conditions, if any, under which the majoritarian Kenyan state may be morally justified to quash the aspirations of a Kenyan ethnic minority.

1.4.4. To determine the extent to which John Rawls’ principles of liberty and difference could serve as a basis for a democratic constitutional order in which the vital interests of Kenyan ethnic minorities are adequately protected.

1.5. Justification of the Study

This study is justified on the following four grounds:

1.5.1. The bulk of contemporary philosophical inquiry into the protection of ethnic minority rights has so far been undertaken in the West, thus the urgent need for similar inquiry within the post-colonial African socio-political milieu. Consequently, by employing the techniques of philosophical reflection to the question of ethnic minority group rights within the Kenyan context (see 1.8), this
study has sought to contribute towards a more comprehensive account of group rights in the philosophical theory of democracy.

1.5.2. By seeking to determine the extent to which John Rawls' theory of justice can serve as a basis for the constitutional protection of Kenyan ethnic minority group rights (see 1.9), this study has endeavoured to contribute to a better understanding of the degree of the applicability of Rawls' seminal theory beyond its Western political cradle.

1.5.3. While contemporary African public and scholarly debates on new constitutional arrangements concentrate on the need to safeguard the democratic process through a system of checks and balances, very little is being said about the need to promote the political rights of minority ethnic groups. This study will therefore hopefully contribute towards encouraging scholarly debate on this vital issue.

1.5.4. In view of the fact that the process of constitutional review is always incomplete, the present study will hopefully provide a sound basis for future debate on the constitutional protection of Kenyan ethnic minorities.

1.6. Scope and Limitations of the Study

The question of the Liberties and Limits of ethnic minorities in a democracy can be approached from a wide variety of standpoints - anthropological, sociological, psychological, historical, legal, and philosophical, among others. It is therefore crucial to bear in mind that this study is a work in political philosophy, operating within the limitations of the conceptual tools available to this particular discipline (see 1.8). Consequently, the study is limited in the following ways:
1.6.1. This work is \textit{not} primarily an empirical case study of how Kenya has responded to the aspirations of its ethnic minorities. Instead, it endeavours, through philosophical reflection, to address the question of the demands of Kenyan ethnic minorities from a normative point of view, with specific reference to John Rawls's conception of justice (see 1.9).

1.6.2. Although this study focuses on the philosophical theory of democracy, it does not present a comprehensive critique of it, because that would involve examining numerous facets of democracy, thereby diverting it from the issue under investigation. Consequently, it limits itself to offering a rationale for a set of moral principles to serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy.

1.7. Assumptions of the Study

The present study proceeds from the following six assumptions:

1.7.1. In the quest for a Kenyan democratic model of governance characterised by social justice, the politicization of ethnicity in the country must be adequately addressed.

1.7.2. The consideration of empirical data gathered by social scientists is an indispensable first step in the quest for workable solutions to social and political problems.

1.7.3. The use of techniques of philosophical reflection is pivotal to an in-depth examination of social and political problems.

1.7.4. An appreciation of classical Western democratic theory can contribute to a clearer understanding of the conceptual underpinnings of Kenya's emerging democracy.
1.7.5. Reflection on contemporary African democratic thought can yield useful insights into how to safeguard the interests of minority ethnic groups in Kenya's emerging democracy.

1.7.6. The constitution of a country is explicitly or implicitly founded on a set of moral principles. As such, political philosophy can provide a rationale for a set of moral principles upon which to build a just constitutional order.

1.8. Research Methodology

In its quest for a rationale for a set of moral principles to serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy, the study has employed two methods of inquiry, namely, description and philosophical reflection, with the latter being more prominent than the former. Consequently, the study has been undertaken through library research. To this end, books, journal articles, internet resources, unpublished dissertations and newspaper articles have been consulted.

1.8.1. The Descriptive Method

The first assumption of this study (1.7.1) focuses on the need to adequately address the problem of the politicization of ethnicity in Kenya's emerging democracy. This requires a clear understanding of the nature and causes of this potentially explosive phenomenon. Such an understanding can only be achieved through a rigorous empirical study of the phenomenon, as is carried out by the social sciences, that is, empirical studies of the relations and institutions which are involved in the human being's existence and well-being as a member of an
organized community (Rudner 1966; Doorne 2000). Consequently, the second assumption of our study (1.7.2) is that the use of empirical data gathered by social scientists is an indispensable first step in the quest for workable solutions to social and political problems.

In view of their empirical approach, social sciences are keen to state the manifestations, nature and causes of social phenomena. In order to avoid philosophizing in a vacuum, the present work has consulted empirical studies by social scientists on democracy and ethnicity, with a view to obtaining information on the social realities upon which to undertake philosophical reflection. Thus the study employs the descriptive method of the social sciences to present this information. This method is mainly employed in the second and third chapters, where the predicament of Kenyan ethnic minorities is explored.

1.8.2. Philosophical Reflection

Philosophical reflection entails the exploration of puzzling questions which science, by virtue of its strictly empirical approach, cannot answer (Njoroge and Bennaars 1986, 23-27). In the fourth to the eighth chapters, the present study employs the analytical, critical, rational and speculative techniques of philosophical reflection, as outlined below.¹

¹ There is no consensus among philosophers on the issue of methodology. Some writers, such as Njoroge and Bennaars (1986), refer to what we have called “techniques” as “methods of philosophical inquiry”. Others such as Plato (1945), Bosanquet (1923) and Maritain (1979) are of the view that there is only one philosophical method characterised by the effort to apprehend the
A. The Analytical Technique

Philosophy is not contented to operate with old categories; rather, it recognises the need to throw new life into key words. In the context of political philosophy, this is partly due to the realisation that dominance is exercised today through categories that are embedded in systems of knowledge (Parmar 2000). In his celebrated essay, “Politics and the English Language”, George Orwell (1946) observed that “political language has to consist largely of euphemism, question-begging and sheer cloudy vagueness”. He added:

Political language - and with variations this is true of all political parties, from Conservatives to Anarchists - is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind (Orwell 1946).

There is therefore need to clarify political language before embarking on an assessment of the veracity of its content. Towards this end, this study employs the analytical technique of philosophical reflection, as espoused by linguistic philosophy.

Linguistic philosophy, with its focus on the nature and function of language, has left its mark on contemporary political philosophers, who have considered the definition and use of such characteristic political terms as “freedom”, “liberty”, “authority”, “power”, “rights”, “obligation”, “consent”, “democracy” and “justice” (Urmson 1956, 163 ff.; Feinberg 1973, 2).
Through its emphasis on definition, the analytical technique focuses on the clarification of basic terms. To clarify something is to elucidate it, explain it, or to spell it out. Clarification removes the kind of ambiguity and vagueness that Orwell (1946) lamented about, thereby facilitating precision in reflection and discussion. In line with this approach, the present study endeavours to clarify the key concepts employed by various political ideologies and philosophical schools of thought examined in the course of the work as a starting point to further philosophical reflection.

B. The Speculative Technique

To speculate is to wonder, conjecture, guess or to hypothesise. Speculation occurs where a particular kind of knowledge being sought for is not available. While the natural and social sciences largely exclude speculation from their methodology, philosophy includes it. This is because philosophy endeavours to transcend the empirical method of the natural and social sciences, as well as the formal method of mathematics. The speculative method of philosophy is most frequently seen in its attempt to solve metaphysical problems such as death, suffering and happiness, to which there are no simple answers. Consequently, philosophers rely mainly on the method of rational speculation in trying to arrive at answers to such questions (Njoroge and Bennaars 1986, 26-27).

In the endeavour to arrive at a rationale for a set of moral principles to serve as a basis for the constitutional protection of ethnic minorities in Kenya’s emerging democracy, the present study sets out by examining existing models of democratic
governance. However, it does not restrict itself to them. Instead, it takes the liberty to postulate models whose workings may not have been hitherto tested, and this involves rational speculation. This approach is quite typical in philosophy. For example, when in *The Republic* Plato recommended a society wholly organised on the basis of his three levels of intellectual ability, he was drawing from the strict militaristic model of Sparta. However, he did not restrict himself to the Spartan model, since he placed intellectual ability at the centre of his own prescribed model, in sharp contrast to the Spartan model which emphasised physical endowment (see Plato 1945).

**C. The Critical Technique**

The word “critical” was derived from the Greek verb *krinein*, literally denoting the act of *judging*. Indeed, the idea of weighing evidence and arriving at a conclusion, as done by a judge in a court of law, is at the core of the meaning of the term “criticism” as used in philosophy. As Russell (1959, 6) correctly observed, there are two attitudes that might be adopted towards the unknown: one is to accept the pronouncements of people who say they know on the basis of books, mysteries or other sources of inspiration; the other way is to go out and look for oneself, and this latter is the way of science and philosophy. The critical method lays great emphasis on independent and original thinking, that includes but transcends empirical investigation (Maritain 1979, 88-89). This approach is adequately expressed by Fuller’s definition of philosophy as “a reflective and reasoned attempt to infer the character and content of the universe, taken in its entirety and as a single whole, from an observation and study of the data presented by all its aspects” (Fuller 1955, 1).
Through the critical technique, the philosopher endeavours to evaluate things in the light of clear and distinct ideas. In this, philosophy seeks to protect humanity from fanaticism, hypocrisy, intolerance, dogmatism, slogans and ideologies. In short, it aims at liberating man from narrow-mindedness (Njoroge and Bennaars 1986, 23-24). Thus the critical technique focuses on the need to examine a claim from all possible perspectives, with a view to ascertaining its truth and/or applicability, with the highest degree of objectivity possible within the confines of human finitude and subjectivity. In this regard, the philosopher seeks to make a clear distinction between the way things appear to be and the way things are, and also between the way things are and the way they ought to be (Wambari 1992).

Prescriptions of specific social arrangements made by various democratic models are often based on the consideration of certain claims about actual conditions in a society. It is crucial that any claims upon which such prescriptions are made be true, or else the prescriptions are bound to be as misleading as the claims on which they rest. Consequently, through the critical technique, the present study endeavours to verify the claims upon which the political prescriptions of politicians, social scientists and philosophers rest. Insights from epistemology (theory of knowledge) are crucial in this regard. Furthermore, a critical examination of values becomes necessary when people are no longer certain about what is important or worthwhile for their lives. For example, faced with conflicting moral standards or radically opposed ideologies, people need to think about the whole foundation of morality and of society. At this point philosophical reflection is unavoidable, even for the scientist (Njoroge and Bennaars 1986, 17).
Contemporary Kenyan society, like others in Africa, finds itself confronted by a variety of moral and political perspectives that call for philosophical reflection, and the present study seeks to contribute towards meeting this need. Moreover, the application of reason, as elucidated in the next technique below, enhances the use of the critical technique.

**D. The Rational Technique**

The word "rational" evidently comes from the word "reason". To *reason* is to provide grounds for a claim. The rational technique focuses on assessing the adequacy of the evidence upon which a claim is made. In other words, it is concerned with the logical connection, or lack of it, between the claims made and the grounds upon which those claims rest. Here insights from logic are crucial, since the central problem with which logic deals is the distinction between correct and incorrect reasoning. The logician's methods and techniques have been developed primarily for the purpose of making this distinction clear (Copi 1972, 5).

For a collection of ideas to qualify as a system of thought, it must be *internally consistent* - its various components must logically fit into one another to form a coherent whole, thereby being free from contradiction. Thus with regard to the rational technique, our focus will be on determining the extent to which the political prescriptions of various thinkers adhere to the rules of inference (Suppes 1957; Tomassi 1999).
E. Overview of the Research Methodology

The descriptive method has enabled us to acquire and present the facts upon which to undertake philosophical reflection, namely, the political realities under which Kenyan ethnic minorities live. Furthermore, on the basis of Assumptions 1.7.4 and 1.7.5 above, this study subjects classical Western democratic theory and contemporary African thought on democratic governance to indepth examination in the quest for a rationale for a set of moral principles upon which to base the constitutional protection of ethnic minorities in Kenya's emerging democracy. As such, the critical and rational techniques of philosophical reflection are the dominant ones. Our reflections are further illuminated by John Rawls' two principles of liberty and difference as outlined in the Theoretical Framework below (1.9).

1.9. Theoretical Framework

The core of the theoretical framework of the present study are the prescriptions of John Rawls' seminal work, A Theory of Justice (1971). The choice of these prescriptions is based on the fact that Rawls seeks to specifically address the plight of the least advantaged groups in society. In our case, we are thinking of the least numerically advantaged ethnic groups in Kenya's emerging democracy - a political system where numerical strength determines a group's influence in decisions pertaining to public policy. Below we outline Rawls' theory, and demonstrate how we have used it to illuminate our reflections.
The basic objective of Rawls (1971) is to provide a coherent theoretical foundation for a conception of justice that can be offered in opposition to the utilitarian point of view that has been dominant in Western ethics and political thought since the nineteenth century work of Jeremy Bentham (see Bentham 1996). Rawls' aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found in thinkers such as Locke, Rousseau and Kant:

In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness (Rawls 1971, II).

Thus for Rawls, justice is the foundation of a social system. This implies that for him, all political and legislative decisions must take place within the constraints that follow from the principles of justice. Rawls' acknowledgement of the central place of justice in social life is crucial to the resolution of ethnic minority-majority conflicts in Kenya's emerging democracy, since the neglect of it leads to the majority ethnic groups denying various entitlements to their ethnic minority compatriots.

This study has been illuminated by the following three main elements of Rawls's theory of justice:

- The quest for objectivity through "the veil of ignorance" in the determination of the principles upon which to establish a just social order.
The idea of "the veil of ignorance" is Rawls' way of appealing to those involved in negotiating constitutions to set aside short-term personal interests in pursuit of principles which would guarantee the welfare of the least advantaged in society.

- The supreme principle of equal liberty for all, with the only justification for any limitation on an individual's liberty being the guaranteeing of equal liberty to others.

- The principle of difference in the distribution of primary goods, with the only justification for any differentiation being the promotion of the welfare of the least advantaged in society.

Below we elaborate on these three elements.

Rawls presents a hypothetical group of people seeking to identify principles upon which to establish a just social order. Due to the "veil of ignorance" (lack of personal awareness of one's position in the proposed society), the negotiators will reject all conceptions of justice in which any member of society will be systematically underprivileged. The negotiators must arrive at the conception of justice that Rawls calls "justice as fairness", in which the original position of equality corresponds to the state of nature in the traditional theory of the social contract. Furthermore, it is understood as a purely hypothetical situation characterized so as to lend to a certain conception of justice (Rawls 1971, 12). Justice as fairness is articulated in two fundamental principles, namely, the principle of maximum equal liberty and the principle of difference. For Rawls, "a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal
persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed” (Rawls 1971, 13).

Once the two principles of justice as fairness are taken as established, the argument next moves to the establishment of a social order within the constraints of these principles. The two principles will discriminate between those social orders that are repressive, subservient to vested interest, or discriminatory, and those that function in the interest of providing every citizen with the best possible prospects of pursuing his or her life plan.

However, the specific interest of our study lies in the next stage of deliberation, namely, the framing of a constitution specifying the powers of government and the basic rights of citizens. The negotiators as delegates bring to the constitutional convention not only their general wisdom, but “the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on” (Rawls 1971, 197). The constitution, constrained by the conception of justice, will have to protect liberty of conscience and freedom of thought, liberty of the person, and equal political rights. Thus the principle of justice that has most bearing at the constitutional level is the principle of liberty. Rawls’ emphasis on the need to take into consideration the relevant general facts about a specific society in the course of constitution-writing is in line with our aim of providing a rationale for a set of moral principles to be included in Kenya’s constitution for the protection of Kenyan ethnic minorities, thereby addressing one of the socio-political peculiarities of the country. Furthermore, in
line with Rawls' emphasis on the principle of liberty at this stage, the set of moral principles proposed by this study is intended to protect the liberties of Kenyan ethnic minorities from the overbearing influence of their majority counterparts.

Once a just constitution is established, the negotiators move to yet another stage - they become legislators. Now constrained not only by the principles of justice, but by the particulars of the adopted constitution as well, they are to judge proposed bills and policies. Here the negotiators consider "the full range of general economic and social facts" (Rawls 1971, 199). At this point, it is the difference principle that holds center stage. The difference principle requires that social and economic policies be aimed at maximizing the long-term interests of the least advantaged under conditions of fair equality of opportunity. For example, laws favoring the privileged are excluded as unjust, unless they result in benefits which accrue maximally to the least advantaged.

Although Rawls asserts that the difference principle mainly applies to the legislative stage, he does not exclude it from the constitution-writing stage. Consequently, the present study appeals to the principle of difference as a means of ensuring the inclusion of constitutional provisions which promote the overall well-being of minority ethnic groups. In this way, the majority's liberty to write a constitution that suits its preferences will be limited by the requirement that the constitution promote the equal enjoyment of liberty by the least numerically advantaged.
In view of the foregoing outline of Rawls' theory, the present researcher concurs with Gorovitz (1976, 289) that Rawls redirected moral and political philosophy with a major work that, in the best tradition of Aristotle and Mill, may well admit of as much precision as the subject matter allows.

1.10. Literature Review

As earlier noted, the aim of the present study is to provide a rationale for a set of moral principles to serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy. Towards this end, the following main categories of literature have been consulted:

- **Social Scientific studies on the plight and aspirations of Kenyan ethnic minorities.** This category of literature has furnished the present study with the socio-political facts on which it has undertaken philosophical reflection.

- **Interdisciplinary studies of the rights of ethnic minorities.** These have shed light on the main historical, legal and ethical ideas pertaining to the political rights of ethnic minorities.

- **Traditional Western liberal democratic philosophy.** For historical reasons, this has greatly influenced the contemporary discourse on democratic governance in present-day Kenya.

- **Contemporary African and Western social scientific and philosophical discussions on suitable democratic models.** In combination with traditional Western democratic philosophy, these have
comprised the main sources of ideas for scrutiny using the techniques of philosophical reflection (see 1.8 above).

1.10.1. Social Sciences on the Plight and Aspirations of Kenyan Ethnic Minorities

Social sciences investigate the origin, development, institutions and ideas involved in human groups (Doorne 2000). The social scientists assume that we human beings "are just as much part of nature as other natural objects, conditions, and phenomena and that, although we possess unique and distinctive characteristics, we can nevertheless be understood and explained by the same methods by which we study nature" (Frankfort-Nachmias and Nachmias 1992, 7). Thus common to the disciplines that fall within this category is the attempt to apply the method of the natural sciences to the study of the human person as an individual and in a group. For this reason, observation, experimentation, case studies and inductive generalization are some of the salient features of their methodology. As Lipset (1960, 9) correctly observed, the increasing collaboration, as well as the acceptance of common concepts and methods, among those studying political behavior within the field of political science, sociology, psychology, and anthropology is evidence of the basic unity of the social sciences.

Wagley and Harris (1964, p.xiv) observed that the problems of ethnic minorities are a subject to which each of the social sciences may contribute. Prejudice, discrimination, and hatred toward a group of people may be studied in terms of its individual manifestations by psychologists, who may ask, for example: "Is there a
prejudiced personality type?” Likewise, the phenomenon may be studied in its economic aspects, posing the question, “What is the effect of prejudice and discrimination on the livelihood of the minority group?” Or “What is the cost of prejudice and discrimination to the society as a whole?” Furthermore, the group manifestations of minorities may be examined by sociologists, who may ask, “What are the formal and informal institutions that a society maintains between such groups, and how do they function?”

It is vital for political philosophers to understand socio-political realities before making prescriptions for their improvement. In earlier periods, they attempted to obtain such information primarily by collating available evidence from the historical record about a wide range of political systems in various human societies. As Miller (2003, 14-15) notes, this evidence was somewhat impressionistic and often unreliable. In this respect, urges Miller, political philosophers today can build on more solid empirical foundations by virtue of the remarkable expansion of the social sciences in the 20th and 21st centuries. Consequently, in the quest for an adequate understanding of the plight and aspirations of Kenyan ethnic minorities, our second and third chapters are based on the relevant social scientific literature.

Chapter 2 investigates the history of the struggle for recognition by Kenyan ethnic minorities. It is informed by three categories of studies by social scientists.

First, several studies undertake a continental survey of democratization in Africa in the last few decades, among them Bayart (1993), Ambrose (1995), Conteh-

Second, some studies focus on Kenya’s democratization from the late 1980s. These include Chege (1994), Muigai (1995), Haugerud (1995), Ngunyi (1996), Ajulu (1998), Throup and Hornsby (1998), Klopp (2001a), Chweya ed. (2002), Kanyinga (2003), Brown (2004), Mitullah et. al. eds. (2005), Murunga and Nasong’o (2006) and Wanyande et. al. eds. (2007). Their insights were useful in shedding light on the twists and turns of efforts at constitutional reform in the country, thereby informing the discussion in Chapters 2 and 3. However, as is typical of traditional Western works on liberal democracy, most of these studies, although dealing with the Kenyan situation, do not interrogate the aspirations of the country’s ethnic minorities.

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Kenya. Wasserman (1973a, 1973b) highlight the struggle of Kenyan Europeans to adapt to the political realities of independent Kenya. Mute (2002) investigates the participation of Kenyan minority groups in the constitutional review process. Makoloo (2005) and Oloo (2007) examine the plight of these communities in the context of transition politics. Nevertheless, these works are largely empirical, and therefore rarely undertake normative reflection on ways of alleviating the plight of Kenyan ethnic minorities.


The foregoing works, consulted in the writing of Chapters 2 and 3 of this study, are descriptive, utilizing the method of the social sciences, which by virtue of being empirical, endeavours to report the way things are, and largely limits itself to only those theories and recommendations that are directly indicated by the facts on the ground. This approach is indispensable to a resolution of our research
problem, because it is meaningless to undertake philosophical reflection on
democratic governance in a vacuum.

However, the usefulness of the studies above to our purpose is limited by their
emphasis on empirical investigation, which implies that they do not adequately
avail themselves of the conceptual tools of philosophical reflection (see 1.8
above). Put differently, the empirical approach of the social sciences does not
allow the human mind to adequately explore a problem way beyond the data
gathered, nor beyond the theories employed to gather them. This study therefore
makes use of the information supplied by such empirical investigations, but
endeavours to transcend them through the use of the techniques of philosophical
reflection (see 1.8 above).

1.10.2. Contemporary Interdisciplinary Studies of the Rights of
Ethnic Minorities

Chapters 4 to 6 of this study seek to answer the question of the moral justification
for various forms of dissent by Kenyan ethnic minorities in pursuit of their
aspirations. Towards this end, the researcher consulted several interdisciplinary
studies on the rights of ethnic minorities.

Chapter 4 examines the moral justification for non-violent civil disobedience.
Among the thinkers whose ideas have been considered in this regard are the
sixteenth-century French jurist and political philosopher Étienne de la Boétie
(2002), the nineteenth-century American libertarian Henry David Thoreau (1848,
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Social scientific studies on non-violent civil disobedience include Paullin (1944), Sharp (1959, 1973), Zunes (1997, 1999) and Markovits (2005). Among the works that examine non-violent civil disobedience from a philosophical perspective are Macfarlane (1968), Hall (1971), Farrell (1977), Feinberg (1979), Lyons (1998), and Sagi and Shapira (2002). However, most of these works, written in a Western political milieu, take liberal democracy for granted, and therefore do not examine the unique experiences of post-colonial African states. The present study has sought to contribute towards the filling of this lacuna.

Chapter 5 interrogates the moral justification for secessionist agitation by Kenyan ethnic minorities. Secessionism has mainly been advocated by Kenyan Somalis. However, literature by members of the Kenyan Somali community articulating their secessionist aspirations is very scanty. Abdullahi (1996) might have been inspired by these aspirations, much as he takes a continental view of the issue of

Chapter 6 examines the moral justification for secessionist wars. This examination is necessitated by the fact that existing states typically vehemently resist secession, often resulting in violent conflict between them and the units wishing to secede from them, as was the case with the Somali secessionist movement in the north-eastern part of Kenya. Among the social scientific works on secessionist wars are Kelsay and Johnson eds. (1991), Lyons (1996), Moore ed. (1998), Calhoun (2001) and Garrett (2001). Among philosophical works relevant to secessionist wars are Luce (1891), Robertson (1901), Russell (1915), Ramsey (1968), Gert (1969), Walzer (1977, 2004), Paskins and Dockrill (1979), Wasserman (1987), Norman (1995), Luttwak (1999), Orend (2000), Rodin (2002),
Coppieters (2003b), Kaufman (2004), McMahan (2004) and Moseley (2004, 2009). Nevertheless, many of the philosophical works on the ethics of war limit themselves to the Western Just War tradition, thus the relevance of the present study, which takes into account the peculiar realities of post-colonial Africa in general, and of Kenya’s ethnic minority-majority tensions in particular.

1.10.3. Moral Principles for the Constitutional Protection of Kenyan Ethnic Minorities

Chapter 7 of this study offers a rationale for a set of moral principles for the constitutional protection of Kenyan ethnic minorities. In this regard, the researcher consulted literature on traditional Western liberal democratic philosophy, as well as contemporary African and Western social scientific and philosophical works on democratic governance.

A. Traditional Western Liberal Democratic Philosophy

The major features of traditional Western liberal democracy include individual freedom (which entitles citizens to the liberty and responsibility of shaping their own careers and conducting their own affairs), equality before the law, universal suffrage and education, freedom of expression and freedom of assembly. Many of these features have been proclaimed in historic documents such as the U.S. Declaration of Independence (Congress of the United States 1776) which asserted the right to life, liberty, and the pursuit of happiness, the French Declaration of the Rights of Man and of the Citizen (National Assembly of France 1789) which affirmed the principles of civil liberty and of equality before the law, and the
Atlantic Charter (UK and US 1941) which affirmed the “four freedoms”, namely, freedom of speech, freedom of religion, freedom from want, and freedom from fear of physical aggression.

Philosophers in the Western liberal democratic tradition have argued for the need to respect the rights of individuals in striking a balance between even the democratic state and its constituents. This tradition may be traced back to Plato’s famous student, Aristotle, in his Politics (Aristotle 2009). Aristotle presents a piecemeal and down-to-earth evaluation of constitutions and institutions of his day. Although he contributed to the naturalist orientation of the liberal tradition, Aristotle’s approach was significantly different from it, in that he insisted that nature herself has established the authority of rulers over ruled, just as she has set masters over slaves, husbands over wives, and fathers over children. Nevertheless, he advocated for a much wider participation in politics than did Plato, thus somehow contributing to the liberalism of nineteenth-century Europe. His Politics successfully combined an empirical investigation of the facts and a critical inquiry into their ideal possibilities, thus providing challenging models of study in both political science and political philosophy. However, convinced that the Greeks were superior to all other nations, Aristotle paid no attention to the rights of minority ethnic groups.

During the millennium in which the Papacy dominated the political life of Western Europe (fifth to fifteenth centuries C.E.), much political theorizing dealt with the outstanding political issue of the time, namely, the protracted struggle for supremacy between the Roman Catholic church and the Holy Roman Empire. The
works of Augustine of Hippo, Thomas Aquinas and Dante all sought to resolve the conflict between religion and politics (Augustine 1887, 1955; Aquinas 1981; Singleton ed. 1970). However, Niccolò Machiavelli transcended the traditional church-state debate by realistically evaluating the problems and possibilities of governments seeking to maintain power (Machiavelli 1998, 2009). While all these works are part of traditional Western political philosophy, they examine non-democratic political arrangements, and are therefore largely irrelevant to the focus of our study.

With the advent of the Renaissance and the Protestant Reformation, liberal democratic thought began to flourish in Western Europe, mainly through the work of two 17th century English philosophers, Thomas Hobbes and John Locke (Hobbes 1904; Locke 1955, 1960). It is in this new context that ideas of a social contract became appealing. Abuse of power by the state, the question of just rebellion, and the extent of the individual’s obligation to obey the state became central issues. Nevertheless, the focus of both Hobbes and Locke was the liberty of the individual rather than that of ethnic groups.

Despite its monarchist position, Hobbes’ *Leviathan* (1651, 1904) conceded that it was unrealistic for the individuals entering into covenant with the sovereign to give up their right to life to the sovereign, since they submitted to the sovereign for the very reason of ensuring the protection of their lives. This concession could be used by members of minority ethnic groups to justify certain of their actions that go against the wishes of the majority in a democratic society. Nevertheless, Hobbes’ overall political thought encourages the subjection of individual and
sectional interests to the sovereign, thereby significantly discouraging ideas of individual and group freedoms such as would suit ethnic minorities in present day Kenya.

In his *Second Treatise of Government* (1690, 1960), John Locke challenged the nature of the state as conceived by Thomas Hobbes. In brief, Locke argued that sovereignty did not reside in the state but with the people, and that the state is supreme, but only if it is bound by civil and what he called "natural" law. Locke was an ardent advocate of the rule of the majority, insisting that civil society commences when the majority of members of a group enter into contract with one another. Locke further held that revolution was not only a right but also often an obligation when the government evidently ceased to serve the interests of the people. However, in step with his times, Locke did not address the need to safeguard the liberties of ethnic minorities, concentrating instead on the liberties of individuals and the supremacy of the majority opinion. Nevertheless, his discussion of the place of the consent of the governed is relevant to any discussion of constitutional democracy such as is undertaken in the present work.

During the modern era in Western thought (17th to 19th centuries c.e.), important contributions to republican and democratic ideals were also made by the French philosophers Jean Jacques Rousseau, who expressed ideas similar to those of Locke, and the Baron de Montesquieu, who proposed a separation of governmental powers in prerevolutionary 18th-century France similar to that later embodied in the U.S. Constitution (Rousseau 1950; Montesquieu *et. al.* 1952).
Again the focus of both authors was the entrenchment of majoritarian rule rather than the protection of the liberties of ethnic minorities.

The nineteenth century English philosopher and social reformer, Jeremy Bentham, advanced utilitarianism as the basis for reform (Bentham 1996). He claimed that one could scientifically ascertain what was morally justifiable by applying the principle of utility. Nevertheless, his insistence that actions were right if they tended to produce the greatest happiness for the greatest number of people excluded any significant commitment to the interests of minorities, ethnic or otherwise.

One of the most prominent 19th Century advocates of the regulation of state action for the promotion of the liberty of the individual was Herbert Spencer. Setting out from a Darwinist perspective of nature, Spencer stated the theoretical basis of many of his political views in Social Statics (1851, 1969). For him, the state ought to limit its activities to promoting harmony among its citizens through criminal and civil law, and to defending its citizens against external aggression. Nevertheless, the laws of a liberal democratic state such as the one envisaged by Spencer are a reflection of the wishes of the majority. As such, the wishes of the minority are trodden upon, so that in the end the theoretical advocacy for the individual’s liberties proves to be inapplicable in practice. Furthermore, the ethnic factor, which is dominant in contemporary Kenyan politics, was evidently absent from the kind of political arrangement that Spencer presupposed.
Another influential nineteenth-century advocate of the regulation of state action in favour of individual liberty was John Stuart Mill. Nevertheless, while Spencer presented a deductive argument for his position, Mill presented an inductive one. In *On Liberty* (1999), Mill contends that under no condition should the majority enforce its will on the individual in pursuit of the individual’s own good. In the light of the liberal affirmation of the right to association, Mill’s affirmation of the need to protect the individual from the tyranny of the majority can be applied directly to minority ethnic group rights. However, the only justification Mill finds for the need to protect the freedom of the minority is that doing so brings benefit to the majority. Such a view effectively treats the minority as a mere means to majority welfare, thereby demeaning the intrinsic worth of individuals holding a minority opinion.

Views such as those of Locke, Bentham, Spencer and Mill above, with their emphasis on the freedom of the individual, are subsumed under the title of “liberal democracy”. Western democratic thought is so dominated by this outlook that Fukuyama (1992) declared that in the light of the collapse of Communism and the “victorious” emergence of the USA from the Cold War, it was evident that the end had come for the struggle between different ideologies, because, purportedly, the universalization of Western liberal democracy had triumphed over other contesting democratic and economic alternatives. Similarly, Sophine (2000) argues that liberal democracy has the potential to guarantee development in Africa. For Sophine, the reason liberal democracy seems to be failing in the continent is that many African states are in haste to consolidate their democracies and impatient in achieving the developmental pace of the West.
It is also evident from the foregoing review that the history of Western political philosophy manifests scarcity of specific reflection on the liberties of minority ethnic groups in democratic societies. As pointed out in the Statement of the Problem (1.2), this is hardly surprising, since many of the Western proponents of liberal ideas (Aristotle, Jean Jacques Rousseau, John Locke, Jeremy Bentham, John Stuart Mill and Herbert Spencer among others) lived in societies that conquered, subjugated or assimilated ethnic minorities, so that the minority views in their societies were assumed to be a purely individual matter.

B. Contemporary African Political Thought on Democratic Governance

Several African scholars and politicians have made prescriptions on how to organise post-colonial pluralistic African states. These have supplied some material for reflection on a rationale for a set of moral principles upon which to base the constitutional protection of Kenyan ethnic minorities.

Some African philosophers have argued that the answer to Africa’s quest for a workable democratic model lies in the continent’s indigenous political systems, with appropriate modifications relevant to current African circumstances. Such scholars include Wamba (1990), Eboh (1990, 1993), Mojola (1996), Wiredu (1996), Chweya (2002), Wamala (2004), Offor (2006) and Moshi and Osman eds. (2008). Others have opted for an eclectic approach to the formulation of an appropriate theory of democracy in Africa, insisting that ideas from other parts of the world can enrich such a theory. These include Gyekye (1997), Owolabi (2004) and Fayemi (2009).
Apart from the prescriptions of African philosophers, several African social scientists and politicians have presented their views on the kind of democratic model best suited to post-colonial African societies. Their prescriptions can be broadly divided into pluralist, assimilationist and social democratic views.

Pluralism advocates accommodation of cultural diversity in a body politic. A number of pluralist options exist, among them multipartism, federalism, proportional representation, or a combination of two or three of these. There seems to be a wide consensus in Kenya on the acceptability of multipartism. Nevertheless, federalism has generated heated debate among Kenyans. Several studies outline the history of federalism in Kenya, among them Murungi (1995), Klopp (2002) and Oyugi (2003). Further afield, some studies seek to define the concept of federal government, among them Wheare (1964), Riker (1964) and Dikshit (1975).

Kenyan supporters of federalism often argue that ethnicity is a fact of life in the country, to be addressed rather than to be suppressed in the name of "nation-building". Among Kenyan supporters of federalism are Okondo (1964) and Pussy (1995). On the other hand, those opposed to federalism concede that ethnic differences do exist, but argue that federalism will exacerbate ethnic differences, and tear the country apart (Odinga 1967; Mboya 1990; Hyder 1994; Nduati 1995; Kimondo 1996; Choto 2002).
As a result of the debate on federalism in Kenya having taken place in the context of its colonial origins and the overwhelming rejection of the system by the majority of Kenyans at independence, it has been difficult to undertake objective discussion of the system in present-day Kenya (Murungi 1995, 8). Through the use of the tools of philosophic inquiry (see “Research Methodology” above), the present study has endeavoured to transcend the biases for and against federalism in pursuit of an objective assessment of its internal coherence and applicability to contemporary Kenya.

The assimilationist perspective asserts that the most adequate way to address problems of ethnic tensions in post-colonial African countries is to work towards building a sense of shared destiny among the various ethnic groups. It is in this context that we often find references to “nation building” - the process of forging a single people out of the various ethnic groups within a state. One of the most articulate assimilationists in the African context is Frantz Fanon (1967). For him, the task of leaders in post-colonial African states is to promote a sense of unity by discouraging sectional consciousness such as that caused by ethnicity. For Fanon, the one-party system of government is best suited for this purpose. Others who have advocated a single-party system of government in the endeavour to promote social cohesion are Julius Nyerere (1961), Oginga Odinga (1967) and Daniel arap Moi (1986). Kibwana (1988) Critically examines the one-party system of government in Africa, with special reference to Kenya, Tanzania and Zambia.

Apart from the one-party system common in African countries in the 1960s to the 1980s, Yoweri Museveni’s no-party system is an effort at assimilation (Museveni
Both proponents of one-party and no-party systems of government insist that federalist and multi-party political systems aggravate ethnic consciousness among the masses, thereby heightening internal divisions in post-colonial African states, and as such ought to be discouraged.

While the one-party system has long been discredited as a recipe for autocracy based on the experiences of many African states, the no-party system is relatively new, and so literature on it is scanty. Oloka-Onyango (1997) focuses on the legal dimension of the politics of constitution making from the dawn of Uganda's independence, rather than on a philosophical scrutiny of the basic assumptions of the no-party system. Of great relevance to the present study is the contention by Wiredu (1996, 172 ff.) that in the majoritarian multiparty system practised in many African countries today, the right of the minority representatives and their constituencies to meaningfully participate in the actual making of decisions is rendered nugatory. Wiredu contends that many pre-colonial African communities were effectively governed through a no-party consensual representative democratic system, and prescribes this model for contemporary African states. Thus part of the task of the seventh chapter of the present study is to employ the tools of philosophical reflection to determine the extent of the suitability of the no-party system for the protection of Kenyan ethnic minorities.

In the African struggle against single party dictatorships from the late 1980's, a major point of contention among scholars was the kind of democracy the continent needed. On the one hand, some like Kibwana (1990) and Ibrahim (1993) vouched for liberal democracy as espoused by classical Western political theory.
On the other hand, some thinkers saw both pluralism and assimilationism as described above as versions of Western liberal democracy, and therefore inapplicable to the unique socio-economic conditions in contemporary Africa. Consequently, such scholars argued for social democracy in place of liberal democracy. Thus Ake (1996) advocated a form of democracy that places emphasis on concrete political, social and economic rights, as opposed to liberal democracy which emphasizes abstract political entitlements. Similarly, for Mafeje (2002), social democracy in Africa means, in practice, that over and above the civil liberties championed by liberal democracy, citizens by virtue of belonging will be entitled to decent livelihood and access to productive resources. Oruka (1991, 1997) presents arguments for social democracy very similar to those of Ake (1996) and Mafeje (2002). Chapter 7 will, among other things, seek to interrogate the extent of the applicability of the concept of social democracy to the protection of the rights of Kenyan ethnic minorities.

C. Contemporary Social Scientific Research on The Protection of Ethnic Minority Rights

A number of studies have specifically examined ethnic group rights from a global and historical viewpoint, among which are Ronen (1979), Cass (1992), Castelino (1999) and Preece (2001). Others have analysed the concept of self-determination from a variety of viewpoints. Capotorti (1992) seeks to answer the question: “Are persons belonging to ethnic, religious and linguistic minorities actually entitled to the rights of minorities contained in international instruments, or should the minority groups, as collective entities, be considered the real legal holders of such rights?” Others who have analysed the concept of self-determination include
Margalit and Raz (1990), McDonald (1991), Galenkamp (1993), Freeman (1995),

Other studies have explored constitutional means of minimizing minority-majority
conflicts in contemporary societies. Roth (1992), Fink (2000), Otongo (2003) and
Campbell (2004) examine constitutional protections for ethnic minorities in the
light of international instruments. Ihonvbere (2000a) aims to demonstrate the
critical place of constitutional reforms in the effort to address issues of identity,
nationality, citizenship, gender, accountability and social justice in the political
process. Among other studies that offer suggestions on how to minimize minority-
majority conflicts are Dinstein and Tabory eds. (1992), Coakley (1992), Safran

Studies on the workings of representative democracy were also found to increase
insight into the kind of measures that could be taken to secure the rights of
Kenyan ethnic minorities. These include Lindsay (1943), Voegelin (1952), Curry
Jr. and Wade (1968), Cook and Morgan (1971), Plamenatz (1973) and Macedo ed.
(1999). Of special relevance to the present study was David Held’s seminal work,
*Models of Democracy* (1996), which furnished the researcher with a wide purview
of approaches to democratic governance.

However, some scholars partially or wholly dismiss the idea of group rights. For
example, Nickel (1997) contends that assigning rights to groups is intellectually
inappropriate, because groups, particularly those with no geographical territory of
their own, lack effective agency and clear identity, and are therefore often unable to play an active role in exercising, interpreting and defending their rights. Similarly, for Brown (2000), one ambiguity of multiculturalism (accommodation of group rights in Western cosmopolitan societies) as advocated by Kymlicka (1995) is that it seems to promise a community which benefits from and celebrates diversity, while also promising to embed the individual members of that community within one ethnic segment.

It is noteworthy that many of the foregoing studies were undertaken in a Western intellectual milieu, with no substantive consideration of the socio-political conditions in post-colonial Africa. Besides, most of them approach the issue of group rights from the point of view of sociology, law or political science, leaving the need for philosophical reflection on such rights largely unattended, hence the relevance of the present study.

**D. Contemporary Philosophical Discussion on the Protection of Ethnic Minority Rights**

The Western liberal emphasis on the autonomy and attendant rights of the individual, traceable to the ancient Greeks and articulated by modern European philosophers such as Locke and Mill, has also been advocated by many contemporary Western thinkers, among whom are Beran (1977, 1984), Wellman (1995, 2001) and Lyshaug (2004). Although Wollheim (1962) is part of this tradition, he can be seen as a precursor to contemporary discussion on the protection of ethnic minorities in a democracy, as he challenged the raw majoritarian approach long associated with democracy. Wollheim pointed out that
it is not always clear which legislation should be enacted in a democracy given the choices of the individual citizens, if all we take into account are the first choices of the citizens. Yet in a purely majoritarian system, a candidate can be declared the winner with 30% of the votes if the remaining 70% of the votes are fragmented. Nevertheless, Wollheim's incisive analysis does not focus on democracies in which ethnicity greatly determines many of the voters' choices. As such, there is need to utilize his incisive analysis in the quest for moral principles for the constitutional protection of Kenyan ethnic minorities.

Concerns such as those expressed by Wollheim above eventually led to the advent of liberal egalitarianism - the view that conditions ought to be created to facilitate the full enjoyment by all citizens of their freedoms. The most influential statement of liberal egalitarianism is John Rawls' seminal work, *A Theory of Justice* (1971), with its emphasis on the need to cater for the least advantaged segment of society in the process of writing a constitution (see 1.9). Rawls' work also proved to be an important precursor of contemporary liberal philosophical defense of ethnic minority rights. Early discussions of Rawls's argument include Barry (1973), Daniels ed. (1975) and Wolff (1977). Among more recent discussions of Rawls' theory are Kukathas and Pettit (1990) and Talisse (2000).

The second most influential version of liberal egalitarianism is that developed by Ronald Dworkin (2000), in which he argues that society should move to relieve individuals of only those undesirable circumstances for which they are not directly responsible. Dworkin insists that this is the only way to strike the right balance between collective and personal responsibility. Macleod (1998) has offered a
detailed critique of Dworkin’s theory of justice. However, the focus of Dworkin and many of his adherents is on economic redistribution rather than on adequate political representation, thus rendering their theories less relevant to the interest of the present study than Rawls’ egalitarianism. What is more, in sharp contrast to his treatment of wealth inequality, Dworkin (2000) rejects the notion that inequalities of political influence should be reduced by neutralizing the advantages of natural political talents. The idea of the free expression of natural political talent could easily be misused by leaders of Kenyan ethnic majorities to the discomfiture of their ethnic minority counterparts. Other influential statements of liberal egalitarianism include Gutmann (1980), Ackerman (1980), Arneson (1989), Cohen (1989) and Roemer (1993). All of these works share the underlying intuition about eliminating unchosen inequalities, while providing space for inequalities due to choices for which individuals are responsible.

With the collapse of the Soviet Union and the balkanisation of its former East European allies at the beginning of the 1990s, a number of Western liberal political theorists began to reflect on the rationale for protecting the rights of minority cultural groups. These reflections were further informed by the accelerated pace of immigration into Western countries from Africa and Asia (see for examples Castles et. Al. 1988; Koopmans and Statham 1999). One of the leading Western proponents of ethnic group rights in pluralist liberal societies is the Canadian political philosopher, Will Kymlicka (1989, 1995). While liberalism has often been criticized for being excessively individualistic and therefore unable to accommodate the rights of cultural groups, Kymlicka argues that it contains a broader account of the relationship between the individual and society - and, in
particular, of the individual’s membership in a community and a culture. Kymlicka (1995) argues that depriving an ethnic minority group of rights such as language and access to land may leave it culturally disadvantaged, and therefore unable to fully participate in a democratic society. However, for Favell (1998), there are methodological and interpretative difficulties of combining normative and empirical goals in Kymlicka’s work, weaknesses that emanate from the Rawlsian influence in it.

Furthermore, other Western political philosophers are of the view that liberalism cannot adequately cater for cultural group rights, and have posited communitarianism in its place. Thus another Canadian political philosopher, Charles Taylor (1994), contends that the demand for recognition of cultural groups is given urgency by the link between recognition and identity. Taylor’s thesis is that members of a cultural group can suffer real damage if the people or society around them mirror back to them a demeaning picture of themselves. Consequently, urges Taylor, due recognition is not just a courtesy we owe people; rather, it is a vital human need (Taylor 1994, 25-26). Taylor (1994) further argues that the so-called difference-blind approach to politics tends to negate the identity of groups by forcing people into a homogeneous mold that is untrue to them. Minority cultures are then ‘forced to take alien form’, that of the dominant culture. The supposedly fair and difference-blind society is then not only ‘inhuman’ (by suppressing identities), but also ‘highly discriminatory’ against minority cultures.

Similarly, Gutmann (1994) contends that within a liberal democratic framework, recognizing and treating members of some groups as equals requires public
institutions to acknowledge rather than ignore cultural particularities, at least for those people whose self-understanding depends on the vitality of their culture. Other influential communitarians include Sandel (1982), Walzer (1983) and MacIntyre (1988).

On his part, Habermas (1995) argues that various aspects of liberal and communitarian theory can be combined to support a universally shared civic culture, one which recognizes and accommodates cultural differences while at the same time providing a "neutral" public sphere in which various groups can communicate, compete, and carry on the democratic project.

The foregoing contemporary philosophical works on ethnic minority-majority relations have been carried out in the Western political context. As such, they do not address the unique contemporary African political milieu of ethnic minority-majority conflicts. Our study has sought to contribute towards filling this gap.

1.10.4. Overview of the Literature Review

A consideration of the foregoing literature review leads to the conclusion that this study is pertinent for at least five reasons. First, while the available social scientific studies on the plight of Kenyan ethnic minorities shed vital light on the bear facts, they, by virtue of their empirical methodology, do not make far-reaching prescriptions on the way to address the problem. Second, while the interdisciplinary studies of the rights of ethnic minorities to self-determination provide us with the relevant historical, legal and ethical ideas, most of them neither undertake a philosophical quest for a democratic model that adequately
caters for the rights of ethnic minorities, nor do they focus on the post-colonial African context. Third, contemporary African thought on democratic governance also pays insignificant attention to the constitutional protection of ethnic minority rights. Fourth, while traditional Western philosophical thought on democracy constitutes the theoretical underpinning of the bulk of contemporary philosophical reflection on democracy, it too almost entirely excludes discussion on the constitutional protection of the rights of ethnic minorities. Fifth and most important, the bulk of contemporary philosophical inquiry into the protection of ethnic minority rights has so far been undertaken in the West, thus the urgent need for similar inquiry within the post-colonial African context.

Thus from the various insights yielded by a critique of the repertoire of literature consulted, along with the researcher’s own philosophical reflection on various possible solutions to minority-majority tensions in present-day Kenya, the present study has presented a rationale for a set of moral principles upon which to base the constitutional protection of Kenyan ethnic minorities. Our reflections have been enlightened by John Rawls’ careful consideration of social justice, with his specific focus on the need to protect the interests of the least advantaged members of society in the process of constitution-making (see 1.9).
Chapter 2: History of Kenyan Ethnic Minority Aspirations

2.1. Introduction

As pointed out in the previous chapter, the over-arching goal of this study is to provide a rationale for a set of moral principles upon which to base the constitutional protection of Kenyan ethnic minorities. Towards this end, the present chapter and the next seek to answer our first research question: What are the political aspirations of Kenyan ethnic minorities? (1.2.1).

In order to address this question adequately, there is need to answer three further questions:

(a) Who are Kenya’s ethnic minorities?

(b) What demands do these communities make on the Kenyan polity?

(c) What is the ultimate cause of discontent among these communities?

On the basis of relevant empirical studies by social scientists (chiefly historians, political scientists and lawyers), this chapter addresses Questions (a) and (b) above, while the next chapter answers Question (c).

Mute (2002, 162-163) correctly notes that in Kenya, the majority-minority status debate has drawn from the following classifications and issues, among others:

- Africans versus Europeans (mainly settlers), Asians and others.
According to Oloo (2007, 180-181), experience in Kenya shows that demands for protection of minority rights emanate from two broad categories of social formations, namely, ethnic constituencies and an array of groups that transcend specific ethnicities. The former comprises distinct socio-cultural groups that consider themselves historically less privileged in access to opportunities and public resources, while the latter includes interest groups such as women, children, the aged, and persons with disabilities, among others. While an examination of the plight of the latter category is a worthwhile undertaking, the present study limits itself to the former, on the basis of the fact that numerical disparities among Kenya’s ethnic groups, coupled with political mobilization along ethnic lines, have resulted in social, political and economic inequities that threaten the stability of the country (Society 2006). Consequently, this chapter limits itself to the presentation of an outline of the history of the aspirations of Kenyan ethnic minorities.
The present chapter sets out with an examination of the legal framework for ethnic minority rights in Kenya. It then goes on to outline the various and varying demands of Kenyan ethnic minorities, namely, the agitation for federalism during the writing of the independence constitution and during the constitutional review at the dawn of this century, the Somali and coastal secessionist aspirations, efforts of national minorities to ensure that they enjoy all the privileges of citizenship, the struggle of pastoralists and hunter-gatherers to protect their culture and natural resources against encroachment by agriculturalists and industrialists, and the struggle of ethnic minorities generally for adequate representation. The chapter concludes that there is need to address the root of ethnic minority discontent in Kenya today, instead of glossing over it in the name of "nation-building" as the Kenyatta, Moi and Kibaki regimes have done.

2.2. The Legal Framework for Ethnic minority Rights in Kenya

This section traces the development of the legal framework for ethnic minority rights in Kenya from the dawn of the country's independence in 1963 to the present. This will hopefully lay the ground for the outline of the aspirations of Kenyan ethnic minorities in the subsequent sections of the present chapter.

By and large, the 1963 Kenyan constitution was modeled after the Western liberal democratic tradition, with its emphasis on the rights of the individual citizen. Originally Chapter 2 of that constitution was titled "Protection of Fundamental Rights and Freedoms of the Individual", and acknowledged the typical individual rights such as freedom of association, movement, conscience and expression (Republic 1963). In due course, Chapter 2 of the 1963 constitution was converted
into Chapter 5 (see Republic 2008a). In contrast, neither the original nor the amended versions of the 1963 constitution had any corresponding chapter on the rights of ethnic groups. Indeed, it did not make any mention of minorities of any kind.

Nevertheless, the 1963 constitution had a few provisions designed to cater for ethnic minorities, chiefly the one concerning regional governments (Republic 1963, Chapter VI). This provision was championed by ethnic minorities who feared the domination of the two major ethnic groups, namely, the Kikuyu and the Luo (see 2.3 below). Regional governments ensured that decisions concerning local matters could be taken at the regional level, and the regions had a considerable degree of ethnic homogeneity or similarity. Besides, the perspectives of the regions were articulated at the central government level through the Senate, which was composed of representatives from the forty original districts and the Nairobi area (Republic 1963, Sect.35). Indeed, under that constitution, the term “National Assembly” referred to the two houses of parliament, namely, the Senate and the House of Representatives (Republic 1963, Sect.34). Furthermore, the constitution recognised customary law (Republic 1963, Sects.21 (12), 208 (5)), and to this extent acknowledged the ethnic diversity of the country. It also recognised a very limited right of “tribes”, as corporate entities, to own land (Republic 1963, Sects. 208 (5), (7) and (8)).

The 1963 constitution provided for specially elected members in the House of Representatives (Republic 1963, Sects.37-39). However, it is not clear what the intent of the specially elected seats was. It is noteworthy that the specially elected
members were themselves elected by the elected members of the House of Representatives (Republic 1963, Sect.39 (2)). As such, it is unlikely that such specially elected members could adequately represent ethnic minorities. With the abolition of the bicameral parliament in 1964, the specially elected members' seats were converted into twelve seats for nominated members “to represent special interests” (Republic 2008a, Sect.33 (1)). Until 1997, the president had a free hand in the said nominations. However, with the Interparliamentary Parties Group (IPPG) accord in the run-up to the 1997 General elections, the constitution was amended to provide that the parliamentary parties would nominate persons to the twelve seats on the basis of the parties’ strength in parliament (Republic 2008a, Sect.33 (3)). In practice, this implied that the seats served party interests rather than the special interests they were meant to cater for.

One piece of legislation that specifically addresses the emotive issue of inter-ethnic relations is The National Cohesion and Integration Act of 2008, which outlaws discrimination on ethnic, religious or racial grounds (Republic 2008b). In fact, it states that “It shall be unlawful for any public officer, while in charge of public resources and without justification, to distribute resources in an ethnically inequitable manner” (Republic 2008b, Sec.11 (2)). The Act goes on to require that no single ethnic group occupies more than a third of the positions in a government institution (Republic 2008b, Sec.7 (2)). Moreover, to enforce its provisions, it establishes a National Cohesion and Integration Commission (Republic 2008b, Sec.15). Nevertheless, the tenor of this Act is the promotion of a homogenous society through the elimination of causes of inter-ethnic tensions. This is evident when we consider the word “integration”, which implies a homogenizing project.
Indeed, the *American Heritage Dictionary* defines the verb “integrate” as “To make into a whole by bringing all parts together; unify.” As illustrated in the subsequent sections of this chapter, integration is a goal which some ethnic minorities are unwilling to subscribe to, as they are keen to maintain their cultural identities. In other words, such ethnic groups prefer a pluralist rather than an assimilationist legal framework.

Kenyan voters ratified a New Constitution on 4th August 2010, which was subsequently promulgated on 27th August 2010. Consequently, the legal framework for ethnic group rights improved somewhat. In its list of national values and principles of governance, the Constitution includes “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized” (Republic 2010a, Art.10 (b)). Ethnic minorities can, therefore, use one or more of these elements as a basis for litigation whenever they feel that their rights have been violated. Besides, the Constitution lists ethnicity among the grounds upon which the state as well as the citizens are forbidden to discriminate against any person (Art.27 (4) and (5)).

Furthermore, Article 56 of the Constitution is titled “Minorities and Marginalised Groups”. It states:

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—
(a) participate and are represented in governance and other spheres of life;
(b) are provided special opportunities in educational and economic fields;
(c) are provided special opportunities for access to employment;
(d) develop their cultural values, languages and practices; and
(e) have reasonable access to water, health services and infrastructure
(Republic 2010a. Art.56).
Of great relevance to the present study is Article 56 (a) of the Constitution, which obligates the state to facilitate the participation and representation of minorities in governance and in other spheres of life. The Constitution also requires parliament to enact legislation to promote the representation in parliament of, among others, “ethnic and other minorities” (Art.100 (d)). Indeed, the Constitution also requires that all political parties “respect the right of all persons to participate in the political process, including minorities and marginalized groups” (Art.91 (1) (e)).

While going by the provisions above, the Constitution seems to cater for the interests of ethnic minorities, there are serious questions about the extent of the rights that it actually recognises as belonging to them.

First, the Constitution requires that political parties have a “national character as prescribed by an Act of Parliament” (Art.91 (1) (a)). It goes on to enjoin political parties to “promote and uphold national unity” (Art.91 (1) (c)) - a requirement which, in the Kenyan context, is understood to refer to a homogenizing project through the systematic de-emphasising of ethnic identities. Furthermore, the Constitution states that political parties shall not “be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis” (Art.91 (2) (a)). This approach had already been articulated in the Political Parties Act, which criminalised the formation of ethnically-based parties, requiring instead that every party be “national in character” (Republic 2007, Sect.14). The effect of the provisos on political parties in the Constitution and in the Political Parties Act is to limit the right of ethnic minorities to pursue their political aspirations through parties of their own. This is
tantamount to a limit on their right of association, which fails to take cognizance of the fact that in some parts of the world, ethnically based parties have actually contributed to social tranquility (see 7.2.2).

Second, although the Constitution requires each political party to “promote and practise democracy through regular, fair and free elections within the party”, the parties are likely to subscribe to the majoritarian orientation which does not suit the interests of ethnic minorities.

Third, while the Constitution provides for a two-thirds ceiling for either gender (Art.27 (8)) and a 5% quota for persons with disabilities (Art.54 (2)) in appointive and elective positions, it does not provide for any such measurable indication with regard to ethnic minorities.

Fourth, whereas Article 100 of the Constitution enjoins parliament to enact legislation for the representation in parliament of “marginalized groups” including “ethnic and other minorities”, it is difficult to see how a parliament elected mainly within an ethnicised and majoritarian framework can achieve this.

Fifth, while the Constitution defines the terms “marginalized community” and “marginalised group” (Ar.260), it is vague on the meaning of “minorities”. This vagueness is augmented by the use of the term “vulnerable groups” in the Bill of Rights:

All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or
marginalised communities, and members of particular ethnic, religious or cultural communities (Republic 2010a. Art.21 (3)).

Whereas the sub-article above makes it clear that the groups listed are all vulnerable, it does not spell out the meaning of “vulnerability”. Furthermore, by including “members of minority or marginalised communities” in the same list of vulnerable groups with “members of particular ethnic, religious or cultural communities”, the sub-article is ambiguous on the minorities envisaged. The same ambiguity is evident in Article 100 on “Promotion of Representation of Marginalised Groups”. Indeed, except in Article 100 (d), which makes reference to “ethnic and other minorities”, the phrase “ethnic minorities” does not appear in the new Constitution, illustrating its leaning towards the retention of the Western liberal democratic orientation, with its emphasis on the freedom of the individual to the exclusion of ethnic group entitlements.

Sixth, the Constitution declares representation of Kenya’s diverse communities as one of the values and principles of the public service (Art.232 (1) (h)). It also enjoins affording adequate and equal opportunities in the appointment, training and advancement at all levels of the public service for members of all ethnic groups (Art.232 (1) (i)). Yet, these provisions might not guarantee that all ethnic minorities are considered for such appointments. Indeed, some of the ethnic minorities, such as the Nubians and the Sengwer, are still not recognized by the Kenyan state, so that they cannot even be considered for such appointments (see 2.5.3 and 2.6.2 (b) below).
Seventh, the Constitution provides for some devolution of power to forty-seven counties (Art.6). It goes on to state that one of the objects of devolved government is “to protect and promote the interests and rights of minorities and marginalised communities” (Art.174 (e)). In addition, it enjoins parliament to enact legislation “to protect minorities within counties” (Art.197 (2) (b)). Nevertheless, ethnic minorities are likely to be disadvantaged in the counties, as the delineation of county boundaries was not actually done with ethnic minority concerns in mind. Indeed, a number of the forty-seven counties have ethnic minorities that would have preferred to have counties of their own (see 2.7 below). Furthermore, just as with the proviso on the representation of marginalised groups in parliament (Art.100), it seems unrealistic to expect a parliament elected mainly on the basis of ethnicity and majoritarianism to enact legislation that adequately caters for the interests of ethnic minorities in the counties.

However, one feature of the Constitution which is potentially of great benefit to the country’s ethnic minorities is that it transforms Kenya from a dualist to a monist state. This is to say that, while under the previous constitution any international instruments that the country ratified had to be domesticated through acts of parliament, such international instruments are now automatically incorporated into the laws of the country. In this regard, the Constitution states that “The general rules of international law shall form part of the law of Kenya” (Art.2 (5)), and “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution” (Art.2 (6)). Thus, such international instruments touching on the rights of ethnic minorities are now part of the laws of Kenya. Let us look at a number of these.
Kenya is a member of the United Nations (UN). On December 10 1948, the General Assembly of the UN adopted and proclaimed the “Universal Declaration of Human Rights” (United Nations 1948). The Preamble to the declaration takes it to be self-evident that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. The preamble goes on to state that it is vital to protect human rights by the rule of law in order to circumvent rebellion against tyranny and oppression. Article 1 of the Declaration states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” The Declaration goes on to recognize the kinds of rights typically espoused by the Western liberal democratic tradition, such as life, liberty and security of person (Art.3), freedom from slavery (Art.4), freedom from torture (Art.5), and equality before the law (Art.7). However, the Declaration does not recognize any minority group rights.

The Universal Declaration of Human Rights was codified into two Covenants, which the UN General Assembly adopted on 16th December 1966, and which came into force in 1976. These were the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (United Nations 1966a, 1966b respectively). Together with the Optional Protocols, they constitute the 'International Bill of Human Rights'.
Kenya acceded to the International Covenant on Civil and Political Rights (ICCPR) on 23rd March, 1976. The provisions of the Covenant have some relevance to ethnic minority rights. The Covenant opens as follows:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (United Nations 1966b, Article I [1]).

However, the second of the two statements above may be puzzling to some, because it seems to disregard the fact that in many parts of the world ethnic minorities are inhibited from determining their own destinies. One would have expected this to be acknowledged in the covenant, and measures to ameliorate the situation outlined.2

Yet the apparent discrepancy in the Covenant is accounted for by the fact that the meaning of the idea of self-determination has undergone considerable change since it first gained prominence almost a century ago. While after the First World War self-determination was understood to refer to the right of ethnic groups to form their own states, after the Second World War it has generally been understood as the right of a population within a specific territory, regardless of its ethnic diversity, to form a state of its own. Thus the “peoples” referred to in the quotation from the Covenant above refers to such populations rather than to ethnic groups. This understanding was particularly influenced by the decolonization ventures in Africa and Asia. In this latter framework, the aspirations of ethnic

2 Despite their vagueness, the two statements above are also found in Article 3 of the “Declaration on the Rights of Indigenous Peoples” (United Nations 2007), with the phrase “all peoples” being replaced by “indigenous peoples”.
minorities have lost the prominence they had earlier enjoyed (see 5.4.1 below).

Indeed, the International Covenant on Civil and Political Rights goes on to make it clear that ethnic minorities are to enjoy collective rights within the states in which they currently live:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language (United Nations 1966b, Art.27).

Thus even in the UN covenant dedicated to civil and political rights, the mention of ethnic minority group rights is itself a minority one.

Kenya also acceded to the UN “Convention on the Elimination of All Forms of Racial Discrimination” (ICERD) on October 13, 2001. In that Convention, the term "racial discrimination" refers to “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” (United Nations 1969, Art.1 No.1). The convention obligates governments to take special measures to ensure that all races (understood to include ethnic groups) equally enjoy human rights (Art.2 No.2). States are also under obligation to submit regular reports to the Committee on the Elimination of Racial Discrimination detailing the measures they have taken to comply with the provisions of the convention (United Nations 1969, Arts. 8-9).
There is also the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (United Nations 1992), which stipulates that states “shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity”.

According to the Declaration, the persons concerned shall:

- Enjoy their own culture, profess and practice their own religion, and use their own language freely in public and private.
- Participate effectively in cultural, religious, social, economic and public life.
- Participate effectively in decisions on the national and, where appropriate, regional level concerning their minority group or region.
- Establish and maintain their own associations.
- Establish and maintain free and peaceful contacts with other domestic minorities and with citizens of other states to whom they are related by national or ethnic, religious or linguistic ties.

However, it is important to bear in mind that declarations of the United Nations are considered to have less force than its covenants/conventions, so that the former are often referred to as “international soft law”, while the latter as “international hard law” (see Guzman and Meyer 2010). As such, Kenyan ethnic minorities are likely to pursue their aspirations much more effectively through the ICCPR and ICERD than through the Declaration.
Kenya is also bound by the instruments of the African Union, of which she is a member. The predecessor of the African Union, the Organisation of African Unity, adopted The *African Charter of Human and Peoples' Rights* (1981). Kenya acceded to this Charter on 23rd January, 1992. The inclusion of the term "peoples" in the charter signalled a recognition of collective rights in contradistinction to the rights recognised by Western liberalism as articulated in the United Nations' *Universal Declaration of Human Rights* (1948). The Charter created the African Commission on Human and Peoples' Rights (see 5.4.3 below). As the case of the Endorois at the African Commission on Human and Peoples Rights illustrates, Kenya is already feeling the impact of international law in the matter of ethnic minority rights (see 2.6.1 (a) below).

One of the most controversial issues in discussions on the aspirations of ethnic minorities is the question of their right to secede from states they consider to be oppressive. More frequently than not, existing states are opposed to the recognition of the rights of ethnic minorities to secede, and their opposition is expressed in several international instruments (see 5.4 below). Chapters 5 and 6 of the present study reflect on the moral implications of secessionist bids by Kenyan ethnic minorities.

It is crucial for us to have an accurate appreciation of the concerns of Kenyan ethnic minorities, as this will ensure that our philosophical reflection in search of a rationale for a set of moral principles for their constitutional protection is based on concrete socio-political realities. Consequently, the rest of this chapter outlines the origin and development of the aspirations of Kenyan ethnic minorities.
2.3. The Agitation for Region-Based Government (*Majimboism*)

During the colonial period, all Kenyan African ethnic groups were part of the conquered "natives", with no substantial political say. As such, the numerical size of the various communities was not a crucial matter, despite the colonial policy of separating the various ethnic groups into homogenous administrative units. However, as political independence drew near, ethnic sentiments grew more intense as various ethnic groups tried to position themselves to capture political power in the nascent state. Thus it was not surprising that the period leading up to independence in 1963 saw a proliferation of regional, ethnic and even clan based political organizations (Ajulu 2002, 257).

Kenya's political independence in December 1963 was preceded by three constitutional conferences held in London in 1960, 1962 and 1963 (Ndegwa 1997, 602-604). The Kenya African National Union (KANU), a party mainly of the numerically advantaged Kikuyu and Luo, was in favour of a unitary state. However, the Kenya African Democratic Union (KADU), supported by minority African communities such as the Turgen and the Giryama, favoured a regionalist (*majimbo*) system. The prospect of Kikuyu-Luo dominance through KANU was real, since the two groups were larger, more politically conscious, and better organized than the KADU groups, and presumably would win overwhelmingly at the polls (Ndegwa 1997, 605). The expectation of a census-type vote was largely fulfilled in the February 1961 elections. Of the 33 open seats, KANU won 19 with 67.4% of the vote, while KADU won 11 seats with a paltry 16.4% of the vote.
These proportions roughly approximated the population distribution of the ethnic groups backing each party (Muigai 2004, 210).

However, *majimboism* was originally not KADU’s idea. Rather, it was hatched by the European settlers, keen to preserve their autonomy in the inevitable eventuality of an independent Kenya. KADU only adopted the idea of majimboism in 1961, when it became clear that together with its allies, Michael Blundel’s New Kenya Party (NKP) and the Kenya Indian Congress (KIC), which then controlled the transition government, they were unlikely to win the 1963 election and assume control of an independent unitary state. The settlers convinced the KADU leaders that majimboism would ensure that Kenyatta would never be Prime Minister, for there would be no need for a head of state or prime minister, but a loose system of regional councils with rotating chairmen (Odinga 1967, 226-227).

Land is an important aspect of the life of any society. It is essential for food production and security, and supports important biological resources and processes. In the Kenyan context, it sustains the livelihoods of the majority of the population, and constitutes an important cultural heritage for many ethnic communities (Akech 2006, 3). The differences between KANU and KADU were deepest and most irreconcilable with respect to how the land previously held by European settlers and the colonial government was to be redistributed. KANU defined “community” as the “nation” to which all belonged, and all had rights to land anywhere, subject to the country’s laws and market forces. On the other hand, the KADU groups, knowing their power would be diminished in the
countrywide political community, offered the ethnic group as the relevant community of citizenship, and sought to limit land rights to those with membership in native groups in each region (Ndegwa 1997, 606).

Thus on the eve of independence, members of KADU persistently agitated for region-based government. Emotions were worked up by Masinde Muliro’s declaration that if KADU’s regional plan was not accepted, KADU’s leaders had a secret masterplan. William Murgor, then Parliamentary Secretary for Defence and Internal Security in the transitional government, invited his fellow Kalenjin to sharpen their spears and wait for the sound of his whistle for the beginning of the war to drive non-Kalenjins out of the Rift Valley. Daniel arap Moi, then Chairman of KADU, vowed to shed his blood to ensure that regionalism was written in the independence constitution (Atieno-Odhiambo 2002, 239).

It was therefore not surprising that from 1961, inter-ethnic clashes swept through the Rift Valley Province. The Kikuyu, Luhya and other ethnic groups, who had lived in the area for years, were labelled foreigners, their houses were burnt, and the majority of them were displaced from their homes. In the Coast Province, KADU’s Sammy Omari popularised the slogans *Wabara Kwao!* (Up country people, Back to their own homes), and *Kila mtu kwao!* (Every person to his or her own home) (Ajulu 2002, 258-259).

At the Lancaster Constitutional Conference in 1962, Ronald Ngala, KADU’s Vice Chairman, contended that KANU’s advocacy for a unitary system of government was a push for dictatorship under Kikuyu-Luo domination. At the same
conference. Martin Shikuku, KADU’s general secretary, threatened that his party would do without independence for another ten years if it did not get its way over regionalism (Odinga 1967, 227-228). Consequently, the independence constitution provided for eight regions, namely, Nairobi, Coast, Eastern, Central, Rift Valley, Nyanza, Western and North-Eastern, each with its own legislative and executive bodies (Republic 1963, Chapter VI).

Following the Lancaster agreement of 1962, elections were held under the new constitution in May 1963. KANU won an overwhelming majority in these “independence elections”, with the regional and ethnic spread remaining similar to that of the 1961 elections, each party predominating in the areas largely populated by ethnic groups sympathetic to it (Odinga 1967, 234). When the two parties returned to London in September 1963 to finalize the independence constitution, KANU demanded amendments to the 1962 agreement to reduce regional powers, the special protections for minorities, and the constraints imposed on constitutional change. On the other hand, KADU, having suffered an electoral setback (and the defection of the Luhya and Kamba leaders), insisted on retaining the 1962 agreement as the framework for the final constitution. Again, KADU threatened the integrity of the new state if protections already attained were withdrawn. Consequently, KANU accepted the majimbo arrangement as the independence constitution, but a number of changes were made in its favor. One of the most important of these was a concession on constitutional change: Amendment proposals that failed to receive the required majority in the House and Senate would then require a two-thirds majority in a national referendum (Odinga 1967, 234). Muigai (2001) identifies the two cardinal principles of the
Independence Constitution as parliamentary government and the protection of minorities.

The *majimbo* constitution was a major triumph for ethnic minorities, who would now be able to preserve autonomy in their regions, since the more or less ethnically defined colonial administrative units (provinces) became the regions. The minority groups were also assured of representation and participation in the central government through the Senate, whose electoral areas were the even more ethnically homogeneous administrative districts. Moreover, the Regional Boundaries Commission was established to collate the views of all ethnic groups regarding the region to which they wished to belong. This resulted in some boundary changes, and the creation of an eighth region to accommodate the secessionist Somali population. In another instance, the Sabaot of Mount Elgon wished to be included in the Rift Valley province along with their Kalenjin cousins, but the commission denied this request (Ndegwa 1997, 602-604).

However, KADU only had the support of the pastoralist communities such as the Kalenjin, Maasai, Turkana, Samburu, and of the Giriama of the Coast and sections of the Luhya. It could therefore only secure control over two regions, the Rift Valley and the Coast. Furthermore, within the first year of independence, KANU undermined the regional governments by withholding funds, passing legislation to circumvent regional powers, and forcing major changes to the constitution by threatening and preparing to hold a referendum if the Senate—in which KADU could block the proposals did not accede to the changes. Outnumbered, outmaneuvered and with no prospects for enforcing the compromise constitution
or, given the reality of census-type voting, for overtaking KANU at the subsequent polls, KADU dissolved and joined KANU to form a single-party state at the beginning of 1964 (Ndegwa 1997, 604; Ajulu 2002, 258-259). This was a major blow to the struggle for ethnic minority rights in Kenya, as it gave the majority communities an opportunity to entrench their hegemony in the nascent state. They did so by amending the constitution to replace the parliamentary system with a presidential one, and concentrating power in the presidency (see details in Chapter 3 below).

From the time KADU was dissolved in 1964 to the next period of fundamental political transformation beginning in 1990, ethnic minority agitation for federalism remained muted, as KANU suppressed advocacy and agitation for alternatives to the unitary state. Nevertheless, the coming to power of Daniel arap Moi in 1978 gave the KADU groups an opportunity to influence the direction of Kenyan politics. In effect, while Moi was president on a KANU ticket, he represented the aspirations of the former KADU groups. This might explain Moi's inauguration of the District Focus for Rural Development (Barkan and Chege 1989).

Furthermore, beginning in 1990, the transition from a single-party dictatorship to a multiparty system of government provided the first opportunity since independence to reconsider Kenya's political institutions (Ndegwa 1997, 606-607). By early 1991, a new strategy to counter multi-party advocates emerged, namely, the resuscitation of the clamour for majimboism. Spearheading this initiative was a constellation of KANU ministers, members of parliament and
local officials associated with the Rift Valley representative to the KANU Governing Council, Nicholas Biwott. Beginning in 1991, this KANU cabal launched a series of rallies, which drew on a narrative of a pre-independence movement for regional autonomy, that is, majimboism (Kuria 1996, 420, 423; Klopp 2002, 271-272). The institutional preferences of the incumbent minority group coalition were initially articulated at five mass rallies held in the space of six weeks in 1991 (Ndegwa 1997, 607 ff.). The majimbo strategy was justified as a means to safeguard minority communities within the Rift Valley and Coast from the larger Kikuyu community (Klopp 2002, 272). Many believe that the rallies were the precursors to the so-called “land clashes” or “ethnic clashes” prior to the 1992, 1997 and 2002 multi-party General Elections (Klopp 2002, 274 ff.; Makoloo 2005, 28).

In the 1990s, calls for majimbo gained popularity at the coast. It was felt that an autonomous Coast province would provide jobs, business opportunities and development funds for indigenous people and at the local level. During campaigns for the 2007 General Election, the Orange Democratic Party Kenya (ODM-K) of Kalonzo Musyoka, Raila Odinga, Najib Balala, Musalia Mudavadi and William Ruto promised to enact a Majimbo constitution once in office. After the Raila group deserted ODM-Kenya to join the Orange Democratic Movement (ODM), Raila, who was running on the party’s ticket, promised that he would implement the original version of Majimbo. Consequently, Raila won majority votes at the coast mostly because of Majimbo (Mjomba 2008).
After the dissolution of KADU in 1964, control over land had reverted to the state. The consequent dominance of KANU enabled it to apportion land, disproportionately favoring its core groups, especially the Kikuyu. This conflict over land has persisted in post-independence politics, and regained prominence alongside the agitation for regionalism and the outbreak of ethnic violence during the transition to multiparty democracy in the 1990s (Ndewga 1997, 606). For example, in 1992, William ole Ntimama, then a minister in the Moi government, dismissed as “mere pieces of paper” the deeds held by non-indigenous residents of the Rift Valley for their land (cited in Ndegwa 1997, 610).

Nevertheless, some majimbo advocates were quite sober, basing their contention on some thought-provoking facts. For example, Chiamba (1997) argued:

The tribe is a natural heritage that none needs to be ashamed of. .... The time for a federal system has come. We are a plural society and we embraced pluralism with the full knowledge of all that comes with it, the decentralization of power. Federalism does not mean tribalisation; it is not an ethnic but geographical device. Anyone who subscribes to the slogan “Let the people decide” should be in the frontline in supporting federalism for it gives the people the power to decide (Chiamba 1997, 91-92).

On the other hand, members of majority ethnic groups contended that majimboism would lead to the fragmentation of the country. The pro-multi-party coalition, Forum for the Restoration of Democracy (FORD), insisted on a nationalist vision, in which any Kenyan was free to own land anywhere in the country. In this, the coalition failed to undermine the deep-seated fears which were the basis for the appeal of majimbo ideology for Kenya’s KAMATUSA (Kalenjin, Maasai, Turkana and Samburu) pastoralist communities of the Rift Valley. The historical basis for these fears lay in the memory of Jomo Kenyatta’s regime, which was widely perceived as deepening already existing inequities across regions (see 3.3
below). Consequently, KANU majimboists directly played upon these fears by telling their pastoralist constituents that a victory for FORD would mean a loss of their land (Klopp 2002, 273-274).

Just before the 1992 general elections, Moi’s minority-dominated KANU government introduced into the electoral law the “twenty-five percent rule”, a consociational mechanism requiring that a presidential candidate garners 25% of the votes in at least five of the eight provinces, in addition to having at least a majority of the countrywide vote. Barring that, a run-off would be held between the two leading candidates, and the one with the majority vote would be declared president. The elite from larger ethnic groups opposed this constitutional amendment aimed to benefit ethnic minorities. They argued that the provinces (the autonomous regions under the 1963 majimbo constitution) were administrative rather than electoral units, and asserted that the president ought to be elected by a simple majority (Ndegwa 1997, 609). Partly due to the 25% Rule, Moi’s presidency continued for the first two terms of Kenya’s restored pluralist politics, from 1992 to 2002.

Nevertheless, according to Ndegwa (1997), the debate between KANU and the opposition coalition in the early 1990s was not, as is often thought, simply one between an antidemocratic incumbent regime and progressive democrats. It was more complex, involving fundamental differences regarding the following issues:

- The preeminent political community in a multiethnic state (“national” versus ethnic).
The political institutions appropriate to govern such a state and, therefore, the kind of constitutional reforms required to arrive at such institutions.

• The process of formulating constitutional reforms.

These essential disagreements reflect positions developed from two distinct perspectives on citizenship, one nationalist and liberal, the other narrow and civic-republican (Ndegwa 1997, 608).

The victory of the National Rainbow Coalition (NARC) in the 2002 general elections resulted in a government of the majority ethnic groups, with the ethnic minorities in the opposition (Makoloo 2005, 8). Of most interest to ethnic minorities during the 2002 elections was the prospect of the implementation of a new Constitution that would protect their rights through, among other things, devolved government. Indeed, this had been promised by the NARC candidates. However, the dominant Kikuyu, Embu and Meru umbrella communities, enjoying immense state power due to the fact of a Kikuyu president, consistently resisted the devolution of power, or any other radical change in Kenya's governance system that would see ethnic minorities achieve affirmative action (Makoloo 2005, 8).

In the run-up to the 2007 general elections, the debate between ethnic majority unitarists and ethnic minority regionalists gained new intensity. The Party of National Unity (PNU) promised its largely Kikuyu, Embu and Meru followers that it would promulgate a new constitution that would uphold a unitarist framework. On the other hand, the Orange Democratic Movement (ODM), at the time enjoying overwhelming support from many minority ethnic groups in the Rift
Valley and Coast provinces, pledged to enact a constitution that would facilitate a decidedly devolved system of government (IREC 2008, 1).

Furthermore, the controversy over unitarism and devolutionism was predictably impassioned during debates on the various drafts produced by the Committee of Experts from the end of 2009, as well as during the Parliamentary Select Committee debates in Naivasha in February 2010. The political elite of the Kalenjin in the Rift Valley and the elites of communities in the Coast and North-Eastern provinces advocated a highly devolved three-tier structure, comprising national, regional and county governments. On the other hand, their counterparts from the Kikuyu, Embu and Meru communities, fearing that devolution could result in part of their political constituency being exposed to evictions from the Rift Valley and other places to which they have migrated from their ancestral Central Province, continued to argue in favour of an essentially unitarist state. Their fears had been reinforced by the post 2007 general election crisis, which as indicated in the following chapter, saw many people from those communities evicted or killed (Kikechi 2010).

It is reported that during the consensus building talks by MPs prior to debate on the draft tabled in Parliament on 2\textsuperscript{nd} March 2010, MPs from the Rift Valley and Central provinces had struck a deal that would have seen the two sides supporting each other’s proposed amendments in Parliament. However, the central Kenya group beat a hasty retreat upon learning that their Rift Valley colleagues were plotting what they (Central Kenya MPs) perceived to be a \textit{majimbo} system of government (Omanga 2010), and later walked out of Parliament to frustrate the
achievement of the 65% threshold for a vote on it (Ndegwa and Mwanzia 2010). Thus in the end, the Constitution that was approved at the August 2010 referendum is essentially unitarist, with a devolved structure that guarantees the dominance of the central government (see Republic 2010a).

2.4. Kenyan Somali and Coastal Secessionist Aspirations

2.4.1. Kenyan Somali Secessionism

The Somali of Kenya are part of a much larger ethnic group which inhabits most of the Horn of Africa. The majority of Somalis live in the Somali Republic. The Somali are also the principle inhabitants of the Ogaadeen (Ogaden) region of South-eastern Ethiopia and Djibouti. Kenyan Somali constitute about 2.3 per cent of the country's population. Most of them live in north-eastern Kenya, formerly referred to as the Northern Frontier District, then as the North-Eastern Province, until the current constitution introduced counties in place of provinces. Kenyan Somali keep cattle mainly in area south of Garissa, and camels mainly to the north of it. Along with customs that are significantly different from those of other ethnic groups, the Somali are also racially distinguishable (Minorities 2004).

Historically, the Somali speaking peoples of the Horn of Africa have always regarded themselves as one people, and have therefore never excused the colonial powers for the Balkanization of Somali territory and people into separate political entities. This factor became a source of tension between the new Somali Republic and her neighbours, Kenya and Ethiopia. Upon assuming the reigns of power in
1960, the leaders of the new Somali Republic made it abundantly clear that the reunification of all Somali-speaking peoples would be a major goal of their country's foreign policy. Indeed, the new Somali Republic demanded that the British government grant the then Northern Frontier District of Kenya political autonomy, which would enable it to join the Somali Republic before Kenya could be granted independence. At the same time, the Somali government encouraged Kenyan Somali to assume greater responsibility for the agitation for union with the Somali Republic (Adam 1999, 261-262).

It was towards the end of union with the Somali Republic that the Somali Youth League established a branch in Nairobi, purposely to be close to the seat of government. Meanwhile, in the Northern Frontier District itself, the Northern Province Progressive People's Party (NPPP) was formed. Like the leaders in Mogadishu, the NPPP pushed, at the Lancaster House Conference, for the British government to grant the Northern Frontier District autonomy as a territory wholly independent of Kenya before any further constitutional changes affecting Kenya were made (Drysdale 1964).

In 1962, Britain held a plebiscite in the Northern part of Kenya, where Somali and other Muslim communities, fearing rule by a non-Somali and non-Muslim government, voted to join the new Somali Republic (Fratkin 2001, 15). On the other hand, Kenya's transitional leaders (those who were in charge of the government at the time under the internal self government arrangement), were opposed to any scheme that they perceived as threatening the territorial integrity of the would-be state. Nevertheless, despite the results of the 1962 plebiscite, the
British created a politico-administrative unit to be known as North Eastern region, which would enjoy equal status as the other Kenyan regions that were being created as part of the provisions of the new regional (majimbo) constitution on the eve of independence. Thus the British opted for the status quo, perhaps in the hope that the two independent states would be able to solve the matter on their own (Drysdale 1964).

In response to the British decision, the Somali and their Waso Boran and Sakuye allies in Isiolo boycotted the Kenyan general elections, after which their political party was outlawed by President Kenyatta. The Kenyan Somali called for secession, and began armed insurrection, which included the mining of roads in Marsabit, Wajir and Garissa Districts (Fratkin 2001, 15). The Kenyan Somali secessionist movement, like that of the Igbo in Nigeria at the same time, received no support from other African countries (with the exception of the Somali Republic, which gave inadequate military support), as the newly formed governments feared fragmentation of their newly won borders. The Kenya government responded with force, aided by British air support stationed in Nanyuki. Muslim pastoralist populations, including the Somali, Sakuye, and Waso Boran, were settled in fifteen “strategic villages” enclosed by barbed wire. Camel herds were shot as “supporting the enemy,” and residents found a mile outside the villages were considered shifta (bandits) and arrested or shot. In due course, support for the secession declined (Fratkin 2001, 15-16). However, that was not to be the end of the affair; for sporadic insurrections continued to challenge the Kenyan authorities during the decade that followed.
In 1989, the Somali were targeted by the Moi government, which accused them of poaching in Kenya's national parks. This heightening of tensions coincided with the flow of refugees into the country, as they sought to escape Somalia's civil war. Kenya instituted a new policy to register all Somali to check their citizenship. Kenyan Somali were therefore required to produce two identification cards to prove their citizenship. This policy might have found some of its justification in Kenya's citizenship law (Republic 1967, 1-19).

Over the years, the area inhabited by Kenyan Somali has remained one of the most insecure regions in the country, where both government and civilian vehicles cannot move without armed escort. Furthermore, since the collapse of the Somali State, lawlessness, banditry and inter-clan fighting have been prevalent, as the assailants commit crimes and then cross over to the neighbouring country, where some have special relations with the warlords. Moreover, the intra-regional efforts to set up a government in Mogadishu with effective control over the whole country have borne minimal fruits, and even introduced new dimensions to the conflict. In the meantime, like the British colonialists, the Kenyan government continues to run the north-eastern part of the country virtually as a closed region. Under the British, one required a special permit to enter the region. This is true today in many respects. In one infamous incident, the so-called Wagalla massacre of 1984, an estimated 2,000 people lost their lives in the hands of Kenyan security personnel (Markakis 2004, 26). These sorts of policies have made it difficult for moderate elements among the Somali to mobilize the population behind the Kenyan state. Even the effort under the Moi regime to extend patronage to the region through the appointment of Somali into the cabinet and into strategic
positions in the public service did not succeed in mollifying the community, as the majority of them seem not to have benefited from that kind of patronage (Markakis 1999, 295; Oyugi n.d.).

The Somali face significant demographic stresses including declining public health conditions, as well as competition with other groups for the use of land. To add to this, being pastoralists, the Somali are significantly affected by drought conditions, which frequently decimate their herds. During times of extreme drought, hundreds of Somali die. The Somali have also frequently criticized the government for its limited and delayed responses to famines in the region (Minorities 2004). Consequently, secessionist sentiments among Kenyan Somali persist, as their disadvantaged circumstances provide them with a basis for believing that the Kenyan state does not fully accept them as its citizens. One of the most well known Kenyan Somali intellectuals, Ahmed Nasir Abdullahi, has contended that in view of the persistent violation of the rights of national minorities across Africa, there is need to amend constitutions of African states to provide for peaceful and orderly secession of marginalized communities, as this is preferable to wars of secession (Abdullahi 1996).

2.4.2. Coastal Secessionism

Some members of Kenyan coastal communities have expressed secessionist sentiments. On 10th May 2009, Calist Mwatela, an Assistant Minister for Education, declared that secession was the key to the prosperity of Coast Province, as it would ensure that the region’s resources benefited its indigenous inhabitants (Mwajefa 2009). Furthermore, on 13th September 2009, there were
reports of growing tension between the Kamba and Taita ethnic groups following a dispute over the ownership of the highway township of Mtito Andei. It was reported that some politicians from the Coast Province were exploiting the issue to whip up secessionist sentiment. Led by the Minister for Tourism, Najib Balala, the group vowed to see to it that Coast Province secedes from the rest of Kenya in order to keep tourism and port funds to develop the region (Nairobi Chronicle Reporter 2009). Evidently, the two politicians spoke as MPs rather than as Assistant Minister and Minister respectively, as has been frequent among members of the Grand Coalition Government.

Furthermore, the activities of the outlawed secessionist Mombasa Republican Council are intermittently highlighted by the Kenyan press. The group first gained public attention in June 2007, when it was reported to have been training dozens of youth from the Mijikenda cluster of ethnic groups at Mulungunipa forest in Kwale to wage a war of independence against the Government (Kareithi 2007; Mjomba 2008; Brennan 2008). Moreover, on 16th January 2011, The Sunday Nation reported that the government had barred the group from holding a rally at the Tononoka Grounds in Mombasa. On that occasion, Mr Alawy Omar, the Mombasa Republican Council National Youth co-ordinator, said that the council had more than 8,000 registered youth, and that the number was growing (Nation Correspondent 2011). Besides, in May 2011, it was reported that police had arrested twenty-eight members of the outlawed group as they held a meeting at a Mombasa hotel. Sources told the Sunday Nation that the group had booked itself at the hotel to deliberate on their response to constant harassment by security forces (Sunday Nation Team 2011).
The secessionist sentiments at the Kenyan coast are mainly inspired by the history of the so-called ten-Mile coastal strip. An 1886 Anglo-German agreement delineated the sovereignty of the Sultan of Zanzibar from the coastline to ten miles into the interior (Brennan 2008, 838). In 1895, the Sultan of Zanzibar leased the administration of the strip to the British. Thus while during the colonial era the rest of the country was referred to as the Kenya Colony, the coastal strip was referred to as a Protectorate (Brennan 2008, 831). Nevertheless, the British Government administered the Protectorate and the Kenya Colony as a two-in-one unit out of expediency (Hassan 2002).

The 1895 treaty between the Sultan of Zanzibar and the British government was the legal point upon which the mwambao (“coastline” in Swahili) movement seized to argue for autonomy, and even outright independence, from mainland Kenya. The pursuit of mwambao independence was at its peak between 1953 and 1963. It was led by Arab and Swahili residents of the Kenyan coast, who feared political domination by indigenous Africans living along the coast and immigrating from “upcountry”. Mwambao supporters sought to protect a number of privileges, among which were the position of *sharia* (Islamic law), local elite control over land, staffing of bureaucratic posts, all of which had been secured by, or at least associated with, the Sultan’s position as nominal sovereign (Brennan 2008, 845). Conversely, coastal Africans were opposed to the sovereignty of the Sultan of Zanzibar over the Kenyan coastal strip, viewing it as a deviously schemed “autonomy” which had perpetrated the Africans’ squatter relationship
with absentee Arab landlords, as well as a haughty ulama’s domination over local institutions of law and education (Brennan 2008, 831-832).

At the commencement of the Lancaster House discussions for independence, the British organised separate talks for the delegates from the Protectorate of the Coast and those from the Kenya Colony. Furthermore, in September 1961, the British Government and the Sultan of Zanzibar appointed a Commissioner, James R. Robertson, to study the issue of the coastal strip, consult all those concerned, with a view to determining whether the 1895 treaty should be amended or abrogated in light of the constitutional future of Kenya and Zanzibar (Brennan 2008, 849). In his report, “The Kenya Coastal Strip - Report by the Commissioner”, Robertson stated that opinion was divided as to whether the coastal strip should join Kenya, be declared independent, or be reverted to the Sultan of Zanzibar. Robertson recommended that the British Government abrogate the 1895 Agreement with the Sultan of Zanzibar, and that another Agreement be made between the Government of Kenya and the Sultan of Zanzibar. In that new agreement, prescribed the Robertson report, The Sultan would surrender his Sovereignty claims over the Coastal strip in consideration of the Kenya Government undertaking to respect and safeguard inter alia the maintenance of the Sharia and the retention of the Kadhi’s Courts. What is more, while the mwambao movement had united around reinvigorated symbols of the Sultan’s sovereignty, it fractured under stress of coastal party factionalism, united Kenya African opposition, and Britain’s desire for expedient decolonization (Brennan 2008, 845).
Subsequently, on 8th October 1963, the coastal Protectorate was simply transferred to Kenya in an agreement between The British Colonial Secretary Duncan Sandys, Zanzibari Sultan Jamshid Bin Abdullah, Kenyan Prime Minister Jomo Kenyatta, and Zanzibari Prime Minister Mohammed Shamte. This followed the signing of letters by Kenyatta and Shamte on 5th October 1963 that guaranteed five safeguards for the Sultan’s subjects in the coastal strip:

1. The free exercise and preservation of Islamic worship.
2. The retention of kadhi jurisdiction over Muslim personal status matters.
3. The appointment of Muslim administrators in predominantly Muslim areas.
4. Arabic instruction for Muslim children.
5. The protection and continued registration of freehold land (Brennan 2008, 858).

Despite the above safeguards, the subsequent domination of Kenya’s government by upcountry politicians has displaced coastal communities (Mijikenda, Arab and Swahili) not only from local political offices, but also from huge tracts of valuable rural land and urban property (Brennan 2008, 858). Thus while indigenous coastal Africans were opposed to the sovereignty of the Sultan of Zanzibar over the coastal strip, they find themselves marginalized by the Kenyan state, leading some of them to agitate for secession.
2.5. The Diverse Demands of National Minorities

By “national Minorities”, we refer to cultural groups that live in Kenya, but that have strong ties to other countries from which they or their recent progenitors hail. The Europeans and Asian communities, as well as the Nubians fall into this category. Below we briefly examine the concerns of these three communities.

2.5.1. Europeans in Kenya

Kenya is a former British colony. This makes the place of Europeans in Kenya today unique, as they are perceived by many as representing foreign interests. In colonial days, Europeans came to Kenya as administrators, traders, settlers and missionaries. Nevertheless, the influence of the settlers in shaping Kenya's future was pivotal to the colonial venture. This was due to the fact that they formed the bulk of the European population, thereby serving to assert British occupation of and supremacy over the country. They also produced food for the colonial administrative and business establishment. By 1945, settler privileges were deeply entrenched and the settlers, through their party, Electors Union, aimed at preserving these privileges at all costs, including the use of military force against any constitutional change that did not guarantee them such privileges (Miguda 2003).

In the colonial era, Kenya’s European communities had diverse, even divergent, interests. Wasserman (1976) analyzes the different objectives, resources, and activities of Kenya’s two main European communities, the farmers and the
businessmen. Wasserman shows that because the European farmers and businessmen perceived their interests very differently, they took opposing positions during decolonization. On one hand, faced with the inevitability of independence and African rule, the farmers were "conservatives" who saw their only salvation in racial solidarity. Their objective during decolonization was to insure that they would be able to leave Kenya with all their assets. On the other hand, the business interests were represented by the New Kenya Group, which had multinational corporate backing and access to decision makers in both the Kenyan and British governments. They were "liberals" who wanted to substitute class identity for racial solidarity. Their actions were designed to perpetuate the political-economic system, even at the expense of European farmers' interests. To Wasserman's analysis must be added the observations concerning regionalism in 3.4 above.

The advent of political independence brought with it uncertainty among Europeans in Kenya. The departure of Afrikaners, the farmers near the Kikuyu reserve (North and South Kinangop) and others who found themselves in a precarious position, reduced the numbers and visibility of the European community (Wasserman 1973b, 134). Nevertheless, many Europeans continued to engage in large-scale agriculture, manufacturing and service industries (Wasserman 1973b). However, over the last forty-eight years, their voice in the political arena has been considerably muted. This can partly be explained by the fact that many of them had firm links with other countries such as Britain and Apartheid South Africa, so that they were aware that they had a fall-back course
of action in the event that the policies of the independent Kenyan state did not suit them.

In the last few years, the latent attitude of many indigenous Kenyans towards their European counterparts has come to the surface with the two shootings of indigenous Kenyans by Tom Cholmondley, a great grandson of the famous settler Lord Delamare. In 2005, Cholmondeley was released by the courts, purportedly for lack of evidence, in a case in which he was charged with shooting to death game warden Samson ole Sasina. Although Mr Cholmondeley confessed to the shooting, he insisted that he had acted in self-defence. He was initially charged with murder but prosecutors dropped the case. Indigenous Kenyans were furious, with the Maasai community threatening to invade European-owned farms (Nugent 2006). Furthermore, following the alleged shooting of stone mason Robert Njoya by Cholmondeley in 2006, there were angry demonstrations, and a protest from civil society organizations and ministers who demanded Cholmondeley's deportation. When Cholmondeley was given an eight-month jail sentence for the offense, there was a brief protest in the courtroom, with some people shouting that justice had not been served (Onyango 2009).

We can infer that the aspiration of Kenyan Europeans is to find acceptance among the majority indigenous Kenyans, and to be able to freely undertake their agricultural, manufacturing or business endeavours in the country.
2.5.2. Asian Communities in Kenya

Until the passing of the British Immigration Act of 1968 and the publicity which surrounded it, the Asian communities of East Africa had lived in comparative obscurity, attracting little political interest since the 1920s. This was largely due to the long preoccupation of sociologists and anthropologists with indigenous African ethnic groups (Cable n.d., 218). The people classified as “Asians” in colonial racial taxonomy are in fact a very mixed category: Hindus from Gujerat and the Punjab, Muslims from Pakistan, and Goans. The categorisation disguises a considerable diversity of faiths (Muslim, Hindu, Sikh, Catholic), language, sect and caste, all of which constitute the bases of commercial organisation and social activity (Cable n.d., 220).

Since no institutional framework exists which effectively cuts across communal boundaries, Asian communities in Kenya do not form a community in the usual sociological sense of the term (Nelson 1972, 255). Yet the casual colonial categorization of these diverse communities into the imaginary monolith of “Asians” has continued beyond the colonial era, so that scholars such as Neale (1974, 69) distinguish between Kenyan “Asians” and “Arabs”, despite the fact that Arabs also hail from Asia. It therefore seems more accurate to speak of “Asian communities” instead of lumping the various communities into a non-existent single ethnicity called “Asians”.

In Kenya, members of Asian communities are usually simply referred to as “Indians”, probably from the legacy of the Indian Coolies who came to East Africa to build the Uganda Railway early in the last century. A substantial number
of the members of these communities also accept the term "Indians" in reference to them, as seen from the name of their pre-independence party - the Kenya Indian Congress (KIC). Nevertheless, the term "Indians" is misleading due to the fact that these people do not all hail from the state called India.

Some members of the Kenyan Asian communities are recent arrivals from India and Pakistan, but most are descendants of the immigrants who came to Kenya in the early years of the twentieth century - traders from Gujarat, railway workers and troops from Punjab, and clerks and artisans from Goa. By 1974, two generations of members of these communities had been born in Kenya, and the immigrants were outnumbered by their children and grandchildren (Neale 1974, 69).

The diversity among the Asian communities is seen in the fact that they have not been able to mobilize politically as a single interest group. For example, prior to Kenya's independence in 1963 when communal representation was abolished, the Asian communities were able to cooperate in seeking elective seats in the legislature only through compromises by which a variety of candidates representing the major communal divisions were elected. For example, the five members of Asian communities elected to Kenya's Legislative Council in 1933 were a Gujarati-Hindu, a Muslim, a Goan, a Sikh, and a Punjabi Hindu; but in the election to the Municipal Council in Nairobi, also in the 1930s, the communities failed to cooperate, and the Government was asked to appoint someone to represent them (Nelson 1972, 257).
The Asian communities in Kenya are mostly urban. This is largely due to restrictive colonial ordinances and practices under which they were effectively precluded from owning land and trading outside certain towns and townships, although a small percentage traded in rural areas. This concentration has had very important implications for their social organisation. As there were no indigenous urban communities, Asian communities created Kenya’s towns and dominated the economic activities in them. This physical concentration and introverted network of economic activity limited both their contribution to the country’s economy and their interaction with other races - a factor that must have helped to lead to much of the disliked’ clannishness ‘which is normally regarded as ‘typically Indian’ (Cable n.d., 221).

During the colonial era, European settlers persuaded the administration to limit the Asian communities’ rights and representation, and to tolerate what amounted to de facto apartheid. Thus under colonialism, Asian communities were middle class, with Europeans as the ruling race above them, and Africans as the subjugated indigenous race whose lot was worse than theirs (Miguda 2003). Asian communities were isolated from Africans by occupation, residence, schools, hospitals and other public amenities, and many were still further isolated by religion (Neale 1974. 69-70). Consequently, urban segregation strengthened traditional ties within the various communities. Segregation in schools in particular provided a cocoon in which the essentials of religious and ideological continuity could be maintained (Cable n.d., 222). The separation between the major racial categories required by the colonial administration in Kenya acted to
increase social distance between those units-African, Asian and European-which together compose the plural Kenyan society (Nelson 1972).

The colonial distinctions which proscribed Asian land ownership, and which segregated schools, hospitals and other public amenities helped to form the basis of misleading and facile racial stereotypes against members of the Asian communities. Very rarely, for example, do public attacks on Asian communities for not taking citizenship and persisting in their traditional ways ever bother to exclude the Ismaelis for whom these accusations have no relevance. Nor do references to business behaviour usually exclude the largely clerical Goans. Most of the stereotypes are built around the Gujerati Hindus who make up about 70 per cent of the total Asian population (Cable n.d., 220).

One important function of the isolation of the Asian communities was their potential usefulness as intermediaries. They could perform the vital retail and clerical functions, not only eliminating the need for training Africans, but also attracting the natural unpopularity of petty traders and bureaucrats, thereby warding off hostility from the European administration which could thereby appear detached and impartial, and even protective of native interests (Cable n.d., 222). The Asian communities were also the envy of other racial groups, particularly the Arabs and the Somalis. Stating that they were immigrants from Arabia, the Arabs demanded that they be distinguished from "natives", and protested against criminal procedures, ordinances and other colonial statutes that included Arabs and Somalis among natives (Miguda 2003).
The attitude of Europeans towards Asians seems to have had some influence on African opinion from the colonial era to the present. During the colonial era, Asian traders were encouraged in their activity with Africans in order to provide an incentive for the indigenous population to work for cash wages. However, to the extent that Asians became a threat to European hegemony in the so-called White Highlands, they were to be treated with hostility (Furedi 1974, 348-349). Thus European settlers were never tired of passing on anti-Asian anecdotes to Africans. In these stories the "parasitic" nature of the Asian community was given great emphasis. The day-to-day contempt and racism that Europeans showed towards Asians provided future examples for Africans. What is more, the Asian attitude towards Africans also had a negative impact on the so-called African squatters in the Rift Valley. Asians saw Africans as clearly inferior to them, and openly expressed this view. Due to closer contacts with Africans, Asian racism caused more irritation among Africans than similar European attitudes (Furedi 1974, 349).

At the dawn of independence, the British government assisted the Kenyan government with finances to buy out settler farms. In sharp contrast to this policy, the erstwhile colonizer did not provide any financial assistance to facilitate the integration or exit of the Asian community (Cable n.d., 219). One option available to the Asian communities was to take up Kenyan citizenship. This was due to the fact that at that time, the provisions for non-Africans to assume Kenyan citizenship were in fact quite liberal. A Kenya-born non-African with one parent also born in Kenya could qualify automatically for citizenship. For the rest, there
was an opportunity for naturalisation by application within two years of independence, that is, before December 1965 (Republic 1963, Chapter I).

Yet there was a striking lack of interest in Kenyan citizenship among members of the Asian communities. Of the 180,000 or so members of these communities in 1963, only 20,000 applied for citizenship, and even those did so mostly in the last few weeks allowed for this procedure. In addition, about 50,000 qualified automatically. Part of their unease to take up Kenyan citizenship was due to the general political climate of 1963-1964. The Zanzibar massacres of the much more ‘integrated’ Arabs, memories of the Congo troubles, and Kenya’s own recent history (the Mau Mau Uprising) were all unconnected phenomena, but all conspired to create a vague unease in an already insecure minority. Nevertheless, the lack of eagerness to take up Kenyan citizenship was widely regarded by indigenous African Kenyans as ‘fence sitting’, or a lack of confidence in the ability of indigenous Africans to manage the country (Cable n.d., 223-224). The indigenous African Kenyans also saw their Asian counterparts as “clannish” and arrogant, and demanded that they open up to integration into the general population. Yet the fragmented nature of Asian society was, and still is, a big enough obstacle to such integration: when people are not used to marrying out of caste or associating out of community, they are singularly ill-prepared for the greater barriers of race relations (Cable n.d., 226-227).

As Kenya was gaining its independence, members of Asian communities were also given the option of taking up British citizenship. With it, they could live in Kenya, but could relocate to Britain whenever they wished to do so. A substantial
number of their members acquired British citizenship, seeing it as a fall-back mechanism to which they could resort if socio-political circumstances in the nascent Kenyan state turned out to be unsuitable for them (Time 1968). This further heightened hostility towards them, as indigenous Kenyans saw them as opportunists who would only stay in the country as long as it suited them rather than patriots who would seek to contribute towards the betterment of the country (Cable n.d., 223). Yet to reduce the matter of hostility towards these communities to the citizenship question is an oversimplification. It should be noted that the European response to voluntary naturalisation was even smaller - less than 2,000 out of 60,000 applied - while one Asian sub-group, the Ismaelis, applied almost without exception. This has not altered Kenyan attitudes to either group (Cable n.d., 223-224).

By the late 1960s, members of Kenyan Asian communities generally occupied “middle-level” jobs. Their over-concentration in commerce and private manufacturing (over 80 per cent of those economically active) stemmed from the colonial restrictions on Asian land-holding, and from salary discrimination and obstacles to promotion in the higher ranks of the civil service (Cable n.d., 220). As the policy of Africanisation increasingly limited job and business opportunities for members of Asian communities in the mid 1960s, their numbers relocating to Britain from Kenya grew substantially, causing great unease among the native British population. Consequently, in 1968, the British government amended its laws to disallow their en masse migration into Britain. Just before the inception of the new legal environment, many members of Asian communities in Kenya sold their businesses at panic prices and hastily traveled to Britain. Thus in the final
week before the inception of the new law, Britain received 6,200 members of these communities from Kenya (Time 1968).

Furthermore, despite their more than a century’s stay in Kenya, Asian communities find themselves considered by many indigenous Kenyans to be foreigners. This fact was demonstrated during the 1982 coup attempt, in which many Asian businesses in Nairobi were looted, and Asian women raped. It was demonstrated again during the post 2007 elections crisis through the experience of Asians in Kisumu. Generous funders of Raila’s campaign, Kisumu’s Asian businessmen had expected to come through the elections unscathed. They spoke Luo, had lived in Kisumu for generations, and saw themselves as loyal supporters of the ODM electoral machine. Thus they had not bothered to take the obvious precaution of running down their stocks. Now they were learning the grimmest of lessons on the impossibility of integration (Wrong 2009, 303).

In spite of the supposed sense of unity often thought to be promoted by outside pressures, the various divisions among Asian communities (ethnicity, religion, caste, economic status, etc.) do not allow for political cohesiveness among them. Thus there are no significant relations between the various Asian communities, except on those few occasions where specific political rights of interest to all of them are concerned, and even on these occasions the various communities do not necessarily unite. Most individuals from these communities do not seek to gain political influence in the wider Asian population; instead, their goals are achieved within the various communal organizations (Nelson 1972).
It is nevertheless certain that members of these communities yearn for a political environment in which their distinct cultural heritage is respected, and where they are regarded as part and parcel of the Kenyan polity. Their deep involvement in philanthropic work is evidence that they do not wish to be considered as an apathetic segment of society.

### 2.5.3. Kenyan Nubians

The Kenyan Nubians are originally from the Nuba Mountains of central Sudan. In 1820, Mehemet Ali (Muhammad Ali), the Khedive of Egypt, decided to conquer the Sudan with his Turko-Egyptian army. He intended to use indigenous African soldiers for his imperial plans. A training camp was established at Aswan in 1821, with many of the indigenous African soldiers being slaves captured from the Nuba mountains and the area to the south of Sennar. This army of slaves, which came to be known as *Jihadiyya*, was used to take control over the Sudan (Heine 1982, 11).

In the second half of the 19th century, the area of recruitment shifted from the northern to the southern Sudan, present day Democratic Republic of Congo and Uganda. The recruitment involved in particular the following ethnic groups: Moru, Madi, Mundu, Lugbara, Lendu, Azande, Makara, Avukaya, Logo, Baka, Bari (including Kakwa), Lotuxo, Dinka and Shilluk. By 1890, soldiers from the southern Sudan outnumbered those from the north. The designation “Nubians” or “Nubi” for this military force of diverse ethnic and linguistic origins probably goes back to the Egyptians, and may be due to the fact that the first recruits of the *Jihadiyya* were drawn from the Nuba mountains (Heine 1982, 11).
According to Atieno-Odhiambo (1977, 6), the growth of the Nubi into a distinct ethnic group is mainly attributable to the following factors:

- The contact language was Arabic, which was later Creolised and became the mother tongue and primary language of the community.

- The recruits were Islamicised and consequently circumcised, and Islamic religion and culture became an important element in strengthening group cohesion.

- Marriage within the community was prevalent, while exogamy was discouraged.

- There appears to have been a feeling of being superior to the people around them - a feeling which was nourished in particular by their being associated with a strong foreign power.

Nubians were conscripted into the British army in the second half of the nineteenth century, when Sudan was under Anglo-Egyptian rule (Manby 2009, 122-123). Later the Nubians formed part of the British colonial army during the British colonizing expeditions to East Africa. Before the turn of the century, groups of Nubi took up service in Kenya, being stationed as occupying forces in Eldama Ravine, Machakos, Mombasa and Kibigori. They formed the backbone of the King’s African Rifles (KAR), which was established in 1902 when the British East Africa Company was dissolved (Heine 1982, 12). By 1905, they were the hub of the British expeditionary colonial forces. They also contributed tremendously to the British military efforts during the First and Second World Wars (Makoloo 2005, 17).
Despite their sterling service to the British colonial endeavour in East Africa, the Nubians were demobilized without the after-service benefits usually accorded to the predominantly European soldiers in the British army. Furthermore, unlike the Asian communities who had also been relocated into Kenya by the British to serve in the military or to build the railway, the Nubians were not accorded British citizenship. Thus at the dawn of Kenya’s independence, the British left their former colony without any plan for the entitlement of the Nubians in Kenya or for their repatriation to Sudan. Moreover, successive Kenyan governments have failed to take concrete measures to improve the Nubians’ situation (Makoloo 2005, 17).

It is true that the British government set aside 4197.9 acres of land in the original Kibera in Nairobi for the Nubians. However, the formalization of their ownership of it was not done, exposing it to frequent excisions by the government and by influential individuals. Consequently, by 2004, the land remaining after the excisions was no more than 600 acres (CEMIRIDE 2004). Even what remains of the original Kibera is presently occupied not only by the Nubians, but also by people from many other communities. Thus the series of annexations have reduced what was initially a spacious and environmentally-balanced Kibera to a squalid, congested and overpopulated area. The Nubians are also often viewed with suspicion, and even hostility. Indeed, on various occasions, there have been serious clashes between them and other ethnic groups residing within the Kibera slums, leading to loss of life and property (Makoloo 2005, 16-17). Besides, the Nubians are highly suspicious of the ongoing slum-upgrading programme in Kibera. Apart from going to court over the government-sponsored relocation programme, the Kenyan Nubian Council of Elders, representing the countrywide
Nubian community, claims that the programme is a ploy by the government to grab their land as it did in previous upgrading programmes in the area (Kebaso 2010).

Apart from Nairobi, Nubian communities are currently resident in Kisumu, Kibigori, Kisii, Eldama Ravine, Bungoma and Mumias. Furthermore, there are smaller groups of one to three families in a number of other urban centres (Heine 1982, 15; CEMIRIDE 2004). With 90 per cent of the Nubians landless, they live in poverty, which impacts on their education, health and food security. Unemployment among the Nubian youth is exceptionally high, greatly contributing to their rampant involvement in crime (CEMIRIDE 2004; Makoloo 2005, 17; Manby 2009, 123).

The Nubians currently number more than 100,000, and their members are now the third or fourth generation of their families born in Kenya, yet they face enormous difficulties in obtaining recognition of their status as Kenyans (Manby 2009, 123). It is noteworthy that they were not included in the 1989 population census. There were, however, categories such as “Other Kenyans”, “Other Africans”, and “Other Arabs” (Republic 1994), and it is not clear if they had been placed in one of these categories. What is clear is that for years many individuals from the Kenyan Nubian community have been denied citizenship, as is evidenced by the fact that the government has often declined to grant identification cards and passports to them (CEMIRIDE 2004; Institute et. al. 2006; Refugees International 2008).
On reaching adulthood, Kenyan Nubians are routinely subjected to discriminatory security vetting when they apply for identification documents - a process which can take years or may only be completed on payment of a bribe (Manby 2009, 124). Consequently, they are kept from enjoying those benefits that accrue from citizenship. Identification cards are required to register to vote, purchase property, open a bank account, conduct business, seek employment, access higher education, enter government buildings, and to register marriages (Refugees International 2008). Of special interest to this study is the fact that in Kenya, people without identification cards are not entitled to vote, and by implication are also not eligible to contest for any political office. This means that they are excluded from decision-making processes. Besides, the police frequently arrest those unable to provide such documentation (Manby 2009, 124).

The experience of Adam Hussein Adam, a Kenyan Nubian who applied five times for a Kenyan passport between 1992 and 2000, missing several opportunities for studies and jobs abroad in the process, is a case in point (Adam n.d.; Kareithi 2006a). There is also the case of a retired Central Bank manager, Ibrahim Adhuman Said, who was denied the right to get a replacement identification card because of his Nubian ethnicity, and had to file a suit in court to enforce his right (Kareithi 2006b). These two are high profile instances in which the individuals eventually obtained the document. The fact is that most Kenyan Nubians, denied identification cards and passports, live as de facto stateless persons, unable to enjoy adequate protection from the law.
In 2002, the Nubian community, through the Kenyan Nubian Council of Elders, instructed the Centre for Minority Rights Development (CEMIRIDE) to take action against the Kenyan government for, *inter alia*, denial of citizenship and/or discrimination in the issuance of identity documents contrary to the Kenyan constitution and international and regional human rights standards binding on Kenya. Consequently, on 17th March 2003, CEMIRIDE filed a suit in the High Court challenging the Kenyan state’s policy of discrimination against the Nubian community (High Court 2003). In response, the government argued that the case should be struck out on the grounds that it should have been brought against the British, that in any case it has been brought too late, and that the Nubians were not citizens. Moreover, numerous procedural obstacles were deliberately and systematically thrown up by the State. For example, despite appearing in court over a dozen times in the intervening years, a hearing on the merits of the case was not disposed of. Within fifteen months of filing, the case had been brought before five different judges, none of whom had proceeded with it (Institute *et. Al.* 2006).

Eventually, the Attorney-General terminated the Nubian case on the flimsy ground that it had been filed too late. Consequently, the Nubians filed a case at the African Commission on Human and Peoples Rights (ACHPR), in which they told the ACHPR that the Kenyan Constitution did not protect group rights; it only guaranteed civil and political rights of the individual in sections 70-82, contrary to the African Charter on Human and Peoples’ Rights which guarantees group rights (Institute *et. Al.* 2006). However, the Nubian case at the ACHPR has also been bogged down by procedural issues (Manby 2009, 124).
2.6. Kenyan Pastoralists And Hunter-gatherers

Pastoralists and hunter-gatherers are often referred to as “indigenous people” (Gurr 1993, 66), implying that they occupied a territory prior to the arrival of the vast proportion of its current population. Yet the term “indigenous” with respect to Africa often leads to debates, because save for a few exceptions involving communities that migrated from other continents, all Africans can claim to be aboriginal people of the continent. Within a common heritage of aboriginality, however, African people have for centuries been migrating from various parts of the continent. There were also wars of conquest, which shaped the character of political formations. To add to this, communities have over the years mixed and inter-married. Moreover, European imperialism in the 19th and 20th centuries further complicated relations among African communities (more on this in the next chapter). Consequently, a working definition of the term “indigenous” is difficult to get, and may not be very useful (Kipuri 2006, 27).

Nevertheless, in line with the bulk of the literature, this study considers the majority of Kenyan pastoralists and all of Kenya’s hunter-gatherers as indigenous peoples, in the sense that they were the earliest arrivals in the country. They include the Ogiek, Yaku, Ilchamus, Turkana, Maasai, Samburu, Pokot, Sengwer and El Molo, among others. The areas in which these communities live are characterised by lack of adequate schools, hospitals, roads and sanitation. Unfavourable government policies and legislation have produced in these peoples a population that is generally the poorest and most illiterate in the country, making them even more vulnerable to further systemic injustices (KNCHR 2006, 24-25).
The collective right to land and other natural resources is one of the most crucial demands of indigenous peoples in many parts of the world. This is due to the fact that these resources are closely related to their capability to survive as peoples and to be able to exercise other fundamental collective rights, such as the right to develop their mode of production on their own terms, to preserve their culture, and thereby to determine their own future (Kipuri 2006, 29). Below we examine the specific concerns of these two groups of extremely marginalized people.

2.6.1. Pastoralists

In the Kenyan context, pastoralists are ethnic communities whose livelihood mainly depends on the raising of domestic animals including cattle, camels, goats, sheep and donkeys, which are used for milk, meat, transport and trade. Their herds are often large and in poor condition, but hardy enough to survive periodic drought and sparse vegetation (Fratkin 2001, 3; Markakis 2004, 2). Although during pre-colonial times pastoralist communities never formed states of their own, they lived in a rough equilibrium with centralized states created by agrarian societies, yet preserved a fiercely defended autonomy (Markakis 2004, 2).

During the first two decades of colonial rule, a new chapter was inaugurated in the history of pastoralism. With few exceptions, colonial boundaries were drawn through the pastoralist domain which, in the absence of settlement, was considered unclaimed by anyone. The result was the partition of many pastoralist communities among two or more states. In the worst case, the Somali were apportioned among five states. Pastoralists throughout eastern Africa found
themselves literally on the margins of every state. As a result, the economic viability, political integrity and social solidarity of pastoralist societies were gravely and permanently impaired. The pastoralist imperative of free movement was also challenged within the boundaries of the new states, because it defied the administrative, fiscal, political and security imperatives of the state (Ndege 1992, 97; Markakis 2004, 7).

The arid and semi-arid lands (ASALs) make up around two thirds of Kenya’s landmass. Although population densities are low in these areas, the various pastoralist communities jointly constitute almost 25% of the country’s population, representing a mosaic of ethnic groups living in three of the former eight provinces - North Eastern, Eastern and the Rift Valley. Pastoralism is also, despite its strong subsistence orientation, economically significant, accounting for an estimated 75% of the livestock population, and supplying the bulk of the meat and hides in the domestic market. However, pastoralists find themselves politically, socially and economically marginalised and disempowered in a polity dominated by people from agricultural communities (Fratkin 2001, 3, 6; Livingstone 2005, 2).

What is more, early in the colonial era, pastoral communities that lived along the Uganda railway and on the highlands were adversely affected by land alienation, which proceeded in total disregard of their interests. Thus by 1915, over 4.5 million acres of largely pastoralist land had been alienated for European settlement. The Soldier Settlement Scheme resulted in the further alienation of
African land. The Nandi, the Kipsigis and the Machakos Kamba lost their rich grazing lands (Ndege 1992, 96).

During the so-called inter-war years (1918-1939), colonial policies, especially those relating to cattle movements and quarantines, began to inhibit the expansion of the pastoral sector. The alienation of land, the constant quarantines, and the neglect of the African pastoral economy all contributed to the rapid increase of livestock in the African reserves, to the extent that the pastoralist communities increasingly found it difficult to maximize the use of available pasture (Ndege 1992, 97).

In the 1950s, the Swynnerton Plan sought to mitigate the unpopularity of the colonial regime by creating an African land-owning petty middle class, which would be driven by an imperative to protect its property. Kenya’s pastoralist communities and other marginalized communities did not benefit from such projects; rather, it was the African middle class, mostly from agrarian societies, that after independence made in-roads into land originally occupied by pastoralist communities and later appropriated by settlers. This development explains why the land problem in Kenya is persistent (Oloo 2007, 206-207).

Under British colonialism, capital investment and technological innovations were not brought to the pastoralist economy, nor were ‘modernizing’ processes such as communications, education, health care, transport or urbanization introduced into the pastoralist milieu. As a result, when political independence came, pastoralism was isolated on the margin of the state and society (Markakis 2004, 2). Thus the
decline of pastoralism was not slowed down by political independence; instead, the growth of ethno-regional inequities was accelerated, as is indicated by a number of specific actions of the Kenyatta, Moi and Kibaki regimes as outlined below.

*First,* just as their colonial predecessors, the three independent Kenyan regimes have defined the economic potential of the country strictly through agro-ecological zones. They have therefore retained the colonial fixation with highland agriculture, defining the Central Province and the highlands as high potential areas; the Lake Basin and Ukambani lowlands (Eastern province) as medium potential; the rangelands, which comprise 70 per cent of the country, as of the lowest potential (Makoloo 2005, 33; Ochieng' 1992, 259 ff.; Ndege 1992, 105). For example, for more than four decades, government policies in Turkana have placed an emphasis on pastoralism, with no serious commitment to economic diversification, although the district has other resources in addition to livestock (Makoloo 2005, 17).

*Second,* the colonial practice of converting pastoralist range lands into nature reserves gained momentum in post-colonial Kenya. In this regard, the experience of the Endorois of Baringo, whose source of livelihood was curtailed when the Lake Bogoria Basin was declared a game park in 1973, is a case in point (Makoloo 2005, 19 ff.).

*Third,* under both colonial and independence administrations, some pastoral areas were declared closed districts. For example, the former North Eastern Province...
(NEP) remained under a state of emergency for more than a decade. This enforced isolation curtailed the economic development of these areas, and has been a major factor in their socio-economic disadvantage (Livingstone 2005, 2).

Fourth, the colonial attempt to achieve the assimilation of numerically disadvantaged communities has continued unabated throughout Kenya’s independent history. Thus many pastoralist parliamentary constituencies in the Rift Valley have substantial immigrant populations from non-pastoralist communities, engaged in trading in town centers and in agriculture in the “green hearts” of pastoral areas. This has negative implications on the effective representation of pastoralists, as the immigrant communities vote people from their own communities into parliament to represent such constituencies. Some Kenyan pastoralists also occupy small pockets within constituencies dominated by sedentary ethnic groups. These pastoralists are more exposed to assimilation than others, because their elected representatives are almost always of a different ethnic group from them, in most cases with interests inimical to those of pastoralists (Livingstone 2005, 24).

During the 1960s and 1970s, Western aid and international development agencies initiated programs in East African countries to improve livestock production and market integration of pastoralists through the privatisation of pastoralist rangelands. This took place in two stages. First, there was the so-called “group ranches”, where title deeds of specific pieces of land were allotted to specific groups. Second, group ranch residents sold portions of the group ranches to individuals, a phenomenon which is still observable in Maasailand. Consequently,
large tracts of Maasai land are increasingly falling into the hands of non-Maasai. This affects the long-term economic security of individual pastoralist families, threatens the resource base for the viable practice of extensive animal husbandry, and undermines the sustenance of an indigenous culture (Munei and Galaty 1999). The rationale of the privatization programmes was Garret Hardin’s “tragedy of the commons” (1968), which held that traditional pastoral practices of individual owners utilising communally shared pastures were wasteful and inherently degrading to the environment (Homewood 1995, 346-347; Fratkin 2001, 6-8; Markakis 2004, 22).

However, one of the most cogent criticisms against Hardin’s (1968) analysis entails highlighting the confusion engendered when pastoral rangelands, in which use is regulated by a variety of social institutions, are confused with "open access systems" in which there is no regulation of access or use (McCabe 1990, 83). What is more, evaluations of privatization programs in Kenya reveal that land concentration, landlessness and economic marginalization of pastoral households is on the increase, because individuals in positions of economic and political power take advantage of the less powerful (Little 1985; Kituyi 1990; Munei and Galaty 1999).

During Jomo Kenyatta’s fifteen-year reign, pastoralist marginalisation continued unabated, as the regime almost exclusively promoted the socio-economic progress of the Gikuyu, Embu and Meru. Furthermore, the rejection of Majimboism (regionalism) by the ruling party Kanu soon after independence had painful consequences for pastoralists, as the country’s resources were centrally
administered to their disadvantage (Livingstone 2005, 8). Many Kikuyu were settled in the Rift Valley in areas historically inhabited by the Maasai and Kalenjin. Here is how one Kalenjin woman, an activist working for peace and reconciliation, narrated her people’s experience:

“When the country attained independence, the first government advised the people from Central Province about land settlement schemes, so they were able to buy white settlers’ farms. …Despite the fact that the Kalenjin community and Luhya community coexisted, most of the farms were bought by the Luhya or by Kikuyu from Central Province. During the distribution of land, the pastoralist communities were neglected and the agricultural communities benefited. As pastoralist children went to school and became aware of this, they started questioning—why? Kalenjins felt they had been invaded. People of this community cannot go any other place to start a business because the community there will be hostile. I saw that happening when I stayed in Central Province for eleven years. Any time someone from another community wanted to start a business there, it was very difficult. …” (Interview with the late Rose Bar-Masai by Helena Halperin, Nairobi, 1996; cited in Klopp 2002, 273-274).

With the ascendancy of Daniel arap Moi to the presidency in 1978, himself from the pastoralist Turgen community, many would have thought the marginalisation of pastoralists would be decisively reversed. Indeed, since Moi emerged from the attempted coup of 1982 strengthened, pastoralists also began to emerge from their marginalization. Under a generous quota system, pastoralists joined high schools, colleges and Universities, as well as public administration, in much greater numbers (Livingstone 2005, 25). Nevertheless, the Moi regime was acutely aware of the need to keep the most populous ethnic groups and the dominant Kikuyu happy. So a pastoralist autocrat was in power, but could do little for pastoralists, given the realities of the country’s balance of power (Livingstone 2005, 9-10). Furthermore, Moi not only acquiesced to the dominance of agriculturalist communities, but also actually facilitated the further dispossession of pastoralists,
as is indicated by his handling of the Ilchamus and Endorois grievances (see (a) and (b) below).

The Kibaki regime has also proved to be preoccupied with those areas of the country with high agricultural yields, and especially districts occupied by the Kikuyu, Embu and Meru (Kiringai 2006). Thus the Kibaki regime has cancelled agricultural loans of coffee farmers, but has extended no similar favour to the pastoralists. The marginalization of pastoralist areas is also seen in the fact that in 2005, the whole of the Turkana district had only one medical doctor, and inadequate medical equipment (Makoloo 2005, 17).

The return of multi-party politics to Kenya in the 1990s gave pastoralists an opportunity to pursue their aspirations. After the 1997 elections, the MPs from Northern Kenya formed a caucus to be called the Northern Parliamentary Group, following the example of other regional groupings in parliament – such as those for the Rift Valley and Western Kenya. In April 1998, a local advocacy organization, the Kenya Pastoralist Forum (KPF), invited the parliamentarians from North-Eastern Kenya to a joint meeting in Naivasha (Markakis 1999, 295). One of the outstanding results of the meeting was that the MPs from North-Eastern Province formed the Pastoralist Parliamentary Group (PPG), and invited all members of parliament from pastoralist constituencies to join. Its stated aim was to defend the interests of Kenyan pastoralists by forging a united front transcending political and ethnic divisions (Markakis 1999, 293, 296).
Within months, the PPG’s membership grew to 36, as MPs from other pastoralist communities (Borana, Maasai, Rendile, Pokot and Orma) joined, irrespective of party affiliation. It was now a political force to be reckoned with, as was shown when it proposed an amendment to the draft law setting up a constitutional commission. The PPG asked for a pastoralist representative to be included in the membership of the commission, and threatened to vote against the law otherwise. The government was forced to give way, and further tried to mollify the PPG by appointing its chairman, a medical doctor and a KANU member, Assistant Minister of Health (Markakis 1999, 296). At its strongest, the PPG had 38 members representing nearly all pastoralist communities and political parties. It was an unprecedented show of solidarity across ethnic and party lines (Markakis 2004).

However, the Moi administration, which controlled 27 pastoralist constituencies, did not want to see the development of any independent force in the country’s politics, and used its considerable resources to undermine this new parliamentary grouping right from its embryonic stage. Furthermore, because the group was mainly founded by MPs from North-Eastern Kenya - an area which at the dawn of independence had fought for secession (see 2.4 above) - there was suspicion towards the PPG (Markakis 1999). Consequently, the PPG became dormant, only to be re-launched in 2003 soon after the Kibaki regime came to power, again with the support of civil society groups (Markakis 2004, 22; Livingstone 2005, 25).

In sheer numerical terms, the PPG potentially represents a considerable force in the Kenyan parliament, as 40 out of the 210 seats are pastoralist constituencies.
One example of successful lobbying by the PPG is the specific measures for pastoral areas in the provisions for free primary education (Livingstone 2005, 42). However, its capacity to influence policy remains limited by continuing problems of corruption and intrigue within the political system in general (Livingstone 2005, pp.iv-v).

Kenyan Pastoralists have taken advantage of the assistance offered by non-governmental organisations (NGOs) to pursue their aspirations. Of note is the assistance of the consortium of NGOs led by the Centre for Minority Rights Development (CEMIRIDE) in organising the annual Kenya Pastoralists Week (KPW) from 2003. Ultimately, the KPW seeks to achieve a public policy paradigm shift in favour of pastoralism (CEMIRIDE 2005).

Thus Kenyan pastoralists resent the marginalisation to which they have been subjected by the colonial government and by successive independent Kenyan regimes. They know from long and bitter experience that neither the law of the state nor those who interpret it are on their side. In the words of one herder, “the law does not speak the Samburu language or the Borana, or the Somali, or the Turkana, or the Maasai” (cited in Mwangi 1994).

The most well known pastoralist community in Kenya are the Maasai. They have suffered dispossession of their land, first at the hands of the colonialists, and then at the hands of the political and economic elite in independent Kenya. Nevertheless, in comparison to some of the other pastoralist communities, the Maasai have a significant numerical advantage, the benefits of formalized
ownership of land, and a sizeable representation in the various arms of government. Moreover, the plight of the Maasai has been so well documented that it is not necessary to present it here (see for example Waller 1976, Kituyi 1990, Munei 1991, Galaty 1992, Homewood 1995, Munei and Galaty 1999, Fratkin 2001 and Hughes 2006). Consequently, in the subsequent paragraphs, we present brief histories of the struggles against marginalization by two much smaller pastoralist communities, namely, the Endorois and the Ilchamus. These two communities, like several others, are not only dispossessed, but also lack the population size to participate effectively in the country’s majoritarian political process.

(a) The Endorois

One of the very small indigenous Kenyan pastoralist communities are the Endorois - a community of approximately 60,000 people. For centuries, they have lived around the Lake Bogoria region in the present South Baringo, Koibatek, Nakuru and Laikipia administrative districts, all within the Rift Valley. It is thought that around 1700 C.E., later migrants - the Turgen and the Maasai - engaged the Endorois in skirmishes, even full-scale wars, and before long the Turgen overran and sought to assimilate them (Ruto 2007).

In view of their gross numerical disadvantage, it is not surprising that the Endorois are often classified as a sub-group of the Tugen who belong to the Kalenjin umbrella group (CEMIRIDE 2003). Nevertheless, on 1st March 2010, Mr. Wilson Kipsang Kipkazi of the Endorois Welfare Council (EWC) told the present researcher in a telephone conversation that the Endorois are not a sub-group of the
Tugen, but rather a distinct Kalenjin ethnic group with their own language and
customs. The Endorois practice of pastoralism has consisted of grazing their
animals (cattle, goats and sheep) in the lowlands around Lake Bogoria in the rainy
seasons, and moving into the Mochongoi forest during the dry seasons. They have
also engaged in bee-keeping (CEMIRIDE 2003).

In 1973, the Government of Kenya, without effectively consulting the Endorois,
gazetted the Community’s ancestral land for the purpose of creating a nature
sanctuary (Ruto 2007). Evictions from the Lake Bogoria Game Reserve began in
the mid-1970s, with the final evictions taking place in 1986 (CEMIRIDE 2003).
These were done despite the fact that the community’s livelihood, health and
culture are all intimately connected to its ancestral land (MRG 2004).
Furthermore, the promised relocation to land of equal value never materialised.
Instead, the Endorois were relegated to semi-arid land between the shores of Lake
Bogoria and Mochongoi Forest (their two traditional habitats), which proved
unsustainable for pastoralism, particularly in view of the strict prohibition of
access to the Lake area’s medicinal salt licks and traditional water sources.
Parcelling of land within Mochongoi forest further restricted the Community’s
nomadic pastoralism. Thus approximately half of the Endorois Community’s
livestock died during the first years after eviction (CEMIRIDE 2003).

Consequently, since the bartering of livestock had been the main means of
exchange within the local economy (apart from modest beekeeping revenues),
most families were neither able to afford school fees for their children nor provide
for basic needs, becoming dependent on relief food (CEMIRIDE 2003).
Furthermore, since the discovery of rubies within Endorois ancestral land, the government has granted concessions for mining to a number of companies that persistently pollute River Waseges - the community's source of fresh water (CEMIRIDE 2007).

At the heart of the Endorois' grievances are three issues:

(1) The members of the community do not expect the Government to allow them back to their ancestral land, so they are seeking adequate compensation for the suffering they have endured since 1973 when they were evicted.

(2) They are seeking "constructive ownership", where joint management of the park with the Government is established and enforced.

(3) They are taking issue with the authorities' sanctioning of the acquisition of a large portion of the land by private developers who have built a luxurious hotel on it (Ruto 2007).

In 2000, having lost faith in contact with former President Daniel arap Moi who was their MP at the time, the Endorois instituted legal action in the High Court at Nakuru against the Baringo and Koibatek County Councils with regard to Endorois rights to their ancestral land. The Community argued that by creating the game reserve, the County Councils had breached the Trust Land provisions of the country's constitution. However, on 19th April 2002, judgment was given, dismissing the application. Although the High Court recognised that the Lake Bogoria Basin had been trust land for the Endorois, it stated that the Endorois had effectively lost any legal claim to it as a result of the designation of the land as a Game Reserve. It also ruled that the small amount of money given in 1986 to 170
families for the costs of relocating represented the fulfillment of any duty owed by
the authorities towards the Endorois for the loss of their ancestral lands. Referring
throughout to “individuals” affected, the Court also stated that it did not believe
Kenyan law should address any special protection of a community’s land based on
historic occupation and cultural rights. The court went on to declare that the law
does not allow individuals to benefit from a natural resource simply because they
happen to be born close to it (High Court 2002).

However, upon the conclusion of the case at the Nakuru High Court, the Endorois
requested a local NGO, the Centre for Minority Rights Development (CEMIRIDE), for help to pursue their cause. With the assistance of CEMIRIDE
and its international counterpart, Minority Rights Group International (MRG), the
Endorois case was filed before the African Commission on Human and People’s
Rights (ACHPR). When the case first appeared before the commission in Banjul,
the Gambia in August 2003, it received immediate admission. In June 2004, the
commission wrote to President Kibaki, asking him to halt activities considered
detrimental to the Endorois, and to ensure that no further issuance of the alleged
mining concessions took place. However, the situation in the Lake Bogoria region
continued to deteriorate (MRG 2004).

In May 2009, the African Commission on Human and Peoples’ Rights (ACHPR)
arrived at a landmark decision, finding the Kenyan government guilty of violating
the rights of the Endorois by evicting them from their lands to make way for a
wildlife reserve (ACHPR 2009). Furthermore, the ACHPR’s verdict was approved
by the African Union at its January 2010 meeting in Addis Ababa, Ethiopia (MRG 2010).

In arriving at its decision, the ACHPR noted that the Kenyan Constitution then while incorporating the principle of non-discrimination and guaranteeing civil and political rights, did not recognize economic, social and cultural rights as such, as well as group rights. This, in the Commission’s opinion, had a direct adverse effect on the domestic claim of the Endorois seeking recognition of their collective claim to their ancestral lands. The ACHPR found the Endorois to be worthy beneficiaries of the collective rights under the African Charter. More specifically, the Commission recognised the right of the Endorois to preserve their identity, part of which found expression through the community’s access to its ancestral lands. The Commission also found that in failing to provide sufficient compensation, or provide suitable alternative land for grazing after the eviction of the Endorois, Kenya’s government fell short of adequately providing for the community in the development process (ACHPR 2009).

In its ruling in favour of the Endorois, the ACHPR made the following recommendations:

(1) Restitution of Endorois ancestral land.

(2) Unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites, in addition to grazing for their cattle.

(3) Payment of adequate compensation to the community for all losses incurred.
(4) Payment of royalties to the Endorois from existing economic activities, and ensuring that they benefit from employment possibilities within the Reserve.

(5) Registration of the Endorois Welfare Committee.

(6) Government engagement with the community for the effective implementation of the recommendations (ACHPR 2009).

In response to the ruling, Wilson Kipsang Kipkazi of the Endorois Welfare Council (EWC) stated: “We are delighted that the African Commission has recognised the wrong that was done decades ago.” He added: “This decision is the result of a sustained campaign for the recognition of the Endorois as a distinct indigenous community and the restoration of our ancestral land” (cited in MRG 2010). Abraham (2010) explains the significance of the ACHPR ruling in favour of the Endorois as follows:

By acknowledging that the scope of article 14 of the African Charter extends beyond individual property based on state-sanctioned titles to encompass collective property grounded on cultural norms, the commission has revisited the post-colonial discourse on the need to reassess colonial land relations that continue to contribute to present iniquities, often leading to violent conflicts. ... By puncturing the juridical stranglehold of states over land, the Endorois decision requires states to engage in a robust conversation with indigenous groups in framing developmental options that encroach upon land traditionally occupied by communities.

During the Endorois celebrations of the ACHPR ruling at the shores of Lake Bogoria on 20th March 2010, James Orengo, the Minister for Lands, undertook to prepare a Cabinet Memorandum, with a view to ensuring that the government respects the ruling (Kiprotich 2010). Yet the intrigues of coalition politics might be converging with the vested interests of those who apportioned themselves the
Endorois property to frustrate the aspirations of this marginalised community. Indeed, on Tuesday 18th January 2011, almost ten months after the celebrations of the Endorois victory, Orengo was hard pressed to explain to Parliament why the government was yet to implement the African Commission decision. In his defence, Orengo asserted that the Endorois leaders had undertaken to provide him with a sealed copy of the ruling, but had not yet done so. However, Ekwe Ethuro, the MP for Turkana Central, dismissed Orengo’s defence on the grounds that the government, being a member of the African Union, was much better positioned than the Endorois to acquire the said sealed copy (National Assembly of Kenya 2011, 19-22). Should the Kenyan government continue to drag its feet in implementing the verdict, the Endorois may need to go back to the Commission for redress, yet this is likely to require vast financial and technocratic resources beyond the easy reach of this marginalised indigenous community.

(b) The Ilchamus

Another tiny pastoralist minority are the Ilchamus, numbering about 25,000-30,000 persons. They are a group of the Maasai that settled around the shores of Lake Baringo in the Rift Valley about two centuries ago, so that they have now developed an identity distinct from that of the Maasai (Little 1985, 244). Nevertheless, Mr. Joseph K. Lolmaeni, an Ilchamus University of Nairobi undergraduate education student, told the present researcher that his community’s language is Maasai, and its members are particularly at home with the Samburu dialect of the language (personal Interview with Mr. Joseph K. Lolmaeni, 3rd September, 2009). Located in the Baringo-Bogoria basin of the Rift Valley, the Ilchamus area offered refuge to impoverished pastoralists predominantly from
Samburu, Uasin Gishu Maasai and Laikipia Maasai areas, who sought irrigation and hunting opportunities, as pastoral accumulation was limited by raids from more advantaged groups in the 19th Century (Little 1985, 244).

The Ilchamus currently occupy the area around Lake Baringo, within Baringo Central Constituency (High Court 2006, 10-11). They have borne the brunt of their numerical disadvantage vis-à-vis the Tugen with whom they share the Baringo Central Constituency. For example, in the 1980s, public-sector interference with livestock marketing cut off the Ilchamus from both the Pokot and Samburu cattle markets which they traditionally drew from to rebuild their herds. Instead, they had to purchase breeding stock from the higher-priced south Tugen areas. This trend most seriously affected the poorer herders, inhibiting their capacity to recover from droughts (Little 1985, 257). The Ilchamus feel that since independence, they were unrepresented by Daniel arap Moi and Gideon Moi, the first two Turgen MPs from 1963 to 2007, under whose constituency they fell.

Consequently, in 2004, a number of individuals from the Ilchamus community moved to court, seeking to have it rule that the Ilchamus have a right to an electoral constituency of their own, where they can be represented by a person from their own community. The applicants pointed out that Baringo District had three different communities - the Pokot, the Ilchamus and the Tugen - and three constituencies, whose boundaries have been drawn in such a way that the Pokot are adequately represented through Baringo East, and the Tugen through Baringo Central and Baringo North. The Ilchamus have no such representation through any of the said constituencies (High Court 2006, 24-25). Moreover, Rangal
Lemeiguran, the main litigant for the Ilchamus, told the court that he had observed by the lists of those nominated to parliament since the establishment of the Electoral Commission of Kenya (ECK), that the primary principle of the representation of special interests, which Section 33 (1) of the then Constitution of Kenya mandatorily provided for, had not been complied with (High Court 2006, 19). In this, he was referring to the fact that political parties have consistently allocated the twelve nominative parliamentary seats to party loyalists, without consideration of the need to represent special interests as required by the former constitution.

In their ruling, the judges differed with the argument of the now defunct electoral Commission of Kenya (ECK) that the applicants were tribalising the electoral process. In the judges’ view, the need to protect minority rights was an issue of justice (High Court 2006, 74-76). The judges went on to state:

We take the view that this nation is a rainbow democracy of 42 colours and the argument that special recognition of the minority will open the floodgates of minorities is in our view misplaced. .... Any floodgates would be floodgates of inclusion not exclusion (High Court 2006, 76).

The court directed that in the event of any future constituencies being created by an act of Parliament or any other review being undertaken, the Ilchamus claim be processed by the ECK with the defined constitutional criteria (High Court 2006, 115).

On nominative seats in parliament, the judges ruled that although the former Constitution did not define special interests contemplated by Section 33 (1), the special interests meant those interests which the normal electioneering process had
failed to capture and represent. Thus a constituency which was otherwise well
represented, but had a distinguishable minority who could not on their own make
any difference to the outcome of the election, had an obvious special interest
which ought to be catered for when allocating nominative seats in parliament
(High Court 2002, 72).

From the foregoing review of the Ilchamus case, it is evident that the ruling in
their favour was a watershed in the struggle for the representation of ethnic
minorities in Kenya, particularly in view of the legal principle of precedence -
other marginalized communities can cite this case in pursuit of their own quests
for representation. The judgment was a significant departure from the Western
liberal interpretation of the law to which the Endorois had been subjected in 2002,
when the High Court sitting in Nakuru declined to acknowledge their group
identity (see (a) above).

However, after the 2007 general elections, the political parties ignored the court
ruling in favour of the Ilchamus, and went ahead to nominate MPs who neither
represented ethnic minorities nor any other special interests. Furthermore, when
the Ilchamus filed a Judicial Review application seeking court orders prohibiting
the now defunct Electoral Commission of Kenya (ECK) from forwarding the list
of nominated Members of Parliament to the President for appointment unless and
until one of their own was included in the list, the court dismissed the application.
The court took issue with the Ilchamus' understanding of the judgement it had
delivered in the earlier case (2006), insisting that nowhere in that judgment did it
indicate or suggest that a political party should mandatorily reserve a seat for
nomination of a member of the Ilchamus as a minority group. The court also asserted that it had no jurisdiction to interfere with the nomination process, since such nomination was purely a party affair. The court even ruled that the nomination of a member from the Ilchamus community to Parliament would depend entirely on the participation of the Ilchamus in the political process through a party of their choice. This position blatantly ignored the fact that party politics, like many other political processes, is based on numerical strength, which is the very thing that the Ilchamus lack.

It seems that the court in the instance of the Ilchamus Judicial Review application chose to go by the letter rather than the spirit of the former constitution, since in its own earlier (2006) ruling it had acknowledged the importance of representation through nominative parliamentary seats for interests which the electioneering process fails to capture and represent. Indeed, the court's Judicial Review ruling was apparently inconsistent, as it went on to state that it was the responsibility of the ECK both to draw attention of the political parties to the Constitutional meaning of special interest and to vet nominations in accordance with the criteria provided in the Constitution. In this the court even seems to have disowned its own 2006 interpretation of "special interests", which it gave after acknowledging that the constitution had not defined this term.

A more plausible ground on which the court dismissed the Ilchamus Judicial Review application was that Section 41 (9) of the Constitution declares that in the exercise of its functions under the Constitution, the ECK will not be subject to the direction of any other person or authority. The court therefore ruled that the ECK
ought to be allowed to discharge its constitutional mandate at all times without interference from any quarter. The only qualification to this mandate was Section 123 (8) of the former Constitution which conferred upon the High Court supervisory jurisdiction. As Mbatia (2008) explains, what in essence the court was saying is that the Ilchamus' application ought to have been brought under the Constitution, and not under the Law Reform Act. This was a fatal defect, so that the application could not be maintained. Thus the Ilchamus Judicial Review ruling seems to have been a significant step backwards for the entrenchment of the rights of Kenyan ethnic minorities in the countries statute books.

2.6.2. Hunter-gatherers

The most marginalised ethnic minorities in Kenya are hunter-gatherers. These are communities with very small populations, and whose economy is based on foraging. They have ancestral claims as original inhabitants of the land. However, like their counterparts elsewhere in Africa, they experience substantial marginalization and exploitation in their relation to the state and to dominant ethnic groups. The key issues for hunter-gatherers revolve around disputed claims to territory (Blackburn, 1982, 296). The marginalization of hunter-gatherers is compounded by intervention in their lives by outsiders - including commercial interests, non-governmental organizations, religious organizations, and international financiers - who rarely understand the link between indigenous culture, social identity and physical survival (Campbell 2004, 18). Nevertheless, it is often governments, in their various guises, that smother local communities with land reforms that strip them of land rights, expropriate their land, and view them as obstacles to rather than agents of their own development (Galaty 1999).
While hunter-gatherers have a long history of trying to ward off domination from their more numerous pastoralist and agriculturalist neighbours, their situation has markedly deteriorated as a result of colonial and postcolonial policies that have removed them from their ancestral lands. The net effect of such policies has been to economically marginalize such groups, and to deracinate them by denying them rights to land, and thus the loss of the ability to maintain their culture, so that they are now on the verge of extinction (Campbell 2004, 8, 15, 19-20). The Mukogodo of Kenya are a case in point (see Cronk 2004). The existence of the Mukogodo has never even been acknowledged in the official population census, because they are grouped with their more populous and dominant neighbours, the Maa-speaking pastoralist communities (Maasai and Samburu). Through close contact with the Maa-speaking communities, the Mukogodo succumbed to pressure to adopt pastoralism in place of their indigenous hunting and gathering. Yet the change was more than simply economic: the community adopted the Maa language in place of its own Yaaku language. Indeed, according to a recent report, due to the overbearing influence of Maa culture, at present only seven individuals can speak Yaaku (Kumba and Ndirangu 2010). Below we briefly examine the aspirations of two hunter-gatherer communities, namely, the Ogiek and the Sengwer.

(a) The Ogiek

The Ogiek are one of the last remaining forest dwellers in Kenya, and number approximately 20,000. Their ancestral home is the Mau forest (the largest tropical
forest in Kenya measuring approximately 3000 square kms) (Jansen n.d.). It seems likely that the Ogiek are aboriginal people of present-day East Africa, and that originally they occupied the whole central highlands region. The clan (oret), constituted by several local groups, is the land holding unit among the Ogiek, and the most important unit socially (Ohenjo n.d.). Although they speak a Kalenjin dialect, depending on who they border, as their first language, the Ogiek do not consider themselves to belong to the Tugen, Nandi or Kipsigis communities by virtue of speaking the languages of those peoples.

In pre-colonial times, the Ogiek lived mainly on game hunting, indigenous bee keeping, gathering wild honey, wild fruits and roots, and were, therefore, friendly to their environment. The community is frequently referred to as Dorobo, from the Maasai derogatory reference to them as il Torobo. To the Maasai, the Ogiek way of life (which excluded livestock keeping) depicted abject poverty, hence the nickname il Torobo, meaning “very poor people”. The term by which the community refers to itself is Ogiek, also spelt Okiek, which literally means “the caretaker of all plants and wild animals” (Kamau 2000; Sang 2001, 113).

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3 The term Ogiek is also used to refer to another community that lives in Chepkitale in the Mount Elgon area. However, while the Ogiek of the Mau Forest are hunter-gatherers, the Ogiek of Mount Elgon are pastoralists. The use of the same term to refer to the two distinct communities is probably due to the fact that the term is assumed to refer to the indigenous character of both communities (see Lynch 2006, 55-56).
From 1902, the colonial government passed legislation that declared forests to be government land. According to the Forest Act, it is illegal to hunt in a forest or collect honey without a special permit, so that only through degazettement can forestland cease to be a forest and be inhabited. This means that the Ogiek would be breaking the law simply by inhabiting their ancestral land, or by going hunting or collecting honey from it. The colonial government also replaced the natural forests in Ogiek territory with Conifer plantations that were, to the Ogiek, totally sterile, unproductive and useless for either bees or wild animals (Kamau 2000).

In 1929, the Colonial Government appointed a Committee to examine the “Ndorobo question”. Defining Ndorobo as “a general term including most kinds of hunting people ... usually scattered families with no tribal organization”, the Committee recommended that “wherever possible, the Dorobo should become members of, and be absorbed into, the tribe with which they have the most affinity” (Colonial Office 1934, 2131, 2133; cited in Lynch 2006, 54). Indeed, the colonial government saw the Ogiek as harmful and barbaric. Consequently, it sanctioned a series of efforts to dispossess them of their land. The Kenya Land Commission, usually referred to as the Carter Commission, was set up to look into land problems in the Kenya colony between 1932 and 1938. The Ogiek made several representations to the commission laying claim to their ancestral land, but the commission rejected all of them. Among the forty-two ethnic groups that the Commission differentiated, the Ogiek were not listed. Instead, they were considered to be “just a wandering people”, and thus not recognized as a distinct ethnic group entitled to their ancestral land. From that time on, the Ogiek became squatters on their own land (Jansen n.d.). The commission recommended that the
Ogiek be allocated land near communities with whom they had affinity, especially the Nandi, Kipsigis and Maasai, to encourage their assimilation into those communities. However, this proved to be impractical, as the Ogiek went back to their homes in the forest, where they were seen as squatters.

Having lost their traditional occupations, the Ogiek have been forced into agriculture and livestock keeping. Nevertheless, they lack the necessary skills in these two fields, and are also exploited by middlemen when they seek to sell their produce. Poverty among the Ogiek has resulted in high levels of illiteracy (more than 80 per cent), since parents cannot afford the cost of education. To add to this, locked out of their “pharmacies” (the forests), and without money to access health facilities which are in any case inadequate, the health standards of the Ogiek have plummeted.

Recent encroachment into Ogiek lands by fellow Africans started in 1958, when identity cards were issued to Africans for the second time. Some members of the Kalenjin community registered themselves as Ogiek in order to have a stake in the Ogiek claims to their ancestral lands. In the first fourteen years of independence, the Kenyan government did not interfere with the Ogiek. Independent Kenya’s government first started harassing the Ogiek in 1977, when government forces led by the Rift Valley Provincial Commissioner invaded Mau West Forest, torching Ogiek houses, and arrested members of the community, who were then arraigned in court on the charge of being illegal squatters in the forest. Ten years later, in 1987, the government banned the keeping of livestock and carrying out of farming
activities in forests. However, this ban was applied selectively, targeting the Ogiek and other non-Kalenjin communities.

Ogiek ancestral lands are gazetted as government forests or national game parks/reserves. Consequently, the government is not required to consult the Ogiek with regard to the use of this land. Logging has been a major cause of the destruction of the forests in Ogiek-inhabited areas, especially from the 1990s. Three giant logging companies - Pan African Paper Mills, Raiply Timber and its sister firm, Timsales Ltd - are exempted from the general government ban against logging on the grounds that Raiply and Timsales employ over 30,000 Kenyans, while the government itself has shares in Pan African Paper Mills. Given that the Ogiek population is not large enough to be politically significant when it comes to voting, and since they have no centralized leadership, their ancestral land was taken away, and they are regarded as squatters in it (Sang 2001, 124).

Since 1993, the Kenyan Government has systematically carved out huge parts of Mau Forest for settlement of people from other communities. Such land has sometimes been allocated as political rewards under the pretext of resettling squatters or enhancing environmental conservation. In the case of Mau forest, some 39 per cent of the officially gazetted forest had been illegally excised according to aerial surveys. Many of the illegal allocations were small-holdings. As well as allocations made by politicians and the local government, forest land in Mau was acquired illegally through a process of extending legitimately settled areas of land adjacent to the forest (known as Group Ranches - a settlement area held by a community group) into the forest (Amnesty 2007). Ogiek ancestral land
has also been taken by private individuals under the existing land laws for cultivation of export crops such as flowers, tea and pyrethrum. The cultivation of pyrethrum is also harmful to the traditional Ogiek activity of honey production, because the poisonous pyrethrum kills bees.

In recent years, the government has stepped up measures to conserve the Mau Forest complex, the ancestral home of the Ogiek. In this venture, the government requires the Ogiek to vacate the forest along with all other inhabitants of the forest, as though the Ogiek are part of the reason for the destruction of the water tower. On 12th July 2008, five Ogiek community based organisations jointly presented a memorandum to Prime Minister Raila Odinga, pointing out that historical sources reveal that they are the earliest inhabitants of Kenya. They further asserted that they were ardent conservationists rather than destroyers of the Mau. They blamed the destruction of the forest on successive regimes, not least the Moi regime which allocated Ogiek land to foreigners while purporting to allocate it to the Ogiek. They outlined the various legal maneuvers by various regimes to dispossess the Ogiek of their ancestral lands. One of the demands of the Ogiek in the said memorandum was constitutional review with focus on the rights of minorities on land and representation, and a confirmation from the Government that the Ogiek shall not be re-located or displaced from their ancestral lands in the Mau (Ogiek 2008).

The Ogiek have formed a number of self help organizations to advocate for their rights, among them the Ogiek Welfare Council (OWC), Ogiek Rural Integral Projects (ORIP), Ogiek Peoples' Development Programme, and the Chepkitale
Indigenous Peoples Trust. The approaches of these organizations differ slightly, but their main struggle is the same - recognition of the Ogiek as a distinct ethnic group, and of their rights to their ancestral lands (Jansen n.d.). At the local level, their struggle has focused on demonstrations, and participation in the Land Reform and Constitution Review Processes. However, these have so far produced no tangible results.

On 25th June 1997, the Ogiek living in Mau east moved to court, seeking to stop the Attorney-General and four senior government officials from surveying and allocating their land to outsiders. The community also sought the court's protection of the land in Sururu, Likia, Teret, and Sigotek forests. On the same day, the court allowed the 22 applicants to sue the state; but even as the Ogiek were in court, the allocation of the land continued. The Ogiek also had to put up with frequent adjournments of their case (Kamau 2000). On 21st May 1999, representatives of the Ogiek again appeared before Nakuru Resident judge, David Rimita, who restrained the government from evicting members of the community from Tinet forest. The Ogiek were pleased to have Nakuru judge David Rimita refer their case to the Chief Justice in Nairobi. However, in March 2000, the High Court in Nairobi ruled on the case, dismissing all the petitions of the Ogiek, and approving their eviction from Mau forest. In their ruling, the two judges, Samuel Oguk and Richard Kuloba, denied the fact that the forest was actually the ancestral land of the Ogiek. The court also failed to dwell on the submission that the motive behind the eviction was to give out the land to individuals close to political power, rather than save the forest which had been intact even with the Ogiek inside it.
At the international level, the Ogiek have been represented by their organizations at forums such as the World Conference Against Racism in 2001, the World Summit on Sustainable Development in 2002, and the UN Working Group on Indigenous Peoples. Other NGOs and civil society organizations have also argued the Ogiek case at these fora, and at the UN Working Group on Minorities.

In the light of their experiences in the courts, the conviction grew among the Ogiek that only in a new constitutional dispensation could their rights be protected. They presented their memorandum to the Constitution of Kenya Review Commission (CKRC), but its impact was lost with the disintegration of the review process in 2005. What is more, in 2010, the Ogiek were evicted from the Mau Forest along with members of pastoralist and agriculturalist communities that had encroached into the forest. By January 2011, many Ogiek families were still languishing on the periphery of the forest, the government plan to re-settle Mau evictees still unimplemented (see Okoth 2011).

(b) The Sengwer

The Sengwer, (also known as the Cherangany), is a hunter-gatherer community which considers itself to be an indigenous ethnic group in accordance with international instruments. They lay claim to this status on the basis that their lives are characterised by lack of recognition as a separate and distinct ethnic group, resulting in marginalization, vulnerability, powerlessness, torture, oppression, unemployment, discrimination and lack of representation. Indeed, the lack of recognition of this community is evident in the fact that Kipkorir and Welbourn
asserted that the Sengwer are part of the Marakwet - a claim which the Sengwer deny. In pre-colonial days, the Sengwer were surrounded by the Pokot, Karamojong, Sebei, Kony, Bukusu, Nandi, Maasai, Keiyo and Marakwet ethnic groups (Sengwer 2007, 3). Many of these groups had a variety of advantages over the Sengwer, resulting in the community’s eventual subjugation. As in the case of the Ogiek, the Maasai referred to them as the *Il Torobo* ("dorobo"), because they did not keep cattle, and therefore seemed to the Maasai to be extremely poor (Sengwer 2007, 2). With a population of approximately 60,000, most of the Sengwer are currently distributed in Trans Nzoia, Marakwet and West Pokot districts in the North Rift Valley province, where they form a minority in each of these districts (Sengwer 2002).

The colonialists removed the Sengwer from their ancestral lands on the pretext of conserving the area’s forest cover (Sengwer 2002). The community was thereby denied access to their homes, herbal medicine and food. To add to this, part of Sengwer ancestral land in Trans Nzoia was converted into a game park, currently known as Saiwa Swamp National Park. This was one of the most important hunting areas of the Sengwer. Part of the impact of the forceful eviction of the Sengwer by the Colonial Government was their dispersion in and out of Kenya. Furthermore, the British colonial administrators facilitated the access of Sengwer ancestral land to other communities, including the Marakwet, Keiyo, Pokot and Nandi (Sengwer 2002).

As in the case of the Ogiek, the colonialists sought to erase Sengwer identity by encouraging their assimilation into the neighbouring communities. This explains
why the Sengwer were not assigned any native reserves, as were their neighbours. To add to this, in a bid to change the lifestyle of the community from being hunter-gatherers, the colonialists introduced cattle keeping and potato planting among the Sengwer. These assimilationist efforts were considerably successful, as seen by the fact that both the Marakwet and Pokot claim that Sengwer is one of their clans (Sengwer 2002).

Soon after independence, most of the former Sengwer land left by the Europeans was given out as settlement schemes to members of other ethnic communities, including the Kikuyu, Nandi, Keiyo, Marakwet, Kisii, Kipsigis, Luhya, Turkana, and Tugen. The remaining portion was made Agricultural Development Corporation (ADC) farms run by the government.

Moreover, during colonial and post-colonial times, the existence of the Sengwer as a distinct ethnic community has not been recognized. In the days when one was required to state one’s ethnicity in order to get an identification card, the Sengwer were forced to identify themselves as Pokot, Marakwet or Keiyo (Sengwer 2002; Lynch 2006, 50-51). What is more, during national population census, the Sengwer are reckoned among neighbouring communities. For example, the Sengwer recall that during the 1999 national population census, every recognised ethnic community in Kenya was given a census code number, even those grouped under the umbrella Kalenjin community. Yet the Sengwer and other minority groups did not appear in the coded list of communities to be enumerated. However, due to persistent protests, The community was eventually given a
census code number 081 on 28th August, 1999. Nevertheless, as pointed out earlier, the government withheld the census results disaggregated by ethnicity.

The numerical disadvantage of the Sengwer impacts negatively on their ability to act in the political realm. For example, they lament that since Kenya’s independence in 1963, they repeatedly sought audience with both Presidents Kenyatta and Moi, but their efforts were unsuccessful.

When eventually the process of reviewing Kenya’s constitution got underway early in this century, the Sengwer, like other minority ethnic groups, saw this as the opportunity to improve their lot. Among the recommendations of the community in its memorandum to the Constitution of Kenya Review Commission (CKRC) were the following:

- Recognition as a distinct ethnic group.
- Freedom to continue with their beekeeping and hunting in the forests, on condition that they do not damage the environment.
- A Sengwer administrative district, where they would be the majority ethnic group.
- Restitution for lost land during the colonial and post-colonial period.
- Mandatory consultation with the community on any public policy with an impact on its welfare.
- Facilitation of a treaty between the aboriginal Sengwer and immigrants into Sengwer land.
In their recommendations for a new constitution, the Sengwer took a broad view, proposing the recognition and protection of every ethnic community's ancestral lands. They further recommended federalism, where power would be decentralized to the ethnic communities in their ethnic administrative districts. They also urged that the constitution increase the number of nominated Members of Parliament from twelve to create room for representatives from ethnic minorities: they might not have realized that the twelve seats were actually intended for special interests, contrary to practice. Moreover, they proposed a bicameral parliament, in which the Senate would have two representatives from each ethnic group, and a House of Representatives in which the ethnic minorities would also have their representatives through affirmative action (Sengwer 2002).

2.6.3. Pastoralists and Hunter-Gatherers' demands: An Overview

In 2002, the Pastoralists & Hunter-Gatherers Ethnic Minority Network (PHGEMN) presented a memorandum to the Constitution of Kenya Review Commission (CKRC), demanding that PHG ethnic communities be named and specifically identified within the constitution as some of the groups forming the Kenyan State and owing allegiance to it. In this way, minority ethnic groups would be recognized, and would no longer be submerged under a "Kenyan identity", which only reflects the history and traditions of the dominant communities (Pastoralists 2002). The PHGEMN further advocated that the new constitution adopts an ethnic based federalism, with the redrawing of Kenya's administrative boundaries along ethnic lines, so that where communities are currently interspersed into different districts, they are put back into one administrative zone. They further proposed two levels of executive power -
national and regional, with the region as the basic unit of decision-making (Pastoralists 2002).

In view of Kenya's multi-ethnic composition, the PHGEMN advocated for a bicameral legislature, with a view to having equal representation of ethnic groups in parliament. They urged that requiring that the Upper House be made up of an equal number of representatives from each ethnic group could achieve equal ethnic representation. They also advocated for an overhauling of the judiciary, including the establishment of the office of Ombudsman for Minorities, to serve as the auditor of human relations in a manner reminiscent of the Auditor-General's role. They went on to demand the establishment of a constitutional Commission to address historical injustices (Pastoralists 2002).

The International Labour Organisation (ILO) "Convention concerning Indigenous and Tribal Peoples in Independent Countries" has several provisions that could enhance the welfare of Kenyan pastoralists and hunter-gatherers (ILO 1989). For example, it enjoins governments to "establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them" (ILO 1989, Art.6 (1) (b)). However, Kenya is not a signatory to this convention.

2.7. Aspirations concerning Representation

Perhaps nowhere else are the conflicting aspirations of Kenyan ethnic minorities and majorities more manifest than on the matter of political representation,
embodied in the debate on the review of electoral constituencies. We have already referred to the case filed by the Ilchamus with a view to getting their own constituency separate from the Turgen of Baringo Central (2.6.1(b)). Besides, the disparity between densely populated highland agricultural constituencies and sparsely populated lowland pastoralist ones is a topic of heated political debate. Of great relevance in this regard is the pastoralists' concern that the review of the constituency boundaries which was due in 2007 would have reduced their representation to a handful. To pre-empt it, pastoralist representatives have consistently argued that land size, dispersal of population, and the state of transport and communications within constituencies ought to be taken into account. In this regard, they have frequently countered the majoritarian saying that "one person one vote" with "one Kilometre one vote". They point out that it is far more difficult for a member of parliament in the arid regions to visit and consult his or her constituents, than it is for his or her colleagues in the highlands.

A memorandum drafted in Naivasha in April 1998 under the auspices of the Kenya Pastoralist Forum and the Northern Parliamentary Group demanded the creation of more constituencies in the arid regions by sub-dividing existing ones. The memorandum also asked for the creation of more districts in order to make administration more efficient and bring government closer to the people (cited in Markakis 1999, 295-296). The underlying reason for this demand was the fear that in some districts the indigenous pastoralist populations were becoming outnumbered by immigrants from the highlands, and risked becoming marginalised in their own homelands (Markakis 1999, 295-296).
In mid 2007, Martha Karua, then Minister for Justice and Constitutional Affairs, tabled in Parliament *The Constitution of Kenya (Amendment) Bill No. 32*, seeking to increase elective parliamentary seats from 210 to 250, to take effect during the General elections of December that year. Karua repeatedly emphasized that the population distribution criterion in Section 42 of the then constitution would be the salient determinant of the new parliamentary constituencies. This proved that the fears of pastoralists and hunter-gatherers concerning representation earlier noted were solidly based on socio-political realities.

Furthermore, the same bill sought to replace the twelve nominative seats for special interests with fifty special seats for women. The bill was seconded by the Attorney General Amos Wako and supported by then Finance Minister Amos Kimunya, who argued that the Kibaki government wanted to leave a legacy of affirmative action for women. In response to objections from other interest groups such as ethnic minorities and persons with disabilities, Karua contended that the women would be able to represent all other special interests because each of them included women. On 3rd August 2007, the Kenya Television Network (KTN) reported that the Ogiek were urging the government to amend the bill so that the fifty special seats could be shared between the women and ethnic minorities on a 50% basis.

However, the bill lapsed when government-friendly MPs boycotted it, insisting that Karua had tabled it without consulting them enough (Nation Reporter 2007). Nevertheless, it was apparent that the danger of ethnic minorities being further dispossessed of their political rights remained for at least two reasons. *First,*
although the MPs declined to lend support to the bill, their action was due to political expediency rather than commitment to the need to ensure that all interests were adequately represented. *Second*, majority ethnic groups continued to wield overwhelming influence in the country’s politics, and therefore able to act in their own interests to the discomfiture of their numerically disadvantaged counterparts. Moreover, the winner-take-all electoral system which prevailed in Kenya until the promulgation of the new constitution in August 2010 offered ethnic minorities inadequate political security: if a minority was in power, as was the case with the Moi regime, it did not wish to risk losing power and, conversely, a minority without power had no hope of winning it (Jonyo 2002, 105).

After the post 2007 elections crisis, The Interim Independent Boundaries Review Commission (IIBRC) was established through an amendment of Section 41 of the former Kenyan constitution, which also established the Interim Independent Electoral Commission (Republic 2008a). The amended Section 41C (a) of the former constitution had stated that the commission was responsible for making recommendations to Parliament on the delimitation of constituencies and local authority electoral units and the optimal number of constituencies on the basis of equality of votes taking into account the following factors:

(i) Density of population, and in particular the need to ensure adequate representation of urban and sparsely-populated rural areas;

(ii) Population trends;

(iii) Means of communication;

(iv) Community interest.
However, with the promulgation of the new constitution in August 2010, the mandate of the IIBRC was limited to creating eighty new constituencies, with a view to arriving at the 290 constituencies stipulated by the new constitution (Republic 2010a, Art.89). The democratic principle of the equality of the vote was to be given effect by the provision requiring that in creating constituencies, the number of inhabitants be as nearly as possible equal to the population quota. The population quota was to be arrived at through dividing the total population of the country by the number of constituencies (ibid.).

Recognising that the country has developed unevenly and also that the population distribution is uneven across the country, Article 89 of the new Constitution also provides that the Independent Electoral and Boundaries Commission (IEBRC), the body to succeed the interim electoral and boundaries bodies, can deviate from the population quota by 40 per cent – upwards in respect to cities and downwards in respect to sparsely populated areas. In all other areas, the deviation from the mean is 30 per cent on the basis of:

(a) Geographical features and urban centres;

(b) Community of interest, historical, economic and cultural ties;

(c) Means of communication.

Furthermore, some Kenyan ethnic minorities unsuccessfully attempted to have the new Kenyan constitution delineate counties in a manner that would have enabled them to have their own counties. For example, on 23rd March 2010, during the debate in Parliament on the adoption of the then Proposed New Constitution, Dr.
Wilfred Machage, MP for Kuria, passionately argued that the counties in the draft ought to be increased to cater for ethnic minorities:

Mr. Temporary Deputy Speaker, Sir, if you go to Chapter 2 of the draft Constitution, it tells us---It constitutionalises that the Republic of Kenya is divided into counties as mentioned in the First Schedule, which legalises only 47 counties, exclusive of other communities! Should we migrate to other countries? Should Kurias migrate to Tanzania? Should the Turkanas migrate to Sudan? Should the Tavetas go to Tanzania? You constitutionalise that; it is an issue that would have been left very politely to the Interim Independent Boundaries Review Commission! The First Schedule, therefore, will be the first document that I will pray about; I humbly pray; I kneel down before all these hon. Members---Look at me and have mercy! Please, increase this number to 80. .... We are now being told that because 41 communities will get counties we just accept and follow. This is totally wrong! (National Assembly of Kenya 2010, 53).

Moreover, in view of the majoritarian orientation retained in the new constitution, ethnic minorities are likely to continue to be discontented by the representation they get in the central government and in the counties.

2.8. Conclusion

The present chapter has argued that although no single Kenyan ethnic group is large enough to enjoy long term dominance of the country’s politics on its own, the country experiences what can be properly described as ethnic minority-majority conflicts. This is due to the fact that the considerably large ethnic groups have frequently formed coalitions that give them greater numerical advantage that has enabled them to win political power, and to subsequently put in place policies that marginalise their numerically disadvantaged counterparts. It is evident that the three classical approaches to ethnic minority-majority conflicts (federalism, secessionism and assimilationism) (Wagley and Harris 1964) have been advocated by various numerically disadvantaged communities in the country: a number of
minority ethnic groups advocate federalism; the Somali and coastal communities have sought the right to secede; the Nubian national minority, in demanding citizenship rights, aspires for some kind of assimilation.

What is more, a consideration of the interaction among various ethnic groups in Kenya reveals that a hierarchy has developed based on unequal political power which translates into unequal access to, and control over, land. From colonial times, alien Western capitalism has encroached on land, whether it belongs to agriculturalists, pastoralists or hunter-gatherers; agriculturalists have moved into pastoralist lands, and agriculturalists and pastoralists have taken over hunter-gatherer territories (Campbell 2004, 7-8). Except for alien Western capitalist encroachment, numerical strength or weakness has been pivotal to this hierarchical process of socio-political dispossession, as the agriculturalists are more numerous than the pastoralists, and the latter have a demographic advantage over the hunter-gatherers. To add to this, national minorities continue to live at the fringes of Kenya’s political life. Due to their links to their countries of origin and to their economic strength, the European and Asian communities do not bear the brunt of political exclusion. However, the Nubians find themselves suffering statelessness, with its attendant socio-economic deprivations. This situation is not sustainable, as the disadvantaged communities are likely to become increasingly desperate, thereby threatening socio-political tranquility.

On Sunday 7th March 2010, some leaders of the Endorois held a press conference to urge the Kenyan government to implement the ruling of the African Commission on Human and Peoples Rights in favour of the Endorois. During that
press conference, the Endorois leaders along with some human rights activists asserted that Kenyan ethnic minorities, including indigenous communities, have been subjected to degrading human rights abuses and other injustices, suffered unequal treatment before the law and in resource allocation, and have been subjected to insecurity of land tenure and alienation from state administration (Barasa 2010). This set of grievances seems to capture the gist of the discontent of many Kenyan ethnic minorities. Thus while the three post-independence regimes have sought to gloss over the discontent among ethnic minorities in the name of “nation-building”, the problem must be urgently addressed if the country is to achieve long term political stability.

In order to bridge the ethnic minority-majority divide in Kenya today, it is necessary to examine its main cause. Any future constitutional reviews can then be effected while taking serious cognizance of the need to address the said cause and to mitigate its effects, and thereby to promote mutual understanding and trust among the various ethnic communities. Consequently, the next chapter examines the wellspring of ethnic mistrust in Kenya, namely, politicized ethnicity.
Chapter 3: Politicised Ethnicity: The Wellspring of Ethnic Minority Discontent in Kenya

3.1. Introduction

As pointed out in the previous chapter, Kenya is home to forty-two officially recognised ethnic groups, with five of them dominating the political and economic life of the country. In order to arrive at a rationale for a set of moral principles for the constitutional protection of Kenyan ethnic minorities, it is necessary to have a clear understanding of the main source of discontent among these communities. Consequently, on the basis of literature by various social scientists, this chapter examines the single most important cause of dissatisfaction among Kenyan ethnic minorities, namely, politicized ethnicity (or ethnicised politics) - the mobilization of sections of the population on the basis of cultural identities with a view to capturing or retaining state power.

The chapter sets out by tracing the origins of politicized ethnicity to the advent of colonialism. It then examines the foundations of post-colonial politicised ethnicity in the regime of Jomo Kenyatta. Next, it focuses on the perpetuation of this approach in the management of public affairs during the Moi regime. This is followed by an examination of politicised ethnicity during the transition to multi-Party democracy from the late 1980s - a period which constituted the latter part of
Moi’s rule. The chapter then interrogates politicized ethnicity during the Kibaki regime. Finally, it briefly looks at the impact of politicized ethnicity on the management of Kenya’s public affairs. The chapter concludes that Kenyans need to identify realistic strategies to counteract politicized ethnicity, abandoning the current approach of preaching against “tribalism” while many in the country, leaders and followers alike, continue to view politics through ethnic lenses. The new approach will involve providing a rationale for a set of moral principles to serve as the basis for the constitutional protection of Kenyan ethnic minorities, thereby making it difficult for politicians to use ethnicity for their own short-term objectives.

3.2. The Colonial Origins of Kenya’s Politicised Ethnicity

In the precolonial period, there was little consciousness of a single religion, language or culture seeking to dominate the ways of other communities in the geographical area that was later designated as Kenya. For the most part, there was no central inter-ethnic organ which could be exploited by a community to the disadvantage of other communities. For centuries, plural societies had survived on notions of multiple identities, respect for diversity and coexistence. While there were outbreaks of inter-ethnic skirmishes, and whereas structural deficiencies and forms of domination existed, the will of numerically advantaged ethnic groups was not foisted on smaller communities, so that the ethnic minority-majority divide was virtually unknown (Oloo 2007, 195; Mute 2002, 160).

The beginning of the process of politicised ethnicity is traceable to the British conquest of present day Kenya. This subjugation commenced with the formal
inauguration of the Imperial British East Africa Company rule in 1888, but more officially with the declaration of British Protectorate in 1895. This set in motion the process of placing different ethnic communities with their diverse systems of government within one large and new area of central administration (Jonyo 2002, 90; Olumwullah 1990, 98). The process of subjugating the country was itself shot through with contradictory policies, and a lack of an elaborate and consistent plan. However, by 1904, the general contours of the polity had been put in place. The territory was then declared to be “Kenya Colony” in 1920 (Omolo 2002, 213).

The dominant ideology under colonial rule was based on the purported supremacy of European ethnicity, so that the European colonial administrators and settlers enjoyed political and economic advantages over the majority African population. This mode of governance encouraged the Africans to associate political power with undue material gain, thereby laying the foundation for politicized ethnicity. African communities neighbouring the so-called White Highlands also became beneficiaries of economic spill-overs such as jobs, petty trade and education, thereby creating inequities between them and the rest of their compatriots (Omolo 2002, 213; Oloo 2007, 195). This inequity is largely responsible for the subsequent intense inter-ethnic competition for the control of the centre, either to redress this anomaly or to perpetuate it (Jonyo 2002, 91). To add to this, the colonial administrative subdivisions of African-designated areas embraced ethnic-specific territorial jurisdictions, and thus helped to foster ethnic identification (Jonyo 2002, 91; Kanyinga 2006, 355).
Kenya’s first indigenous political organisation, the East African Association (EAA), formed in 1919, was truly trans-ethnic. Its leadership was comprised of the different ethnic groups - Kikuyu, Luo, Kamba, the various communities later subsumed under the term Luhya, and some Ugandans, then the dominant ethnic groups in Nairobi’s incipient labour market. Its political programme - protests against hut-tax, forced labour, and the kipande (the pass book) - reflected the frustrations of an embryonic urban working class confronted with the demands of typical settler colonial accumulation strategies (Ajulu 1989). However, following the EAA-led Nairobi riots of 1922 and the subsequent arrest and deportation of three of EAA’s Kikuyu leaders, Harry Thuku, Waiganjo Ndotono and George Mugekenyi, the colonial government seemed to have resolved not to encourage country-wide African political activity. Rather, the policy was to encourage ethnic associations. The subsequent period thus saw the proliferation of such ethnic bodies as the Kikuyu Central Association, Kikuyu Provincial Association, the Kavirondo Tax-payers Association, the North Kavirondo Tax-payers Association, the Taita Hills Association and the Ukamba Members Association, whose activities were similarly confined to narrowly defined ethnic issues (Ajulu 2002, 255).

Some of the Kenyan groups viewed today as monolithic entities were in fact not coherent communities before colonial rule. For example, the name Baluhya dates only to the 1920s, when it was used to profess the unity of Bantuspeaking groups to which the British referred as the North Kavirondo, an administrative aggregation of sixteen separate groups. The British classification of these groups as one was strategically adopted by elites from the subgroups to assert unity for
political goals, for example, through the creation of the Baluhya Political Union to join the independence struggle (Osogo 1966; Itebete 1974, 97-101; Ndegwa 1997, 599). Similarly, Kalenjin (literally meaning “I tell you”), as a group identity, emerged during the World War II period. The group comprises about eight Nilotic subgroups related to each other by common migration and/or origin, settlement, language and material culture (Kipkorir and Welbourn 1973, 1, 70 ff.; Kanyinga 2006, 353). As Kipkorir and Welbourn (1973, 70) have written, “The name ‘Kalenjin’ is not only of recent coinage, it is unpretentiously artificial and political in its origins.” Furthermore, ethnic identity as a strategy for survival in emergent urban social formations is the very stuff of traditional anthropological study in colonial Africa. In the Kenyan case, this explains the emergence of the Mijikenda as an identity distinct from the Swahili community in Mombasa in the 1930s (Atieno-Odhiambo 2002, 231-232). As Davidson (1992, 100) correctly observes, the motive for the colonial policy of encouraging the merger of related cultural groups into “tribes” was to reduce administrative costs.

Along with the policy of encouraging related ethnic groups to merge, the colonial government also made deliberate effort to cause ethnic animosity between various African communities, in line with the strategy of divide-and-rule. The most well documented example of this strategy concerns the creation of suspicion between the Kikuyu and Luo. The stereotypes of the industrious Kikuyu and the lazy Luo were the results of colonial productions of knowledge, but they have continued to inform the constant creation and re-creation of ethnic categories in post-colonial Kenya (Atieno-Odhiambo 2002, 232 ff.).
In 1944, the colonial government appointed Eliud Mathu as the African representative to the Legislative Council. On the advice of the Governor, the Kenya African Study Union (KASU) was formed as a colony-wide African body with which the lone African member could consult. However, the Africans changed its name to the Kenya African Union (KAU), insisting that their grievances did not need study but rather organisation (Odinga 1967, 97). The composition of KAU was significant, in that its membership cut across ethnic boundaries (Muigai 2004, 204).

In 1947, James Gichuru stepped down as chairman of KAU in favour of Jomo Kenyatta. To his credit, Kenyatta set out to establish KAU as a truly national political forum and a mass movement. However, there were serious disparities in political awareness, and widespread ethnic parochialism largely fostered by the colonial government (Muigai 2004, 204-205). While KAU sought to project a nationalist image, its links with other communities were often strained because of what was perceived as Kikuyu domination of the organisation. Furthermore, by 1950, KAU was largely moribund as a result of the radicalization of African politics, as through the Mau Mau Uprising Africans presented an outright challenge to the entire basis of colonial rule, rather than seeking piecemeal reforms (Muigai 2004, 205-206). KAU was finally banned in June 1953, when the colonialists concluded that radicalization was inevitable in any country-wide African political organisation (Muigai 2004, 207).

In 1953, the colonial government adopted the Swynnerton Plan to respond to growing political unrest in Kenya during the Mau Mau uprising. Two components
of the plan aggravated ethnic acrimony by deliberately generating inequalities which would be a basis for future ethnicisation of political processes. These were the policies of land consolidation (which enabled Kikuyu peasants to purchase small tracts of land in the Rift Valley), and the commodity production programme (which enabled Kikuyu peasants to undertake small scale farming of cash crops such as coffee and tea). Thus the two programmes effectively put the Kikuyu considerably ahead of other communities economically, thereby consolidating a pattern of regional inequalities. This was later to account for the ethnicisation of the nationalist movement and the subsequent political arrangement introduced in the post-colonial period (Oloo 2007, 195-197).

From 1953 to 1956, there was a total ban on African political organization. However, when the Lyttelton Constitution with increased African representation was in the offing, the colonial government decided to permit the formation of district political associations (except in the Central Province still heavily under the Emergency where the government would permit nothing more than an advisory council of loyalists), but no national political movement under any circumstances. Argwings-Kodhek had formed the Kenya African National Congress to cut across district and tribal affiliations, but the government would not register the organization, so its name was changed to the Nairobi District African Congress. The colonial policy of encouraging the formation of district-based African political organizations fostered every kind of local separatism. When, as a result, a profusion of parties and leaders developed, all with district and not national loyalties, the African people were blamed for tribalism (Odinga 1967, 146-147).
However, between 1955 and 1963, there developed a nationalist movement, led by non-Mau Mau African leaders. They appealed to a vision of Kenya as a single people desperately striving to free itself from the shackles of colonialism. This movement, which was pivotal to the attainment of Kenya’s political independence, had overwhelming popular support. However, it was a fragmented movement, partly because the different peoples of Kenya had an uneven political development, becoming politically active at different times. The difficulties of communication, the limited leadership and official discouragement also contributed to the weakness of the movement (Atieno-Odhiambo 2002, 236 ff.; Makoloo 2005, 23).

Consequently, it was not surprising that the period leading up to independence in 1963 saw a proliferation of regional, ethnic and even clan based political organisations: the Mombasa African Democratic Union (MADU), the Taita African Democratic Union (TADU), the Abagussi Association of South Nyanza District (AASND), the Maasai United Front Alliance (MA), the Kalenjin Peoples Alliance (KPA), Tom Mboya’s Nairobi People Convention (NPC), Argwings-Kodhek’s Nairobi African District Council (NADC), the Rift Valley Peoples Congress (RVPC), Masinde Muliro’s Kenya Peoples Party (KPP), the Baluhya Political Union (BPU), Paul Ngei’s Akamba Peoples Party (APP), later on named African Peoples Party (APP), and others. These district-based political organisations were to constitute the most effective recipe for the post-independence politicisation of ethnicity. As pointed out in the previous chapter, it is against this background that the formation of the nationalist parties, Kenya African National Union (KANU) and Kenya African Democratic union (KADU)
can be understood (Ajulu 2002, 257; Muigai 2004, 209-210). Thus what Berman (1998, 309) noted about Africa in general was true of Kenya: “From colonial intrusions and African responses emerged the unique linkage under colonialism between bureaucratic authoritarianism, patronage and clientelism, and ethnic fragmentation and competition.”

Nevertheless, it is noteworthy that on the eve of independence, some Kenyan urban dwellers did not view politics through ethnic lenses. For example, in the February 1961 elections, Tom Mboya (perceived to be a Luo)⁴, was able to beat Munyua Waiyaki (a Kikuyu) in a Kikuyu-dominated constituency in Nairobi (Muigai 2004, 210). Thus despite the British policy of divide and Rule, Kenyans at the dawn of independence were probably ready to give national politics a chance. If the masses had been given an opportunity for true co-operation among various ethnic groups, the cosmopolitan outlook of Mboya’s constituents would probably have spread to the rest of the country. After all, various ethnic groups had worked together in the East African Association in the 1920s, and in the Kenya African Union in the 1940s and 1950s.

⁴ Tom Mboya actually belonged to the much smaller Suba ethnic group (which is actually a Bantu-speaking community), his ancestral home being the largely Suba-populated Rusinga Island in Mbita County in the former South Nyanza District, but accepted the Luo identity for political expediency.
3.3. The Foundations of Post-Independence Politicised Ethnicity in Jomo Kenyatta's Regime

At the attainment of Kenya's political independence in 1963, Jomo Kenyatta ascended to leadership, first as Prime Minister, then as President. The change from Prime Minister to President was crucial to the process of increasing Kenyatta's unchecked power. As Prime Minister, Kenyatta was directly answerable to Parliament, and it is this accountability that he sought to put aside through a series of constitutional amendments. First, Kenyatta's KANU government initiated a series of constitutional amendments that concentrated power in the hands of the central government at the expense of the district authorities. These amendments produced a strong provincial administration, which became an instrument of central control. Second, KANU initiated amendments which produced a hybrid constitution, in which the inherited parliamentary system of governance was replaced by a strong executive presidency without the checks and balances expected from separation of powers (Badejo 2006, 254-255).

In our previous chapter, we noted the dissolution of KADU in favour of KANU in 1964. However, the dissolution was done without any clear crafting of alternative modes of cooperation on previous contentious issues that divided the two parties along ethnic lines. Thus the two major communities in KANU (the Kikuyu and the Luo) continued to harbour centralist aspirations, confident that their numerical advantage would ensure their maximal benefit in such a framework. On the other hand, the former KADU members acknowledged that they were outnumbered by KANU, and therefore had to lay aside their regionalist aspirations until an opportune time presented itself in the future. While the division between the two
camps might be viewed as ideological, the truth is that ethnic interests rather than abstract ideological constructions were at the centre of the controversy. This view is supported by the fact that if ideology had been the focus, there would have been supporters of both systems in both camps. As matters were however, no influential personality from the larger communities espoused regionalism, and no prominent leader from the smaller communities advocated centralism (see Odinga 1967, 219-231).

Consequently, while KADU joined KANU, cleavages remained trapped in ethnic interpretations and meanings, much as no leader would have been willing to admit that this was the case. The merger transferred ethnic competition from regions to parliament. Thus while in the decentralized system each district had endeavoured to articulate its specific concerns in its local seat of power and in the Senate, now the struggle for power and economic resources had to be articulated in the unicameral parliament. Furthermore, with increased presidential power, the presidency turned into the epitome of patron-client relationships now operating in Parliament. Ethnic rewards and privileges that are characteristic of patron/client relations inspired a need to defend the presidency. Subsequently, the president became jealously guarded on the basis of ethnic interests, and the presidency became an object of ethnic defence at all costs (Miguda 2003). The upshot was that in the absence of any legal and official opposition and despite the Constitution's allowance of parliamentary democracy, Kenyatta quickly created a highly centralized, authoritarian republic, reminiscent of the colonial state (Mutua 2001, 97).
Kenyatta's immense power meant that he could maneuver to get his way not only in parliament, but also in the judiciary, since the latter was staffed by his own appointees, free from any vetting by parliament. It was these immense powers that Kenyatta used from 1964 to entrench Kikuyu hegemony, and thereby to heighten ethnic sentiments in the management of public affairs in independent Kenya. Thus as the renowned constitutional lawyer, Gibson Kamau Kuria correctly stated, “Since 1963, KANU has acted on a curious principle on which no true democracy acts, namely that the majority in a legislature has an unlimited power to alter the constitution which governs the society in whichever way they choose. The distinguished mark of a democracy is that the government's power is constitutionally limited” (Kuria 1996, 425).

Kenyatta had long held the view that “detribalization”, that is, efforts to delink individuals from their ethnic identities, was a serious moral offense. He blamed the religious pluralism of modernity for breaking up households and ethnic unity. In his ethnographic work, Facing Mount Kenya (1938), he had defended the view that ethnic pride was a precondition of liberation (Kenyatta 1938, 120, 267, 317). After sixteen years of voluntary exile in Britain, Kenyatta returned to Kenya in 1946, with his views on the need to preserve ethnic identities unchanged. He became KAU's most eloquent ethnic conservative. His vision was one of a country in which the various ethnic groups asserted their uniqueness, and cooperated on the basis of mutual respect (Lonsdale 2004, 89).

In practice however, Kenyatta consistently worked for the welfare of his ethnic group, the Kikuyu, to the discomfiture of the other communities. He was
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convinced that in order to present himself as the leader of Kenyan nationalism, he had to foster a secure Kikuyu ethnic sub-nationalism. To secure the latter, he was willing to jeopardize the former. In no area was his partisanship as evident as that of the distribution of land and civil service jobs. On the most critical issue of land redistribution, Kenyatta put Kikuyu interests first (Muigai 2004, 212). Land in the Rift Valley previously occupied by Europeans was given to the Kikuyu and their cousin communities (Embu and Meru), instead of being returned to its previous owners (the Maasai and Kalenjin). Kenyatta had revealed the expansionist plans he nursed for his ethnic community during the Lancaster House Conferences, to the dismay of other delegates: "He said that the Gikuyu must be allowed to take up land in the Rift Valley ... Immediately there was a long-drawn-out 'Aaah' from the Kalenjin and Maasai representatives, and Willie Murgor from the Eldoret area produced a whistle and blew a long note of alarm on it," recalled Michael Blundell in his memoirs (cited in Wrong 2009, 112). Indeed, Wasserman (1973b) amply documented the fact that Kenyatta's regime pursued a policy of maintaining the European settler infrastructure, while enabling the Kikuyu elite to benefit from it, and handing out some land to the Kikuyu masses to entice them away from attempting a violent take-over of the so-called White Highlands.

Thus throughout the Kenyatta regime, Power was increasingly concentrated among the Kikuyu elite, who therefore had a disproportionate access to state resources (Kanyinga 2006, 374). This laid the foundation for a perception of political power as a vehicle for disproportionate socio-economic gain to whichever community occupied the presidency.
In 1966, Oginga Odinga, the Luo leader at the time, who had hitherto been the Vice-President of both the country and KANU, lost both posts due to a series of political maneuvers aimed at his political marginalisation. Odinga responded by forming a political party - the Kenya Peoples Union (KPU) - in April of the same year. The KPU was a loose coalition of KANU (B) “radicals” and trade-union leaders. Although the party was initially supported by a fifth of the existing members of parliament, it was widely perceived as a Luo party. This was mainly due to the fact that Kenyatta and his cohorts, using the state media, waged a deadly and highly effective propaganda war against the KPU. Kenyatta took every opportunity to promote the belief that his political opponents came from one ethnic group, that is, Oginga Odinga’s Luo (Muigai 2004, 213; Kihoro 2005, 123).

What is more, Kenyatta was prepared to use his immense state power to ensure that no free and fair elections took place. For example, in the 1966 “little General elections” occasioned by the formation of KPU and the change of the constitution to require defecters to the new party to seek a fresh mandate from the electorate, KPU candidates were subjected to considerable official harassment. They were not, on the whole, granted licenses for campaign rallies; their passports were impounded; the Registrar of Societies denied KPU registration until nomination day; The voice of Kenya (the country’s government-run broadcaster) imposed a news blackout on KPU. Moreover, in the 1968 local government elections, all KPU candidates were disqualified on the grounds that their nomination papers were filled incorrectly (Wanjala 2002c, 102-103).
Kenyatta also sought to consolidate his grassroot Gikuyu support by highlighting the cultural differences between the Gikuyu and the Luo, with a view to stirring up Gikuyu supremacist sentiments. Gikuyu rites of passage from childhood to adulthood are signified by male circumcision and cliteridectomy, the *sine qua non* for entry into civil society for men, and the route by which women could become “beautiful in the tribe” (Ngugi 1965, 53). Kenyatta extended this Gikuyu notion of civil society to the political arena of the state from 1966 to 1969, when he accused the KPU opposition of being chameleons - definitely not part of civil society and therefore, by extension, not legitimate citizens of the Kenyan state that he ran. The Luo were targeted for this rhetorical exclusion, ostensibly because they did not practice male circumcision (Atieno-Odhiambo 2002, 243-244).

By 1968, the full implications of Kenyatta’s increased powers was dawning on those outside his clique. Thus in October of that year, Joseph Theuri, the Nyeri Town MP, moved a constitutional amendment to reverse the constitutional amendment of 1964 which had made Jomo Kenyatta an executive president. Seconding the motion, J.N. Kibuga, MP for Kirinyaga West, said: “We need a Prime Minister who is directly answerable to the house, a person who can be heckled and shouted at by members” (Daily Nation, 14th August, 2003). The motion, which received the strong support of Oginga Odinga, was opposed by Vice President Daniel arap Moi, who argued that any attempt to remove any of Kenyatta’s powers would result in trouble with the people of Kenya. The motion was roundly defeated (Badejo 2006, 255).
During the 1969 General Elections, KANU was unopposed for the first time. Those who were nominated by the party in the party primaries, where they were held, were declared automatically elected as MPs, and in the case of Kenyatta, President (Kihoro 2005, 158). Thus during the 1969 general elections, Kenyatta also established the practice where only he would be the presidential candidate, and where members of his inner circle would also be unopposed in their bids to recapture parliamentary seats (Wanjala 2002c, 103-106).

Political representation is key to socio-economic development, largely because it is closely linked to public administration and the allocation of resources (Society 2004, 26). It is therefore noteworthy that Kenyatta also systematically worked to increase Kikuyu representation in the legislature. The number of parliamentary seats increased from 113 in 1963 in the House of Representatives to 158 in the uni-cameral National Assembly in 1969. During this period, the number of seats held by the Kikuyu increased by 36% (from 20 in 1963 to 32 in 1969). Kenyatta extended a similar favor to his new allies, the Kalenjin elite - their numbers in parliament increased by about 35%. Other groups did not benefit significantly. The Luhya increased by 16% - from 15 to 18 seats, while the Luo got only one seat (Kanyinga 2006, 370-371).

The assassination of the perceived Luo minister Joseph Tom Mboya on 5th July 1969, a few months after the mysterious death of Argwings Kodhek, another prominent Luo politician, intensified the ethnic animosity between the Luo and the Kikuyu (Muigai 2004, 213). The oathing of the Kikuyu in 1969 in the aftermath of Mboya’s death, with Kenyatta’s knowledge and connivance, was
justified to the ordinary Kikuyu folk on the basis that they had to be prepared to protect the presidency in the "house of Mumbi". Politically, the oathing achieved nothing. Yet it served to unmask Kenyatta as an opportunistic and shameless manipulator of ethnic sentiment. It also served to create even greater suspicion against the Kikuyu among other ethnic groups in Kenya (Muigai 2004, 213-214).

Subsequent oppositional debates have articulated the issues as a dialectic between the following: ethnicity and representation; ethnicity and equitable resource allocation; ethnicity and popular participation and legitimacy; ethnicity and class conflict (Atieno-Odhiambo 2002, 241).

During Kenyatta’s visit to Kisumu in October 1969, just three months after Mboya’s assassination, a large crowd of Luo reportedly threatened Kenyatta’s security, and was fired on by the security guards in what later came to be known as the “Kisumu massacre”. Forty three people were killed on that occasion. In an explanatory statement, the government accused the KPU of being subversive, intentionally stirring up inter-ethnic strife, and of accepting foreign money to promote anti-national activities. Soon after this incident, the Attorney-General Charles Njonjo banned “Kenya Peoples Union and all its branches and sub-branches” under Legal Notice No.239 of 30th October 1969, and Kenya became a de facto one party state. Several KPU leaders and MPs were immediately apprehended and detained (Kihoro 2005, 157).

By the end of 1969, a mere six years after independence, political power had effectively been monopolized by the Kikuyu elite, with Kenyatta at the helm, and closely surrounded by ethnic relatives and friends such as Mbiyu Koinange,
Njoroge Mungai, James Gichuru and Charles Njonjo. The Kikuyu constituted the majority in the cabinet, with important cabinet positions becoming their preserve, as did the headships of such key institutions as the Central Bank, the civil service, the police and strategic parastatal establishments. Even though Daniel arap Moi, a Turgen, was the vice president, it was common knowledge that he held nothing more than a nominal position (Kanyinga 2006). The centre stage was Kenyatta’s, and he enjoyed unrivaled power up to the time of his death in 1978 (Kihoro 2005, 161).

Thus the assassination of Tom Mboya, the banning of the KPU, the subsequent detention of Oginga Odinga and several other KPU leaders, as well as the increasing concentration of power into the hands of Kenyatta’s Kikuyu inner circle all served to heighten animosity between the Kikuyu and the Luo. Following these incidents, the Luo found themselves excluded from power and its attendant access to state resources (Atieno-Odhiambo 2002, 242; Wanjala 2002c, 103). Inter-ethnic tensions were further stoked by the fact that the average Kikuyu was favoured in the allocation of public largesse such as appointments to the public service and access to state loans for private business (Omolo 2002, 214). Yet what is noteworthy for the purpose of this study is that ethnic minorities were not even regarded as contenders to state resources, as the contest was almost exclusively between two large ethnic groups (Makoloo 2005, 5).

In 1973, the Gikuyu, Embu and Meru Association (GEMA) was formed with Kenyatta’s consent. The association had a two-pronged mission: to strengthen the immediate ethnic base of the Kenyatta state by incorporating the Embu and Meru
into a union with the Kikuyu, and to circumvent KANU's party apparatus in the mobilisation of political support among these groups (Muigai 2004, 214). According to Wrong (2009, 113), "If ever there was an expression of ethnic hubris, GEMA was it." While posing as a cultural organisation, GEMA virtually replaced KANU as the vehicle for political activity for most of the Kikuyu power elite. The immediate result of the rise of GEMA was that many other ethnic groups formed "cultural groups" of their own. For example, the Luo formed the Luo Union, while the Kamba formed the New Akamba Union: the façade of nationalism within KANU had broken down irretrievably (Muigai 2004, 214).

In reference to the Kikuyu and the Luo, Kenyatta's regime made clear distinctions between Muru wa Mucii ("Kikuyu for "son of the home") and Wa Ruguru ("the one from the west") - the ultimate "other" in the regime's political lexicon (Atieno-Odhiambo 2002, 242). Thus in the heyday of the Kenyatta regime, it was assumed that the people within the corridors of his power would speak Gikuyu. Shadrack Ojudo Kwassa, a Luo former Chief of Protocol, recalled the surprise of First Lady Mama Ngina Kenyatta at his inability to speak Gikuyu at an official encounter over afternoon tea in Gatundu, President Kenyatta's country fiefdom. He was out of the protocol office the following day, his job having been assigned to a more "appropriate" Mugikuyu (a person belonging to the Kikuyu ethnic group), Daniel Gachukia (Wod Nam, interview by Atieno-Odhiambo, University of Nairobi Senior Common Room, 12th July 1997; cited in Atieno-Odhiambo 2002, 243-244).
Muigai (2004, 201) has summarized the popular misgivings with Kenyatta's perpetuation of politicized ethnicity as follows:

First, by choosing to surround himself with an inner circle of Kikuyu advisors, he [Kenyatta] was seen as having created a Kikuyu government within the government, to the exclusion of other ethnic groups. Secondly, by choosing to champion the deep-seated land and power grievances of the Kikuyu, he was perceived as having consented to be the Kikuyu paramount chief. Thirdly, by co-opting the power elite of other ethnic nationalities into his ruling coalition, he set himself up as the ultimate patron in the neo-patrimonial state he presided over, without placating the poor and dispossessed.

3.4. Politicised Ethnicity in the Moi Regime

When Daniel arap Moi took over power from Kenyatta at the latter's death in 1978, many Kenyans' hoped that ethnic equity would be restored. Indeed, for a while it seemed that their hopes had a sound basis. This was due to the fact that Moi shrewdly ran a government that included most of the ethnic communities in Kenya, including minority communities (Makoloo 2005, 5-6). However, Moi gave high priority to building a strong political power base. He established control over the Civil Service, especially the Provincial Administration, by replacing Kenyatta's appointees with his own. Moi's appointees were from ethnic groups that made up the old KADU party, but most were from his own umbrella ethnic group, the Kalenjin (Kanyinga 2006, 375; Amisi n.d.). Essentially, the ethnic nature of the state changed little, but for the ethnic backgrounds of the favoured elite (Omolo 2002, 214-215).

Two years before Kenyatta's death, Moi was nearly prevented from succeeding to the Presidency by more than twenty Members of Parliament, who sought to amend the section of Kenya's constitution which specified that the Vice-President...
would become the interim president if the incumbent should become incapacitated or die. Although the "Change the Constitution Movement" involved MPs from across the entire country, members of GEMA were among the most vociferous in seeking to block Moi's succession. Thus, upon assuming the Presidency, Moi set about reducing the influence of GEMA, especially its leaders who had been closest to his predecessor (Barkan and Chege 1989, 435; Kanyinga 2006, 356). Whereas Kenyatta had by-passed KANU, Moi revitalized and mainstreamed it, using it as the institution through which his networks would be built. By so doing he undercut the power of established ethno-regional political leaders, and made the party an instrument of personal control (Amisi n.d.).

Furthermore, Moi constituted a new group of loyalists, including Kikuyu senior politicians who had not been influential during Kenyatta’s reign, and who also lacked support from their ethnic constituencies. He also recruited a new loyal grouping from among the Kalenjin. Parallel to this strategy, Moi also utilized the Luo and Luhya in his power game. An overall strategy whereby one ethnic group was played against another evolved (Kanyinga 2006, 356-357).

On 22nd October 1982, Moi introduced his policy of District Focus for Rural Development (Barkan and Chege 1989, 431) In substantive terms, through this policy, Moi sought to redirect the flow of resources from the Central Province, the home of the Kikuyu, to the less-developed regions populated by other ethnic groups, especially the non-Kikuyu areas of the Rift Valley Province and, to a much less extent, the Western Province (Barkan and Chege 1989, 436; Kiringai 2006).
A significant ethnic reconstitution of parliament during the Moi era came following the 1988 General Elections. The proportions of the different Kenyan ethnic groups had remained the same even after the 1979 and 1989 censuses. However, the number of parliamentary seats occupied by the Kalenjin and related groups increased by the largest margin, such that the community had the same number of seats as the Kikuyu (36 seats each), even though they constituted only 13.8% compared to the Kikuyu who constituted 20.9% of the population, Luhya 13.8%, Luo 12.8% and Kamba 11.3% (Kanyinga 2006, 372).

By the time the first multi-party elections were held in 1992, the number of parliamentary constituencies had increased to 188. The proportions of the Kenyan ethnic groups had, according to the 1989 census, remained approximately the same as they had been during the previous census. The comparative ethnic representation in the house did not change significantly. The single notable change was that the Kalenjin had now become the community with the highest rate of representation, having 36 seats compared to the Kikuyu with 35, the Luhya with 23, Luo with 19, and the Kamba with 17 seats. The same pattern of ethnic distribution of parliamentary seats appeared following the 1997 elections, even though the total number of seats had increased from 188 in 1992 to 210. Specifically, the Kalenjin and related groups still had the highest number of seats (Kanyinga 2006, 372-373).

Similar ethnicisation of appointment to cabinet positions was witnessed for most of Moi’s twenty-four year reign. He consolidated political power by
amalgamating the interests of former KADU groups - the Maasai, Turkana and Samburu. Together with his own ethnic group, the Kalenjin, the new alliance, KAMATUSA (Kalenjin, Maasai, Turkana and Samburu), became a formidable political grouping. Their proportion of cabinet seats was about 30% from the mid 1980s, and remained at about this level throughout the 1990s. In effect, although the group comprised approximately 13.5% of the country’s population, it had a proportion of cabinet seats more than twice its share (Kanyinga 2006, 375-376).

During most of his time in office, Moi had to contend with many forces which sought to dislodge him from power. Consequently, in the 1980s, he sought to stifle various forces of reform through measures such as censorship, torture and detention (Atieno-Odhiambo 2002, 227-230). Kenyans therefore found themselves trapped in a political system characterised by ethnic bias, and one in which they lacked sufficient political space to effect desired change. However, the economic impact of Moi’s “ethnic balance” policy began to be felt in the late 80s and early 90s, as reports of economic mismanagement and corruption involving members of the pro-Moi Kalenjin elite were made public (Amisi n.d.).

3.5. Politicised Ethnicity During the Transition to Multi-Party Democracy

The collapse of the Soviet empire had much to do with the invigorated push for the restoration of multiparty politics in Kenya. The enunciation of glasnost and perestroika by Gorbachev and their application in the Soviet Union from 1986, the extension of the same to Soviet Eastern Europe, and the eventual
collapse of the Soviet empire at once led to a global attack on centralism and authoritarianism of the left and right. African authoritarian regimes (military or one party) became natural targets of the West. The USA, the Scandinavian countries, Germany, the World Bank and the IMF led the way. Even reluctant world powers such as France and Britain were later forced to apply pressure when the movement gained momentum from within individual African states (Oyugi 1997, 45-46).

The year 1990 was critical in the construction of alliances that brought the debate about political pluralism to the streets of Nairobi for the first time since the opposition Kenya Peoples Union (KPU) was banned in 1969. In February 1990, the mysterious death of Robert Ouko (a Luo, MP and Kenya’s Minister for Foreign Affairs) further strained the relationship between the Luo and the Kalenjin ruling elite. Later that year, a number of forces were marshalled against Moi’s single-party regime. Among these were the original radical tradition of dissent sustained by Oginga Odinga for three decades, opposition from several religious leaders, a tradition of protest sustained by groups of intellectuals and students at university campuses since the 1960s, a group of reformist constitutional lawyers, and Western bilateral and multilateral financiers (Atieno-Odhambo 2002, 226; Badejo 2006, 156-176).

It was against the background of the heightened pressure outlined above that the relevant organs of KANU met in early December 1991 to endorse the repealing of Section 2(a) of the then Constitution of Kenya, thereby effectively ending a decade of de jure one party rule (Oyugi 1997, 47). However, the opposition unity
that had influenced the change was not to last. With the country's constitution amended to legalise multiparty politics, the Forum for the Restoration of Democracy (FORD) was registered as a political party. However, personal and ethnic considerations immediately began to influence the decisions and actions in the party. A month or so later, two new parties (FORD-Kenya and FORD-Asili) were launched both with an ethnic agenda. By the time of the 1992 elections, more than ten ethnically-based parties had been formed (Oyugi 1997, 47-48).

There are two important aspects of the transitional process in Kenya. These are the increased space for competitive politics spurred by the return of multi-partism in the early 1990s, and the quest for a new constitutional dispensation (Oloo 2007, 204-205). Nevertheless, politicized ethnicity significantly slowed down the transition to a truly multi-party democracy (Ndegwa 1997, 611-613; Oyugi 1997, 47-48; Brown 2004). Besides, the Moi regime was reluctant to put in place the legal infrastructure for a truly multiparty democracy, and the same was to later prove true of the Kibaki regime. Furthermore, with the colonial, Kenyatta, Moi and Kibaki ethnic-based politics firmly in the minds of many Kenyan politicians, politicised ethnicity has easily fed into the democratisation process in at least seven ways.

First, in the early 1990s, a major arena of antagonism between minority and majority ethnic groups had to do with the preferred form of government. For the Kalenjin, Moi's ethnic group and the favoured community, institutional transformation as entailed in democratisation represented a great threat to extant political and economic privileges. They were thus the least predisposed to support
reform measures. On the other hand, ethnic “outgroups” embraced democratization, mainly as an opportunity to overthrow a system which they perceived as antithetical to their political and economic aspirations. Quite predictably, then, the Kalenjin supported the ruling party, while the new opposition parties were enthusiastically embraced by the ethnic outgroups, especially by the numerically significant Kikuyu, Luo and Luhya (Omolo 2002, 215; Jonyo 2002, 94-95).

Second, as indicated in the previous chapter, the agitation for majimbo (regional governments) was a precursor to the so-called land clashes in the 1990s. The violence during those clashes not only targeted “outsiders” as part of an electoral strategy; it also aimed at policing community boundaries through fear, thereby undermining potentially threatening trans-ethnic organizing. Besides, casualties of the 1990s clashes were multi-ethnic small farms, pointing to the class dimension of the violence (Klopp 2002, 274-275; Ajulu 2002, 251; Jonyo 2002, 92, 99-101). This suggests that politicized ethnicity is merely a strategy to obscure the true class and patron-client nature of Kenyan politics.

Third, at the dawn of the re-instated multi-party system in Kenya in the early 1990s, all the political parties were built on ethnic foundations, with the electorate consistently voting along ethnic lines. The ruling party, KANU, was mainly associated with the Kalenjin and other smaller ethnic groups such as the Maasai, Samburu and Turkana. The Democratic Party (DP) and Ford-Asili were largely Kikuyu parties, FORD-Kenya predominantly a Luhya political party, the Social Democratic Party belonged to the Kamba, and the National Development Party to
the Luo (Jonyo 2002, 97; Institute 1998A). Since ethnic loyalty is usually based on kinship and clan affiliation, Davidson (1992, 227-228) is justified to refer to such ethnically-based parties as "kinship corporations".

Fourth, the transition to multi-party politics was also characterized by fierce intra-party ethnic antagonism. Between 1992 and 1996, opposition parties were engaged in an orgy of fierce ethnic-based, in-house rivalry. When the new party FORD was poised to win the 1992 elections, it split into two along ethnic lines, FORD Kenya and FORD Asili, when the two most populous ethnic groups, the Kikuyu and the Luo, were unable to think in terms of sharing power (Jonyo 2002, 96-99; Kanyinga 2006, 357). There was also the ugly scene in which the FORD-Asili Chairman, Kenneth Matiba (a Kikuyu), evicted the party Secretary-general, Martin Shikuku (a Luhia) and some of his relatively better known allies from the party office, replacing them with handpicked Kikuyu kinsmen. FORD-Kenya also split into two outfits following the Thika party confrontation between Raila Odinga (a Luo) and Kijana Wamalwa (a Luhya) over party leadership. Eager to fill the vacuum left in Luo leadership by the death of his father Jaramogi Oginga Odinga, Raila took over the hitherto little known National Development Party (NDP) from Stephen Omondi Oludhe, a fellow Luo (Badejo 2006, 174-179). Subsequently, the Luo moved en masse to NDP, leaving FORD Kenya mainly for the Luhya (Jonyo 2002, 101). In 1997, ethnic divisions once again prevented the opposition from consolidating its strength to defeat KANU, as the Kikuyu largely voted for Mwai Kibaki, the Luhia for Kijana Wamalwa, the Luo for Raila Odinga and the Kamba for Charity Ngilu.
Fifth, electoral constituencies in Kenya continued to be mainly ethnic enclaves, with only a few exceptions in cosmopolitan towns and settlement areas. Even in these cosmopolitan spots, ethnicity loomed large. For instance, during the 1992 and 1997 elections, Luo voters all over the city of Nairobi were mobilised for voter enrolment in one constituency, namely, Lang’ata, as a way of overwhelming the number of voters from other ethnic groups, thereby ensuring the victory of Raila Odinga, the Luo candidate. In the Westlands constituency in Nairobi, Fred Gumo (a Luhya) also won the parliamentary seat, primarily because the constituency is heavily populated by the Luhya, most of whom work as sentries and domestics to the predominantly Asian businesses and homes (Jonyo 2002, 102-103).

Sixth, Kenya’s transition to pluralism was accompanied by the resurfacing of the debate on the place of male circumcision. The specifically central Kenyan discourse on being “cut” resurfaced in 1992, as two Gikuyu barons, Kenneth Matiba and Mwai Kibaki, bid for the presidency against Oginga Odinga, the veteran leader from the Luo community. GEMA community elite frequently sought to convince the masses of their communities that Odinga should not be elected because he was not circumcised. In Meru, the Ford-Kenya party secretary and parliamentary candidate, Gitobu Imanyara, was repeatedly ridiculed for fronting for Odinga, an uninitiated “boy”. The issue of circumcision also confronted the NDP presidential candidate, Raila Odinga, again in central Kenya in 1997. Thus the ball set in motion by Kenyatta in the mid 1960s found its everyday life extended in the bid for a post-Moi state (Atieno-Odhiambo 2002, 243-244; Ndewga 1997, 602).
Seventh, an amendment to the constitution limiting the eligibility to stand for the presidency to two terms of five years each accompanied the re-introduction of pluralism in 1991. This implied that Daniel arap Moi would not be eligible for re-election in 2002. Significantly, although Moi was not a candidate for the 2002 elections, both the ethnic elites in the opposition and in KANU saw him as an important factor in shaping the final outcome of the 2002 elections. Consequently, there were ethnic alliances and counter alliances for most of the period between 1998 and 2002. One of the key coalitions was that between the ruling Kenya African National Union (KANU) and the National Development Party (NDP) - a merger between minority ethnic groups and the Luo respectively (Kanyinga 2003, 96; Badejo 2006, 182-205). The Rainbow Alliance, which was the NDP-led KANU faction against Uhuru’s nomination to succeed Moi, coalesced with the National Alliance Party of Kenya (NAK) to form the National Rainbow Coalition (NARC) between the Luo and the Kikuyu, along with a number of other communities. NARC was a coalition of ethnic groups hiding behind the thin vail of political parties. The Democratic Party represented Kikuyu interests, while the FORD-Kenya and NPK represented Luhya and Kamba interests respectively. The Liberal Democratic Party, which had membership beyond the Luo community, was still perceived as a Luo party due to the power wielder within it, Raila Odinga (Mitullah et. Al. 2005, 89).
3.6. Politicised Ethnicity in the Kibaki Regime

According to the arithmetic of ethnicity that Moi had long manipulated with such skill, KANU's eclectic base as a coalition of minorities would not be enough to win in 2002. Moi's original approach, going back to his first days as president in the late 1970s, had been to conduct a courtship with the Kikuyu, but to punctuate it with bouts of vilification. Since about one out of every four Kenyans belongs to the Kikuyu or Kikuyu-related Embu and Meru, Moi seems to have believed that he would need them to secure stable government as well as safety and privileges for his own family, his regime cohort, and his Kalenjin ethnic minority. When his wooing of the Kikuyu seemed to be going nowhere, Moi sought co-operation from the Luo (which at about 12% of the population was roughly the size of the Kalenjin) initially through dealings with Jaramogi Oginga Odinga (1993-94), and then through his son, Raila Odinga (1998-2002), whose National development Party (NDP) merged with KANU on 18th March, 2002. However, this union was short lived, as it was fragmented by internal conflicts which culminated in the desertion of the merger by NDP when President Moi chose Uhuru Kenyatta as his preferred successor (Kanyinga 2003, 111-119; Ndegwa 2003, 150). Raila Odinga's exit from KANU to join Mwai Kibaki's coalition to form the National Rainbow Coalition (NARC) was pivotal to the latter's successful bid for the presidency in 2002 (Wanyande 2003, 128-154; Kanyinga 2006, 359-361; Badejo 2006, 206-237).

Thus unlike the scenarios in the 1992 and 1997 elections where Moi won despite an overwhelming but fragmented opposition vote, the inter-ethnic coalition under
the NARC banner ensured that his use of state power to campaign for Uhuru Kenyatta, his preferred successor, was rendered ineffective. Consequently, NARC won overwhelmingly, with its presidential candidate, Mwai Kibaki, getting a comfortable 62.2 per cent of the vote (3,646,713) to Uhuru Kenyatta’s 31.3 per cent (1,834,468). Thus Kibaki had a clear mandate to lead the country as the third post-independence President.

When Mwai Kibaki ascended to the presidency on 30th December 2002, many Kenyans had great optimism that their country would finally make a clear break with the Kenyatta-Moi ethno-clientelist approach to the management of public affairs (Murunga and Nasong’o 2006, 2). Indeed, the coming to power of an ethno-regional coalition after the 2002 elections resulted, at the outset, in an apparently balanced representation of the main ethnic groups in cabinet (Kanyinga 2006, 76).

However, a group comprising many of the still living key figures of the Kenyatta regime was soon reconstituted as Kibaki’s main advisers, including Njenga Karume, George Muhoho, Matere Keriri, Joe Wanjuui, Peter Kanyago, S.K. Macharia and Nat Kang’ethe (Murunga and Nasong’o 2006, 7). Consequently, members of the president’s own ethnic group, the Kikuyu, and their Meru allies, got some of the most key positions not only in cabinet, but also in the civil service. For example, appointment of permanent secretaries favoured the Kikuyu and the Meru more than any other group. Out of 25 permanent secretaries, 11 were from the Kikuyu and Meru ethnic groups. Some of the Kikuyu and Meru permanent secretaries were appointed into these positions even though they had
already retired from the civil service. Other large ethnic groups had about 2 positions each (Kanyinga 2006, 391-392). In essence, whereas the political dominance of the GEMA elite had replaced the previous pre-eminence of the KAMATUSA (Kalenjin, Maasai, Turkana and Samburu ethnic communities), it was politics as usual (Murunga and Nasong’o 2006, 10).

In response, the other coalition partners accused Kibaki of reneging on his promise to effect the pre-election pact among parties in the coalition, a pact whose core component was the equitable distribution of appointments to public positions (Livingston 2005, 17-18). Furthermore, both the Liberal Democratic Party (LDP) and FORD Kenya interpreted the inequitable appointments as the beginning of a process of marginalising them by resuscitating the dominance of the Gikuyu, Embu and Meru Association (GEMA). KANU capitalized on the grievances of the LDP and FORD Kenya, complaining of the dominant influence of groups from the Mount Kenya region (Badejo 2006, 238-253).

Furthermore, during the National Constitutional Conference (NCC) which commenced early in 2003, the contentious issues in the draft constitution were discussed either through ethnic/regional alliances, or through the ethnically-based political parties (Mitullah et. Al. 2005, 89). Whereas the principal players within the Liberal Democratic Party (LDP) faction of NARC were seen to be focused on using the review process to realise the pre-election power sharing pact, the National Alliance Party of Kenya (NAK) wing of NARC seemed to be set on securing their gains by preventing encroachment on the powers of the presidency. Thus while members of the NAK faction of NARC had previously advocated for
devolution of power to an executive Prime Minister in their representations to the Constitution of Kenya Review Commission (CKRC), they now vehemently opposed such an arrangement (Odhiambo 2005). It was Minister John Michuki who revealed the thinking behind NAK’s jettisoning of the pre-election memorandum of Understanding between the LDP and the NAK. While addressing a rally in his home province (Central Kenya), he pointed out that they had argued the case for a premiership so that “one of our own could share power with Moi”. Now that Moi was no longer in power, he reasoned, there was no need for devolution of power because Kibaki, unlike Moi, was a good president! (The Standard, September 18, 2003).

The discontent against the Kibaki faction of NARC spilled over into other arenas including parliament, where other factions in the coalition teamed up to vote against the government on crucial decisions. Consequently, the Kibaki faction of the coalition turned to opposition parties for support in parliament. In mid 2004, to reinforce the new partnership between the Kibaki faction of NARC and opposition parties, senior members of opposition parties were appointed to the cabinet in what was called a Government of National Unity (GNU). Yet the pre-eminence of the Mount Kenya actors in Kibaki’s government, and the attendant acrimony between this group and those from elsewhere, obviated any claims that the outfit was a government of national unity (Murunga and Nasong’o 2006, 11). What is more, the formation of the so-called Government of National Unity undermined the logic of equitable distribution of cabinet positions. Indeed, the crisis in the coalition provided Kibaki with an opportunity to add the Kikuyu share of the cabinet positions, whose numbers in the cabinet increased from four to five during
the period. At the same time, the proportion of other major ethnic groups in cabinet dropped (Kanyinga 2006, 376-378).

Disgruntled by the cabinet reshuffle of mid 2004, the Liberal Democratic Party wing of the NARC government joined hands with KANU to form the Orange Democratic Movement (ODM), which successfully campaigned against the government-sponsored proposed new constitution in the November 2005 Referendum. The ODM capitalized on the growing dominance of the Kikuyu in the public sector positions to convince a large proportion of the masses that the government was simply interested in consolidating Kikuyu dominance over other groups. The evidence of internal disagreements in the coalition showed clearly in the referendum, in that unlike the 2002 elections where support for Kibaki was almost countrywide, only the Central Province voted overwhelmingly in favour of the draft constitution.

Following the defeat of the government at the constitutional referendum in November 2005, the Kibaki administration did away with equitable distribution of cabinet and other public positions. All ministers from the LDP faction of NARC were relieved of their positions. Among other changes, the number of Kikuyu ministers increased from 5 to 6, and assistant minister positions produced a similar form of imbalanced representation (Kanyinga 2006, 379-381). At the end of the day, by jettisoning the pre-election Memorandum of Understanding (MoU), ignoring the NARC Summit, incorporating KANU members into his government, and presiding over the entrenchment of politicised ethnicity, Kibaki demonstrated that he was committed to the politics of continuity rather than change (Murunga
and Nasong'o 2006, 12). Even though the MoU was not a legal agreement, the Kibaki Government’s turning away from it and removing from government the group of Ministers associated with Odinga had the effect of increasing the polarization of politics along ethnic lines (CIPEV 2008, 30).

One of the main arguments put up by Kibaki and his supporters during the 2007 General Elections campaigns was that his leadership had facilitated economic growth unparalleled in Kenya for decades (see for example Kibaki 2007). Nevertheless, the said growth did not deal with the issue of inequalities between the dominant ethnic majorities on the one hand, and the marginalized ethnic minorities on the other. Indeed, the economic growth during the Kibaki regime in the face of glaring inequalities mostly based on ethnicity had demonstrated that economic growth is a necessary but not a sufficient condition for poverty eradication. Without a conscious attention paid to issues of equity in public policy, rapid economic growth can easily marginalize certain sections of society and exacerbate poverty for others (Society 2004, p.iii). This observation is confirmed by a look at some of the economic indicators prior to the 2007 discredited general elections, summarised by Wrong (2009), which highlighted the negative effects of politicised ethnicity in Kenya:

Perhaps the most worrying element exposed by economic surveys (in 2007) was the extent to which, once you set aside the cosmopolitan cities, the growing divide between rich and poor took geographical – in other words, ethnic – form. A Kikuyu inhabitant of Nyeri, just north of Kibaki’s constituency, could expect to live 23.4 years longer, on average, than his Luo counterpart in Raila’s home town of Kisumu. If 46 per cent of the population in Central Province had only limited access to a qualified doctor, the problem was nearly twice as bad – 88 per cent – in remote North-Eastern Province. Adult illiteracy, just 16.7 per cent in largely Kikuyu Thika, was 78.1 per cent in Bomet, a heavily Kalenjin Rift Valley town (Wrong 2009, 282).
Thus Wrong notes elsewhere with regard to the economic upturn in the first five years of the Kibaki regime: "The better Kenya's economy fared, the more unstable the country actually became, because public awareness of inequality - sociologists call the phenomenon 'invidious comparison' - deepened a notch" (Wrong 2009, 325).

The climax of politicised ethnicity during the Kibaki regime, and indeed in the whole of independent Kenyan history, came with the contested 2007 general elections. Although the 2005 referendum was peaceful and its results uncontested, through it the lines of the 2007-2008 violent conflict were drawn, heightened by the perceived urgency of the need to win the presidency (CIPEV 2008, 30). In the run-up to the 2007 elections, Mwai Kibaki, heading the newly-formed Party of National Unity (PNU), drew his support mainly from the Kikuyu, Embu and Meru communities of Central and central Eastern provinces, and campaigned principally on his socio-economic record. On the other hand, Raila Odinga, at the head of the Orange Democratic Movement (ODM), with the support of vast proportions of the Luo, Luhya, Kalenjin and some smaller ethnic communities, vocalised the need for fundamental political and socio-economic reform and devolution of state power (IREC 2008, 1).

In January 2007, violating the 1997 Inter-parties Parliamentary Group (IPPG) agreement that political parties should be consulted on the selection of electoral commissioners, Kibaki unilaterally announced nine new appointments to the twenty-two-member organisation, and later five more. The fourteen new arrivals broke with tradition in another worrying way: they chose to supervise the polls in
their home provinces, where they hand-picked returning officers (Wrong 2009, 298). Kenyan election monitors, the European Union, the Commonwealth and other observers reported many anomalies and irregularities during the 2007 elections: unusually high voter turn out, lack of access to voting centers, names missing from registers, questionable voting hours, party agents disappearing at crucial moments, and the Electoral Commission of Kenya showing signs of manipulating the results (Hellsten 2009, 129; Wrong 2009, 307). Most significantly, the Independent Review Commission (IREC), commonly known as “the Kriegler Commission”, formed as part of the African Union mediation process under the chairmanship of former United Nations Secretary-General Kofi Anan to investigate the integrity of the 2007 Kenyan elections, was later to declare that “The conduct of the 2007 elections was so materially defective that it is impossible – for IREC or anyone else – to establish true or reliable results for the presidential and parliamentary elections” (IREC 2008, 9).

Despite the loud protests concerning the rampant election anomalies, Kibaki was announced the winner (by a lead of 231,728 votes) in the late afternoon of 30th December 2007, and then hurriedly sworn in (IREC 2008, 2). The swearing in was conducted at twilight in a heavily guarded statehouse function, with Kibaki surrounded only by his closest associates. This was in sharp contrast to his first swearing in, which took place in broad daylight at Uhuru Park, with a large, enthusiastic crowd in attendance (Wrong 2009, 1 ff.).

Within minutes of the announcement of Kibaki’s contested victory in the afternoon of 30th December 2007, the multi-ethnic settlements of Nairobi,
Mombasa, Kisumu, Eldoret and Kakamega erupted into violence. Luo and Luhya ODM supporters armed with metal bars, machetes and clubs vented their frustration on local Kikuyu and members of the smaller pro-PNU Meru, Embu and Kisii ethnic groups, setting fire to their homes and shops (Wrong 2009, 307). As Wrong correctly observes, "The approach was brutally simplistic. Many Kikuyu, especially the young, urban poor, had actually voted ODM, regarding Raila, ‘the People’s President’, as far more sympathetic to their needs than the aloof Kibaki. But mobs don’t do nuance (sic). Fury needs a precise shape and target if it is to find expression, and ethnicity provided that fulcrum. The attackers claimed they took action because they could not bear the sound of Kikuyu celebrating ‘their man’s’ victory. But their victims said they would have never been so brazen or so foolish, and pleaded with fellow slum-dwellers to remember they were all poor people, suffering together" (Wrong 2009, 307).

The worst unrest was around the Northern Rift Valley town of Eldoret, where Kalenjins mobilised against Kikuyus, driving them away and burning their property. There was also serious violence in the Southern Rift, with Kalenjin attacks on Kisii communities over land ownership issues, and in Western Kenya, particularly in Kisumu, where Luo supporters of the opposition Orange Democratic Movement (ODM) were shot by the Kenyan police, perceived to be controlled by the Kikuyu elite. In the Rift Valley towns of Naivasha, Molo and Nakuru, the Mungiki, a Kikuyu outlawed militia, attacked ODM supporters. Families from the minority Ogiek hunter-gatherer community close to Nakuru had their houses and other property destroyed by Kikuyu villagers. By the time the power-sharing deal was struck on 28th February 2008, bringing together the ODM
and the PNU, approximately 1,500 Kenyans had been killed, over 400,000 displaced, and an unknown number of women had been raped (Matheson 2008). Key among grotesque displays of ethnically-based violence were the Kiambaa church burning in Eldoret where 35 Kikuyus were killed, the burning of a house in Naivasha where 19 Luos were killed, the forcible circumcision of Luo men in Naivasha and parts of Central, Nairobi and Rift Valley Provinces, Police shootings in places including Kisumu and Kericho, and the rape of women and girls (KNCHR 2008, 9).

The report of the commission of Inquiry into Post-Election Violence (CIPEV), popularly known as “the Waki Commission”, also formed as part of the AU mediation process, stated that the post 2007 Kenyan election violence was by far the most destructive ever experienced in the country. Besides, unlike previous cycles of election related violence, much of it followed, rather than preceded elections. It was also more widespread than in the past, affecting all but 2 provinces (CIPEV 2008, p.vii). The violence eventually impacted upto 136 out of 210 parliamentary constituencies in six of Kenya’s eight provinces (KNCHR 2008). It continued for weeks and threatened the very integrity of the state (Matheson 2008).

According to CIPEV (2008), the fact that armed militias most of whom developed as a result of the 1990s ethnic clashes were never de-mobilized led to the ease with which political and business leaders reactivated them for the 2007 post-elections violence. CIPEV concluded that the post-elections violence entailed systematic attacks on Kenyans based on their ethnicity and political leanings.
Although the crisis was sparked by the contested 2007 election results, it quickly manifested its true ethnic character, as ethnic groups divided themselves up into two blocks - those in support of the Kikuyu Mwai Kibaki determined to ensure he retained power, and those in support of the Luo Raila Odinga equally resolved to ensure he captured it (Wrong 2009, 295 ff.).

The CIPEV report summarised the Kibaki regime’s portion of responsibility for the post 2007 election violence as follows:

The post election violence ... is, in part, a consequence of the failure of President Kibaki and his first Government to exert political control over the country or to maintain sufficient legitimacy as would have allowed a civilized contest with him at the polls to be possible. Kibaki’s regime failed to unite the country, and allowed feelings of marginalization to fester into what became the post election violence. He and his then Government were complacent in the support they considered they would receive in any election from the majority Kikuyu community and failed to heed the views of the legitimate leaders of other Communities (CIPEV 2008, 30).

Former UN secretary general Kofi Annan, at the request of the African Union, mediated between Kibaki and Odinga. On 28th February 2008, Kibaki agreed to form a coalition government between his PNU and Odinga’s ODM, with Raila as Prime Minister. Michella Wrong has noted that “The irony was that, combined with undertakings to review the constitution and discuss sweeping electoral, parliamentary and judicial reform, the deal brokered by Annan and Tanzanian president Jakaya Kikwete contained most of the elements of NARC’s pre-2002 programme. Had the regime only delivered on its original promises, Kenya could have been spared a multitude of horrors” (Wrong 2009, 314).
When the Grand Coalition government was formed in April 2008, its leaders vowed to tackle the deeply rooted problems that led to the violence. They promised a new inclusive approach to governing Kenya’s multi-ethnic society – instead of the ‘winner takes all’ mentality of the past. A key test of the pledge is how the Coalition government treats the country’s most marginalized and impoverished communities. The experience of Kenya’s minority and indigenous peoples shows that the coalition government is dominated by the interests of majority ethnic groups. For example, by mid 2008, members of the Ogiek hunter-gatherer group caught up in the post 2007 elections violence were yet to receive any government assistance, while a considerable number of internally displaced peoples (IDPs) from larger ethnic groups had received shelter, seeds and fertilizers, as well as the promise of compensation to rebuild houses. Besides, despite the important reforms set in motion by the Kofi Annan-brokered deal, there has been insignificant commitment to involve minority and indigenous peoples in these processes (Matheson 2008).

Furthermore, the Grand Coalition Government has been plagued by persistent tensions between the coalition partners over the interpretation of the National Accord. For example, in 2009-2010, there was a protracted contention between President Kibaki and Prime Minister Odinga concerning which of them had the right to appoint the Leader of Government Business in parliament. It was noteworthy that even lawyers interpreted the relevant provisions of the National Accord to suit whichever side of the political divide they supported.
Besides, after the post 2007 elections crisis, debate on the content of the new constitution continued to be patterned after the 2005 referendum, with PNU advocating for a strong central government and a powerful presidency, and ODM rooting for a federal and parliamentary system. In the end the political elite settled for a centralised presidential system with some devolution of power to counties. This favours majority ethnic groups as it thrives on strength of numbers, while a federal parliamentary system would be conducive to the interests of ethnic minorities who would thereby participate in decision making at the grassroots. Furthermore, in January 2011, there was the controversy over the nomination of persons for the posts of Chief Justice, Director of Public Prosecutions and Director of Budget, with the Kibaki faction insisting that the president had the final say on the matter, while the Odinga wing avered that consultation as envisaged in the National Accord entailed arriving at a consensus on the appointments.

Another manifestation of politicized ethnicity was the proposed Kikuyu, Kalenjin and Kamba (KKK) Alliance associated with Uhuru Kenyatta (Kikuyu), William Ruto (Kalenjin) and Kalonzo Musyoka (Kamba) ahead of the 2012 presidential elections. The KKK debate began in 2009 at Burnt Forest, when three MPs - Kareke Mbiuki, Simon Mbugua and Joshua Kuttuny - claimed that Vice President Kalonzo Musyoka, deputy Prime Minister Uhuru Kenyatta and Eldoret North MP William Ruto would unite their ethnic groups to take power in the 2012 presidential elections (Muriungi 2011). Some time in 2010, Kalonzo Musyoka endorsed the idea in a meeting in the North Rift, sparking off a tirade of protests that the proposed alliance was divisive. In response, Ruto, Kenyatta and Musyoka
repeatedly disowned the alliance. Musyoka and Kenyatta appealed to the National Cohesion and Integration Commission (NCIC) to ban the use of the term, on the grounds that the continued use of the KKK tag was against national unity, cohesion and integration.

With the KKK Alliance falling into serious disrepute, around March 2011 William Ruto and Uhuru Kenyatta quickly hatched yet another ethnic coalition, this time involving politicians from seven ethnic groups or clusters of ethnic groups. The so-called G7 included William Ruto (Kalenjin), Uhuru Kenyatta (Kikuyu), Kalonzo Musyoka (Kamba), Eugene Wamalwa (Luhia), Aden Dualle (Somali), Najib Balala (Arab), and Omingo Magarra (Kisii).

3.7. The Impact of Politicised Ethnicity in the Public Affairs of Contemporary Kenya

Our discussion so far has sought to demonstrate that politicised ethnicity has been a salient feature of Kenya’s politics from colonial days to the present. The politicization of ethnicity (which is tantamount to the ethnicisation of politics) in Kenya, as in other parts of the world, has been inadvertently facilitated by the fact that strong kinship ties among members of ethnic groups reinforce the feelings of “in-group” loyalty to the exclusion of members of “out-groups”. A three tiered affiliation, namely, the family, the clan and the ethnic group are the foundation upon which forces of social organisation and socialisation revolve (Jonyo 2002, 105). It is these ethnic sentiments that post-independence Kenyan politicians continue to exploit in their endeavour to create political cleavages to their personal
advantage, thereby inhibiting healthy inter-ethnic relationships and the attendant socio-political stability.

The absence of a single disproportionately large Kenyan ethnic group, the relative equality of the five main ethnic groups (Kikuyu, Luhia, Kalenjin, Luo and Kamba), as well as the existence of many smaller groups whose combined share of the country’s population is under 14%, have led to increased politicization of ethnicity in Kenya. Each ethnic elite is keen to mobilize members of its community in the quest for power, luring them with the prospect of privileged access to state resources with which to catalyse their own economic development (Kanyinga 2006, 354-355).

It seems appropriate at this stage to outline the impact of politicised ethnicity on the management of public affairs in Kenya. Miguda (2003) has argued that given the current globalising trends, ethnicity as a central basis for cleavage formation in local politics is weakening as new forms of interaction between global forces and local events inspire alternative forms of coalitions and cleavages among citizens. Miguda cites student movements, Marxism, feminism, religious institutions, and a vibrant civil society as some of the globalizing forces that are shifting focus from politicized ethnicity. Nevertheless, it is the view of the present researcher that in view of rampant poverty, generally low levels of school education, and the convenience of ethnic sentiments to politicians seeking an easy source of cleavage, the death of politicized ethnicity is not imminent. Indeed, as Miguda (2003) herself acknowledges, since the authoritarian single-party mode of governance was set aside, many former Marxists, feminists and human rights
activists have themselves appealed to ethnicity in a bid to capture or retain political power. Politicised ethnicity continues to have at least four negative effects on the management of Kenya’s public affairs.

First, contemporary Kenya exhibits disparity in development between and among various regions of the country. Since the eight former provinces were largely demarcated along ethnic lines, it is reasonable to conclude that there is ethno-regional disparity in development (Society 2004, 13). This implies that some ethnic groups are collectively poorer than others, with fewer opportunities to improve their well-being. The former North-Eastern and Coast provinces are worse off in terms of access to basic services than others. The former Central Province is also relatively more developed than other areas. To add to this, it is evident that regions inhabited by smaller ethnic groups are more marginalized than those inhabited by larger ones (Kanyinga 2006, 364-368). These disparities are largely accounted for by the fact that while the government budget ought to play the dual roles of ensuring rapid economic growth and facilitating redistribution of the country’s resources, political patronage influences the pattern of public spending, especially on large infrastructure projects and staffing of public enterprises (Kiringai 2006).

It is therefore not surprising that in 2004, the doctor-patient ratio was about 1:20,700 in the former Central Province (home of the Kikuyu who had the presidency from 1963 to 1978, and again from 2003), but 1:120,000 in the former North Eastern Province (which has not had a president from the region). Even more shocking, about 93% of women in the then North Eastern province had no
school education at all, compared to only about 3% in the former Central province (Society 2004, p.vii). Of great concern is the fact that by 2004, there was no comprehensive socio-economic data for the then North Eastern province. This was in itself a glaring inequality, as it constrained planning and service delivery for that region (Society 2004, 13).

Second, politicized ethnicity has stunted the growth of issue-based politics in Kenya, as ethnic personality cults have taken centre stage. Various individuals have set themselves up as spokesmen of particular ethnic groups. Such individuals repeatedly make political decisions for their personal benefit, but convince their followers that such decisions are for the good of their communities. The case of Raila Odinga’s National Development Party (NDP) merger with the Kenya African National Union (KANU) in 2002 succinctly illustrates this point (see Badejo 2006; Wanyande 2007).

The clouding of issue-based public discourse by politicized ethnicity is also often evident in cases where politicians or their cronies are implicated in improprieties such as abuse of office or embezzlement of public funds. In such cases, the persons concerned often whip up ethnic sentiments among their followers, telling them that it is their “community” which is under attack. For instance, in response to pressure to resign from the Finance portfolio due to allegations of corruption in the handling of the sale of the Grand Regency Hotel, Amos Kimunya convened a rally in his parliamentary constituency, in which he told those in attendance that they were the target of the calls for his resignation (Kenya Television Network 9:00 p.m. News, 6th July, 2008; Omanga and Gitonga 2008). Similarly, during the
controversy over Keriako Tobiko’s nomination to the post of Director of Public Prosecutions, Maasai elders told their followers that it was their community rather than Tobiko that was under siege. The council accused majority ethnic groups of conspiring to block members of minority communities from taking up key public offices (Rajab 2011). In short, politicized ethnicity continues to thwart the growth of personal accountability of public office holders in Kenya.

Third, politicized ethnicity has frequently resulted in violent inter-ethnic conflicts. The Kisumu Massacre in 1969, the inter-ethnic skirmishes in the Rift Valley in the early 1960s and 1990s, the menace of various ethnically based political militias during electioneering periods from the early 1990s, and the 2007-2008 post-elections crisis are all cases in point.

Fourth, for almost five decades, Kenyans from minority ethnic groups and those from mixed marriages within cosmopolitan and urbanised settings have found themselves grossly disadvantaged in the competition for business and job opportunities, simply because they do not hail from the ethnic communities of influence wielders. For example, Adam Hussein, a Kenyan Nubian, worked for a multinational company in the Channel Sales Department. Eventually, the company decided to suspend the operations of that department, and to deploy the staff to other departments. Strangely, Hussein found that he was not being deployed alongside his colleagues. In due course, his boss asked him: “Why don’t you have a name that places you somewhere?” Names which “placed people somewhere” were of ethnic origin such as Njoroge (Kikuyu), Onyango (Luo) or Muliro (Luhya), among others (Personal Interview with Adam Hussein Adam on
18th August, 2007). Furthermore, over the years, the elite from the president’s ethnic community have tended to occupy strategic ministries, departments and state corporations. Consequently, they allocate middle and junior level positions to members of their own ethnic groups. The hierarchy of patronage thus begins at the level of high politics, and extends to the lower levels of public service (Kanyinga 2006, 383).

Similarly, Kenyans with mixed parentage and/or who are highly urbanised do not have deep loyalties to any ethnic group, and yet in times of ethnic tensions they are treated as belonging to specific ethnic groups on the superficial basis of their names, which are easily associated with specific ethnic groups. The experience of Simiyu Barasa’s sister, Rozi, at the height of the post 2007 elections crisis is instructive in this regard. Rozi was asked to state her “tribe” by a gang of young men with an assortment of crude weapons, who stopped an ambulance she was travelling in along the Eldoret-Kakamega Road. She said she was Luhia, whereupon the young men insisted that she speak some Luhia. However, she told them that although her father was Luhia, her mother was Taita. She only escaped being hacked to death by showing a copy of her mother’s identity card. The truth turned out to be that the only language she could speak apart from Kiswahili and English was Gikuyu, her family having lived for many years in central Kenya; yet the marauders were busy looking for Kikuyus travelling along that road (Simiyu 2008).

Thus Simiyu and his siblings are of Luhia-Taita parentage, but they speak neither Luhia nor Taita - only Gikuyu. Yet with politicised ethnicity, marauders such as
the ones Rozi met assume that she has deep loyalty to Luhia ethnicity. Barasa summarises his family’s predicament in an ethnically politicised Kenya as follows:

My friend, I know no tribe. I only know languages. My mother is Taita, my Father is Luhya, and we were raised in Kiambu among the Gikuyu. It has never been important in our family to know which tribe we should belong to, my sisters and brothers have names from both sides of our parents communities. In this chaos, if the hunters of fellow humans were to find us in our house, would they really believe we are brothers and sisters from our names? (Barasa 2008).

The negative effect of politicized ethnicity on Kenyan society was captured by a report of the National Cohesion and Integration Commission (NCIC), released on 6th April 2011. The NCIC referred to its report as the “First Ethnic Audit of the Kenya Civil Service”. It was based on an analysis of the Integrated Personnel and Payroll Data System for March 2010 against the population census report of 2009, as well as other official documents. According to the report, over 50 per cent of Kenya’s ethnic groups were only marginally represented in the Civil Service - the country’s largest employer. What is more, only 20 out of over 40 listed Kenyan ethnic groups were statistically visible in the Civil Service. Some 23 ethnic groups had less than 1 per cent presence in the Civil Service.

The report also stated that the Teso, Samburu, Pokomo, Kuria and Rendile were among the most under-represented groups. The Teso had only 2,029 members in the civil service, or 0.961 per cent of the 338,000 workforce, while the Samburu had 1,457, Pokomo 1,303, Kuria 1,207, Mbeere 1,062, Gabra 648, Bajuni 579, Basuba 462, Tharaka 365, Orma 349 and Rendile 301. Other small ethnic communities also had less than 100 members in the more than 300,000 strong civil service. The Kenyan Arabs had 90 members, Asians 74, Boni-Sanye 44,
Elmolo 24, Gosha 19, Dasnach 10 and Kenyan Europeans two. Others were the Burji (288), Taveta (237), Njemps - who refer to themselves as Ilchamus - (220), Swahili-Shirazi (122) and Dorobo (119). In the newly created Ministry of Nairobi Metropolitan Development, the Pokomo, Teso, Bajuni and Kalenjin constituted 1.09 per cent each, while Kikuyus constituted 33.7 per cent. This trend was replicated in the Ministry of Northern Kenya and other Arid Lands as well as the Office of the Prime Minister.

What is more, the NCIC report revealed that the five most numerous ethnic groups (Kikuyu, Kalenjin, Luhya, Kamba and Luo) occupied nearly 70 percent of all government jobs. The Kikuyu led the pack with 22.3 per cent of all civil service jobs, followed by the Kalenjin (16.7 per cent), Luhya (11.3 per cent), Kamba (9.7 per cent) and Luo (9.0 per cent). The report went on to state that only seven communities had a representation above 5 per cent in the Civil Service. The Kikuyu, Kalenjin, Luhya, Kamba, Luo, Kisii and Meru had a representation of above 5 per cent. All the other communities’ representation was below 5 per cent. Two communities alone, the Kikuyu and the Kalenjin, had a combined presence of almost 40 per cent of civil service jobs.

Furthermore, the Kikuyu constituted the largest single dominant ethnic group in all ministries and departments, with the exception of the Office of the Prime Minister, the Police and Prisons departments. The Kalenjin were the second largest group in the civil service, dominating the Prisons and the Police departments. Whereas the Kikuyu constitute 17.7 per cent of the population, they occupied 22.3 per cent of the civil service jobs. The Kalenjin on the other hand
occupied 16.7 per cent of all civil service jobs despite constituting only 13.3 per cent of the population. “Their numbers in government suggest a direct relationship with the tenure of the presidency in that they (Kikuyu and Kalenjin) have both had a member as President for over 20 years,” said the report.

According to the NCIC report, State House topped the list of 10 government departments that had broken the National Cohesion and Integration Act ceiling of 33.3 per cent of staff from one ethnic group, employing 45.3 per cent of its staff from President Kibaki’s Kikuyu ethnic group. Moreover, the bulk of civil service jobs were in the Office of the President, thus underlining the overweening influence this office has enjoyed in the past, and the patronage attendant to it. At Prime Minister Raila Odinga’s Office, the Luo accounted for 21.85 per cent, the only ministry where they had the upper hand. The representation of the Kikuyu was nearly the same as that of the Luo, who occupied 21.19 per cent. The two ethnic groups were way above the Kamba, who occupied only 13.3 per cent at the Prime Minister’s Office. Luhya and Kalenjin occupied 12 per cent and eight per cent respectively. Other ministries and departments that had more than a third of workers from a single group included Transport, Public Works, Tourism, Local Government, Higher Education and the Nairobi Metropolitan. The report described the imbalance in employment as “patronage hiring”.

The NCIC Chairman, Dr. Mzalendo Kibunjia, warned: “We cannot have a civil service with no face of Kenya and equity and say we need to have a harmonious country.” Kibunjia further observed that jobs such as serving tea and cleaning did not need high education, yet the “big” communities had dominated even such
positions. “Kenya must not allow itself to operate an informal apartheid system that could perpetuate an intergenerational transmission of inequality,” Kibunjia said. According to Kibunjia, the 33 per cent ceiling for an ethnic group in a government institution, stipulated by the National Cohesion and Integration Act, should be reduced to 15 to 20 per cent, with small communities getting key appointments. Kibunjia went on to note that the composition of the civil service is important, not only because it is the face of the government and can speak volumes about inclusivity, but also because salaries from jobs are an important source of income for many people, forming the initial bases for wealth accumulation. Furthermore, the skewed composition of the civil service not only distorts incomes, but also excludes large populations from driving policy about the things that matter to them (Kibunjia 2011).

However, in response to the NCIC report, Bagaka (2011) charged that “the Commission makes some obvious assumptions about public sector employment that might incite the supposedly under-represented communities against the big tribes.” What he needs to remember is that the “smaller tribes” are already incited by the glaring inequities in the distribution of state resources since independence. This is why politicians easily strike resonance with their ethnic constituents when they (the politicians) tell them that “it’s our turn to eat!” Bagaka went on to assert that the NCIC had failed to recognize that not all Kenyans want jobs in the public service. Nevertheless, the high level of abject poverty in the country does not allow Kenyans the luxury of deciding where they want to work.
Bagaka (2011) further contended that when Kenyans seek for employment, they do not do so on behalf of their ethnic groups. Yet whether or not Kenyans get employment has impact on their ethnic groups. An ethnic group whose members have no significant presence in the civil service, and which is groaning under the weight of abject poverty, would certainly appreciate its members being incorporated into the public service. Bagaka went on to chide the NCIC for allegedly not taking into account that even at independence employment in the civil service was not equitable, as some communities had been given a head start by the foreign invaders: this cannot be disputed. Yet the three independence regimes have perpetuated rather than remedied this situation, and this fact is what the report was highlighting.

To fault the NCIC’s analysis, Bagaka (2011) cited communities that have never had one of their own in the presidency, but whose presence in the civil service was disproportionately higher than their populations. What he did not take into consideration was that the patronistic system that the three post-independence regimes have overseen has always extended beyond the specific ethnic groups of the men in statehouse to the formation of ethnic coalitions. For example, in the period in which Daniel arap Moi’s Kalenjin-dominated Kenya African National Union (KANU) had a working relationship with Raila Odinga’s predominantly Luo National Development Party (NDP), Moi declared Kisumu to be a city, giving Raila’s Luo followers the hope that Kisumu would be allocated more resources for its development, leading to drastic improvement in the economic circumstances of its largely Luo residents.
3.8. Conclusion

The present chapter has examined the single most important cause of dissatisfaction among Kenyan ethnic minorities, namely, politicized ethnicity (or ethnicised politics) - the mobilization of sections of the population on the basis of cultural identities with a view to capturing or retaining state power. It has first traced the origins of politicized ethnicity to the advent of colonialism. This has been followed by an examination of the foundations of post-colonial politicised ethnicity in the regime of Jomo Kenyatta. Next, it has focused on the perpetuation of this approach in the management of public affairs during the Moi regime. This has been followed by an examination of politicised ethnicity during the transition to multi-Party democracy from the late 1980s - a period which constituted the latter part of Moi’s rule. The chapter has then interrogated politicized ethnicity during the Kibaki regime. Finally, it has briefly looked at the impact of politicized ethnicity on the management of Kenya’s public affairs.

It is evident from the foregoing discussion that ethnicity is a fundamental force in Kenyan politics, a fault line along which elites mobilized and competed for power within incipient democratic institutions at independence, in the authoritarian interim, and in the recent return to party pluralism (Ndegwa 1997, 611-613). In calmer times, ethnic differences are a source of endless comment, humour and discussion among Kenyans of all ages and backgrounds (Matheson 2008). Nevertheless, by and large, post-independence Kenya has been what Ogude (2002) refers to as an ethnocratic state, one whose basic political rhetoric is nation building, while in practice it undermines any real desire for nationhood (Ogude 2002, 205). So ethnically polarized is Kenya’s electorate, that it is easy to tell
which presidential candidate will garner the majority votes from which region (Wanjala 2002c, 119). It is not surprising therefore that elections in Kenya are characterised by ethnic loyalties and rivalries, built on the notion that it is “our turn to eat” - a reference to the disproportionate access to state resources by the community whose member occupies the presidency (Jonyo 2002, 94; Murunga and Nasong’o 2006, 10; Wrong 2009).

Furthermore, the electoral process itself has been seriously skewed in favour of the executive, which has used it to entrench the hegemony of whichever ethnic elite the president belongs to (Wanjala 2002c, 112-114). Thus Ramogi Achieng’ Oneko could write with deep melancholy in 2005, “An important driving force in general elections and politics today is tribalism and sectarianism, while pursuit of effective representation has been relegated to the background. The truth is that accelerated divisive tribal politics have marked the decline of our country as an effective political-economic force, not only in regional matters but also in African affairs” (Oneko 2005, pp.xii-xiii).

It is worth noting that ethnicity as such is not a source of friction. As Cohen has pointed out, “People do not kill one another because their customs are different. Men may make jokes at strange customs of men from other tribes but this by itself will not lead to serious disputes. If men do actually quarrel seriously on the grounds of cultural differences it is only because these cultural differences are associated with serious political cleavages. On the other hand men stick together under the contemporary situation only because of mutual interests” (Cohen 1996, 84). Indeed, ethnicity can perform positive functions in civil society, as a means of
checking the excesses or frailty of political leaders. The claims and counterclaims of members of ethnic groups over real and imagined discrimination over access to scarce resources can have a balancing effect on the national politico-economic system. The challenge is how to harness these positive attributes (Makoloo 2005, 24).

It is therefore evident that the Kenyatta, Moi and Kibaki regimes have repeatedly condemned “tribalism”, urging Kenyans to engage in “nation-building”, while in reality perpetuating politicized ethnicity, thereby inhibiting social cohesion. Kenyans must therefore urgently find ways of mitigating the effects of decades of politicized ethnicity by putting in place constitutional provisions that make it difficult, if not impossible, for politicians to perpetuate political cleavage along ethnic lines. They must also put in place a set of moral principles to serve as a basis for the constitutional protection of ethnic minorities in Kenya’s emerging democracy. Consequently, in view of the focus of this study, its subsequent chapters undertake philosophical reflection, with a view to providing a rationale for such a set of moral principles.
4.1. Introduction

In line with global trends, Kenyan ethnic minorities have agitated for recognition as distinct collective entities, with a view to securing their economic, social and political interests. In this regard, Chapter 2 explored the aspirations of various Kenyan ethnic minorities, namely, the agitation for federalism during the writing of the independence constitution and during the constitutional review at the dawn of the 21st century, the secessionist aspirations of Kenyan Somalis and coastal communities, efforts of national minorities to ensure that they enjoy all the privileges of citizenship, and the struggle of pastoralists and hunter-gatherers to protect their culture and natural resources against encroachment by agriculturalists and industrialists.

Chapter 3 focused on the main cause of discontent among Kenyan ethnic minorities, namely, politicized ethnicity, that is, the mobilization of sections of the population on the basis of cultural identities for the purpose of gaining or retaining power. Politicised ethnicity has been sustained through the distribution of the country's resources in a way that favours the ethnic groups whose elites have access to political power. Consequently, the efforts of Kenyan ethnic minorities to
improve their lot have to date borne negligible results. The promulgation of the new constitution in August 2010, devolving power to forty-seven counties, might partially address the concerns of some ethnic minorities. However, in view of the way the counties were formed, the very small communities such as the Mukogodo, Ogiek and Sengwer are likely to continue to suffer marginalization. This situation is likely to drive them into increasingly radicalized strategies for achieving their goals.

When political dissent is ignored, it often expresses itself through political disobedience - instances in which men and women take steps not permitted by authority to effect changes in the policy, laws, government, or constitution of the state in which they live (Macfarlane 1968, 31, 37). It is important to distinguish between ordinary acts of law breaking and acts of political disobedience. In general, those who deliberately break the law to secure changes in the policy, laws, government, or constitution of the state do not hope for any narrow personal gain. Instead, they seek either the good of the whole society, or the good of the group with which they identify. Actions of this nature are easily distinguishable from those of the ordinary criminal, whose objection is not to the law he or she breaks, but rather to the penalties applied if he or she is caught (Macfarlane 1968, 30).

Paullin (1944) structured his discussion of political disobedience on the basis of six types resulting from a continuum, at one end of which he placed violence coupled with hatred, and at the other, dependence only upon the application of
positive love and good will. In the intermediate positions there are possibilities such as the following:

(1) Violence without hatred.
(2) Non-violence practiced by necessity rather than because of principle.
(3) Non-violent coercion.
(4) Satyagraha and non-violent direct action.
(5) Non-resistance.

However, Brownlee (2007) has correctly observed that the various points of contact and overlap amongst different types of political protest suggest that there is no one-dimensional continuum from weak to strong dissent. Instead, there is more plausibility in the idea of a multi-dimensional continuum of protest, which recognises the complexities in such critical points of contrast as legality, violence, harm, communication, motivation, and persuasiveness.

In view of the foregoing observations, the present chapter and the following two employ the critical, rational and analytical techniques of philosophical reflection (1.8) to undertake an examination of circumstances under which Kenyan ethnic minorities may be morally justified to use various forms of political disobedience in pursuit of their aspirations. More specifically, the three chapters aim to address the second and third of the four questions that this study seeks to answer:

- Are there any conditions under which a Kenyan ethnic minority may be morally justified to disregard the authority of the Kenyan state?
• Are there any conditions under which the Kenyan state may be morally justified to quash the aspirations of a Kenyan ethnic minority? (1.2.2 and 1.2.3).

To justify an action is to show that it is rational (Gert 1969, 618). In his seminal work, *Rethinking Criminal Law* (2000), George P. Fletcher made a distinction between justification and excuse. He noted that claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; on the other hand, claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. In short, a justification speaks to the rightness of the act; an excuse, to whether or not the actor is accountable for a concededly wrongful act (Fletcher 2000, 759).

The focus on moral justification for political disobedience throughout this chapter and the two following is inevitable, since political philosophy seeks to apply ethical concepts and norms to the evaluation of mankind’s collective existence. Indeed, as pointed out in our first chapter, political philosophers have presupposed moral values such as freedom, responsibility and justice. Thus Plato (1945) advocated justice as the aim of society; Aristotle (2000) prescribed society’s role as that of facilitating the cultivation of virtue in the individual; John Stuart Mill’s moral and political theory were linked by his insistence that politics must be governed by the principle of utility (Mill 1972; 1999); Rawls (1971) considers justice to be pivotal to the creation of a sustainable democratic order.
In view of the plan of this study, it cannot exhaustively reflect on all forms of political disobedience. Consequently, the present chapter and the two following will examine the two extreme forms of political disobedience, namely, non-violent civil disobedience within a state on the one hand, and secessionist war on the other. This will be done in the hope that a consideration of these two extreme approaches will implicitly shed some light on the ethical ramifications of intermediate forms of political disobedience. Thus the three chapters will examine the basis upon which Kenyan ethnic minorities would be morally justified to move progressively from legally sanctioned action, to non-violent civil disobedience, to agitation for secession, and finally to the waging of secessionist war.

The present chapter interrogates the possibility of morally justifying non-violent civil disobedience in pursuit of the aspirations of Kenyan ethnic minorities. Assuming that these communities adopt a gradualist approach, it sets out by examining the likelihood of ending their marginalization through the country’s legal system. In this regard, it assesses their efforts at litigation and at participating in the constitutional review process. It then examines the nature of non-violent civil disobedience, and outlines the views of four of its most influential advocates, namely, Étienne de La Boétie, Henry David Thoreau, Mohandas Karmachand Gandhi and Martin Luther King, Jr. Finally, the chapter offers a moral critique of this method of political disobedience.
4.2. Legal Options for Kenyan Ethnic Minority Aspirations

Like many other governments which profess to be democratic, the Government of Kenya urges its citizens to use legally sanctioned means to effect any changes they may desire. Such means include licensed demonstrations and rallies, use of freedom of speech, voting in elections, litigation and participation in formal processes designed to review the constitution or the subordinate laws of the state. However, the very same government often quashes the use of some of these channels. For example, it frequently declines to grant licenses for demonstrations and rallies convened by perceived opponents, and goes ahead to violently disperse them. This was the case during the clamour for multi-party democracy, after the 2005 referendum on the proposed new constitution, and in the aftermath of the disputed 2007 Kenyan general elections, among others.

Since the Kenyan government has repeatedly crushed demonstrations and rallies organised by members of majority ethnic groups, tiny ethnic minorities are even more vulnerable when organising such functions, as the experiences of the Ogiek and Endorois illustrate (see Chapter 2). Consequently, Kenyan ethnic minorities have often resorted to the judiciary and the constitutional review process in an attempt to get a favourable hearing for their concerns. Consequently, the following two sub-sections examine in some detail the efficacy of this strategy.
4.2.1. Litigation In Kenya

Under the Bill of Rights in the former Constitution of Kenya, individual citizens were entitled to sue the state when they felt aggrieved by it. In this regard, as outlined in our second chapter, a number of minority ethnic groups filed suits against the state, among them the Ogiek, the Endorois and the Ilchamus. Nevertheless, as that chapter indicates, such suits met with meager success. For example, while the High Court in 2006 granted the prayer of the Ilchamus that the community be considered for a nominative parliamentary seat in the next round of appointments, the political parties ignored that ruling with complete impunity after the 2007 General elections. The suits of the Ogiek and the Endorois have had even less success, as technicalities and delays have frustrated them. What is more, while the legal suits of the various Kenyan ethnic minorities were mainly filed against the actions of the executive, the executive had progressively acquired immense powers from 1964 when Kenyatta began a series of amendments to the constitution which not only divested parliament of its powers, but also took away a considerable amount of autonomy from the judiciary (Kuria and Vazquez 1991).

The manner in which the Kenyan courts have been beholden to the executive was classically illustrated On 4th July, 1989 in Maina Mbacha v. Attorney General. The High Court of Kenya appeared to remove itself from its role of enforcing the Bill of Rights in the then Constitution of Kenya. The court ruled "inoperative" section 84 of that Constitution, which section had granted original jurisdiction to the High Court to enforce the Fundamental Rights and Freedoms of the Individual contained in Chapter V section 70-83. The provision was deemed "inoperative" in Kamau Kuria v. Attorney General, and this was upheld shortly thereafter in Maina
Mbacha v. Attorney General when the High Court found that no rules of procedure had been enacted to enforce the Bill of Rights and dismissed the suit for lack of jurisdiction. Indeed, in the latter case the court dismissed the application for lack of jurisdiction even though the case was before the court by virtue of the constitutional grant of "original unlimited jurisdiction" (see Kuria and Vazquez 1991).

Another legal channel of redress in Kenya is applications for judicial review - the means by which High Court Judges scrutinize public law functions, intervening as a matter of discretion, so as to right a recognizable public law wrong such as unlawfulness, unreasonableness or unfairness (Lumumba 2006, 3). In response to applications for judicial review, the High Court may issue orders of Sertiorari, prohibition, mandamus or habeas corpus. An order of sertiorari requires the proceedings of a court to be transferred to a higher court and examined for validity. An order of prohibition is issued to stop the assumption of unlawful jurisdiction or excess of jurisdiction. When a public official refuses to act in the manner prescribed by law, the court issues “mandamus” to compel performance. The unlawful deprivation of liberty invites the order of habeas corpus (Lumumba 2006, 2).

Yet in order for the courts to hear a litigant’s matter in an impartial manner, the judiciary must be insulated from manipulation by any other institution. As Waihu (n.d.) explains, judicial independence means two things:

• An impartial state of mind or attitude of a judicial officer in the exercise of a judicial power (personal independence).
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A special quantitative as well as qualitative constitutional status or relationship between the judicial arm of government and other arms of government, with special attention to the executive arm (institutional or structural independence).

The requirement that the judiciary be independent is intended to ensure that the principles of natural justice are adhered to in all of the court’s adjudicative work. Principles of natural justice denote two things:

1. That an adjudicator must be disinterested and unbiased (*nemo judex in causa sua*).
2. That the parties must be given adequate notice and a fair opportunity to be heard (*audi alteram partem*) (Kuloba 1997, 92-93; Lumumba 2006, 36).

Yet under the former Kenyan constitution, there were at least six constraints to the independence of the judiciary.

*First*, the judiciary depended on the executive for appointments to the bench, revision of its terms and conditions of service, taxation, removal from office, equipment and accommodation (Kuloba 1997, 169, 192). As such, the executive could easily intimidate the judiciary through the manner in which it disbursed resources to it. During the Moi era, the judiciary showed no ability or inclination to uphold the rule of law against the express or perceived whims and interests of the executive and individual senior government officials, their business associates and cronies. Judges and magistrates who occasionally failed to carry out the government’s wishes were swiftly disciplined or dismissed (Mutua 2001, 98-99).
So intimidated was the Kenyan judiciary during the Moi era, that M’inoti (1998) described it as “the reluctant guard”.

The minimal autonomy of the Kenyan judiciary was highlighted by the fact that it was not until 1995 that the judiciary ceased to be a part of the civil service with respect to its staff’s terms and conditions of service, when Daniel arap Moi signed the Gazette Notice No. 3801 of 8th May 1995. Yet the Kenyan executive continued to enjoy vast latitude in the appointment of judges, especially because of the unsatisfactorily meager qualifications required for one to be appointed as a judge. Thus persons who had formally served in the executive were appointed judges, as were the late Kitili Mwendwa and the late Matthew Guy Muli. Such persons were likely to consciously or unconsciously seek to protect the interests of the executive of which they had been members, thereby compromising the impartiality of the judiciary (Kuloba 1997, 183).

For most of independent Kenya’s existence, the removal of judges from office has been through extra constitutional action by the executive. In the case of judges appointed with security of tenure, removal other than by death was by forced resignation. Chief Justice Kitili Mwendwa, the first African to hold that position, was forced to resign following allegations of his involvement in an attempted military coup against the Kenyatta regime (Wahiu n.d.).

It was also common for the Kenyan executive to appoint some judges on renewable contracts, despite the fact that the former constitution did not provide for such appointments. The practice developed that the President could dismiss
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contract judges at will, as though they were civil servants, simply by terminating their contracts. Thus Chief Justice Madan was removed by abrupt termination of his contract after less than two years in office. Observers point out that his removal followed the decision in Stanley Munga Githunguri vs. Attorney General, where the High Court stayed criminal prosecutions against Githunguri following a lapse of 8 years, and repeated assurances that the matter had been put to rest. The two other judges who comprised the three-judge bench, Justice Sachdeva and Justice William Mbaya were also subsequently forced to resign. Similarly, in 1993, Justice Torgbor was forced to resign when he was informed that his contract would not be renewed. The judge had sat in the two-judge bench which allowed the election petition filed by Stanley Matiba against Daniel Arap Moi. The decision was overturned on appeal. Mr. Moi’s lawyer in that case was subsequently appointed judge (Wahiu n.d.). Judges on contract could therefore not afford to act with neutrality if they thought to be impartial may spoil the chances of having their contracts renewed (Kuloba 1997, 184).

Furthermore, under the former constitution, just as executive power was concentrated in the person of the President, in the judiciary all administrative decision making power was concentrated in the Chief Justice. In the words of Wahiu (n.d.), “In Kenya, the union of judicial and administrative chieftainship in the Chief Justice is complete. Because institutional criteria are non-existent and no officially designated deputy exists, the Chief Justice exercises personal power and discretion. Kenyans in turn are meant to trust in the wisdom and benevolence of this ‘Father of Justice’.” Yet the Chief Justice was appointed and dismissed by the President, elaborate dismissal procedures in Section 65 of the former Constitution
notwithstanding. As such, the independence of the Chief Justice, and that of the judges and magistrates under him or her, was compromised. Furthermore, the President had power to grant executive clemency and pardon to those found guilty by the courts; and this executive power was beyond judicial review (Kuloba 1997, 192).

In September 2004, early in the Kibaki Era, 5 of 11 Judges of the Court of Appeal and 17 of 30 judges of the High Court were suspended, and in accordance with the constitution, two separate tribunals appointed by the President to determine the question of their permanent removal from office for professional misconduct. However, before the tribunals started their operations, several of the judges under suspension were pressured to resign by the Ministry of Justice and Constitutional affairs and by the judicial administration through the withdrawal of their office facilities and perks, and the threat of eviction from official housing. Those who opted to resign were assured and subsequently allowed to retain their full retirement pensions. Thus what begun as a constitutional practice in the removal of judges deteriorated into unconstitutional procedure, with all but two of the appellate judges and five puisne judges under suspension blackmailed into compulsory retirement (Wahiu n.d.).

Second, the independence of the Kenyan judiciary was constraint by the fact that appointment and removal of judges carried ethnic connotations, with the apparent urge to create a judiciary that represented the country’s ethnic make up overriding meritocracy. Thus after the removal of the judges in September 2004, politicians
and other patrons lamented that their communities were being targeted (Freedomhouse 2006; Waihi n.d.).

Third, the independence of the judiciary was limited by the legislature, which had power to nullify court decisions by amending the laws of the land. Judges could even be deprived of office by legislation (Kuloba 1997, 192). The removal of the security of tenure for judges by the executive-dominated parliament in the late 1980s is a case in point (Kuria and Vazquez 1991; Mutua 2001). Furthermore, as indicated in the previous chapter (3.3 and 3.4), the Kenyan parliament was dominated by ethnic groups that had occupied the presidency. As such, matters brought before judges who partly relied on the goodwill of the legislature for their positions were likely to be decided in favour of those ethnic groups that wielded great influence over the legislature.

Fourth, while classical democratic theory advocates for the independence of the legislature, executive and judiciary on the assumption that the three are equals, the fact is that such equality is impracticable. In this regard Kuloba (1997) observes:

It is indisputably true that by constitutional arrangement the judiciary is the weakest arm of the state and the least dangerous to political rights. .... With no constitutional power to control the treasury or the armory, the judiciary is the least powerful branch of government and is so dependent on the other two branches of government, especially on the executive, that it is the organ least expected to exert sufficient checks and balances in the sense intended by the doctrine of separation of powers (Kuloba 1997, 170).

Furthermore, the political realities of the modern state are such that the independence of the three arms of government is virtually impossible:

If the doctrine of separation of powers worked well in a small, simple and slow-moving agrarian world of the 18th century, a past in which things
worked by a massive consensus of opinion, the complexities of fast-moving modern states preclude the full operation of the doctrine. Not all legislation can be made by parliament; not all disputes can be decided by courts only; not all executive functions can be done by the executive alone; nor should abuse of power be unrestrained (Kuloba 1997, 171).

Under the former Constitution of Kenya, the executive's power was overbearing over the other two arms of government. As Wahiu (n.d.) explains, that constitution reserved executive power in the President and legislative power in Parliament, which consisted of the President and the National Assembly. Equally express reservation of judicial power in the judiciary was absent, so that the exclusivity of judicial power could only be inferred. The weakness of the judiciary vis-a-viz the executive was seen in the way in which the executive could with impunity procrastinate or even totally neglect to implement court orders. For example, in 2007, the Ilchamus won a case where the High Court ordered the Government to establish a commission to address the community's grievances concerning the poisonous weed, *prosopis juliflora*, introduced into its land by the government, but by October 2008 the court order had not been implemented (Masibo 2008).

In view of the evident weakness of the judiciary vis-a-viz the executive and the legislature, it was not surprising that at the height of the clamour for multi-party politics in the late 1980s and early 1990s, Kenyan politicians, interested in access to power, focused on reforms to the legislature and executive rather than on the judiciary (Kuloba 1997, 181). It is no wonder therefore that the Orange Democratic Movement (ODM) declined to take legal action against the controversial declaration of Mwai Kibaki as winner of the 2007 presidential elections, insisting that they would not get a fair hearing since it was the Chief Justice, who had presided over the hasty nightfall swearing in of Kibaki, who
would be ultimately determining the judgment. Since a coalition of ethnic groups under the ODM did not have confidence in the judiciary, it is not surprising that minority ethnic groups such as the Ogiek and the Ilchamus have even less confidence in it.

Fifth, over the years, intricate court procedures have proved to be a formidable hurdle to the attainment of the justice that Kenyan ethnic minorities seek. For example, as pointed out in our second chapter (2.6.1 (b)), the Ilchamus application for judicial review concerning nominative parliamentary seats after the 2007 elections was ultimately dismissed on the ground that it ought to have been brought under the Constitution, and not under the Law Reform Act (Mbatia 2008). Furthermore, the elaborate court procedures necessitate the hiring of lawyers. Justice Kuloba highlighted this challenge as follows:

The pursuit of justice in courts is on the basis of pay-as-you-go. .... Frequently, one’s wallet is the litmus test for the quality of justice one gets and how early or late one gets it. It is the purse which will determine what kind of lawyer and legal services one will get. One’s imprudence to pursue or resist certain causes may count, but in the midst of it, money is the common factor (Kuloba 1997, 137).

Thus despite the fact that many of the Kenyan ethnic minorities seeking legal redress are evidently poor due to decades of marginalization, they are required to pay what to them are exhorbitant legal fees. While it is true that a pauper can be allowed to sue before making payments, this makes his or her debt burden even heavier, as any compensations he or she wins will be eroded by the fact that he or she is then obligated to pay the outstanding court fees from such compensation (Kuloba 1997, 138).
Sixth, the actual inadequate state of the Kenyan judiciary has been a major hindrance to the achievement of ethnic minority aspirations. In January 1998, the Chief Justice appointed a committee chaired by Justice Richard Otieno Kwach, to investigate the state of administration of justice in Kenya. In its Report, the committee noted:

The Kenyan Judiciary has experienced, in the recent past, lengthy case delays and backlog, limited access by the population, laxity in security, lack of adequate accommodation, allegations of corrupt practices, cumbersome laws and procedure, questionable recruitment and promotional procedures and general lack of training, weak or non-existence of sanctions for unethical behaviour and inequitable budget (Republic 1998).

Yet the Kwach Report was never acted upon by the Chief Justice (Ratushny 2004, 18). Furthermore, in May 2002, a panel of Commonwealth judicial experts, on request by the now defunct Constitution of Kenya Review Commission, examined Kenya’s court system. It concluded that the country’s court system was among the most incompetent and inefficient in Africa, with judges subject to political pressure, and often accepting bribes to influence their decisions. Within days of its release, the Report was angrily attacked by both Chief Justice Bernard Chunga and President Moi. They both defended the integrity of the judiciary and attacked “foreigners” who come to Kenya with “cheap solutions” for problems that do not exist but are merely “gossip” (Ratushny 2004, 20). Moreover, a 2005 report by the International Commission of Jurists concluded that corruption in the judiciary remains a serious impediment to the rule of law in Kenya (Freedomhouse 2006).

It is therefore evident that for a variety of reasons, litigation has not resulted in redress for Kenyan ethnic minorities. However, as De Smith (1964, 312) noted, “If the minority group is particularly unpopular and is also being victimized by the
government, favourable judicial decisions are unlikely to help it materially. .... 

.... The primary safeguards of minorities, insofar as public opinion will tolerate 
recognition of the need to safeguard them, are political and administrative.” 

Consequently, Kenyan ethnic minorities have sought other means of securing their 
interests. One of these is participation in the constitutional review process, to 
which we turn presently.

4.2.2. Participation in the Kenyan Constitutional Review Process

During the period of de jure one-party state in Kenya from 1982 to 1991, there 
was increasing dissatisfaction with the way in which sections of the Independence 
Constitution were changed and power concentrated in the Presidency. Indeed, the 
many political, social and economic problems facing the country were attributed 
to deficiencies in the Constitution. The pressure for a review of the constitution 
heightened as the movement for the restoration of multi-party politics started in 
the early 1990s, led by the Citizens’ Coalition for Constitutional Change (4cs) and 
religious organisations (Lumumba 2008, 1).

Apart from filing of legal suits and applications for judicial review, Kenyan ethnic 
minorities have participated in the constitutional review process, in the hope that a 
new constitution would be more facilitative of the protection of their rights (see 
2.3 and 3.5). Nevertheless, in the run-up to the return of multi-party politics in 
Kenya, the bulk of the agitation for a new constitution was undertaken by majority 
ethnic groups. This seems to have been due to at least three reasons. First, the 
larger communities such as the Kikuyu, Luhia and Luo had felt marginalized by 
the Moi regime. Second, Moi himself was a member of the minority communities,
so that a number of minorities thought opposing the perpetuation of his regime was going against their own interests. Third, due to rampant lack of formal education among ethnic minorities, they had fewer members able to articulate their concerns in the public arena.

Soon after the 1992 General Elections, it became clear that the repeal of Section 2 A of the then constitution which had decreed Kenya as a one-party state had done little to increase democratic space in the country. This was due to the fact that except for the reintroduction of Multiparty politics, all the institutions of oppression had been left intact: the awesome powers vested in the presidency had been untouched; the provincial administration with its vast anti-liberal powers was still in place; police brutality was still evident; a number of laws that outrightly contradicted constitutional imperatives were still in the statute books (Wanjala 2002b, 359). As such, the fear of government by the populace was still pervasive.

Furthermore, the efforts of the Inter-parties Parliamentary Group (IPPG) in 1997 did not yield any substantial constitutional reforms, except for allowing all parliamentary parties to participate in the appointment of the twelve nominative parliamentary seats. This meant that the president no longer had unchecked powers to nominate loyalists into those positions (Wanjala 2002b, 362). Yet as we have already seen, this amendment did not benefit ethnic minorities, as political parties continued to use the positions to reward their loyalists (see 2.6.1 (b)).

Thus upto 2010, Kenya’s democratization continued to be bogged down by a distorted Westminster constitution, despite the clamour for a new constitution
dating back to the 1980s. The main reason for the long delay in the enactment of a new constitution seems to have been that those in power found it difficult to facilitate the re-writing of the constitution in a manner that would reduce the immense powers they enjoyed. This fact was seen most clearly in the drastic shift of position of the National Alliance Party of Kenya (NAK) faction of the national Rainbow Coalition (NARC) concerning the creation of the position of an Executive Prime Minister (see 3.6). Thus while those out of power agitated for radical constitutional reform as a means for capturing power, those in power insisted on minimal reforms as a means of retaining it. Amidst this contention, the voices of marginalized ethnic minorities went unheard by both sides. After all, even those majority groups agitating for radical reform still insisted on majority rule, without much thought for the need to protect the rights of ethnic minorities. Thus during the Constitutional Conference held at the Bomas of Kenya from early 2003, the voices of ethnic minorities were drowned by those of majority ethnic groups agitating for whichever system of governance they deemed to be most suitable for the facilitation of their ascent to power or maintenance of it.

4.2.3. Overview

In the case of Kenya during its first four-and-a-half decades of independence, legal action through suits and applications for judicial review, as well as efforts at re-writing the constitution, have all contributed insignificantly to ending the marginalization of ethnic minorities. Despite the promulgation of the new constitution, this situation is not likely to change substantially in the foreseeable future, as the majority ethnic groups continue to dominate the country’s politics. Kenyan ethnic minorities can therefore easily identify with Henry David
Thoreau’s almost total lack of confidence in the legally-provided methods of seeking to initiate reform:

As for adopting the ways which the State has provided for remedying the evil, I know not of such ways. They take too much time, and a man’s life will be gone. I have other affairs to attend to. .... It is not my business to be petitioning the Governor or the Legislature any more than it is theirs to petition me; and if they should not hear my petition, what should I do then? But in this case the State has provided no way; its very Constitution is the evil (Thoreau 1848, Part 2 Par.6).

As Macfarlane (1968, 42) correctly noted, in extreme instances the rulers may deprive some of their subjects of all legal capacity and status, treating them as objects, or even denying them the right to exist. In such extremities, contends Macfarlane, there is unquestionably no obligation on the part of those affected to obey. As a general rule, unconstitutional methods should not be considered until the permitted methods have been exhausted, although one has to accept that in extreme circumstances, such as the threat of genocide, the urgency of the issue may require the immediate exploration of direct action (Macfarlane 1968, 43-44).

In the light of the grave difficulty of effecting change through legal means such as litigation and constitutional review as outlined in the foregoing discussion, Kenyan ethnic minorities are likely to resort to illegal means of getting their voices heard, among which are non-violent civil disobedience on the one extreme, and secessionist war on the other. Consequently, the rest of this chapter will undertake a critical examination of the moral basis of non-violent civil disobedience, while the next two chapters will examine justification for secession and secessionist war respectively.
4.3. The Nature of Non-violent Civil Disobedience

Non-violent civil disobedience refers to actions taken by a disgruntled group to challenge a law or a social order without any use of physical force. Tactics of non-violent civil disobedience may include strikes, boycotts, mass demonstrations, refusal to pay taxes, destruction of symbols of government authority (such as official identification cards), refusal to obey official orders (such as curfew restrictions), and the creation of alternative institutions for political legitimacy and social organisation (Zunes 1997). Nevertheless, it should be noted at the outset that some of those who engage in non-violent action do not have an ethical commitment to it, but simply choose it for pragmatic purposes. Thus many so-called non-violent uprisings have not been exclusively non-violent. Indeed, some have included riots, sabotage, and the murder of collaborators (Zunes 1997). This expedient use of non-violent action can partly be accounted for by the fact that a similarity that liberation movements share across the world is that they must develop a collective action strategy that will generate leverage, enabling them to engage in power struggles with opponents who have superior military might (Morris 1999, 529). In the light of this reality, non-violent civil disobedience is a tactic well suited to struggles in which a minority group lacks access to major sources of power within a society (Zanden 1963, 544).

For historical reasons, non-violent resistance is often so associated with civil disobedience that "civil disobedience" is frequently understood to refer to "non-violent civil disobedience". The term "civil disobedience" was coined by Henry David Thoreau in his essay under the same title (Thoreau 1848) to describe his refusal to pay the state poll tax imposed by the American government to prosecute
a war in Mexico and to enforce the Fugitive Slave Law. On the most widely accepted account of civil disobedience, famously defended by John Rawls in his seminal work, *A Theory of Justice* (1971), civil disobedience is a public, non-violent, conscientious yet political act contrary to law, usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way one addresses the sense of justice of the majority of the community, and declares that in one's considered opinion the principles of social cooperation among free and equal persons are not being respected (Rawls 1971, 364). Nevertheless, in view of the fact that other writers consider the use of violence to be a type of civil disobedience, we shall use the term “non-violent civil disobedience”, thereby eliminating the possibility of ambiguity.

The purpose of non-violent civil disobedience can be to publicize an unjust law or a just cause, to appeal to the conscience of the public, to force negotiation with recalcitrant officials, to get into court where one can challenge the constitutionality of a law, to exculpate oneself, or to put an end to one's personal complicity in the injustice which flows from obedience to unjust law - or some combination of these (Suber 1999).

One of the earliest articulations of non-violent civil disobedience is that by Plato in the *Apology* and the *Crito* (Plato 2009a, 2009b). In the *Apology*, Plato presents Socrates as declaring that while he is committed to obeying the dictates of the state, he is obliged to disobey them whenever they conflict with the express will of the gods, even if the state threatens to put him to death for doing so. Socrates goes on to assert that if the Athenians were to sentence him to death, they would
thereby injure themselves more than him. This position is pivotal to the doctrine of non-violent civil disobedience, which seeks to appeal to the conscience of the oppressor through the suffering he or she inflicts on the oppressed.

In the *Crito*, Plato presents Socrates asserting that it is virtuous to submit to the decision of the state to sentence him (Socrates) to death. To support this position, Socrates declares two cardinal principles:

1. We ought never to harm anyone.
2. We ought never to retaliate.

Plato’s Socrates hence provided the precedent for a tradition of dissent that aims at resisting a specific authority, law, or policy considered unjust, while at the same time recognising the rulemaking prerogative of the existing political system as legitimate and generally binding (Bleiker 2002, 37).

Since Plato, the doctrine of non-violent civil disobedience has undergone significant change, especially in terms of the strategies for its implementation. For while Socrates did not go out to challenge the status quo through openly confrontational means, this very strategy is at the heart of contemporary non-violent civil disobedience. Thus as presently understood, non-violent civil disobedience involves suddenly thrusting the initiative to a political authority for a conflict with unarmed citizens that it cannot avoid, and which will also have the inevitable consequence of alienating it from a portion of the on-looking subjects/citizens. Furthermore, because the resister is unarmed and “suffers” imprisonment, being beaten, etc., the onus of responsibility for all the suffering falls squarely on the authority (Tinker 1971, 777-778).
Rawls (1971, 373-374) suggests three counts on which non-violent civil disobedience by a minority can be justified in a nearly just society, namely, when it is undertaken:

1. In response to an instance of substantial and clear injustice.
2. As a last resort.
3. In coordination with other minority groups.

However, Lyons (1998) faults the Rawlsian civil disobedience theory, basing his reflections on three paradigm resisters and the targets of their resistance: chattel slavery, British colonial rule and Jim Crow. Lyons argues that none of these three regarded the prevailing system as “reasonably just” or accepted a moral presumption favoring obedience to law (Lyons 1998, 33). Given the settings of their resistance, ..., it would not have been reasonable for Thoreau, Gandhi or King to have regarded the prevailing system as sufficiently just to support political obligation (Lyons 1998, 40). Thus for Lyons (1998, 47), insofar as non-violent civil disobedience theory in the tradition of Rawls assumes political obligation, it distorts the outlook of principled resisters. Lyons (1998, 36) also observes that Even those who are treated unjustly can have moral reason to comply with the culpable laws—when, for example, disobedience would expose innocent persons to risks they have not agreed to assume; and we can have moral reason to support a regime that is profoundly unjust—when it is endangered, for example, by forces that threaten to impose much worse injustice.
Zunes (1997) asserts that despite the stereotype of Africa as a continent characterized by violent conflict, it also has a tradition of non-violent civil disobedience. Zunes cites the 1919 revolution in Egypt, which consisted of months of non-violent civil disobedience against British occupation of the country. It was centred in Cairo and Alexandria, and included strikes by students and lawyers, as well as by postal, telegraph, tram and railway workers, and eventually by Egyptian government personnel. The result of this non-violent movement was the British recognition of limited Egyptian independence.

Other non-violent African pro-independence movements emerged in the 1950s and 1960s, most notably when Kenneth Kaunda helped lead Zambia to independence in 1965 through his Gandhian-style campaign of civil disobedience. Ironically, Kaunda was faced with widespread non-violent resistance a generation later in opposition to his one-party rule, resulting in the opening up of the political system to the extent that he was forced out of power (Zunes 1997).

Non-violent action also played a major role in the downfall of one-party states in Mali, Malawi, Niger, Madagascar and Benin. Similar campaigns have also seriously challenged well-entrenched regimes in Nigeria, Kenya, Togo, Gabon, the Democratic Republic of Congo and several other countries (Zunes 1997). Besides, in view of the formidable military might of apartheid South Africa as compared with the indigenous African resistance to it, non-violent action proved to be instrumental to the collapse of that regime (Zunes 1997; 1999).
In January 2011, more than ninety years after the 1919 non-violent Egyptian uprising, the Egyptian masses staged another non-violent uprising. It involved a series of demonstrations, marches and strikes. Grievances of Egyptian protesters were focused on issues such as police brutality, state of emergency laws, lack of free elections and freedom of speech, rampant corruption, high unemployment, high food prices and low minimum wages. Protests by millions from a variety of socio-economic and religious backgrounds culminated in the overthrow of the regime of President Hosni Mubarak on 11th February, 2011. However, despite being predominantly peaceful in nature, the uprising involved some violent clashes between security forces and protesters.

In the succeeding four sub-sections, we outline the views of a number of influential advocates of non-violent civil disobedience, before offering a moral critique of this strategy in the following section.

4.3.1. Étienne de La Boétie

The basic assumption of non-violent civil disobedience is that governments are ultimately dependent on the fearful obedience and compliance of their subjects. This was succinctly stated by the French jurist and political philosopher, Étienne de La Boétie (2002), who wrote his seminal essay *Discours de la Servitude Volontaire* (“The Discourse of Voluntary Servitude”) in 1552-53 (Rothbard 2002, 9). In his abstract, universal reasoning, his development of a true political philosophy, and his frequent references to classical antiquity, La Boétie followed the method of Renaissance writers, notably Niccolo Machiavelli (see Machiavelli 1998). However, whereas Machiavelli attempted to instruct the Prince on effective
means of cementing his rule. La Boétie was dedicated to identifying ways to overthrow him, and thereby to secure the liberty of the individual (Rothbard 2002, 12). For La Boétie, all that the oppressed masses need to do in order to overthrow the tyrant is to withdraw their cooperation from him:

He who ... domineers over you has only two eyes, only two hands, only one body, no more than is possessed by the least man among the infinite numbers dwelling in your cities; he has indeed nothing more than the power that you confer upon him to destroy you. Where has he acquired enough eyes to spy upon you, if you do not provide them yourselves? How can he have so many arms to beat you with, if he does not borrow them from you? The feet that trample down your cities, where does he get them if they are not your own? How does he have any power over you except through you? How would he dare assail you if he had no cooperation from you? What could he do to you if you yourselves did not connive with the thief who plunders you, if you were not accomplices of the murderer who kills you, if you were not traitors to yourselves? .... Resolve to serve no more, and you are at once freed. I do not ask that you place hands upon the tyrant to topple him over, but simply that you support him no longer; then you will behold him, like a great Colossus whose pedestal has been pulled away, fall of his own weight and break into pieces (La Boétie 2002, 48-49).

Rothbard (2002, 18) observes that it was a medieval tradition to justify tyrannicide of unjust rulers who break the divine law, but La Boétie's doctrine, though non-violent, was in the deepest sense far more radical. For, continues Rothbard, while the assassination of a tyrant is simply an isolated individual act within an existing political system, mass non-violent civil disobedience is far more revolutionary in launching a transformation of the system itself. Hence La Boétie was the first theorist of the strategy of mass, non-violent civil disobedience of State edicts and exactions (Rothbard 2002, 37).

Some might fault La Boétie's views on the grounds that after graduating from law school, he took up an eminent career as a royal official in Bordeaux. He never published The Discourse, and as he pursued a career in faithful service of the
monarch, never a hint did he express along the lines of his earlier treatise (Rothbard 2002, 31). Yet such a line of reasoning would be guilty of the argumentam ad hominem (circumstantial). Our interest here is in the theoretical incisiveness of La Boétie’s analysis, rather than his faithfulness to his theoretical insight.

David Hume independently discovered the principle of the goodwill of the populace as the ground of government two centuries after La Boétie, and stated it as follows:

**NOTHING** is more surprising to those who consider human affairs with a philosophical eye, than to see the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we enquire by what means this wonder is effected, we shall find, that, as Force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular (Hume 1870, 23).

Among the most enthusiastic advocates of non-violent civil disobedience have been the anarchist thinkers, who simply extend both La Boétie’s analysis and his conclusion from tyrannical rule to all governmental rule whatsoever. Prominent among the anarchist advocates of non-violent civil disobedience have been the 19th century thinkers Henry David Thoreau and Leo Tolstoy. Tolstoy, indeed, in setting forth his doctrine of non-violent anarchism, used a lengthy passage from La Boétie’s *Discourse* as the focal point for the development of his argument (Tolstoy 1948, 42-45).
4.3.2. Henry David Thoreau

While the thoughts of La Boétie and Hume on non-violence were purely theoretical, the nineteenth century American thinker, Henry David Thoreau, took some non-violent action in an attempt to challenge the authority of the state. Because he detested slavery and because tax revenues contributed to the support of it, Thoreau refused to pay the poll tax - a capital tax levied equally on all adults within a community. Consequently, in July 1846, he was arrested and jailed. He was supposed to remain in jail until a fine was paid, which he also declined to pay. However, without his knowledge or consent, relatives settled the “debt”, and a disgruntled Thoreau was released after only one night (McElroy 2005). The incarceration was brief, but it has had enduring effects, as it prompted Thoreau to write his seminal essay, "Civil Disobedience" (1848), which, as we shall see in subsequent subsections, had a profound influence on the thinking of Mohandas K. ("Mahatma") Gandhi and Martin Luther King, Jr.

Thoreau shared with La Boétie the view that states continue to exist because of the acquiescence of the citizenry:

Those who, while they disapprove of the character and measures of a government, yield to it their allegiance and support are undoubtedly its most conscientious supporters, and so frequently the most serious obstacles to reform. Some are petitioning the State to dissolve the Union, to disregard the requisitions of the President. Why do they not dissolve it themselves — the union between themselves and the State — and refuse to pay their quota into its treasury? Do not they stand in the same relation to the State, that the State does to the Union? And have not the same reasons prevented the State from resisting the Union, which have prevented them from resisting the State? (Thoreau 1848. Part 2 Par.1).

As Rosenwald (n.d.) has correctly noted, although proponents of non-violent action often cite Thoreau’s “Civil Disobedience” in support of their strategy, non-
violence is not a first principle for Thoreau; instead, it is at most a practical preference. Indeed, as Rosenwald (n.d.) further points out, Thoreau criticizes the Mexican War not as a war, but as an unjust war; he criticizes not prisons, but unjust imprisonments. Moreover, after the passage of the Fugitive Slave Law in 1850, and still more after John Brown’s raid, Thoreau defended violent actions on the same grounds as those on which he had defended non-violent action in “Civil Disobedience” — because, by that time, circumstances had changed, and the actions he found himself called to defend were violent. The following passage from Thoreau’s “A Plea for Captain John Brown” (1859) is conclusive evidence that he was not a doctrinaire advocate of non-violent action:

It was his [Brown's] peculiar doctrine that a man has a perfect right to interfere by force with the slaveholder, in order to rescue the slave. I agree with him. ... I do not wish to kill nor to be killed, but I can foresee circumstances in which both these things would be by me unavoidable (Thoreau 1859).

Thus it is not surprising that while Mohandas K. Gandhi and Martin Luther King, Jr. got their inspiration for non-violent resistance from Thoreau’s “Civil Disobedience”, an anonymous member of the Danish resistance learned a different lesson from it:

Thoreau's "Civil Disobedience" stood for me, and for my first leader in the resistance movement, as a shining light with which we could examine the policy of complete passivity which our government had ordered for the whole Danish population. ... I lent Thoreau's books to friends, told them about him, and our circle grew. Railroads, bridges, and factories that worked for the Germans were blown up (cited in Rosenwald n.d.).

4.3.3. Mohandas Karmachand Gandhi

One of the best known organizers of non-violent civil disobedience is the Indian nationalist, Mohandas Karmachand Gandhi, commonly referred to as Mahatma
"Great Soul") Gandhi. As a young lawyer in South Africa protesting the government’s treatment of immigrant Indian workers, Gandhi was deeply impressed by Thoreau’s essay on civil disobedience. Years later, he thanked the American people for Thoreau as follows:

You have given me a teacher in Thoreau, who furnished me through his essay on the "Duty of Civil Disobedience" scientific confirmation of what I was doing in South Africa (cited in McElroy 2005).

Gandhi called his overall method of non-violent action Satyagraha. According to Kumarappa (1961, p.iii), Satyagraha can be traced essentially to the Gita ideal of the karmayogin, to Jesus' "Sermon on the Mount", and to the writings of Henry David Thoreau, John Ruskin, and more especially Leo Tolstoy; but Kumarappa asserts that Gandhi’s practical application of Satyagraha in the social and political spheres was entirely his own. Gandhi himself explained the meaning of Satyagraha as follows:

Satyagraha is literally holding on to Truth and it means, therefore, Truth-force. Truth is soul or spirit. It is, therefore, known as soul-force. .... The word was coined in South Africa to distinguish the non-violent resistance of the Indians of South Africa from the contemporary 'passive resistance' of the suffragettes and others (Gandhi 1961, 3).

Gandhi was at pains to make a sharp distinction between “passive resistance” and Satyagraha. The main difference, according to him, is that passive resistance is not committed to love, but is rather an expedient strategy that can be easily abandoned whenever it was convenient to use violence. On the other hand, Satyagraha is committed to non-violence, considering itself to be the very opposite of violent resistance (Gandhi 1961, 6; Gandhi 2003, 74-75). He believed in confronting his opponents aggressively, in such a way that they could not avoid dealing with him. The difference was that the non-violent activist, while willing to
die, was never willing to kill (Shepard 2002). In support of non-violent action, Gandhi argued that if the world were to pursue violence to its ultimate conclusion, the human race would have long ago become extinct (Gandhi 1961, 15-16, 387).

Gandhi practiced two types of Satyagraha in his mass campaigns. The first was civil disobedience, which entailed breaking a law and courting arrest. The second was non-co-operation, that is, refusing to submit to the injustice being fought. It took such forms as strikes, economic boycotts, and tax refusals (Shepard 2002). Satyagraha, as developed by Gandhi, became unique among the existing types of generic non-violence by being a matter of principle, including a program for social reconstruction and an active individual and group method of effecting socio-political transformation (Sharp 1959, 60). Gandhi's work greatly influenced the thinking of the African-American Civil Rights leader, Martin Luther King, Jr., to whose views on non-violent civil disobedience we now turn.

4.3.4. Martin Luther King, Jr.

In contemporary political thought, the term 'civil rights' is indissolubly linked to the struggle for equality of African-Americans during the 1950s and 1960s, whose aim was to secure the status of equal citizenship between African and European Americans (Altman 2007). After slavery was abolished, the US federal Constitution was amended to secure basic rights for African-Americans. In 1877, however, the federal government moved to frustrate efforts to enforce those rights. State laws and constitutions were modified to exclude African-Americans from the political process. Consequently, the system of legalized segregation and disenfranchisement was fully in place in every state of the former Confederacy by
1910 (Lyons 1998, 38; Davis n.d.). It is those discriminatory pieces of legislation and court rulings that are collectively referred to as Jim Crow laws. The disenfranchisement of African-Americans in the South barred them from participating in the political process. They were also kept at the bottom of the economic order, because they lacked even minimal control over land and capital (Morris 1999, 518). Furthermore, segregation and disenfranchisement laws were often supported by ritualized mob violence ("lynchings") against southern African-Americans (Davis n.d.).

It was during the early to mid 1960s that the modern civil rights movement became the organized force that would topple Jim Crow. In this period highly public demonstrations occurred throughout the South, and came to be increasingly strengthened by Northern demonstrations organized in their support (Morris 1999, 525-526). The intensity and visibility of demonstrations caused the Kennedy Administration and the Congress to seek measures that would end demonstrations and restore social order. The Birmingham, Alabama, confrontation in 1963 and the Selma, Alabama, confrontation in 1965 generated the leverage that led to the overthrow of the formal Jim Crow order (Morris 1999, 526-527).

Martin Luther King, Jr. catapulted to fame when he came to the assistance of Rosa Parks, the Montgomery, Alabama African-American seamstress who refused to give up her seat on a segregated Montgomery bus to a European-American passenger (Sylvester 1998). Garrow (1991, 86) laments that King, Jr.'s plagiarism in his graduate school term papers and doctoral dissertation is fast being pushed to the periphery. Nevertheless, our concern here is not to conduct a phrensic
investigation into the originality of King, Jr.'s ideas, but rather a philosophical reflection on non-violent civil disobedience. Consequently, we shall put the claims of plagiarism aside, and focus on King, Jr.'s views on non-violence, without seeking to determine how original they were. Indeed, King, Jr. himself was emphatic that he was not the founder of non-violent civil disobedience among African-Americans; rather, he merely served as their spokesman (King, Jr. 1964a, 83).

King, Jr. states that his adoption of non-violent civil disobedience was inspired by Thoreau's "Civil Disobedience" (King, Jr. 1964a, 73). Nevertheless, he attributes the details of his strategy to the work of Mohandas K. Gandhi (King, Jr. 1964a, 78). He notes the following concerning Gandhi's influence on him:

> It was in this Gandhian emphasis on love and nonviolence that I discovered the method for social reform that I had been seeking for so many months. The intellectual and moral satisfaction that I failed to gain from the utilitarianism of Bentham and Mill, the revolutionary methods of Marx and Lenin, the social-contracts theory of Hobbes, the "back to nature" optimism of Rousseau, and the superman philosophy of Nietzsche I found in the non-violent resistance philosophy of Gandhi. I came to feel that this was the only morally and practically sound method open to oppressed people in their struggle for freedom (King, Jr. 1964a, 79).

In line with Gandhian thinking, King, Jr. (1963b, 2) was of the view that the purpose of direct mass action is to attain a situation in which the opponent is willing to negotiate. King, Jr. (1964a, 83-88) outlines several basic aspects of the doctrine of non-violence as follows:

- It is not for cowards, but is actually a method of resistance.
- It seeks to win the friendship and understanding of the opponent.
- It attacks forces of evil, rather than persons who happen to be doing the evil.
• It is willing to accept suffering without retaliation.

• It avoids not only external physical violence, but also internal violence of spirit.

• It is based on the conviction that the universe is on the side of justice.

4.4. A Moral Critique of Non-violent Civil Disobedience

In moral philosophy, the debate between deontologists (advocates of duty for duty’s sake without any consideration of consequences) and teleologists (advocates of actions that produce desirable consequences) is a drawn out one which the present study cannot purport to resolve. Suffice it to observe that on the one hand, while deontology correctly emphasises the need for conscientiousness by insisting on the sense of duty for duty’s sake without consideration of consequences, it thereby detaches morality from the rest of life, and so fails to acknowledge that the purpose of morality is to promote the welfare of humanity. On the other hand, while teleology correctly emphasises the need to act in order to promote human welfare, denying the place of commitment to duty without regard for consequences, it thereby reduces morality to mere prudence. Thus deontology and teleology each gives a useful but partial account of morality, so that a more comprehensive account of it might be arrived at by utilising the valuable elements in both of them (Frankena 1973).

It is also important to note that there are various forms of teleology, depending on what they say about who is to benefit from the consequences to be produced by the individual’s actions. The best known forms of teleology are ethical egoism.
altruism and utilitarianism. While ethical egoism seeks to promote the individual actor's own maximum benefit, altruism seeks to promote the welfare of other people without consideration for the individual actor's own. On its part, utilitarianism advocates for the maximization of the welfare of the greatest number of people. Ethical egoism hardly seems to be a serious moral theory, since it is difficult to distinguish between egotism (outright selfishness) and egoism (an enlightened, philosophically grounded endeavour to promote one's own maximum benefit. On the other hand, altruism seems to be impracticable on the basis that it demands that the individual ignores his or her interest - a demand which intuitively seems to be contrary to human nature. This leaves us with utilitarianism, which demands that the individual act to maximize the benefit of the greatest number of people, without over-emphasising the individual's interests, but also without ignoring them.

In view of the foregoing observations, our moral critique of non-violent civil disobedience will be based on relevant arguments from both deontological and utilitarian perspectives. Following our critique of non-violent civil disobedience from a theoretical standpoint, we shall seek to determine the extent to which this form of political action is applicable to the circumstances of Kenyan ethnic minorities.

4.4.1. Moral Arguments for Non-Violent Civil Disobedience

Non-violent civil disobedience can be morally justified on at least nine counts.
First, in a violent struggle, the violence of each side goads the other to greater violence. Each side also uses the violence of the other side to justify its own violence. A non-violent struggle, on the other hand, does not encourage the violence of the opponent to the same degree (Shepard 2002). Thus during the post 2007 Kenyan general elections crisis, some violent attacks were said to have been planned specifically to revenge for violence meted out on certain ethnic groups (see CIPEV 2008). Such violence would have been averted if those who felt aggrieved by the announced election results had restricted their expression of dissent to non-violent forms.

Second, violence generally leaves the two sides as long-standing enemies (Shepard 2002). A number of countries have had decades of hostilities due to the violence that they meted out on each other in the past. Examples in this regard include the Koreans and the Japanese, the Chinese and the Japanese, and the Ethiopians and Eritreans. No such negative effects are attributable to non-violent resistance. Thus as Shepard (2002) has noted, “Maybe the most amazing thing about Gandhi’s non-violent revolution is, not that the British left, but that they left as friends, and that Britain and India became partners in the British Commonwealth.”

Interestingly, in August 2011, both Britain and India had serious instances of civil disobedience, but the British one was violent, while the Indian one was non-violent. On the one hand, in London and other English cities, youth from minority communities destroyed property worth millions of Pounds Sterling in protest against the alleged killing of one of them by police (AFP 2011a). On the other
hand, the Indian government found itself pleading with a 74-year-old anti-corruption activist, Anna Hazare, to give up his hunger strike to pressurise it to address the problem of corruption more decisively - a fast that mobilised hundreds of thousands of anti-graft protesters to hold rallies in Hazare’s support (AFP 2011b, 2011c). The loss of life and property in the British case evidently caused wounds which will be harder to heal than the pressure which Hazare exerted on the Indian government.

Thus non-violence does not carry the same risk of antagonising potential allies or confirming the antipathy of opponents (Raz 1979, 267). Indeed, Kenyans are now talking of the need for healing and reconciliation for the very reason that the violence that members of various ethnic groups meted out on each other following the disputed 2007 general elections inflicted wounds that may take generations to heal: this would not have been so if the antagonists had confined themselves to non-violent means of expressing their discontent.

Third, even when an armed insurgency is victorious, the final outcome is often disastrous. Thus the Algerian victory against the French and the Kenyan victory against the British together cost over one million lives, with millions more displaced, hundreds of villages destroyed, several cities and much of the countries’ infrastructure severely damaged, the economies wrecked and requiring complete overhauling, and the environments devastated (Zunes 1997). Similarly, while the Kenyan economy had been steadily improving since Mwai Kibaki took power in 2002, it plummeted after the post 2007 elections violence, and has not
fully recovered to date. No such losses are associated with non-violent civil disobedience.

Fourth, armed civil disobedience tends to push undecided elements of the population towards the government, as any effects of the violence they suffer serves to convince them that the purported “liberators” are actually “terrorists”. In sharp contrast to this, government repression against unarmed resistance movements usually creates greater popular sympathy for the regime’s opponents. Indeed, attacks against unarmed demonstrators have often provided the spark that has turned periodic protests into full-scale insurrections, as large segments of the population come out in sympathy with the victims of the repression (Zunes 1997). This explains the tendency of many governments, when faced with non-violent civil disobedience, to emphasise any violent fringes that may emerge (Tinker 1971, 786-787). Indeed, the Kenyan government often violently disperses peaceful demonstrations, culminating in retaliatory action by sections of the crowd, after which the government claims that the organisers of the demonstrations were advocates of violent mass action. Indeed, some Kenyan politicians frequently assert that a call to mass action is tantamount to urging the population to engage in violent civil disobedience, contrary to the facts.

Fifth, quite frequently, regimes which come to power through violent means soon forget their pledges to uphold personal liberties. Once in power, the revolutionaries have often failed to establish truly democratic political systems capable of supporting social and economic development. Often disagreements, which could have been resolved peaceably in a non-militarised institution, erupt
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into bloody factional fighting. Thus some countries, such as Algeria and Guinea-Bissau, have experienced military coups not long after armed revolutionary movements have ousted colonialists. Others, such as Angola and Mozambique, have had to endure long and costly civil wars which broke out soon after the wars of liberation (Zunes 1997). In contrast to such instability, India, which achieved independence through largely non-violent means, has not had a single military coup for the more than half a century that it has governed itself.

However, critics could offer counterexamples such as those of Nigeria and Ghana, both of which got their political independence from Britain through peaceful means, only to sink into a series of coups, some of which were bloody. On the other hand, Kenya, which achieved its political independence partly due to pressure from the Mau Mau Uprising, has not had a single successful military coup (see McGowan 2003). Thus critics can contend, quite plausibly, that while nonviolent means may engender a stable political process, it is not always true that it does; and, conversely, whereas violent means may give rise to an unstable political process, it is not always the case that it does. As such, there were probably other factors at play in the examples on both sides (see Johnson et. Al. 1984; Kposowa and Jenkins 1993; Ngoma 2004). Nevertheless, it seems evident that along with those other factors, a culture of violent civil disobedience is likely to contribute to long-term political instability. As such, it seems reasonable to infer that Kenya is more likely to have long-term political stability if its citizens develop a culture of non-violent civil disobedience rather than a violent one.
Sixth, throughout history, acts of non-violent civil disobedience have forced a reassessment of moral, social, political and economic parameters. The Boston Tea Party, the suffragette movement, the struggle for Indian immigrant rights in South Africa and the resistance to British rule in India (both led by Gandhi), the US civil rights movement led by Martin Luther King. Jr., Rosa Parks and others, American student sit-ins against the Vietnam War, and the resistance to apartheid in South Africa are all instances where non-violent civil disobedience proved to be an important mechanism for social change (Brownlee 2007; Zunes 1997, 1999). In the Kenyan context, the non-violent campaign of the late Prof. Wangari Mathai from October 1989 forced the Moi regime to abandon its plans to build a sixty-storey sky-scraper in Nairobi's Uhuru Park. Her protests, the government's response to them and the media coverage of the events all led foreign investors to withdraw from the project in January 1990, barely three months after her protests began, leaving the Moi regime with no option except to abandon it. Similarly, the non-violent strategy of the Release Political Prisoners lobby, backed by the prisoners' mothers and other women including the late Prof. Wangari Mathai in the early 1990s, eventually forced the Moi regime to release all political prisoners in 1993.

It is a fact that violent civil disobedience has also had a substantial impact on socio-political progress. For example, revolutions in France in the 18th century and in Russia in the 20th ushered in epoch-changing political arrangements. In the Kenyan context, the Mau Mau Uprising jolted the British into hastening the process of relinquishing political control (see Berman 1991; Kinyatti 2000). Nevertheless, the perception, popularized in Africa by Marxism, that significant
change can only come through violent means, is debunked by the many examples of effective change through non-violent means listed above.

Seventh, there is at least one point in favour of non-violent civil disobedience over legal protest. With regard to dissent in general, Mill (1999) notes that sometimes the only way to make a view heard is to allow, or even to invite, society to ridicule and sensationalise it as intemperate and irrational. In similar vain, Russell (1998, 635) observes that it is typically difficult to make the most salient facts in a dispute known through conventional channels of participation, because the controllers of mainstream media tend to give defenders of unpopular views limited space to make their case. However, given the sensational news value of illegal methods, urges Russell, engaging in civil disobedience often leads to wide dissemination of a position. Admittedly, the success of this strategy depends partly upon the character of the society in which it is employed; but it should not be ruled out as a strategy for communication (Brownlee 2007).

Like many regimes around the world, the Kenyan government frequently reminds its citizens to use legal channels to voice their concerns. However, the government has consistently proved to be slow in responding to concerns that are expressed through legal means. On the other hand, the rampant damage of violent action is well known. As such, while both violent and non-violent civil disobedience would attract greater attention than legal protest, a non-violent approach is morally preferable to a violent one, for the reasons given in the preceding six arguments.
Eighth, as Shepard (2002) correctly observed, even in revolutions that are primarily violent, the successful ones usually include non-violent civilian actions. Yet nearly every time, these actions are curiously downplayed or ignored by most journalists and historians. What is more, as Shepard further noted, there are other cases in which violence would work, but so would non-violent action with much less harm. Indeed, while some Kenyans probably quietly believe that the violence after the disputed 2007 general elections was necessary to bring about the social changes now being witnessed in the country (chiefly the promulgation of the new constitution in August 2010 and the numerous reforms consequent on it), concerted non-violent civil disobedience would have achieved the same results.

Ninth, one of the greatest advantages of non-violent civil disobedience over violent action is that it caters for human finitude and its attendant fallibility. Ross (1998) stated this point as follows:

The violent struggler, if proven to have been mistaken, has left behind a swathe of suffering and destruction for no good end whatsoever. Mistaken violence is liable to result in global catastrophe, while mistaken non-violence is no more than a personal tragedy for those involved in the struggle - tragic enough, but at least accepted freely (Ross 1998).

In the context of the post 2007 Kenyan elections crisis, the crowds in the slums engaged in inter-ethnic violence out of ignorance of the fact that their fellow slum dwellers were not responsible for the mismanagement of the polls (see Wrong 2009, 307).
4.4.2. Moral Arguments against Non-violent Civil Disobedience

Despite an apparently impressive rationale for non-violent civil disobedience, at least six objections have been leveled against it.

*First*, non-violent civil disobedience results in harm, and any harm is undesirable. Raz (1979, 262) identifies two kinds of harm that easily arise out of non-violent civil disobedience:

1. it can be a divisive force in society.
2. since it is normally designed to attract public attention, it can lead people to think of resorting to disobedience to achieve whatever changes in law or policy they find justified.

Furthermore, critics assert that non-violent civil disobedience can encourage not only others to engage in similar disobedience, but also a general disrespect for the law, particularly where the law is perceived to be lenient toward certain kinds of offences (Brownlee 2007).

Nevertheless, proponents of non-violent civil disobedience can respond with Pantham (1983, 182-183) that any harm occasioned by non-violent civil disobedience can be seen as the sacrifice necessary to effect socio-political transformation, and that an element of sacrifice is involved not only in *non-violent resistance*, but also in violent resistance against oppression. It is true that a proponent of violent civil disobedience could argue that a violent approach is morally preferable to a non-violent one in cases where it is clear that there is a balance of positive consequences over negative ones. Thus some people may be injured or may even die because of employing violent means, but these sacrifices
would be justified if they are necessary to effect socio-political transformation. Yet the balance of advantage over disadvantage in the two extreme forms of resistance (non-violent and violent) must be determined through some other means, and the foregoing nine arguments in favour of a non-violent approach are worth considering in this regard.

Second, it could be argued that non-violent civil disobedience is unbearably slow in achieving desired results. Numerous non-violent campaigns must be organised, at great cost to the participants, before public policy is adjusted in favour of the non-violent resisters. In response to this charge, Shepard (2002) has asserted that even violent action takes long to produce desired results:

... we can still rid ourselves of the idea that violence is necessarily quick. If we look at the Chinese Revolution, for instance, we find that Mao Tse-Tung and his Communist forces were engaged in combat over a period of 22 years. Vietnam was embattled for an even longer period: 35 years. These are not swift victories.

... We can also dispel the notion that non-violent action has to be slow. The non-violent overthrow of Marcos in the Philippines—measured from the assassination of Benigno Aquino—took only three years (Shepard 2002).

Theodore Roszak once commented on the lack of insight on the part of those who charge that non-violent civil disobedience is slow:

People try nonviolence for a week, and when it ‘doesn’t work’, they go back to violence, which hasn’t worked for centuries (cited in Shepard 2002).

Third, some critics have questioned the truth of the assertion that non-violent methods of struggle always cause less injury than violent ones. Thus the carefully staged military coup which got rid of Kwame Nkrumah was almost certainly both more effective and less bloody than non-violent civil disobedience would have
been in the conditions prevailing in Ghana at the time (Macfarlane 1968, 45-46). In response to this charge, proponents of non-violent civil disobedience could point out that the example of Nkrumah's ouster has two possible interpretations. On one interpretation, the military coup saved the country months, or even years, of repressive action which would have been occasioned by non-violent civil disobedience. However, on a second interpretation, the coup was actually largely peaceful, thereby confirming the superiority of non-violence over violence.

Fourth, some thinkers have charged that there are cases in which non-violence cannot produce the desired results. Threats to fast unto death or of self-incineration would seem to make sense as acts of political disobedience only if there is reason to believe either that the state authorities are capable of being moved by such acts, or that their committal would lead to a great upsurge of public feeling in support of the cause promoted. Neither condition is likely to apply under highly repressive regimes, which are notorious for their moral insensitivity and their ability to hush up and crush all demonstrations of public protest (Macfarlane 1968, 46). The 1986 Tiananmen Square student demonstrations in China, which were ruthlessly crushed by the Communist regime, quickly come to mind. For Kinyatti (2000), non-violent civil disobedience was incapable of achieving freedom for the Kenyan people:

This [the violent response of the British invaders to the Harry Thuku-led non-violent resistance in the 1920s] clearly demonstrated that Kenya was plagued by a merciless foreign regime whose ideological creed was to maintain repression and exploitation by force of arms. It also demonstrated to many that nonviolence as a form of struggle was inapplicable to the social reality of the country then. It taught them the violent nature of imperialism and its agents, and at the same time it heightened their fighting consciousness and their determination to resist further, ... (Kinyatti 2000, 13).
Thus it might seem reasonable to subscribe to the assertion of Macfarlane (1968, 45) that what methods in practice are available for any appropriate immediate purpose will depend largely on factors such as the nature of the society, the gravity of the situation, the importance of the time element, and, above all, the way in which the state deals with political dissenters.

However, Macfarlane neglects the fact that non-violent action has been used with some success against highly intolerant regimes. For example, in 1944, military dictators were ousted non-violently in both El Salvador and Guatemala. Furthermore, during World War II, Norway non-violently and successfully resisted Nazi attempts to reorganise its society along fascist lines. Moreover, in 1968, Czechoslovakian civilians non-violently held Soviet armed forces at bay for a full week, and stopped the Soviet leaders from ever subjugating that country to the degree they had intended (see Sharp 1973). Furthermore, the cases in which non-violent action would not work are also often cases in which violence would prove pointless or worse. Indeed, where violent uprisings would be easily contained or instantly crushed, non-violent action may be the only realistic choice (Shepard 2002).

Furthermore, reflecting on non-violent civil disobedience in several parts of the world - in Europe during World War II, with the Buddhists in South Vietnam in 1963, with the African-Americans in the southern part of the United States in the 1950s and 1960s, in the efforts of the Release Political Prisoners lobby in Kenya in the 1990s, and in the Egyptian ouster of Hosni Mubarak early in 2011 - it seems clear that non-violent resistance does not depend upon any particular
attitude of the opponent or upon the nature of the political system to be effective. Thus Tinker (1971, 787-788) seems justified to conclude that the only aid a democratic framework provides in contrast to a totalitarian one is to make the process easier, or at least safer, for the non-violent resister.

Fifth, it seems evident that recognition of the value of positive actions such as Gandhi’s non-violent resistance against oppressive laws is reinforced by the feeling that there are times, for example, in Nazi Germany, when political disobedience is morally required even of the average person (Hall 1971, 128-129). However, the objector to non-violent civil disobedience can contend that even those who are treated unjustly can have moral reason to comply with the culpable laws - when, for example, non-violent civil disobedience would expose some persons to risks they have not agreed to assume (Lyons 1998, 36). Thus children and the very elderly may be harmed by the state in response to the non-violent civil disobedience of zealous young adults in their communities. To this objection the proponent of non-violent civil disobedience can reply that such casualties (sometimes referred to as “collateral damage”) are to be found both in instances of violent and non-violent civil disobedience, so that they do not effectively serve to demonstrate the moral superiority of one over the other.

Sixth, some critics have charged that non-violent civil disobedience is merely a manipulative strategy by the Western liberal democratic establishment to maintain the status quo. Bleiker (2002) has stated this objection thus:

While giving the appearance of radical dissent, non-violent civil disobedience is a reformist practice that often strengthens the existing societal order. In being tolerated only as long as the liberal constitutional framework is not disputed, civil disobedience refuses to question the
values of its own political foundations. In this sense, civil disobedience has lost most of the meaning that Thoreau’s famous essay originally bestowed upon it. This narrowing down of dissent also demonstrates that in a liberal democratic context, granting and withdrawing popular consent only works in a very restricted way. ... the withdrawal of consent via civil disobedience is limited to a mere challenging of individual laws or policies that may not be compatible with the generally recognised leitmotifs of the existing legal system. Overwhelmingly, the rest of the State apparatus remains unchallenged by this liberal version of withdrawing consent (Bleiker 2002, 38-39).

Nevertheless, whereas that may be the role that non-violent civil disobedience plays in the West, there is evidence that it has the potential to effect radical change in any society. We have already cited the success of civil disobedience in El Salvador, Guatemala, India and Czechoslovakia.

4.4.3. Applicability of Non-violent Civil Disobedience to the Struggles of Kenyan Ethnic Minorities

As pointed out earlier, non-violent civil disobedience takes advantage of numbers of citizens large enough to frustrate the normal operations of state, thereby forcing negotiation between the disobedients and the state. Consequently, although non-violent civil disobedience is morally appealing for the nine reasons given in subsection 4.4.1 above, Kenyan ethnic minorities are unlikely to use it successfully due to their gross numerical disadvantage.

In sharp contrast to the numerical disadvantage of Kenyan ethnic minorities, the indigenous South African populations had the advantage of numbers in their struggle against Apartheid, enabling them to cut off the vast labour pool needed for the regime to function (Zunes 1997). The power of the apartheid regime was
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fundamentally vulnerable, in that it depended upon the submission of the 80 percent non-European majority (Zunes 1999, 138). Similar circumstances prevailed in the successful 2011 Egyptian uprising, which was a mass movement, not the action of ethnic minorities. Besides, in the case of Apartheid South Africa, international pressure, augmented by the end of the Cold War, significantly weakened the resolve of the racist regime to hold on to power. Yet such international pressure is not likely to be brought to bear on the Kenyan establishment with regard to the rights of its ethnic minorities.

Similarly, the success of the minority African-American struggle against segregation was partly due to the fact that their numerical disadvantage was not as great as that of Kenyan Ethnic minorities. Furthermore, there were factors that were conducive to the success of their movement at exactly the time when it gained momentum. By the 1950s the Northern African-American vote, the politics of the Cold War, the rise of modern communication technologies, all contributed to social conditions conducive to the rise of a massive liberation movement (Morris 1999, 522-523).

Thus in spite of the appeal of non-violent civil disobedience, Kenyan ethnic minorities would be greatly limited if they tried to use it to pursue their aspirations. This is due to the fact that most techniques of non-violent civil disobedience require mass action if they are to be anything more than simply fleeting symbolic acts. A boycott, for instance, presumes participation by great numbers of people (Tinker 1971, 779-780). Yet it is these great numbers that Kenyan ethnic minorities, by definition, lack. As pointed out in our first chapter
(1.3.3), both the 1989 and 2009 Kenya Population Census indicated that out of the forty-two recognized Kenyan ethnic groups, thirty-four groups made up about 14% of the population and, individually, many were less than 1% of the country’s population. These included the Elmolo, Malakote, Ogiek, Sanye and Waata, among others (Republic 1994; Republic 2010b). If any of those communities attempted to organise a non-violent civil disobedience campaign on its own, the state would crush it in a very short time and with very little publicity. This becomes more evident when we consider that from the early 1990s, the Kenyan government has successfully crushed many non-violent campaigns organised by members of the larger ethnic groups such as the Kikuyu, Luhya, Kalenjin, Luo and Kamba.

4.5. Conclusion

The aim of this chapter has been to interrogate the possibility of morally justifying non-violent civil disobedience in pursuit of the aspirations of Kenyan ethnic minorities. Assuming that these communities adopt a gradualist approach, the chapter set out by assessing their efforts at litigation and at participating in the constitutional review process in the endeavour to end their political marginalisation. It then examined the nature of non-violent civil disobedience, and outlined the views of four of its most influential advocates, namely, Étienne de La Boétie, Henry David Thoreau, Mohandas Karmachand Gandhi and Martin Luther King. Jr. Finally, the chapter offered a moral critique of this method of political disobedience.
From the foregoing reflections, it is manifest that while there are many plausible moral arguments for non-violent civil disobedience, there are also a number of formidable moral objections to it. Above all, in view of the gross numerical disadvantage of many Kenyan ethnic minorities, non-violent civil disobedience is not likely to produce the results they desire. Consequently, some Kenyan ethnic minorities have considered secession as an option. The following chapter will therefore examine the moral implications of secessionist bids, while the sixth chapter will examine the ethical issues related to secessionist wars that are likely to arise out of such bids.
Chapter 5: Moral Justification for Secession by Kenyan Ethnic Minorities

5.1. Introduction

If non-violent civil disobedience as discussed in the previous chapter persistently fails to result in the redress of the grievances of Kenyan ethnic minorities, they are likely to agitate for secession - the breaking away of a community and its land from an established state to form a new state or to join another state (Bartkus 1999, 3). The desire for secession by many ethnic minorities around the world is triggered or fuelled by violations of such fundamental rights as due process, freedom from discrimination, and personal liberty and security (Castellino 1999, 404-405). Yet states that claim to be democratic often violently thwart secessionist bids. Nevertheless, many ethnic minorities have deemed it worthwhile to risk state repression in the hope of liberating themselves from what they see as illegitimate political authorities.

As noted in our second chapter (2.4), Kenyan Somalis made an unsuccessful secessionist bid at the dawn of independence. Chapter 2 also noted the ongoing secessionist aspirations at the Kenyan coast. Furthermore, at certain crucial conflictual points in Kenya's history, other ethnic communities have suggested that they might opt for secession to secure their interests. For example, soon after
the 2002 elections in which the National Rainbow Coalition (NARC) resoundingly defeated the Kenya African National Union (KANU), a number of Kalenjin members of Parliament declared that they would secede if the new government continued to “discriminate” them in key public appointments (BBC 2003).

The Somali, Kalenjin and coastal expressions of secessionist sentiments indicate that the possibility of secession is often not too far from the thoughts of disgruntled elements in the Kenyan body politic. Yet secessionist sentiments almost invariably result in coercion by the state in a bid to quash them. Thus in response to the Kalenjin MPs who had advocated for Rift Valley secession at the beginning of 2003, the first National Rainbow Coalition (NARC) Minister for Internal Security said that the government could charge them with incitement (Nation Reporter 2003). Had the MPs tried to make good their threat, Kenya’s armed forces would almost certainly have been deployed to ensure that the secessionist bid was frustrated, as was the case with the Kenyan Somali (see 2.4 above), and as the Congolese and Nigerian governments had responded to the Katangese and Biafran secessionist bids respectively (Islam 1985; Boehme 2005; Nwankwo and Ifejika 1969; Collis 1970; Okpaku 1972). The government’s recent response to the Mombasa Republican Council (2.4) is further indication of its probable reaction to any future secessionist bid.

Beran (1984, 22) points out that secession is one of the basic problems of political philosophy, as can be demonstrated by a consideration of the following new problems which it poses within traditional Western debates about the state:
• According to democratic theory, the people have sovereignty. Is this sovereignty a collective attribute of all the citizens of an existing state, or can some of them exercise their share of sovereignty by setting themselves up as an independent state?

• Majority rule is claimed to be an essential part of democracy; but is majority rule morally legitimate if a territorially concentrated minority does not acknowledge the unity of the state?

• According to Western liberalism, freedom is the greatest political good. Does this imply a freedom to secede?

• Under what conditions, if any, is secession morally justified?

• Under what conditions, if any, is the forceful prevention of secession morally justified?

• Is there a moral right to secession? If there is, who are the candidates for such a right: member nations of multi-national states, member states of federations, any group within a state with a suitable territory and the will to secede?

This chapter utilises the critical, rational and analytical techniques of philosophical reflection to determine whether or not there are circumstances in which Kenyan ethnic minorities may be morally justified to launch secessionist bids. It sets out by examining the nature of secession. Since secessionist movements deny the legitimacy of the states from which they seek to separate, the chapter goes on to reflect on the vital concepts of political legitimacy and obligation from a Kenyan ethnic minority perspective. In view of the fact that seceding communities seek to get the recognition of existing states, the chapter
next interrogates current international thinking on secession. This is followed by a brief examination of the background to contemporary philosophical reflections on secession. All the foregoing lay the ground for the core of the chapter, which is a philosophical reflection on the moral justification for the right to secede, with specific reference to Kenyan ethnic minorities. In this regard, the chapter assesses the three main arguments for secession, namely, choice, national self-determination and remedial right. The chapter then contends that a more plausible justification for the right of secession may be found in a purely teleological approach to it.

5.2. The Nature of Secession

Secession is the formal withdrawal from an established, internationally recognized state by a constituent unit to create a new sovereign state. The decision to secede represents an instance of political disintegration, in which the citizens of a subsystem withdraw their political activities from the central government to focus them on a centre of their own (Bartkus 1999, 3). In contrast to secession, if the part of the state which challenges its unity includes the central government and lays claim to the legal identity of the existing state, we have a case of expulsion rather than secession (Beren 1984, 21).

Secession can also be contrasted with another form of opposition to political authority, that is, revolution, and with a different way in which citizens can free themselves from the jurisdictional authority of a state, namely, emigration. Unlike the revolutionary, the secessionist's primary goal is not to overthrow the existing government nor to make fundamental constitutional, economic, or socio-political
changes within the existing state. Instead, he or she wishes to restrict the jurisdiction of the state in question so as not to include his or her own group and the territory it occupies (Buchanan 1991b, 326). A rare variety of secession is the consensual one, which results either from a negotiated agreement between the state and the secessionists (as occurred when Norway seceded from Sweden in 1905), or through constitutional processes (as the Quebecois are pursuing in the Supreme Court of Canada) (Buchanan 2007).

Spencer (1998) has observed that secession is sometimes described as "political divorce", and the analogy aptly highlights the acrimony typical of both kinds of rupture. Spencer goes on to note that in secessions and divorces alike, those who have contributed to the joint assets tend to resent the breakup and to consider themselves the losers, regardless of how the common property is divided. Still, divorced spouses can move apart and avoid dealing further with each other, whereas after a secession, most members of the rival political units go on living where they are, confronting each other and having to handle their conflicts (Spencer 1998).

Several elements are necessary for a secession crisis, among them an identifiable unit of people or "distinct community", territory, leaders, and discontent (Bartkus 1999, 5). Furthermore, a precondition for the emergence of secessionist movements is nationalism (Spencer 1998). As Brown (2000, 2) has pointed out, "Nationalism may be viewed either as an embedded loyalty tying individual identity to the organic community; as a political resource used to mobilise individuals for the rational pursuit of common interests; or as an ideological myth
appealing to confused individuals who seek simple formulas for the diagnosis of complex situations." Nevertheless, nationalism is usually understood to be devotion to the culture and interests of one’s ethnic group, with the ultimate aim of achieving statehood for it. Ideally, according to nationalists, the population of each state should consist of a single ethnic community, and all members of that ethnic community should live within the borders of that state (Spencer 1998).

Furthermore, secessions take place in waves. After both world wars, it was the great powers that broke up states and shifted borders around, for separatist movements were far too weak to achieve these results by their own actions. During the wave following World War II, European colonization was reversed, and several states, such as India and Korea were divided to accommodate the incompatible demands of ethnic or ideological groups. During the troughs that followed those waves, maps remained fairly stable until about 1990, when a third wave of secessions began. The Soviet Union broke apart, and separatist aspirations spread to other states, both socialist and nonsocialist (Spencer 1998).

With the exception of East Pakistan (now Bangladesh), there were virtually no successful secession movements in the entire period from 1920 till the cataclysmic year of 1989 (Buchanan 1998, 14). This was largely due to the fact that between 1947 and 1991, the superpowers (the Soviet Union and the USA) were committed to upholding existing state boundaries, and encouraged the development of international law and practice in which borders were viewed as permanent features of the international state system. Since 1991, however, numerous multinational states have disintegrated along national lines, among them the
Soviet Union, Yugoslavia and Czechoslovakia. Nor is this limited to former communist countries. There are numerous secessionist struggles across the globe: in the First World Quebec, Northern Ireland, Flanders, Catalonia, the Spanish Basque country are cases in point; while those in the Third World include Sri Lanka, Kashmir and Punjab, and the Kurdish regions of Iraq and Turkey (Moore 1998, 1; Buchanan 1998, 14). In Africa, some of the most well known secessionist flashpoints are Katanga, Biafra, Southern Sudan, Eritrea and the Somali regions of Kenya and Ethiopia.

Moreover, the secessionist waves correlate with the democratization of states. The first long wave of democratization took place between 1820 and 1920, spreading from the United States of America to some European states, a few British dominions and Latin American countries. This cycle was reversed to some extent between 1920 and 1945, partly due to the growth of fascism and Marxism. Then, after World War II, a new wave of democratization took place because Western liberal democratic states, as the victors, were able to impose reforms on the vanquished states. That was also the period of decolonization, and most of the new states created in those days tried to emulate Western liberal democracies. This surge then waned between 1960 and 1975, as the emulations of liberal democratic states collapsed or were overthrown in several countries, including a number of African ones. While the government of Kenya was not overthrown through a military coup, the country's liberal democratic constitution was increasingly perverted by the executive (see 3.3-3.6 above). Another wave of democratization rose in 1975, and in 1989 it overturned almost the entire socialist world (Spencer 1998).
Successful secessionist bids result in new states. By the year 2003, there were roughly 190 sovereign states. This number had increased significantly since the beginning of the twentieth century, when only some fifty or so had been acknowledged. The number rose to seventy-five before World War II, and by 1979 there were over 150. Many of the newcomers in the second half of the last century were former colonies. The number of independent states increased fourfold over the twentieth century, and it may grow considerably in the coming decades (Coppieters 2003a, 1).

The government of a newly independent state must adopt credible fiscal and monetary policies to regulate its economy. It must also create legislative, judicial and executive institutions, administer the education system, and establish a diplomatic corps to formulate and implement its foreign policy. To a newly emerging country possessing only limited resources, these economic challenges can prove daunting. Conversely, independent statehood can also provide both new opportunities for previously disadvantaged ethnic elites and the possibility of receiving international financial assistance (Bartkus 1999, 53). Nevertheless, secessionist leaders appear to be relatively more preoccupied with the reactions of the state and the international system than with the economic challenges associated with independence. This point was emphasized by Odemjegwu Ojukwu, the former military governor of the Eastern Region of Nigeria and head of state of the secessionist Republic of Biafra from 1967 to 1970. In 1968, Ojukwu declared: “In the question of independence and self-determination, viability is usually given a very, very low priority” (cited in Bartkus 1999, 53).
A community aspiring for secession holds the view that the state from which it wishes to separate lacks political legitimacy, and that therefore it has no obligation towards the said state. Consequently, we now turn to the question of political legitimacy and obligation.

5.3. Political Legitimacy and Obligation: A Kenyan Ethnic Minority Perspective

As indicated above, all secessionist movements have in common the conviction that the existing political order is illegitimate, and that their group has been assigned to a lower status than it deserves. This sense of illegitimacy or humiliation is especially likely to be felt when the local group cares deeply about an issue that is treated as trivial by those who outvote them. For example, one can imagine the outrage of American Southerners who had invested large sums of money in buying slaves, only to be condemned by Northerners who had nothing to lose from abolition (Spencer 1998). A secessionist party must argue not only that it owes no allegiance to its current political union, but also that it (rather than the current state or some third party) has the legitimate jurisdiction over the territory of the proposed seceding region (Spencer 1998). Consequently, any adequate analysis of secession will necessarily involve an account of what justifies the state’s claim to exercise political jurisdiction over its territory. Different responses to this latter question will produce varying answers to the former (Macfarlane 1968, 29; Wellman 1995, 144-145).
Throughout history, the belief that political society and its rules are divinely ordained has been so strong as to keep many people from considering the possibility that disobeying those rules might ever be justified (Dagger 2007). Nevertheless, in the *Apology*, Plato (2009a) presents Socrates as allowing for this very possibility in his insistence that his duty to obey the gods took priority over his responsibility to obey the state. Furthermore, with the advent of Christianity, that possibility had to be taken seriously. The distinction Peter and the other apostles made between their obligation to obey God and their duty to obey the Sanhedrin (Jewish council of elders) points to the fact that what the political leadership commands may be at odds with God’s will (see Acts.5:29). Indeed, martyrdom was often the result of the refusal by Christ’s followers to obey political authority. Nevertheless, the Bible also teaches that there is an obligation to obey political authority because such authority is ordained by God for the maintenance of social order (Romans 13:1-2).

In Medieval Western Europe, it was widely accepted that divine authority and political authority were merged in the papacy. However, with the advent of the Renaissance and the Protestant Reformation, there was a new found liberty to question the legitimacy of political authority and the attendant obligation of subjects to it. Similarly, in many indigenous African communities, political authority was seen as a crucial element in the orderly management of society, with councils of elders and/or chiefs/kings highly esteemed. Nevertheless, with the coming of colonial and post-colonial governments, Africans, like their European counterparts, have found themselves questioning the legitimacy of political authorities.
Buchanan (1998, 27) notes that political philosophers and international lawyers use the term "legitimacy" in different senses: "For political philosophers the basic question has been: when are citizens justified in opposing state power? For international lawyers the basic question, at least so long as international law has been mainly the law of states, has been: which entities are states (and what are their rights, privileges, and responsibilities)?" For our purposes, we shall focus on the concept of legitimacy as envisaged by political philosophy.

To say that something is legitimate is to say that it is in accordance with accepted standards within a specific society. Consequently, when philosophers raise questions about the legitimacy of a political authority, they are interrogating that authority's moral acceptability or reasonableness (Christiano 2004). A state is a coercive organization that has, in a given territory, an effective monopoly on the use of force. A state is legitimate when its use of force (and threat thereof) is typically morally permissible (Valentine 2006).

Furthermore, the concept of political legitimacy is closely related to that of political obligation. To have an obligation is to be bound to do or not do something, as the etymological connection to the Latin ligare indicates. Philosophers are generally in agreement that to have a political obligation is to be morally bound to obey the laws of one's country (Dagger 2007). Indeed, if an individual views a political authority over him or her as legitimate, he or she implicitly considers himself or herself morally obligated to obey it. However, Wellman (2001) contends that the two concepts are not flip sides of the same
issue. For Wellman, political legitimacy and political obligation pose related but separate challenges, so that we might have one without the other:

The correlative of a state’s right to coerce is not a citizen’s moral duty to obey: it is a citizen’s lack of right to not be coerced. Political legitimacy entails only the moral liberty to create legally binding rules, not the power to create morally binding rules (Wellman 2001, 741).

Nevertheless, even if Wellman (2001) is correct in denying a one-to-one correspondence between political legitimacy and political obligation, it seems evident that if the state has a right to rule, this right would be correlated with the citizens’ duty to obey it and vice versa (Christiano 2006). Various groups have denied their obligation to political authorities on a number of counts, such as general ineffectiveness, widespread corruption and misuse of authority, persistent discrimination against sections of the population, repressive rule, and dedication to immoral ends or to aggression directed against other states (Macfarlane 1968, 41).

One of the best known accounts of political legitimacy and obligation is the social contract tradition. This is the view that persons’ moral and/or political obligations are dependent upon an agreement between them to form society (D’Agostino 2003; Cudd 2007). Plato’s Socrates uses something akin to a social contract argument to explain to Crito why he (Socrates) must remain in prison and accept the death penalty (Plato 2009b). However, social contract theory is associated with modern moral and political theory, and is given its first full exposition and defense by Thomas Hobbes (1904), who utilised the idea of the passage from the state of nature to that of civil society through a covenant between the people and the sovereign. After Hobbes, John Locke and Jean-Jacques Rousseau are the best
known proponents of this enormously influential theory (Locke 1960; Rousseau 1950). Below we examine a number of theories of political legitimacy and obligation that are variants of the social contract tradition, with a view to determining the extent to which Kenyan ethnic minorities could use them as a basis for pursuing their aspirations. We limit our reflections to contractarian theories because the theoretical framework of this study is based on John Rawls' contractarian theory of justice (see 1.9 above).

In the subsequent paragraphs of this section, we examine a number of theories of political obligation with their implicit theories of political legitimacy, namely, consent, the analogy of the obligations of family, gratitude, fairness, Samaritanism, and, of great relevance to the present study, majoritarian democratic theory. The purpose of this examination is to identify the possible inferences that Kenyan ethnic minorities could make from these theories in a bid to question the legitimacy of the Kenyan state and the attendant obligation that such legitimacy would impose on them. The reflections below are based on the fact that political legitimacy and obligation are closely related to the notion of justification, which assumes that we are dealing with beings responsible for their actions, who can be asked to tell us why they chose to follow one course of action rather than another (Macfarlane 1968. 24). Politics is one of the key institutions of human society. To justify an institution is, in general, to show that it is what it ought to be, or does what it ought to do (Schmidt 1990, 90). Political justification differs from other forms of justification only in its setting: ideally, it is made in public, and aimed at the community in totality (Macfarlane 1968. 27-28).
5.3.1. Consent Theory

Closely associated with the contract tradition of political legitimacy is the idea of consent, which entails the claim that no one is obligated to support or comply with any political power unless he or she has personally approved or accepted its authority over him or her, free from coercion or deception (Simmons 1976, 274; Beran 1977, 271). The classic formulation of this doctrine appears in John Locke's Second Treatise of Government (Locke 1960). According to this view, agreeing to do something is either a form of promising or something analogous to promising; and promissory obligations are moral obligations. Thus the Consent Theory subsumes political obligation and the right involved in political authority under moral obligation and moral right, that is, the kind of moral obligation and moral right which arise out of a promise (Beran 1977, 262).

However, since the earliest consent theories, it has been recognized that "express consent" is not a suitably general ground for political obligation. The paucity of express consenters is painfully apparent: most of us have never been faced with a situation where express consent to a government's authority was even appropriate, let alone actually performed such an act (Pitkin 1965, 994). The notion of tacit consent has therefore been used as the fulcrum of consent theory (Simmons 1976, 278). Thus just as Locke (1960) maintained earlier in the Treatise that men have tacitly consented to all inequalities in property simply by accepting and using money as a medium of exchange, so in the political realm he argues that men have tacitly consented to obey a government simply by remaining within its territory.
Several objections have been raised against the notion of tacit consent. David Hume (1965) argued that given the extraordinary costs to most people of moving out of the country of their birth, no one can sensibly interpret the voluntary continued residence of a person in a state as a case of tacit consent. Furthermore, going by Locke’s account of tacit consent, being within the territory of the worst tyranny in the world could constitute tacit consent to it, creating an obligation to obey it (Pitkin 1965, 994-995). Going by such logic, colonized peoples would have been obligated to obey their colonisers in perpetuity.

It is often pointed out that any citizen who participates in an election thereby tacitly consents to the government for which he or she votes. However, Wellman (1995, 154) argues that voting on political options in existing democracies is significantly disanalogous to acts of tacit consent in other arenas because the voter is never given the option of whether there will be a government or not. Instead he or she is given only a voice (and typically a negligible one at that) in what particular form this government will take. Wellman therefore contends that unless a voter is given an option of being exempt from the political imposition (i.e., allowed to secede), he or she cannot be bound by the outcome of an election in which he or she voted. For Wellman, to say that a citizen is bound by a law since he or she voted for it (given the practice of current democracies) is similar to saying that a person has consented to being shot since he or she expressed a preference that his or her abductor shoot rather than stab him or her!

Furthermore, even if it is the consent of those now subject to authority that matters, there are still several alternatives: is it to be the individual’s personal
consent that determines his or her obligation, or the consent of all (or most) of those subject to the government? Is it to be his or her or their present consent, or consent given in the past? (Pitkin 1965, 993). Moreover, feminists and philosophers who reflect on race relations have argued that social contract theory is an incomplete picture of our moral and political lives, and may in fact camouflage some of the ways in which the contract is itself parasitical upon the subjugation of classes of persons (Friend 2004).

In the Kenyan context, ethnic minorities can use the idea of tacit consent to argue that the Kenyan state is an imposition on their indigenous political organisations, and as such illegitimate. Indeed, as pointed out in the previous chapter (3.2), the idea of Kenya as a country only came into being in 1920 with the declaration of the relevant territory as the “Kenya Colony”. In contrast to this very recent political entity, the Ogiek, Ilmolo, Ilchamus and other ethnic minorities had indigenous political institutions, some of which were several centuries old.

5.3.2. The analogy of the Obligations of Family

Another classical account of political legitimacy and obligation has likened them to the authority of parents and the obligations of family. Plato presents Socrates as giving this account of authority and obligation among others in the Crito (Plato 2009b). This view is meant to capture the idea that a political society can have legitimate authority even if it is not a voluntary association, and even if there is disagreement on many political principles. Another attempt to ground the legitimacy of political authority in this way is that by Ronald Dworkin (1986). Dworkin’s thesis is that groups that satisfy four conditions for being genuine
communities thereby generate obligations to go along with the terms of the association. The four conditions are:

(1) Each member of the community sees himself or herself as having special obligations to the other members.

(2) They see the obligations as owed to each of the others personally.

(3) These obligations are understood to flow from a concern for the well-being of each of the members.

(4) The obligations are understood as flowing from a plausible version of equal concern for all the members.

However, the analogy between obligations of family and political society is controversially grounded in the idea that in both of these, individuals are obligated to abide by the rules or norms of the community. The fact is that there are times when an individual is justified to defy the demands of his or her family. For example, an individual's wish to marry a person from an ethnic group other than that of his or her own family may be vehemently opposed by his or her family. In such a case, the individual is justified to defy his or her family's demand on the ground that it denigrates the dignity of people from other ethnic groups. If this is so, it follows that the individual citizen can find himself or herself in situations in which he or she is justified to go against the dictates of his or her government.

On the basis of political obligation as analogous to that dictated by family relations, Kenyan ethnic minorities can contend that the Kenyan state has behaved more like an invader than a parent, in that it has disrupted their social organisations and condemned them to the periphery of the social, political and
economic life of the country. As such, ethnic minorities can insist that they are justified to work towards the downfall of the state rather than for its sustenance and prosperity, or that they are justified to secede from it.

5.3.3. Gratitude Theories

Yet another classical contractarian theory of political obligation is that from gratitude for benefits enjoyed from society. In the Crito, Plato (2009b) presents Socrates as arguing that if he (Socrates) escaped from prison, he would thereby be guilty of ingratitude to the state which has facilitated his birth and upbringing. On the same line of reasoning, Walker (1988, 192) urges that our obligation to comply with the law is grounded in considerations of gratitude for benefits received from the state. For Walker (1988, 200), the grateful person must, on the one hand, make clear to his or her benefactor that he or she has the appropriate attitudes towards the benefactor, and, on the other, refrain from acting in ways incompatible with his or her possession of these attitudes. More specifically, Walker (1988, 202) bases his gratitude account on an argument that appeals to our obligation not to act in ways that betray lack of goodwill for a benefactor. In general, contends Walker (1988, 204), noncompliance with the law damages the interests of the state because without a fair measure of compliance with the law, albeit enlightened compliance, no state could function or survive.

However, according to Klosko (1989, 354-355), the problem with Walker's argument is that though obligations of gratitude undoubtedly exist, they are generally too weak to function as prima facie political obligations in the usual sense. Such obligations would be overridden frequently, not just in unusual
circumstances. They would not appear generally to require compliance with burdensome laws (Klosko 1989, 358). Furthermore, Wellman (2001, 738) urges that “existing states force political benefits and burdens upon all those within their territorial borders. States may be justified in doing so, but they certainly do not give each citizen the chance to reject these benefits (i.e., secede), and thus we cannot with a straight face allege that each citizen has incurred an obligation as a result of freely accepting benefits from her state.”

In the light of the grievances of Kenyan ethnic minorities outlined in Chapters 2 and 3, these communities can aver that the Kenyan state has consistently dispossessed them instead of promoting their welfare, and as such, they do not owe the Kenyan state any obedience on the basis of gratitude. Instead, they could insist, the Kenyan state owes them restitution for numerous historical injustices, and, at the very minimum, respect for their right to secede.

5.3.4. Fairness Theories

Klosko (1987, 362) argues for an account of political legitimacy and obligation in terms of fairness. He calls attention to the strong connections that have been noted between people's willingness to bear burdens to provide public goods and their concern with the behavior of other people. Thus when every citizen fulfils his or her obligations to the society, the society enjoys legitimacy from its members.

One of the most celebrated objections to the fairness theory is Robert Nozick's criticism that we are not obligated to contribute toward all cooperative schemes that benefit us (Nozick 1974, 93). Indeed, if such a scheme was instituted without
the beneficiaries being consulted, it would in fact be unfair to expect them to contribute to it. If, for example, a neighbour in a block of flats repairs a road to the block of flats without consulting his or her neighbours, it would be unfair for him or her to insist that the neighbours should contribute to meeting the bill. The old American motto, “No taxation without representation”, is relevant in this regard.

A critic could also point out that certain features of political obligation cannot be accounted for in terms of fairness. For example, a person who gives up his or her right to life so that his or her compatriots may be saved from a major disaster could account for his or her action in terms of notions other than fairness, and yet still feel morally obligated to do what he or she does (see Urmson 1958; Wolf 1982; Timmermann 2005).

Kenyan ethnic minorities could assert that even if the fairness theory was cogent, it would not be a basis for them to feel obliged to obey the Kenyan state, because the state has been the major agent of their gross deprivation. As such, their obedience to it would be tantamount to reinforcing the behaviour of a malefactor rather than expressing gratitude to a benefactor, and would thereby be contrary to natural justice, which acknowledges that an individual ought not to be required to work against his or her own interests.

5.3.5. Samaritanism

Wellman (2001) proposes a synthesis of the fairness and benefits accounts outlined above to arrive at a Samaritan theory of political obligation. According to him, a state has a right to coerce even those who do not consent because such
coercion is necessary to rescue this person and others from the perils of the Hobbesian state of nature (Wellman 2001, 749). Wellman explains the rationale for his theory as follows:

..., the state is at liberty to coerce individuals in a way that would ordinarily violate their rights only because this coercion is necessary to rescue all those within the state's borders from peril. In the political instance, each individual's peril stems from the dangers inherent in the state of nature, and the only vehicle to peace and security is a territorially defined, common power. ..... Although each citizen generally enjoys a privileged position of moral sovereignty over her own affairs, samaritanism entails that none has a moral claim-right that the state not coerce her. ..., the perils of the state of nature and the necessity of constructing a state to rescue anyone from these circumstances combine to justify the state's coercive presence (Wellman 2001, 745).

One objection which readily presents itself against Wellman's Samaritan theory is that it misuses the term "Samaritan". Presumably, Wellman borrows this term from the parable in which Jesus spoke about a kind Samaritan who helped a member of a community that was hostile to his own (Luke 10:30-37). Yet the Samaritan in the parable was not compelled to show kindness to the man in need as Wellman's theory suggests; instead, he voluntarily responded to the victim's plight. Thus Wellman's Samaritanism is a misrepresentation of true Samaritanism.

Furthermore, philosophers are in general agreement that society ought not to demand outstanding acts of self sacrifice from its members, although it ought to appreciate them (Urmson 1958); yet Wellman, without sufficient justification, implicitly demands such acts from all citizens.

On the basis of Wellman's Samaritanism, Kenyan ethnic minorities could insist that they are already victims of the kinds of peril associated with the state of nature which Wellman's theory endeavours to eliminate, in that the Kenyan state imposes its discriminatory policies on them. Consequently, these communities can
view themselves as having a Samaritan obligation not to support the Kenyan state, but rather to overthrow it, or at least to liberate themselves from it.

5.3.6. Majoritarian Democratic Theory

Of great relevance to the present study is the majoritarian democratic theory of political obligation. The basic idea behind it is that when there are disagreements among persons about how to structure their shared world together and it is important to structure that world together, the way to choose the shared aspects of society is by means of a decision making process that is fair to the interests and opinions of each of the members. On this view, the democratic assembly has a right to the obedience of its members, grounded in the right of each member of the assembly to be accorded equal respect. Further, the duty of equal respect requires that the collective decision process gives each a vote in a broadly majoritarian process and a robustly equal opportunity to participate in the deliberations and negotiations leading to decisions. The equal rights of each of the members are in effect pooled in the democratic assembly, so that because one owes each person equal respect, and the democratic way of making decisions embodies this equal respect, one owes the democratic assembly respect (Christiano 2004).

However, ethnic minorities find the majoritarian democratic model to be oppressive. When, for example, Macfarlane (1968, 47) declares that “Except in very special circumstances attempts by minorities to impose their views on the majority are insupportable, irrespective of the means used”, minorities will contend that such a blanket statement ignores the fact that majorities often hold views that negatively impact on minorities, and which therefore must be contested
by minorities. As the American thinker, Henry David Thoreau correctly observed, the majority’s power can be illegitimate:

...the practical reason why, when the power is once in the hands of the people, a majority are permitted, and for a long period continue, to rule, is not because they are most likely to be in the right, nor because this seems fairest to the minority, but because they are physically the strongest. But a government in which the majority rule in all cases cannot be based on justice, even as far as men understand it. Can there not be a government in which majorities do not virtually decide right and wrong, but conscience? — in which majorities decide only those questions to which the rule of expediency is applicable? Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then? I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume is to do at any time what I think right (Thoreau 1848, Part 1 Par.4).

As noted in our first chapter (1.2), John Stuart Mill distinguished between true democracy in which all are represented, and false democracy in which only the majority is represented:

The pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practised, is the government of the whole people by a mere majority of the people exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favour of the numerical majority, who alone possess practically any voice in the State. This is the inevitable consequence of the manner in which the votes are now taken, to the complete disfranchisement of minorities (Mill 1890, 126).

Mill’s position above could be interpreted as advocacy for mono-ethnic liberal democratic states, in which minority opinions would not be based on ethnic identities.

With regard to the disputable authority of the majority, Mohandas K. Gandhi observed:
It is a superstition and ungodly thing to believe that an act of a majority binds a minority. Many examples can be given in which acts of majorities will be found to have been wrong and those of minorities to have been right. All reforms owe their origin to the initiation of minorities in opposition to majorities. If among a band of robbers a knowledge of robbing is obligatory, is a pious man to accept the obligation? So long as the superstition that men should obey unjust laws exists, so long will their slavery exist (Gandhi 1961, 17-19).

Furthermore, it is commonly but erroneously believed that democracy and majoritarian rule are synonymous. For example, Onalo (2004, 15) wrote that “All democracies are systems in which citizens freely make political decisions by majority rule.” However, there are other forms of democracy. Wolff (1970) identifies three forms of democracy, namely, majoritarian democracy, unanimous direct democracy and representative democracy. At present, representative democracy is often combined with majoritarian democracy, as is the case in Kenya. Nevertheless, as earlier noted (1.10.3 b), Wiredu (1996, 172 ff.) prescribes a no-party consensual representative democracy for contemporary African states, avering that many pre-colonial African communities were effectively governed through it. He contends that unlike majoritarian democracy, this model upheld the citizen’s right of decisional representation in any political council in which resolutions were adopted that affected him or her. Nevertheless, Wiredu (1996, 180, 189-190) concedes that it is difficult to abandon majoritarianism altogether, because it is a practical means of choosing representatives and of finding a way out when consensus fails in the representative body. As such, the need to protect ethnic minorities whenever the majoritarian principle is applied would still remain.
5.3.7. Overview: Grounds for Dissent by Kenyan Ethnic Minorities

The foregoing theories seek to justify the existence of the state, and to indicate conditions under which the individual may be justified to go against the demands of the state. Consequently, Kenyan ethnic minorities could base their renunciation of obligation to the Kenyan state on any of them:

- On the grounds of consent theories, Kenyan ethnic minorities could argue that they are trapped in a body politik to which they have not acquiesced, so that they are not obligated to abide by its decisions.

- With regard to the analogy of family, they could urge that the Kenyan state has so disregarded their interests that it is meaningless to think of it as a parent figure towards which they have obligations.

- Based on gratitude theories, they could contend that the Kenyan state has grossly violated their rights and freedoms, and conferred on them no meaningful benefits, so that they are under no obligation of gratitude to obey its laws.

- On the grounds of fairness theories, they could insist that the Kenyan state has not only failed to promote their well being, but has also actively worked against it, so that they have no obligations of reciprocal fairness to it.

- Founding their argument on Samaritanism, they could charge that the Kenyan state is so cruel to them that their Samaritan obligation is to mobilize forces to overthrow it, or at least to liberate themselves from it, in order to save their members from further oppression.
• Of specific relevance to the present study, they could argue that Kenya’s democratic model, which is almost wholly majoritarian, disregards their identities and interests, so that they are under no obligation to submit to decisions arrived at through it.

It seems evident that none of the foregoing contractarian theories, each based on a single principle, can fully account for political legitimacy and obligation. Thus Mapel (1990, 249) proposes the utilization of a multiplicity of principles suggested by monistic theories, with a view to arriving at a more adequate account of political obligation. In line with this prescription, Klosko (2004, 801, 803) proposes a theory of political obligation based on the principles of fairness, a natural duty of justice, and what he calls the "common good" principle. However, a theory that is based on several principles is likely to be susceptible to the objections raised against the various principles separately, and there is also the possibility of other objections emanating from a combination of such principles. Thus if such a theory were to be applied to the Kenyan context, Kenyan ethnic minorities could challenge it by questioning its constituent principles separately and/or jointly. The upshot of this is that the discontent of Kenyan ethnic minorities cannot be adequately addressed by appealing to contractarian theories of political legitimacy and obligation.

The community of existing states, usually referred to as "the international community", is often pivotal to the success or failure of secessionist bids. Consequently, the following section examines the responses of this community to secessionist aspirations.
5.4. International Thinking on Secession

It is important to examine current international thinking on secession because a secessionist entity wishes to be recognised by the international community as a sovereign state. Besides, the international community wields vast powers with which it can either facilitate or frustrate secessionist endeavours. We shall first examine the origin and development of the key concept of national self-determination. Thereafter, we shall look at the interpretation of this concept by three influential international organisations, namely, the United Nations (UN), the defunct Organisation of African Unity (OAU) and the African Union (AU).

5.4.1. The Principle of National Self-determination

One of the key concepts in international discussions of the right to secession is national self-determination - a term introduced by the former American president, Woodrow Wilson, in a series of speeches between 1918 and 1919, beginning with the famous “Fourteen Points Speech” to the American Congress on 8th January, 1918 (see Link et. Al. eds. 1984, 536). As Knight (1985, 255) has correctly observed, it is noteworthy that while Wilson's “Fourteen Points” address has long been taken as the official statement of the principle of self-determination, the phrase never appeared in the text. George (1939, 11-12) indicates that the concept was first mentioned in an autumn 1916 British Foreign Office memorandum on post-war peace conditions, where it was stated that as an essential condition of peace, "national aspirations" would have to be given full recognition.
According to the Paris Peace Accord of 1919, the “peoples” entitled to exercise the right to self-determination were ethnic groups which had become nationally mobilized, and numerous states were carved out of the ruins of the Russian, German, Austro-Hungarian and Ottoman empires along broadly ethnic lines (Moore 1998, 3). The principle of self-determination, which electrified popular idealism in 1919, retains power today as its repercussions after decolonization reverberate around the world, pervading the consciousness of numerous subjected communities (Bartkus 1999, 113). However, whereas self-determination in the Wilsonian period was conceived of as the political independence of ethnic communities, the principle has been elaborated in international law in the post-World War II period to make clear that the 'peoples' in question are not ethnic groups, but rather multi-ethnic people under colonial rule. Self-determination has been conceived in international law as the 'right of the majority within an accepted political unit to exercise power', and boundaries have been drawn without regard for the linguistic or cultural composition of the state (Moore 1998, 3).

Nevertheless, movements striving to overcome their minority status by achieving state sovereignty invoke the principle of national self-determination. This is despite refusals to acknowledge their claims on the grounds that redrawing international boundaries means creating new conflicts with new national minorities. Such debates are prominent in violent conflicts (such as in the wars of secession in Croatia, Bosnia-Herzegovina, Abkhazia and Chechnya) and in peaceful areas (such as Quebec and Tatarstan) that are striving for sovereign status (Coppieters 2003b, 272). Thus current international law does not recognise the right of ethnic minorities to secede, on the basis that it would unleash separatist
forces which threaten to destroy international order, as groups within groups attempt to seize power and form their own sovereign states. Despite the reinterpretation of "peoples", minorities, best placed in terms of the politics of difference, and also the original "people" in the Wilsonian scheme of things, have sought consideration as peoples entitled to self-determination (Castellino 1999, 392).

Buchanan (1998, 27) notes that in the Copenhagen Agreement of 1990, a new normative conception of statehood began to gain currency in the international community. According to this conception, only those political units that meet the most basic standards of human rights are to be recognized as members of the community of states. The conception came to be understood as including a requirement of democratic governance. The Copenhagen Agreement does not explicitly address secession. However, it does explicitly obligate the signatories to support democratic governments, whether they are threatened by external or internal forces. This provision is consistent with the idea that there is at least a presumption that there is no right to secede from a democratic state (so long as it also respects human rights) (Buchanan 1998, 27-28). We now turn to a brief examination of the responses of the United Nations, the defunct organization of African Unity and the African Union to secessionist bids.

5.4.2. The United Nations

Although most liberal political philosophy has maintained that a state's legitimacy rests on the proper relationship between the individual citizen and the state, more recently, the notion that the state bears a responsibility to its distinct communities
as groups rather than as collections of individuals has entered political discourse. Consequently, international law now recognizes the beneficial aspects of cultural diversity, and the need for states to help protect and promote it. The United Nations (UN) has played a significant role in effecting this normative change (Bartkus 1999, 43-44).

The Charter of the UN was signed on 26th June 1945 in San Francisco, USA, at the conclusion of the United Nations Conference on International Organization, and came into force on 24th October 1945. Articles I and 55 of the Charter proclaim the right of national self-determination for all peoples as one of the principles by which to develop friendly relations among nations (United Nations 1945). However, opinion differs as to whether self-determination was intended as a legal and binding right with a correlative duty on member states to grant self-determination to peoples (Addo 1988, 182).

The Resolution of the UN Subcommission on the Prevention of Discrimination and Protection of Minorities of June 1949 codified its member states' responsibilities towards ethnic/cultural groups. It acknowledged that distinct communities “wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.” It went on to declare that “differential treatment of such groups or of individuals belonging to such groups is justified” (cited in Bartkus 1999, 43-44). Nevertheless, the Resolution does not touch on the right of secession, restricting itself to the protection of ethnic groups within existing states. This same outlook is reflected in several other UN documents, as outlined below.
The UN's "Declaration on the Granting of Independence to Colonial Countries and Peoples" (United Nations 1960) seems to have been the organisation's attempt to be in step with the irreversible wave of decolonisation in Asia and Africa in the 1950s and 1960s. Since then however, the UN has been largely unwilling to apply the principles enunciated in this document to groups desiring to break away from existing states, as if a certain class of states - those created through decolonization - had been acceptable, while others are not (Bartkus 1999, 75-76). The difficulty with this conception is that, while clearly embodying the idea that serious and persistent injustices can generate a right to unilateral secession, it arbitrarily restricts the injustices that generate the right to the special case of classical colonialism, where a metropolitan power dominates a racially and/or ethnically distinct group in an overseas colony (Buchanan 2007).

The "International Covenant on Civil and Political Rights" (United Nations 1966a) makes a specific but brief statement on the rights of ethnic minorities, again excluding the right of secession:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language (United Nations 1966a, Article 27).

Of great relevance to the discussion on the right of secession is the UN "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States", which contains a provision that peoples who wish to organize themselves as states should be able to do so, and that the new states are entitled to recognition by existing states (United Nations 1970). Without
this principle, that peoples should be enabled to start managing their own affairs if they so wish, it would hardly be possible for new states to come about legally (Jooste 1996). In practice however, this Declaration seems to be frequently disregarded by the UN itself, as in the case of Somaliland discussed in the next subsection. Furthermore, we earlier referred to the UN “Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities” (United Nations 1992; see 2.2 above). This convention also focuses on the protection of ethnic minority rights within existing states, with the possibility of secession not being entertained.

Even clearer opposition to secession in the thinking of the United Nations is manifest in its “Declaration on the Rights of Indigenous Peoples” (United Nations 2007), which only envisages the autonomy of such peoples within current states:

*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (United Nations 2007, Article 4).*

The restricted application of self-determination and the elevation of territorial integrity to an almost absolute principle unite to form the basis of the UN’s implicit opposition to secession (Bartkus 1999, 73). In the Katangan crisis of the early 1960’s in the Congo, UN troops defeated a secession movement which its 1960 “Declaration on the Granting of Independence to Colonial Countries and Peoples” would seemingly have validated (Bartkus 1999, 75). Nevertheless, almost from the very beginning, the Katangan secession was supported by a Belgian mining company and by Belgian troops. The opposition to the Katangan claim was therefore largely based on the judgment that the declaration of
independence did not represent the true wishes of the majority of the Katangese (Islam 1985, 213). Having suffered much criticism for its handling of the Katangan crisis, the UN formally remained silent on the Biafran secession from Nigeria six years later (Bartkus 1999, 75-76).

Yet the UN has recognised thirty new countries since 1990, although most of these emerged from the dissolution of the USSR and Yugoslavia rather than from classical colonialism (Simanowitz 2005, 339). Furthermore, the UN was active in facilitating the secession of Eritrea from Ethiopia, as signified in the UN mediated plebiscite that was held by the Eritreans prior to their secession (Castellino 1999, 400). Moreover, the UN is currently very supportive of Southern Sudan’s secession, even deploying the United Nations Mission in the Sudan (United Nations 2011). Nevertheless, the UN has opposed the secession of Somaliland from the Somali Republic, despite the fact that the territory had been under British colonialism, while the rest of the country had been under the Italians. Indeed, British Somaliland only voluntarily joined Italian Somaliland at independence (Ahmed 2008, 40).

It is therefore evident that the position of the UN on the right of secession has been characterised by considerable ambivalence. Thus in 1970, the United Nations Secretary-General, U Thant, commenting on the failed Biafran secession, categorically ruled out the possibility of the UN supporting a secessionist thrust. However, in September of the following year, confronted by Bangladesh’s successful secession from Pakistan, he conceded that the UN could support such ventures (Addo 1988, 191). It is highly probable that similar inconsistent
responses can be elicited from the current UN leadership. Nevertheless, on the whole, the UN is hostile to secession, insisting on the territorial integrity of existing states, and on the definition of “a people” as all those within the territory of an existing state, regardless of their ethnic diversity.

5.4.3. The Organisation of African Unity and the African Union

The Organisation of African Unity (OAU) was established on 25th May 1963 in Addis Ababa by thirty-two newly independent African governments. In the preamble to the OAU Charter, the governments committed themselves to protecting the sovereignty and territorial integrity of member states (Organisation 1963). This commitment has translated into hostility against African secessionist movements for over forty years now.

The OAU condemned the Biafran secession. The Resolution on the Situation in Nigeria in September 1967 reaffirmed the member states’ adherence to the principle of respect for the sovereignty and territorial integrity of Member States, and reiterated their condemnation of secession in any Member State (Bartkus 1999, 75-76). The secessionist aspirations of the Kenyan Somalis and the Southern Sudanese met similar opposition from the OAU.

Thus the newly independent African states did not fully share the UN’s ambivalence toward the debate between self-determination and territorial integrity. Not only did the OAU deny the right of self-determination to secessionist movements, but also denied a forum for those communities seeking to publicise their grievances. As one of the leaders of the Southern Sudanese
secessionist struggle, Major-General Joseph Lagu once lamented, “We have endured more deaths ... than all the other African freedom movements combined. And yet the OAU will not even allow our story to be told” (cited in Bartkus 1999, 74).

However, in due course, the OAU seemed to soften its stance on secessionist aspirations. Thus the right of political self determination was acknowledged in articles 19 and 20 of the OAU’s *African Charter on Human and Peoples' Rights* (Organisation 1981). This charter, which came into force on 21st October 1986, established the African Commission on Human and Peoples' Rights. The Commission was officially inaugurated on 2nd November 1987 in Addis Ababa, Ethiopia. With its headquarters in Banjul, The Gambia, the commission is charged with ensuring the promotion and protection of Human and Peoples' Rights throughout the African Continent (African Commission 2009). In our second chapter, we mentioned the Nubian and Endorois cases, filed by two Kenyan ethnic communities before the Commission.

Article 20 of the *African Charter on Human and Peoples' Rights* provides *inter alia* that:

All peoples shall have a right to existence. They shall have the unquestionable and inalienable right to self determination. They shall freely determine their political status (Organisation 1981).

However, the views of the committee of experts that drafted the *Charter*, as reflected in the report of its Chairman (Judge Keba Mbaye), to the 37th ordinary session of the Council of Ministers of the OAU in June 1981, declined to offer a definition of the notion of “peoples” so as not to end up in difficult discussion
(cited in Addo 1988, 183). As Addo (1988, 183-184) correctly observes, the disadvantage of this omission was the danger of confusion as a result of more than one interpretation being advocated in the pursuit of subjective goals. Thus whereas the OAU was committed to refrain from interfering with colonial boundaries, it gave very little thought to finding ways of making culturally different and sometimes incompatible groups live together in harmony (Addo 1988, 189).

On 11th JULY, 2000, with the adoption of the *Constitutive Act of the African Union* (African Union 2000), the OAU was replaced by the AU. The AU inherited the OAU’s *African Charter on Human and Peoples’ Rights*, along with other obligations of the organisation. However, in practice, African states view the charter as promoting the human rights of peoples within existing states, rather than the facilitation of the creation of new ones. This is evident in the African Union’s response to the secessionist Republic of Somaliland’s bid for international recognition, a response which highlights the degree to which political expedience can go to quash a group’s political aspirations.

British Somaliland became independent in 1960 as the State of Somaliland. It willingly merged with Italian Somaliland to form the Somali Republic on 1st July, 1960. Thus the Somali Republic was formed by a merger of two former colonial territories: British Somaliland, in the north, and its larger and more populous neighbour, Italian Somaliland in the South. With the end of more than two decades of Siyad Barre’s dictatorship (1969-1991), the Somali Republic sank into anarchy, with inter-clan warfare. In that same year, former British Somaliland
seceded from the Somali Republic, to form the Republic of Somaliland (Ahmed 2008, 40). Thanks mainly to the predominance of a single clan (the Isaq), it has remained largely stable since 1991.

The government of Somaliland has indefatigably lobbied for international recognition. Its strongest argument is that British Somaliland had voluntarily opted to merge with Italian Somaliland at independence, and so has the right to revoke that decision. Furthermore, the Somaliland government points to its several achievements, among them internal stability since the area’s unilateral declaration of independence, its working political system, police force and currency (Ahmed 2008, 40). It is evident that Somaliland has taken important steps towards creating a stable working democracy in one of the poorest and most dangerous regions of the world (Simanowitz 2005, 335). However, she is still not recognised as a separate state by the international community (Ahmed 2008, 40; McConnell 2009, 17).

One of the reasons for the refusal of various countries to recognise Somaliland is that the UN still hopes for a peace agreement covering all of Somalia. To add to this, Somaliland’s neighbours are wary of an independent Somaliland, fearing a potential “Balkanisation” of the Horn of Africa. Furthermore, Arab states insist on a united Somali Republic. Western countries contend that the issue of Somaliland’s recognition is a matter for the African Union to decide. The African Union, on its part, invokes its pan-African practice and commitment to respect the territorial integrity of African states as constituted at the dawn of political independence (Ahmed 2008, 40). This is despite the strong argument that by
breaking a union that it had entered into as an independent state, Somaliland would be reverting to, rather than redrawing its colonial borders (Simanowitz 2005, 339). Thus despite the relative tranquility in Somaliland, both the UN and AU consider it part and parcel of the Somali Republic, thereby lumping it up with the southern part of the country steeped in perpetual anarchy for almost two decades now.

Nevertheless, despite their reluctance to recognise Somaliland, African states have recognised the newly formed states of Western Sahara and Eritrea (Simanowitz 2005, 339). This inconsistency is seen in the fact that Eritrea, like Somaliland, was originally not part of a single colonial territory (Castellino 1999, 400-401), so that in both cases the preservation of sovereignty and territorial integrity principle does not apply. The main reasons for the African states’ recognition of Eritrea seem to be the UN’s long involvement in the territory, and the post-Mengistu Ethiopian leadership’s support for Eritrea’s secessionist bid.

The “Transitional Period Charter of Ethiopia” (Ethiopia 1991) is the first constitution in Africa that not only guarantees the right of people to self-determination, but also explicitly gives the same communities the right to ultimately secede from the rest of the country. The Ethiopian constitution recognises the right of self-determination to all “nations, nationalities and peoples”, who are defined as a “group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory” (Ethiopia
1991, Art.39(5)). .... As Abdullahi (1996, 383) observes, this is a revolutionary approach to both governance and ethnic co-existence in Africa, for it shows that peace can only be achieved when the rulers have the consent of all their subjects. Regretably, no other member state of the African Union has so far followed the example of Ethiopia in this regard.

5.4.4. Overview

In view of the foregoing observations concerning the policies and practices of the UN, OAU and AU, it is evident that the prevailing international view has been that ethnic minority rights should be protected, but not at the expense of state sovereignty (Gurr 1993, 161-162). The international community fears that the institution of sovereignty as the cornerstone of international order may be devalued through a multiplication of sovereign states (Coppieters 2003b, 272). Treanor (n.d.) has noted that together, nationalism and democracy have produced a specific world order:

It [the world order] has a relatively limited number of states, there is no possibility to form new states, and the internal political process in each state has a universal legitimacy claim. This is not a favourable climate for innovation in the long term. .... The world as it is today reflects the dominance of western liberal-democratic ideas (Treanor n.d.).

Nevertheless, the international community facilitates some secessionist bids, as it did the Eritrean one. In view of this ambivalence, Buchanan (1998, 15) seems justified to conclude that international law has not provided coherent guidance on how to respond to the new wave of secessions. On the one hand, neither international legal doctrine nor practice recognize a right to secede, except in the case of the efforts of colonies to free themselves from metropolitan control; and
this provision is of little practical relevance today, since the work of
decolonisation, which was at its peak in the 1960s, is virtually complete. On the
other hand, international law has not been successfully invoked to block secession
either; nor has it provided a principled distinction between legitimate and
illegitimate secession. Quite often, it seems that the community of independent
states is guided, not by ethical ideals, but by realpolitik, that is, what expediency
demands at a particular moment, expressed through concepts such as “balance of
power” and “national interest” (see Russell 1915; Emery 1915; Cusack and
Zimmer 1989; Sample 1998). It is therefore hoped that the philosophical
reflections below will contribute to the formulation of a more coherent and
ethically defensible view of secession.

5.5. Background to Contemporary Philosophical Reflections on
Secession
Studies on secession can broadly be divided into two. On the one hand, social
scientists attempt to describe and explain the causes and effects of secessionist
movements and of states' reactions to them. For example, Bartkus (1999)
discusses several elements which he takes to be necessary for a secession crisis.
Similarly, Kreptul (2003) explores the explicit and implicit secession rights in the
constitutions of Ethiopia, the European Union, St. Kitts and Nevis, Austria,
Singapore, Switzerland and Canada. On the other hand, political philosophers
focus on the moral issues and on clarifying the conceptual framework for thinking
and Wellman (2001).
In 1984, Harry Beran lamented the almost complete neglect of secession in political philosophy in the face of numerous secessionist conflicts. For him, the neglect of secession “is rather as if philosophers writing on moral issues arising out of marriage and the family did not even mention, let alone discuss, divorce” (Beran 1984, 22). Beran also pointed out that the twentieth-century subsumption of secession under national self-determination had not rescued it from philosophical neglect, as the latter topic was suffering from almost as much inadequate attention as the former (Beran 1984, 22-23).

Similarly, in 1991, Alan Buchanan noted that the issue of secession had not received any sustained and systematic consideration by the leading figures of Western political philosophy, including Plato, Aristotle, Hobbes, Locke, Rousseau, Hegel, Marx and Mill, and that the situation was the same in contemporary political philosophy, with a few limited exceptions (Buchanan 1991b, 323). Buchanan went on to declare that the lacuna of philosophical works on secession “is all the more bewildering since secession is a form of refusal to acknowledge the state’s claim to authority and since political philosophy has taken as one of its constitutive tasks the justification of political authority and the articulation of the conditions under which the state’s claim to authority may rightly be denied” (Buchanan 1991b, 326).

Nevertheless, secession has not been totally neglected by philosophers. In the sixteenth and seventeenth centuries, it was common to include the topic in philosophical works on the state. Thus the seventeenth century Dutch political
philosopher and jurist, Johannes Althusius, included secession among the just remedies against tyranny (see Carney trans. 1964, Ch.XXXVIII). Another seventeenth century Dutch philosopher and jurist, Hugo Grotius, asserted that in exceptional cases a part of a state may have the right to secede (see Grotius 1925, 261-262). On the other hand, the seventeenth century German philosopher, Samuel von Pufendorf, holding a Hobbesian theory of absolute sovereignty of the ruler, denied that secession was permissible (see Pufendorf 1927, 137). Closer to our time, Ackerman (1980, 194), reflecting on the limits of federalism, came close to acknowledging secession as an option. Arneson (1990, 437-438) also briefly considered the option of secession in the context of federalism, and endorsed it. On his part, Galston (1989, 717) criticised John Rawls for failing to consider the possibility of secession as an option for communities who feel they cannot flourish within the liberal framework.

Following the fall of communism in Eastern Europe in the early 1990s, smaller, independent, ethnically-based political entities emerged. In the years since, a lively discussion in the academic mainstream on the morality and legality of secession has occurred among predominantly Western liberal democratic political philosophers, a discussion that was virtually non-existent prior to the fall of the Berlin Wall (Kreptul 2003, 39; Buchanan 2007). Allen Buchanan's seminal work, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991a), was pivotal to the invigoration of this debate. In South Africa in the early 1990s, there was debate about whether a post-apartheid federalism would be able to accommodate that country's racial and ethnic diversity, and whether a new constitution should recognize a right to secede (Buchanan 1991b.
322-323). Besides, the idea that there is a strong case for some form of self-government for groups presently contained within states has gained ground. Once one begins to take seriously the case for special group rights for minorities - especially if these include rights of self-government - it is difficult to avoid the question of whether or not some such groups may be entitled to full independence (Buchanan 2007).

Coppieters (2003a, 2-3) observes that one of the characteristics of normative studies on secession is the preponderance of deductive reasoning. Philosophers discuss the relevance, meaning, and relative weight of particular principles that are used in making a judgement on secession. Coppieters asserts that this particular style and method of political philosophy has made the strongest imprint on current discussions, even though scholars from disciplines other than philosophy have been involved.

According to Buchanan (2007), philosophical work on secession falls into three main categories:

(1) Attempts to develop an account of the moral right to secede.

(2) Investigations of the compatibility or incompatibility of secession with constitutionalism.

(3) Efforts to determine what posture international law should adopt concerning secession.

Buchanan (2007) further points out that in each of these areas of inquiry, as well as in the connections among them, exploration of the moral issues touching on secession provides a powerful lens through which to examine some of the most
important issues of political theory, including perhaps the most fundamental issue of all: what gives a state a valid claim to its territory? Buchanan goes on to explain that a fully developed philosophical theory of what the international law of secession ought to be would have to include not only an account of the connection between the right to secede and the right to recognition, but also a theory of justified intervention in support of or against secession that would cohere with a more general position on the legitimate use of force across borders. For our purpose, however, we shall limit ourselves to an examination of the main moral arguments advanced for and against secession, with specific reference to the Kenyan context.

Most of the philosophical debate on secession has presupposed a liberal democratic framework. A pivotal tenet unifying all liberals is their commitment to personal freedom. This commitment grounds the liberal conviction that the state must not interfere with a citizen’s sphere of autonomy (Kymlicka 1989, 9-20; Wellman 1995, 143). Seymour (2007, 402) has pointed out that ethical individualism provides the foundation for a specific version of liberalism, one that has its roots in Western Enlightenment tradition, and according to which:

(1) Personal identity is prior to moral identity.

(2) Individuals are the ultimate sources of moral worth.

(3) Autonomy is the most fundamental liberal value.

However, such a framework seems evidently inapplicable to the contemporary Kenyan context, where the communalist outlook is still considerably dominant, as memorably expressed by Mbiti (1969, 141) in the saying. “I am because we are, and because we are, therefore I am.” Even in the West, a number of thinkers have
challenged liberalism, and proposed that it be substituted by communitarianism - the view that the human self is essentially social, and that communities with shared experiences over time provide the framework in which the good life is worked out (Garrett 2001).

Furthermore, in view of the urgent need for the intellectual liberation of African scholarship, African political philosophers are dutybound to undertake their own reflections on secession, free from undue influence from the Western philosophical discourse. This implies that they must draw insights from their own cultural heritage, as well as from the traditions of other peoples, the West included, but must consider the pertinent issues in the light of their continent’s unique socio-political circumstances. This is what the subsequent section of this chapter will endeavour to do.

5.6. Moral justification for The Right of Kenyan Ethnic Minorities to Secede

At first glance, the case for a right to secede is straightforward. There seems to be no reason to force a subunit which no longer wants to exist within a state to continue doing so. This position draws strength from a number of arguments, including the right to self-determination, the history of unjust acquisition, the need to preserve ethnic and cultural integrity, the threat of abridgement of basic rights and liberties, and The desire to escape from a state that practices discriminatory redistribution (Sunstein 1991, 648; Buchanan 1991b, 327-332). These grounds for
secession have given rise to a number of theories of secession, which have been
categorised in various ways by different scholars.

Buchanan (2007) sees two main types of philosophical theories of the right to
secede, namely, primary right theories and remedial right only theories. Primary
right theories view the right to secede as one of the fundamental entitlements in
line with Western liberalism. On the other hand, remedial right only theories
analogize the right to secede to the right to revolution, understanding it as a right
that a group comes to have only as a result of violations of other rights. However,
a number of writers classify philosophical theories of the right to secede into
three, namely, choice, national self-determination and remedial right (Moore
1998, 5; Norman 1998, 35). The discussion below broadly follows this tripartite
categorisation, but goes on to propose that a purely teleological justification for
secession is more applicable to the contemporary Kenyan context than these three
theories normally debated by Western philosophers.

5.6.1. Choice Theories of Secession

Choice theories of the right to secede are founded on Western liberal democratic
thought, with its emphasis on the autonomy of the individual and the importance
of arriving at collective decisions through a majoritarian mechanism. Thus Beran
(1984, 21-23) contends that in view of the value liberalism places on freedom,
popular sovereignty and legitimate majority rule, liberal political philosophy
requires that secession be permitted if it is effectively desired by a territorially
concentrated group within a state and is morally and practically possible. Thus for
Beran (1984, 26-27), if there is no genuine possibility of a minority becoming the
majority through a majoritarian democratic process, the use of the majority principle may not be legitimate. Furthermore, urges Beran, if the minority is territorially concentrated and does not wish to be governed by the majority, the principle which underlies rule by the majority - respect for the political rights of all persons - is better served by permitting the minority to secede and establish its own state. Similarly, Wellman (1995, 170-171) argues that since the liberal cannot justifiably restrict political liberty which is not sufficiently harmful to others, a secessionist party has a primary right to secede without needing to appeal to issues such as cultural preservation, as long as its independence will not jeopardize political stability.

In typical Western liberal fashion, Beran (1984, 30-31) memorably stated the conditions which may justify disallowing secession as follows:

1. The group which wishes to secede is not sufficiently large to assume the basic responsibilities of an independent state.
2. It is not prepared to permit sub-groups within itself to secede although such secession is morally and practically possible.
3. It wishes to exploit or oppress a sub-group within itself which cannot secede in turn because of territorial dispersal or other reasons.
4. It occupies an area not on the borders of the existing state so that secession would create an enclave.
5. It occupies an area which is culturally, economically or militarily essential to the existing state.
6. It occupies an area which has a disproportionately high share of the economic resources of the existing state.
Choice theories typically require that a territorially concentrated majority express a desire to secede (in a referendum) for the secession to be legitimate, and do not require that the seceding group demonstrate that they are victims of injustice or that they have a special claim to the territory they intend to take with them. On this view, there is a close relationship between democracy and the right to secession: both are legitimated by the importance of people making decisions about the institutional structure of the society in which they live (Moore 1998, 5). Thus choice theories are closely linked to the consent theory of political legitimacy (see 5.3.1 above), as they both share the conviction that no government is legitimate that does not enjoy the willing submission of its subjects.

However, as Coppieters (2003b) notes, the organization of a referendum in a seceding territory as a legitimate means of measuring the degree of popular support for independence can be challenged. It may find no acceptance at all in the international community when the results of a referendum have been predetermined by a policy of ethnic cleansing. Even when it is respectful of the individual rights of all the inhabitants of a territory, a referendum remains problematic, because it is based on the assumption that one section of the population of a state may, as a well-defined community, enforce a particular point of view concerning the future of that state. Furthermore, it has been argued that the question of sovereignty or independence for a seceding unit should be put not only to the population in the seceding territory, but also to that of the state as a whole. A referendum also ceases to be the expression of an inherent right to unilateral secession when it is seen as part of a complex legal procedure which
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will eventually involve political negotiations between the seceding entity and the institutions of the central state (Coppieters 2003b, 268-269).

Nevertheless, proponents of choice theory could reply that it is inconsistent to acknowledge the individual’s right to vote for a government of his or her choice within a particular state, and yet deny him or her the right to choose whether or not to continue to be a part of that state. Furthermore, the insistence that a referendum to decide the issue of secession be conducted among all the citizens of the state seems to render the exercise meaningless, as the outcome of such a plebiscite would be skewed against the section of the citizenry wishing to secede.

Another standard objection to choice theories of secession maintains that the entrenchment of a plebiscitary right to secede in international law and practice would have a number of undesirable consequences: it would lead to a proliferation of secessionist crises and of the outbreaks of violence and war that sometimes result from such crises. It would also create perverse incentives for existing states, including an incentive to avoid otherwise beneficial schemes of regional autonomy and federalism where such schemes raise the probability that secessionists would be able to organize and win a referendum on independence. In addition, it is argued, a plebiscitary right to secession would undermine the practice of democracy by making exit too easy, thereby discouraging the exercise of legitimate agitation for reform within established states (Patten 2002, 559; Abbott 2000, 517). In short, the recognition of such a right, it is argued, would result in anarchy.
However, some proponents of choice theories contend that what little evidence there is on secession does not support the anarchist objection. For example, Norway seceded from Sweden in 1905, Iceland from Denmark in 1944, and Singapore from Malaysia in 1965 (Spencer 1998), but these secessions were not followed by further secessions from the newly independent states or the parent states. As Beran (1984, 29-30) contends, people do not disrupt the unity of an existing state lightly, especially if it is not in their self-interest and if the grievances which may make secession appealing to them are dealt with fairly and sympathetically. Beran also points out that political separation at one level can go hand in hand with economic and political integration at another. Going by Beran’s reasoning, Kenyan Somalis could secede from Kenya, but join the East African Community of which Kenya is a member.

Furthermore, as Buchanan (1991b) has correctly noted, going by the anarchist objection to the right to secession, one might just as well say that we should not acknowledge the moral ideal of personal autonomy, because if we do people will run amock, committing all sorts of atrocities in its name. For him, the saner approach is to admit that this moral ideal, like all others, can be abused, and then set about the task of determining the scope and limits of the ideal in its implications for how one ought to act, and ensuring that the ideal is embodied in institutions in such a way that its proper scope and limits will be duly observed in the main. Buchanan further points out that the anarchist objection seems to be oblivious to the fact that secession is now a widespread idea that has found concrete expression in many movements. In Buchanan’s words, “For many political actors in today’s world, the issue is not so much, ‘Shall we recognize a
right to secede?" as it is, ... "How can we utilize clear moral thinking and wise institutional design to enable us to live with it?"" (Buchanan 1991b, 339).

Of great relevance to the present study is the observation made by Moore (1998, 5) that because choice theorists tend to conceive of secession as justified in terms of individual decision, they ignore entirely the ethnic or ascriptive character of many secessionist movements. Furthermore, Moore contends that this understanding of secession as simply an extended form of individual freedom fails to explain the territorial claim that these groups make. Choice theories of the right to secession are therefore irrelevant to the highly communalistic claims of Kenyan ethnic minorities such as Kenyan Somalis.

5.6.2. National Self-Determination Theories of Secession

A justification for secession which is more likely to appeal to Kenyan ethnic minorities is the right to national self-determination. As noted in 5.4.1 above, this argument was first advanced by the former American president, Woodrow Wilson, in a series of speeches between 1918 and 1919. Wilson's assumption seemed to have been that acknowledging the claims of self-determination was a simple corollary of respect for democracy. Contemporary secessionists, and many who write and theorize about secession, share Wilson's intuition about this (Patten 2002, 558-559). This Wilsonian perspective is what Buchanan (1991b, 328-329) refers to as the normative nationalist principle.

However, Lynch (2002) has argued that an examination of Woodrow Wilson's concept of national self-determination in light of both Wilson's own intellectual
development and the evolution of wartime strategy and diplomacy establishes that there was no prior consideration of ethnic or collective versus liberal or civic nationalism in Wilson’s idea of ‘national’ self-determination. Lynch further urges that the actual enunciation and application of the principle was deeply affected by considerations of wartime strategy and diplomacy. Despite Lynch’s perspective, for almost a century now, many politicians and scholars have been greatly influenced by the more conventional interpretation of Wilson’s view, which understands him to have advocated that for the sake of world peace, culturally homogenous groups be allowed to form states of their own (see for example Buchanan 1991b, 328-329; Patten 2002, 558-559).

Following the conventional interpretation of Wilson’s view, some contemporary thinkers argue that ethnic minorities, being different from the rest of the population, have an equal right to a separate identity and existence (Castellino 1999, 404-405). The ideal conception of a democracy is that in an election, the majority wins and the minority loses, and due to the dynamism of individual voters’ opinions, no one is outvoted all the time. However, the reality is that gross numerical differentiation among ethnic groups in a single state means that some groups do regularly lose electoral battles (Spencer 1998). Consequently, a number of contemporary thinkers urge that it is necessary to recognise the right of such groups to secede. Thus Patten (2002, 569) contends that the recognition of ethno-national identity is a “good” for individuals in two different ways. First, it allows individuals to fulfill their aspiration to participate in collective self-government alongside members of the group with which they identify, and, second, it promotes the value of communal integrity.
Nevertheless, critics contend that the concept of "peoplehood", central to the Wilsonian idea of self-determination, is a fuzzy one, as there is no consensus on what kind of group comprises a people (Bartkus 1999, 112-113). In this regard, Ivor Jennings (1963, 56) famously commented: "On the surface it seem[s] (sic) reasonable: let the people decide. It [is] in fact ridiculous because the people cannot decide until somebody decides who the people are."

Presumably a people is a distinct ethnic group, some of the identifying marks of which are a common language, shared traditions, and a common culture. However, each of these criteria has its own difficulties. What count as different dialects of the same language and what count as distinct languages raise complex theoretical and metatheoretical issues in linguistics (Buchanan 1991b, 329; see also Levitt and Levitt 1962; Russell and Russell 1962). Besides, the histories of many groups exhibit frequent discontinuities, infusions of new cultural elements from outside, and alternating degrees of assimilation to and separation from other groups (Buchanan 1991b, 329; Jenkins 1997, 165 ff.; Masolo 2009, 53-55). Moreover, if "culture" is interpreted broadly enough, then the right of self-determination for "peoples" denies the legitimacy of any state that exhibits cultural pluralism. Yet cultural pluralism is often taken to be a distinguishing feature of the modern state, or at least of the liberal state (Buchanan 1991b, 329; Kymlicka 1995). What is more, if the number of ethnic or cultural groups or peoples is not fixed but may increase, the principle of national self-determination is a recipe for limitless political fragmentation (Buchanan 1991b, 329).
Furthermore, on the conventional Wilsonian interpretation of who the 'peoples' are that are entitled to be self-determining, the ethnic identity of the 'people' defines where the boundaries should be drawn; on the civic conception of peoples as majorities within accepted political units, the answer to the territorial question defines who counts as “the people”. Critics point out that in many cases, the two conceptions do not coincide, and the possibility of conflict is very real. For example, Moore (1998, 3-4) observes that the principle of national self-determination is unproblematic only in the ideal case that the administrative boundary coincides with the ethnic or national group: the group is territorially concentrated, with no significant minorities; and the members of the group are strongly mobilized in favour of secession. Moore points out that most cases fall far short of that ideal, although Iceland is the rare exception, in which both definitions of 'people' (those resident in the administrative boundaries of the unit, and those who are members of the nation) happen to coincide.

Moreover, there is the question of the minimum size of a territory and the minimum size of a group of people eligible for secession. For Wellman (1995, 142), while individuals and small groups may not secede, a larger group may, provided it is of sufficient size to perform satisfactorily the functions necessary for a state to legitimize its claim to territory. However, Philpott (1995, 366) sees no reason why a city or tiny region cannot be self-determining: “Andorra, Monaco, Liechtenstein, Singapore, and Hong Kong are all doing just fine.” Nevertheless, Philpott insists that a neighborhood or family are more dubious candidates for secession, because there are certain functions which any independent state must
perform: maintain its roads and utilities, educate its children, preserve minimal domestic order, and provide basic public goods.

Perhaps the most outstanding objection to the Wilsonian right to self-determination is the number of ethnic groups claiming statehood versus the availability of land on which they can form their own states. For example, African states are home to over a thousand ethnic groups with disparate cultural, social, economic and political orientations (Abdullahi 1996, 372). Kenya is home to more than forty such groups (Republic 2010b). Going by the conventional interpretation of the Wilsonian outlook, each of these groups is entitled to form its own state - an evident impracticability. Gellner (1983) summarises this difficulty as follows:

... there is a very large number of potential nations on earth. Our planet also contains room for a certain number of independent or autonomous political units. On any reasonable calculation, the former number (of potential nations) is probably much, much larger than that of possible viable states. If this ... is correct, not all nationalisms can be satisfied. ... The satisfaction of some spells the frustration of others. This argument is ... strengthened by the fact that very many of the potential nations of this world live, or until recently have lived, not in compact territorial units but intermixed with each other in complex patterns. It follows that a territorial political unit can only become ethnically homogeneous, in such cases, if it either kills, or expels, or assimilates all non-nationals (Gellner 1983, 1-2).

It therefore seems necessary to identify a more pragmatic criterion for determining which groups are entitled to secession, and the criterion that readily suggests itself is the need for a group to escape sustained gross injustice, that is, secession as a remedial right.


5.6.3. Remedial Right Theories of Secession

Remedial right theories, also called “just cause theories”, shift the emphasis from an absolute right to national self-determination to relative legal amelioration and the means used to achieve redress to wrongs committed on a group. These theories are firmly located within the evolving international practices of universalism, and the increasing number of conventions dealing with human rights principles (Coppieters 2003b, 273). On Buchanan’s version of the remedial right only position, injustices capable of generating a right to secede consist of persistent violations of human rights, including the right to participate in democratic governance, and the unjust taking of the territory in question, if that territory was previously a legitimate state or a portion of one (Buchanan 1998, 25).

However, for Seymour (2007, 419-420), the injustices sufficient to warrant a secessionist bid do not merely relate to the violation of human rights, to the annexation of territories or to the violation of previous intrastate autonomy arrangements, but also to a failure on the part of a state to comply with principles such as fair representation and internal self-determination. Fair representation is at the core of contemporary majoritarian democratic theory. Nevertheless, as we noted above (5.3.6), ethnic minorities find the majoritarian democratic model to be unrepresentative of their interests, and they are supported by thinkers such as Thoreau, Mill and Gandhi.

One of the most well known remedial right arguments for secession is the need to redress historical injustice. This is what Buchanan (1991b, 329-330) refers to as “The argument from rectificatory justice”. This argument can be advanced by “a
group that was once invaded, annexed, or robbed of its land through diplomatic subterfuge and continues, through literature, stories handed down, and the brave acts of dissidents, to tend the memory of its glorious, innocent, free, untrammeled past, staving off the homogenizing intentions of its oppressors” (Philpott 1995, 376). Annexation is usually based on conquest. Indigenous Kenyan ethnic communities such as the Ogiek, Endorois and Sengwer can argue that the more numerous ethnic groups that immigrated into the country after them actually overpowered them and took their land through conquest. They could therefore argue with John Locke that any government formed as a result of conquest is not legitimate:

... many have mistaken the force of arms for the consent of the people, and reckon conquest as one of the originals of government. But conquest is as far from setting up any government as demolishing a house is from building a new one in the place. Indeed, it often makes way for a new frame of a commonwealth by destroying the former, but, without the consent of the people, can never erect a new one (Locke 1960, 99).

Concerning the right of secession for a people who find themselves in a state as a result of their land having been annexed, Buchanan (1991b) has written:

... if a nation forcibly annexes the territory in which some ethnic group resides but fails to recognize that group as having any legitimate standing as a group, then there may be no mechanisms by which members of the group can select representatives who will press their claims for secession. Even worse, the state may use its coercive power to prevent the members of the group from voicing their demand for secession by a direct, popular referendum. ...: a state cannot justify blocking a secessionist movement on the grounds that it fails to represent the will of the group in question if that state has prevented the members of the group from choosing representatives to express its will (Buchanan 1991b, 340).

Along similar lines, Patten (2002, 574) has noted that if multinational constitutional arrangements have not been established in the first place, and the central state is stubbornly refusing to put them in place, then clearly the
secessionists cannot be accused of undermining equality in the recognition of national identity.

Historical injustice often results in a threat to the culture and even the very existence of the vanquished group, as is the case with the native Americans (Olson *et. Al.* eds. 1997; Trafzer and Hyer eds. 1999), and also with the Ogiek of Kenya (Kamau 2000). Regretably, Bertrand Russell (1915) openly supported wars of colonisation, arguing that they were justified by their results, namely, the survival of the fittest, specifically the European race, whom he claimed was far superior to races such as native Americans and Maoris. Nevertheless, a number of Western philosophers argue that if a culture is endangered, its members have the right to secede. Similarly, a group threatened with genocide by the state or a third party against whom the state cannot defend them has a strengthened right to secede, just as a state, in just-war theory, has a right to self-defense (Philpott 1995, 378; Wellman 2001, 756). This outlook concurs with Hobbes’ view that the individual’s who make a covenant with the sovereign cannot be expected to give up their right to life:

The Obligation of Subjects to the Soveraign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. For the right men have by Nature to protect themselves, when none else can protect them, can by no Covenant be relinquished. .... The end of Obedience is Protection; which, wheresoever a man seeth it, either in his own, or in anothers sword, Nature applyeth his obedience to it, and his endeavour to maintaine it (Hobbes 1904, 156).

Furthermore, historical injustice is usually characterised by *discriminatory redistribution* - the implementation by a government of taxation schemes, regulatory policies, or economic programs that systematically work to the disadvantage of a group, while benefiting others, in morally arbitrary ways. Most
ethnic groups agitating for secession cite discriminatory redistribution among their major grievances. Thus for decades the Southern Sudanese were discontented by the fact that the Arab-dominated regime in Khartoum channeled the vast oil revenues from their region to Northern Sudan, leaving the South in abject poverty (Roden 1974; Heraclides 1987; Martin 2002). Similarly, in May 2009, Mr Calist Mwatela, the Kenyan Education assistant minister referred to in Chapter 2 of this study (2.4.2), argued for the secession of Kenya’s Coast Province on the basis that although the province was the greatest revenue contributor to the central government, it was getting a “raw deal” in the distribution of the country’s resources (Mwajefa 2009). A state that persists in discriminatory redistribution has violated one of the fundamental conditions of its authority, namely, the requirement that it operate for the mutual advantage of all the stakeholders in it (Buchanan 1991b, 330-331).

For Abdullahi (1996, 373), African states have since independence failed to run the affairs of the state as was initially envisaged, that is, as democratic societies where all are equal and where each member of the community enjoys his or her full rights and freedoms. Instead, the rulers have favoured the continuation of the status quo by simply extending privileges to members of their ethnic groups, and have engaged in large scale abuse of human rights, thereby breaking the social contract between them (the governments) and the citizens.

As discussed in our second and third chapters, there are Kenyan ethnic groups that have consistently suffered economic, social and political marginalisation due to their numerical disadvantage. Furthermore, populations in some of the
marginalised regions have suffered gross human rights abuses. For example, during the reign of Daniel arap Moi, over fifteen thousand Somalis were killed by Kenyan security forces in the North-Eastern Province. Two outstanding massacres occurred in Garissa in 1980 and in Waggala in 1984 (Africa Watch 1991). Thus Abdullahi (1996, 374), himself a Kenyan Somali, argued that since the Kenyan Government had failed to manage the affairs of the state in a democratic and equitable manner, it was appropriate to reappraise the current form of the state, with a view to addressing the grievances of marginalised ethnic groups through secessionist self-determination.

5.6.4. Teleological Justification of Secession

It could be argued that choice, national self-determination and remedial right theories are all broadly teleological, in that they emphasise the purported favourable consequences of recognising the right of secession. However, a teleological perspective is broader than those three theories, and therefore worth reflecting upon on its own merits. Choice theories, as earlier pointed out, are based on an ideology of thoroughgoing individualism which many Kenyans, with their communalistic outlook, would find difficult to relate to. On the other hand, a national self-determination approach is impracticable, due to the large number of Kenyan ethnic groups as opposed to the landmass that they would be vying for. A remedial right approach is closer to the Kenyan socio-political reality in that many Kenyan ethnic minorities have suffered gross historical injustices and ongoing marginalisation, all of which need to be redressed. However, the majority ethnic groups control the legislative and judicial processes needed for such redress (see
Chapters 3 and 4 above), and are therefore likely to frustrate efforts at such redress.

The purely teleological approach allows groups to claim a right to secede grounded in efficiency. According to this view, given that the state is justified through what it does rather than through its being consented to, desirable consequences might result from changing the state from an unchecked monopoly to a supplier in a competitive market. This implies that rather than endure oppressive conditions in an unresponsive state, a group could secede and merge with another state that better served it. Furthermore, the constant threat that a group might secede would exert market pressures on existing states to treat minority groups with the decency they deserve (Wellman 1995. 157-158; 171).

The teleologist can also argue, as Walzer (1986. 227-239) does, that there are three separate benefits associated with secession. First, nations can best guarantee their own safety when they possess the medium of sovereign power. Second, sovereign statehood provides the opportunity to organize political life according to the community's values. Third, nations aspiring to statehood on the first two grounds continue to disturb world peace as long as their aspirations are denied.

For Abdullahi (1996, 373-374), due to the high cost of military force, it is prudent and humane to entrench the right of communities to secede into the constitutions of various African states, so that the process of secession is executed in an orderly manner. Abdullahi (1996, 384) further contends that making secession a constitutional right in African states could herald the creation of a more protective
human rights legal regime, whereby the people are in control and not the rulers. This, according to him, is likely to create greater accountability in the management of public affairs. Abdullahi (1996, 378-379) proposes the following set of criteria for entrenching constitutional secession in African states:

1. When there is gross abuse of human rights directed against a particular ethnic group by the functionaries of the state.

2. When the level of a community’s development is extremely low because the state deliberately suppresses the advancement of the community in all spheres.

3. When the members of the community are qualitatively and quantitatively under-represented in the institutions of the state.

4. When the state has been engulfed in constant war as a result of ethnic rivalry between different ethnic groups, the solution may be the splitting of the state into ethnically-based smaller states. ....

5. When a combination of the above problems have little or no prospect of internal remedy.

However, Sunstein (1991, 634) is of the view that whether or not secession might be justified as a matter of politics or morality, constitutions ought not to include a right to secede. For him, to place such a right in a founding document would increase the risks of ethnic and factional struggle, reduce the prospects for compromise and deliberation in government, raise dramatically the stakes of day-to-day political decisions, introduce irrelevant and illegitimate considerations into those decisions, create dangers of blackmail, strategic behavior and exploitation; and, most generally, endanger the prospects for long-term self-governance.
Furthermore, Sunstein (1991, 635) argues that the opportunity for a negotiated agreement or a right of revolution would provide a remedy against most of the relevant abuses, without raising the continuous risks to self-government that would be created by a constitutional right to secede.

Along similar lines, Buchanan (1998) contends that a plebiscitary right to secession would erode the conditions that make it rational for citizens to sustain a commitment to practice the virtues of deliberative democracy:

In a world in which states can be dismembered at any time and repeatedly, through the exercise of a plebiscitary right to secede, the results of democratic processes can be nullified simply by voting to change political boundaries. When new states can be formed whenever local majorities can be assembled, the significance of political decisions made within any given state is diminished and with it the rationality of investing in the political processes that generate those decisions (Buchanan 1998, 22).

Buchanan's view above is reminiscent of Tom Mboya's position concerning the question of the secession of the Northern Frontier District of Kenya at the dawn of independence:

Somalia's case is that because there are people of Somali origin living there (in the Northern Frontier District), this territory should be ceded to Somalia. Our position is that merely because there are people of Somali origin is no justification for secession, because in our country there are other tribes like the Maasai, like the Luo - my own tribe, who come from the Sudan; the Masai - half are in Tanganyika and half are in Kenya, and many other tribes, and if we started ceding territory purely on basis of trying to accommodate ethnical groupings we would have no Kenya left. And similarly other African states would find themselves facing the same problem (Mboya 1963, 12; words in parenthesis added).

From a teleological point of view, a critic could also point out that recognition of a constitutional right of secession would put any subunit whose resources are at the moment indispensable to the state, and which might be able to exist on its own, in an extraordinary position to obtain benefits or to diminish burdens on matters
formally unrelated to its comparative advantage (Sunstein 1991, 650). In the eyes of many English-speaking Canadians, Quebec has long used the threat of separation to extract an unjustly disproportionate portion of federal resources and political prerogatives (Philpott 1995, 383). Similar threats were occasioned by the secessionist efforts of Katanga in Congo and Biafra in Nigeria, both provinces with a disproportionately high share of their states' wealth (Boehme 2005; Davis 1973). Nevertheless, in such instances, compensation may be an appropriate solution (Philpott 1995, 377-378).

Besides, critics contend that secession brings certain ills upon the larger state that more benign forms of self-determination do not. ..., it more strongly restricts the larger state's citizens, denying them opportunities for work, movement and change of residence that they previously enjoyed. In addition, by creating more states, especially adjacent hostile ones, secession increases cases of inter-state conflict (Philpott 1995, 381-382). The war between Ethiopia and Eritrea in recent years is a case in point.

Furthermore, Spencer (1998) notes that secession damages interpersonal relations. In peacetime, many people regard their ethnicity as a matter of little significance. They may even change from one supposedly ascribed ethnic community to another several times during their lifetime, converting to a different religion or marrying out. In mixed marriages, a common way of avoiding friction is to evade the issue by refusing to identify oneself as belonging to either group. Secessionists, however, insist that everyone's ethnicity must be permanent and salient in social situations, thereby making it extremely difficult for people to
preserve harmony in their homes. In such situations, interethnic marriages typically break up or the families flee. The same must be said of interethnic friendships and business partnerships.

Of great concern to the present study is the fact that secession almost always produces new disadvantaged minorities, who are oppressed and marginalised by the newly formed states (Macfarlane 1968, 42; Buchanan 1998, 14). Quite often, there are cases in which dissenters and minorities live among the seceding group. A dissenter is one who belongs to the group, but does not agree on separation; a minority does not belong to the group at all, but lives in the group’s territory (Philpott 1995, 378). Thus if most Kenyan Somalis were to support secession, the few Kenyan Somalis opposed to it would be dissenters, while any Gabras living among the Kenyan Somalis would be a minority.

Despite the foregoing objections to a teleological justification of the right of secession, it seems to be the most practicable in contemporary Kenya. In sharp contrast to the foregoing three approaches (choice, national self-determination and remedial right), a teleological justification of secession would be based purely on calculation of cost versus gain in any minority ethnic group’s consideration of the possibility of secession. If a Kenyan ethnic minority is faced by overt or covert genocide, the teleological Hobbesian principle that the right to life cannot be transferred to a sovereign would lead to the conclusion that the community has the right to attempt to secede rather than endure the annihilating effects of the state upon it. If it arrives at such a conclusion, it would be choosing the risk of war instead of the certainty of extermination. In the words of Philpott (1995, 381-382),
“Secession, ..., truly becomes a last resort; it should be endorsed only when a people would remain exposed to great cruelty if left with a weaker form of self-determination.”

Thus the purely teleological approach to secession would require a Kenyan ethnic minority considering the possibility of secession to realistically assess its prospects of success. In this regard, the group would need to bear in mind not only the military might of the state from which it wishes to secede, but also the overbearing influence of the international community earlier outlined (5.4). What is more, it would have to carefully consider the prospects of the ability of the new state to defend itself against aggression from its neighbours, including, not least, the state of which it was formerly a part. Nevertheless, this does not imply that in all cases the prognosis will be the likelihood of defeat for the secessionist party; for as the case of Somaliland earlier cited illustrates, there are times when it is worth making a secessionist bid against all odds rather than resign to the debilitating conditions in a state that is either unwilling or incapable of protecting the vital interests of a community. Thus from this point of view, the Tutsis of Rwanda would have been morally justified to make a secessionist bid rather than submit to the prospect of being annihilated by the Hutu majority during the 1994 genocide.

5.7. Conclusion

This chapter has utilised the critical, rational and analytical techniques of philosophical reflection in an attempt to determine whether or not there are circumstances in which Kenyan ethnic minorities may be morally justified to
launch secessionist bids. Towards this end, it has examined the nature of secession, the concepts of political legitimacy and obligation, current international thinking on secession, the background to contemporary philosophical reflections on secession, and the moral justification for the right to secede, with specific reference to Kenyan ethnic minorities. The chapter has contended that a plausible moral justification for secession by Kenyan ethnic minorities may be found in a purely teleological approach to it. If an ethnic minority is faced with overt or covert genocide, the teleological Hobbesian principle that the right to life cannot be transferred to a sovereign would lead to the conclusion that the community has the right to attempt to secede rather than endure the annihilating effects of the state upon it. If it arrives at such a conclusion, it would have chosen the risk of war instead of the certainty of extermination.

Secessionist bids often result in secessionist wars, as the American, Congolese, Nigerian and Ethiopian civil wars illustrate. Nevertheless, in view of the grave consequences of war, it is not clear that the considerations that may justify a secessionist bid may also justify a secessionist war. Consequently, partly building on insights gained through the reflections in this chapter, the following chapter examines the moral justification, if any, for secessionist wars.
Chapter 6: Moral Justification for Secessionist War by Kenyan Ethnic Minorities

6.1. Introduction

The most common outcome of a secessionist bid is war, both before the event and thereafter (Bartkus 1999, 3; Coppieters 2003b, 254). Secession and war have been so closely connected that Kreptul (2003, 62-63) has claimed that for most of human history and continuing into the present day, the only effective means of secession has been war - a claim for which only a few counter-examples are available. According to Spencer (1998), although not all ethnic wars aim for secession, virtually all secessionist wars are based on ethnicity. Spencer goes on to note that of all the wars in the 1990s, between 40 percent and 50 percent involved the armed actions of members of an ethnic community to secede from the country where they lived. Furthermore, several movements which set out with a non-violent strategy end up engaging in violent demonstrations, if not outright warfare. Thus for instance, Umoja (1999) has argued that accounts of the struggle to desegregate the American South must revise the definition of the civil rights movement to include the role of armed militancy as a complement to nonviolent direct action. Moreover, secessionist wars have often entailed dreadful costs in terms of lives and human suffering. For example, in its nearly three-decade struggle to secede from Ethiopia, the Eritrean community lost approximately five
hundred thousand people out of a total population of about four million (Bartkus 1999, 51).

If a Kenyan minority ethnic group were to make a unilateral declaration of independence, the Kenyan government, like many elsewhere, would probably use the state security apparatus to render the declaration ineffectual. The ethnic minority in question could decide to fight back, culminating in a full-scale secessionist war. Furthermore, as intimated at the end of the previous chapter, in view of the grave consequences of war, it is not clear that the basis for a moral justification to secede is also sufficient for a moral justification to wage a secessionist war. As Rodin (2002, 1) has correctly noted, of all the problems of moral and political philosophy there are few as difficult or as urgent as those concerning war. For Rodin, there are two features which make war particularly challenging. First, in war and interpersonal violence we find humans at their most fearful, most vulnerable, and also most destructive. Second, the character of the problems associated with war changes with evolving historical circumstances, compelling us to continually re-evaluate the principles and sometimes the very concepts of our moral assessment. Moreover, young people who are faced with conscription must make an ethical decision with regard to personal involvement in combat (Clouse 1981, 9).

The moral dilemmas relating to war cannot be resolved by classic texts on war such as Sun Tzu's *Art of War* (Tzu 1999) or Carl von Clausewitz's *On War* (Clausewitz 1995), because they address strategies for winning a war rather than moral justification for engaging in it. Neither can works on the evolution of
international thinking on war, such as Kelsay and Johnson (eds. 1991), Johnson (1998) or Willmott (2002) serve as a basis for decisions for or against war from a moral point of view, because they are largely descriptive rather than prescriptive.

In view of the foregoing observations, this chapter employs the critical, rational and analytical techniques of philosophical reflection to examine the question of whether or not there are circumstances in which Kenyan ethnic minorities may be morally justified to wage secessionist wars against the majoritarian Kenyan state. The chapter sets out by examining the three main schools of thought on war, namely, pacifism, realism and just war theory. In this regard, it contends that only the third school of thought allows the possibility of war while insisting on the need to pay attention to moral considerations before, during and after war. Consequently, the chapter interrogates the six principles of just war theory by which to determine whether or not to go to war (jus ad bellum), with a view to ascertaining their applicability to the circumstances of Kenyan ethnic minorities. Finally, the chapter critically examines one of the arguments most frequently adduced in support of secessionist war, namely, self-defense, and finds the forfeiture version of it to be both internally consistent and relevant to the circumstances of Kenyan ethnic minorities.

6.2. Pacifism, Realism and the Just War Theory

Three traditions dominate debate on the ethics of war, namely, Pacifism, Realism, and Just War Theory (Orend 2005).
Pacifism is in principle opposed to war and other forms of violence. Most basically, pacifists hold that war is wrong because killing is wrong (Fiala 2006). For pacifists, war is always wrong, because there is always some better resolution to a problem than fighting (Orend 2005; Moseley 2005b). However, pacifists differ on their moral grounds for rejecting war and other forms of violence, and on the grounds for their commitments to varieties of non-violent actions. They may be passivists, refraining from any form of resistance to perceived injustice. Alternatively they may be activists, resisting perceived injustice through non-violent means (Wells ed. 1996, 375; see also Allen ed. 1930). Pacifism consists of two parts: opposition to violence, and commitment to cooperative social conduct based on agreement. However, the antiviolence and especially the antiwar aspect of pacifism is much more frequently debated in philosophic literature than the positive peace aspect (Wells ed. 1996, 375).

In typical pacifist fashion, Calhoun (2001, 56-57) argues that the rational and moral approach to resolving international conflict is negotiation facilitated by neutral parties. However, such a position seems to be unfruitfully idealistic, because it is evidently impractical to find a truly neutral party. This is due to the fact that the people usually assigned to arbitrate in inter-state conflicts often themselves represent the interests of specific states or groups of states. Furthermore, some states may be unwilling to subject themselves to the process of arbitration, preferring instead to execute a war to its military conclusion. Of even greater relevance to our present concern is our earlier observation that the international community refuses to recognise many secessionist movements, and as such is unwilling to arbitrate between them and the states from which they wish
to secede. Furthermore, by virtue of its opposition to violence, pacifism is not part of the debate on the moral justification for secessionist war. Besides, Chapter 4 reflected on non-violent civil disobedience, with the views of La Boétie, Hume, Thoreau, Gandhi and Luther, Jr being subjected to philosophic scrutiny. As such, any further treatment of the issue here would be superfluous.

Realism, also referred to as realpolitik, asserts that war is an extension of politics, whose ultimate goal is the acquisition and maintenance of coercive power. According to it, "a precarious form of order through the balance of power, not justice, is the best we can hope for in the international anarchy, an asocial realm of continual struggles for power and security among states" (Griffiths 1992, p.ix). Realism emphasizes the constraints on politics imposed by human nature and the absence of international government, which together make international relations largely a realm of power and interest (Donnelly 2000, 9). Generally, political realists focus on the need to ensure that the relevant agent (politician, nation, culture) works towards its own survival by securing its own interests before it looks to the needs of others (Moseley 2005a).

For realists, ethics as an impartial arbiter has nothing to do with the rough-and-tumble world of global politics, where only the strong and cunning survive. A country should therefore tend to its vital interests in security, influence over others, and economic growth—and not to moral ideals (Orend 2005; see also Luce 1891). As Moseley (2009) has noted, political realists frequently cite Thucydides' *History of the Peloponnesian War* to illustrate that war is necessarily the extension of politics and hence permeated by hard-nosed state interest rather than "lofty"
pretensions to moral behavior (see Thucydides 2009). Thus Luttwak (1999, 36), writing from a realist viewpoint, laments that since the establishment of the United Nations and the enshrinement of great-power politics in its Security Council, wars among lesser powers have typically been interrupted early on, before they could burn themselves out and establish the preconditions for a lasting settlement.

However, Rogers (1905) accuses proponents of realpolitik of inconsistency when they uphold the rule of law and morality in the internal politics of individual states, while allowing for a Hobbesian state of nature at the international level. The allusion to the Hobbesian state of nature itself points to another criticism against realpolitik, namely, that it is amoral. Nevertheless, a rebuttal of this latter charge is that the definition of morality is being twisted to assume that acting in one's own or one's nation's interests is immoral or amoral at best. The realists can argue that it would be absurd to prohibit state officials to give their own country greater moral weight over others, just as it would be absurd to require parents to give equal consideration to their children and others' children (Moseley 2005a).

Nevertheless, looking at the various versions of realpolitik such as Thomas Hobbes' purely egoistic social contract (Hobbes 1904), Niccolo Machiavelli's end-justifies-the-means (Machiavelli 1998), or Herbert Spencer's Laissez Faire (Spencer 1969), it is evident that this outlook is concerned with the idea of survival-for-the-fittest rather than with ethical principles such as justice. As such, realpolitik seems unlikely to enrich our reflections on the possible moral justification for marginalised Kenyan ethnic minorities to wage a secessionist war against the majoritarian Kenyan state.
On its part, the just war (*justum bellum*) tradition offers a series of principles which could serve as a basis upon which to reflect on a possible moral framework for secessionist war. The core proposition of just war theory is that states can sometimes have moral justification for resorting to armed force. The idea here is not that the war in question is merely politically shrewd, or prudent, or bold and daring, but moral (Orend 2005). Holmes (1981, 119-120) explains that the just war theory tries to bring war under the control of justice so that, if consistently practiced by all parties to a dispute, it would eliminate war altogether. In the words of Hugo Grotius, the seventeenth century Dutch jurist and philosopher, "Justice is not included in the definition of war, because the very point to be decided is, whether any war be just, and what war may be so called. Therefore we must make a distinction between war itself, and the justice of it" (Grotius 1925, Book I Chapter 1).

Thus while pacifists consider war to be morally inadmissible, realists take the fact of war for granted, and therefore make no effort to reflect on its ethical implications. Consequently, of the three main viewpoints on war, the only one which might be applicable to our current inquiry is the Just War tradition. Our reflections in the succeeding paragraphs will therefore utilise insights from this tradition, although we shall not limit ourselves to its tenets.

Historically, when enemies differ greatly because of divergent religious beliefs, race or language, war conventions have rarely been applied. Instead, it is when the enemy is seen to be a people with whom one will do business in the following
peace that tacit or explicit rules are formed for how wars should be fought and who they should involve. Nonetheless, it has been the concern of the majority of just war theorists that just war theory should be universal (Moseley 2009).

As Orend (2005) notes, just war theory can be meaningfully divided into three parts, which in the literature are referred to, for the sake of convenience, in Latin. These parts are:

1. *Jus ad bellum*, which concerns the justice of resorting to war in the first place.
2. *Jus in bello*, which concerns the justice of conduct within war, after it has begun.
3. *Jus post bellum*, which concerns the justice of peace agreements and the termination phase of war.

However, there is a lively debate in the literature concerning the plausibility of the just war theory. For example, Rodin (2002, 166-167) argues that *jus ad bellum* and *jus in bello* derive from different sources, and are actually logically incompatible. *Jus ad bellum* is the invention of churchmen and lawyers and represents a fundamental challenge to the assumptions built into chivalry - the assumption that military life and warfare are an acceptable and potentially noble form of activity. *Jus in bello*, on the other hand, is the product of the medieval chivalric code, the self-regulation of the warrior classes. Nevertheless, continues Rodin, pragmatically, combining the two ideas enables lawyers and humanitarians to regulate and mitigate the evils of war twice over: once through restrictions on the recourse to war, and again (with the knowledge that the first set of restrictions will often be ineffective), through restrictions on the conduct of war. For Rodin,
the pragmatic aim is laudable, but the conjunction leads to philosophical contradiction as soon as we consider the issue of personal responsibility. For Calhoun (2001, 46), it is noteworthy that just war theory has been effectively wielded throughout history by the leaders of both sides to every conflict to galvanize their troops to kill, suggesting that the value of this paradigm needs to be re-assessed.

Nonetheless, the plan of the present study does not permit an indepth examination of objections to the just war theory such as those by Rodin and Calhoun above. Instead, in the following section, we shall use the principles of *jus ad bellum* (“the justice of going to war”) in our reflections on conditions under which Kenyan minority ethnic groups might be morally justified to wage secessionist warfare, but will seek to transcend those principles in the subsequent section in which we shall focus on the concept of self-defense as a justification for going to war.

6.3. *Jus ad Bellum* Principles as the Justification for Secessionist Wars by Kenyan Ethnic Minorities

Documented discussions of just war theory go back to the ancient Greeks and Romans. Plato, both in the *Republic* and in *the Laws*, insisted that the only legitimate purpose of war is the restoration of peace (Plato 1945; 2009c). Similarly, Aristotle, arguing that the very nature of human beings calls for a rule of reason rather than of passion or violence, declared that “... we ... make war that we may live in peace” (Aristotle 2000, bk.10, ch.7). Furthermore, Cicero, the Roman orator, jurist and philosopher, asserted that reason requires that even war
be governed by moral law, so that it is engaged in only when necessity demands it (Cicero 1928, i. ii. 34-35). Indeed, the guidelines for war Cicero articulated were the first explicit formulation of just war rules (Holmes 1981, 125).

Augustine of Hippo’s moral prescriptions on war consisted of rules of warfare developed by earlier thinkers such as Plato, Aristotle and Cicero, but modified under the influence of biblical and Roman Catholic viewpoints. He interpreted war as both an element in religious pedagogy and an exercise of divine power and judgment (Augustine 1887, 301). As Langan (1984, 22) explains, Augustine’s view entails an approach to the whole problem of war which sees it in primarily spiritual and attitudinal terms rather than as a threat to human interests and survival, or as the doing of actions which are evil. Nevertheless, writing to Boniface, the governor of Africa, in 418 C.E., Augustine tells him that war is waged for the sake of peace, and that he is to wage war as a peacemaker. War is "the result of necessity." and therefore "let it be necessity, not choice, that kills your warring enemy" (Augustine 1955, 26). In the *Summa Theologica*, Thomas Aquinas (1981) contends that war is justified only where it is authorised by legitimate authority, where there is a just cause for war, and where the combatants have right intentions, either to advance a good or to prevent an evil.

During the sixteenth, seventeenth and eighteenth centuries C.E., the position which Augustine and Aquinas articulated in theistic form was transformed by modern Western thinkers into a secular Just War Theory (Rodin 2002, 169). Many of the rules developed by the just war tradition have since been codified into contemporary international laws governing armed conflict, such as The United
Nations Charter and The Hague and Geneva Conventions. The tradition has thus been doubly influential, dominating both moral and legal discourse surrounding war (Orend 2005).

In the twentieth century, just war theory underwent a revival mainly in response to the invention of nuclear weaponry, and to American involvement in the Vietnam war (Moseley 2009). The most important twentieth-century just war texts include Michael Walzer’s *Just and Unjust Wars* (1977), Barrie Paskins and Michael Dockrill’s *The Ethics of War* (1979), and Richard Norman’s *Ethics, Killing, and War* (1995). In the twenty-first century, Brian Orend’s *War and International Justice* (2000) and Michael Walzer’s *Arguing about War* (2004) are among the influential works in this debate.

It is noteworthy that almost throughout the two-and-a-half millennia of just-war discourse, the underlying assumption has been that war is between states. The effect of this is to exclude secessionist war from the discussion. One of the oft-quoted definitions of war is the one in L. Oppenheim’s treatise on International Law:

War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases (cited in Dinstein 2001, 4).

Indeed, Oppenheim’s definition is in line with the Just War tradition. His definition is also in line with most of the contemporary understanding of the ethical ramifications of war (see for example Walzer 1977, 2004; Primoratz 2002).
However, the concept of sovereignty, so central to the idea of statehood, raises a number of perplexing issues. As Calhoun (2001, 53, 56-57) observes, states are conventionally delimited, and leaders are conventionally appointed, so that the idea of legitimate authority is not objective and absolute. The notion of proper authority therefore requires thinking about what is meant by sovereignty, what is meant by the state, and what is the proper relationship between a people and its government (Moseley 2009). Consequently, and in order to take cognizance of civil war, Orend (2005) seems justified to define war as an actual, intentional and widespread armed conflict between political communities, that is, those entities which either are states or intend to become states. Indeed, international law recognizes two disparate types of war: inter-State wars (waged between two or more States), and intra-State wars (civil wars conducted between two or more parties within a single State) (Dinstein 2001, 5). Consequently, the present study lays aside the presumption of just war tradition that war is always between states, and seeks to assess the extent to which this tradition could be used to provide a moral justification for secessionist war by Kenyan ethnic minorities.

Calhoun (2001, 45) has correctly noted that there have been disagreements over precise articulation, but the following *jus ad bellum* ("justice of going to war") requirements are widely accepted by just war theorists:

1. A just war must be publicly declared.
2. A war justly waged must have a reasonable prospect for success.
3. The cause of a just war must be proportional, i.e., sufficiently grave to warrant the extreme measure of war.
4. A war is justly waged as a last resort.
(5) A just war must be waged for a just cause.

(6) A just war must be waged by a legitimate authority (see also Holmes 1981, 120-121).

Mosely (2009) points out that the principles of *jus ad bellum* are neither wholly intrinsicist nor entirely consequentialist, but rather invoke the concerns of both models. For Moseley, whilst this provides just war theory with the advantage of flexibility, the lack of a strict ethical framework means that the principles themselves are open to broad interpretations. Moseley also observes that philosophically the principles invoke a plethora of problems by either their independent vagueness or by mutually inconsistent results. Nevertheless, the present study will not undertake a rigorous point by point scrutiny of the above *jus ad bellum* principles, nor a thoroughgoing reflection on the relationships among them, because the available literature abounds in such studies (see for example Ramsey 1968; Walzer 1977; Holmes 1981; Langan 1984; Garrett 2001; Calhoun 2001; Coppieters 2003b). Instead, using each of the principles as a starting point for a line of reasoning, we shall seek to identify specific conditions, if any exist, under which Kenyan ethnic minorities could be morally justified to wage secessionist warfare. In other words, in the succeeding paragraphs of this section, we shall briefly examine the applicability of each of the six *jus ad bellum* principles outlined by Calhoun (2001) above to the circumstances of the ethnic minorities in present day Kenya. This will be followed in the next section by indepth reflection on self-defense as a moral justification for secessionist war by these communities.
6.3.1. Public Declaration

*A just war must be publicly declared.* This principle is closely related to Principle 6, namely, that a war must be declared by a legitimate authority. The rationale for a public declaration seems to be that the party to be attacked deserves to be given a final opportunity to reconsider whether its position is, in its opinion, worth defending violently. However, in view of the fact that the various ethnic minorities do not constitute recognised states, the Kenyan government would consider their declarations not as ones of war, but rather of rebellion. It might therefore be prudent for such communities to refrain from declaring war, but be prepared to resist any military assault from the government if they consider themselves morally justified to use violence in their secessionist bids. Nevertheless, conditions under which they would be morally justified to do so are open to debate, as will be evident from our reflections below.

6.3.2. Prospect for Success

*A war justly waged must have a reasonable prospect for success.* For Coppieters (2003b, 270), regardless of all other ethical considerations, a population should not be expected to bear the heavy costs of an attempt to achieve unilateral secession unless it has a reasonable chance of being recognised by the international community. However, this view seems to the present writer to put an unnecessarily high premium on the place of international recognition. It fails to recognise the fact that the condition of a group in an existing state could be so desperate that the need to escape overrides the need to achieve international recognition. What is more, as the case of Somaliland earlier discussed illustrates,
secessionist states can drastically improve the lives of their citizens even without the attainment of international recognition. It therefore seems appropriate to revise Coppieters' interpretation of "reasonable prospect for success" in terms of whether or not the secessionist war is likely to produce a new state that significantly improves the quality of life for the population concerned.

Nevertheless, as pointed out in our second chapter (2.2), various population census indicate that Kenya has some very small ethnic communities, among them the Dasnachi, Ogiek, Endorois and Sengwer. Such minority ethnic groups are so small that they are not likely to wage a successful secessionist war against the Kenyan state. They would therefore not be able to invoke the "prospects for success" principle to justify secessionist wars.

6.3.3. Proportionality

The cause of a just war must be proportional, i.e., sufficiently grave to warrant the extreme measure of war. The principle of proportionality requires us to balance the harmful effects of the defensive action against the good to be achieved. A classic legal formulation of "proportionality" requires that "the mischief done by, or which might reasonably be anticipated from, the force used be not disproportioned to the injury or mischief which it is inflicted to prevent" (Rodin 2002, 41). In discussing the Just War principle of proportionality, Coppieters (2003b, 271) contends that the calculation of the high moral cost of secession and war as against the benefits of remedying or preventing injustices cannot be made exclusively from the perspective of one's own nation, but also that of the resulting
damage and benefits to the international community, including the nation one wishes to secede from.

Nevertheless, Coppieters’ view would only be tenable in situations in which the seceding group does not require remedial justice; for if a community has been grossly dehumanised through impoverishment and even attempts at genocide, it would be difficult to see what it would owe to the central government responsible for its plight. In such a case, a more credible objection to this principle would have to do with the reckoning of the balance between the desirable and undesirable consequences of war to the secessionist community. Thus if the hunter-gathering Ogiek community, expelled by the government from its indigenous habitat in the Mau Forest complex were to weigh the option of violently resisting the Kenyan state’s efforts to prevent it from seceding, it would need to consider whether or not any gains accruing from its actions would exceed the horrendous damage to the community from a much more powerful Kenyan military machine.

It is also noteworthy that though morally crucial, consequences are difficult to weigh against the moral worth of a secessionist bid (Philpott 1995, 381). As we earlier noted (5.6.1 and 5.6.4), a region characterised by a proliferation of secessionist movements seems bound to be unstable, so that the very aspirations of such movements would thereby be difficult to fulfil. Thus before a Kenyan minority ethnic group decides to wage a secessionist war, it must carefully consider whether or not its long-term interests would thereby be served.
6.3.4. Last Resort

*A war is justly waged as a last resort.* Garrett (2001) contends that wars are not justified by minor injustices or even major injustices to a handful of people. He seeks to support this assertion by pointing out that any war is massively destructive to social order: by making people desperate, it tempts them to act in morally demeaning ways; it also puts a strain on the habit of lawful behavior, and is thus likely to increase unjust behavior in the world. However, Kenyan ethnic minorities would understandably not take kindly to Garrett’s assertion that even major injustices to a small group of people do not justify a war, as it suggests that numerical strength or weakness augments or diminishes human worth. Garrett would also need to indicate the line between a reasonably large group from a small one - an impossible undertaking.

Nevertheless, the principle of last resort is one of the most important considerations in determining the moral justification for a secessionist war, because it would be evidently unreasonable to go to war as long as other less harmful strategies for redress are available. In the context of the ethics of secession, a unilateral declaration of secession may only be justified where remedying or preventing severe injustices by any other means seems impossible. In the context of the ethics of war, the principle requires that before the use of force, all other means to remedy or prevent a severe injustice be exhausted (Coppeters 2003b, 273). Thus in the globalised milieu in which they now live, Kenyan ethnic minorities might be able to end their marginalisation by appealing for advocacy and legal assistance from the many non-state actors such as non-governmental organisations and professional societies that today wield immense
influence over state policy (see Higgott et. Al. eds. 2000; Josselin and Wallace eds. 2001; Buthe 2004). In this regard, Chapter 2 outlined the assistance that the Nubians, Endorois and Ogiek have received from non-governmental organizations (see 2.5.3, 2.6.1(a) and 2.6.2(a)). However, since such assistance has yielded negligible desired results for the ethnic minorities concerned, it seems reasonable to concede that these communities cannot rule out the possibility of engaging in secessionist bids, or even secessionist wars as a last resort.

6.3.5. Just Cause

A just war must be waged for a just cause. The just causes most frequently cited include self-defense or defense of others from external attack, the protection of innocents from brutal regimes, and punishment for a grievous wrongdoing which remains uncorrected. However, self-defense has long been accepted by most just war proponents as the centerpiece of the modern *jus ad bellum* (see Rodin 2002; McMahan 2004). It seems reasonable to grant that any individual whose life is threatened by another individual or group reserves the right to do all in his or her power to ward off the offensive. However, some thinkers have questioned the right of self-defense. Thus Rodin (2002) has written:

> Self-defense is difficult because it stands at the centre of a tension between one of the most basic of all moral prohibitions (that against violence and the taking of human life) and an explicit and often surprising exception to that very prohibition. There are very few circumstances in which self-preferential killing is morally or legally permitted. Understanding why it is permitted in the case of self-defense is no trivial matter (Rodin 2002, 2).

Of all the just war principles, the present one is likely to be invoked by Kenyan ethnic minorities that decide to wage secessionist wars. We shall therefore interrogate it in greater depth in the next section.
6.3.6. Legitimate Authority

*A just war must be waged by a legitimate authority.* This principle is presumably intended to ensure that there is a distinction between criminal violent acts within a political community or across political communities on the one hand, and morally justifiable violence between two political communities on the other. However, as illustrated in the previous Chapter (5.3), the concept of legitimacy is controversial. Furthermore, Calhoun (2001, 56-57) points out that the declaration of war by a legitimate authority does not transform the moral character of the killing of innocent people, because legitimate authorities are themselves the products of conventionally formed social units rather than the result of objective moral criteria. This point is important, in view of the fact that many states which today deny ethnic minorities the right to statehood were themselves formed through struggles for statehood. This is true of almost all African states, Kenya included. While Calhoun's preferred inference is that there ought to be no war, it is also possible to arrive at an alternative conclusion, namely, that the declaration of war is not the preserve of existing and internationally recognised states.

6.3.7. Overview: The Six Principles of *Jus ad Bellum*

The foregoing reflections have indicated that the principles of *jus ad bellum* are fraught with inadequacies, some specific to particular principles, others relating to them as a composite whole. Even more crucial is the fact that their applicability to the circumstances of Kenyan ethnic minorities is open to question. Consequently, without restricting ourselves to the just war tradition, we shall in the next section
critically examine the most frequently cited argument for secessionist war, namely, self-defense.

6.4. Self-defense as the Ultimate Justification for Secessionist Wars by Kenyan Ethnic Minorities

Quite frequently ethnic minorities claim that they resort to secessionist wars to defend their very existence. Thus as the Kenyan Somalis violently struggled to exit the Kenyan state and join the Somali one at independence, they avered that their survival in the Kenyan state was threatened. Since then, Kenyan Somalis have often asserted that their rights are so frequently violated that continuing to be part of the Kenyan state will ultimately result in their extinction as a distinct community (see 2.4 above). It is therefore necessary to examine in some depth self-defense as a justification for secessionist war.

Although many of the principles of *jus ad bellum* have been vigorously contested, the principle of just cause has enjoyed considerably wide acceptance, especially because it has often been interpreted in terms of self-defense. Many philosophers are in agreement that the justifiability of acting in self-defense is in line with our moral intuitions. Various Western legal and philosophical writers endorse this principle, albeit with significant variations of interpretation (see Wasserman 1987; Johnson 1998; Fletcher 2000). As earlier indicated (5.6.3), the belief that the moral acceptability of self-defense is self-evident was even endorsed by Thomas Hobbes (1904, Chapters Xiv and XXI), despite his articulate advocacy for absolute government. However, it could be argued that if the sovereign's failure to
provide adequate protection to subjects extinguishes their obligation to obey, and if it is left to each subject to judge for himself or herself the adequacy of that protection, then people have never really exited the fearsome state of nature (Lloyd and Sreedhar 2008). Be that as it may, it is clear that Hobbes recognised that the purpose of government is to guarantee the physical security of its subjects. As such, he would probably argue that if the Kenyan government threatens the lives of its ethnic minority citizens, those citizens have the right to free themselves from their perilous condition, so that any war waged by such groups in pursuit of this goal would be morally justified.

While Hobbes restricted the right of self-defense to individuals within a state, John Locke asserted that if a government is so distorted in its structure that it fails to fulfil its responsibility to protect the citizens' property, then the people are free to dissolve it:

The end of government is the good of mankind. And which is best for mankind? That the people should be always exposed to the boundless will of tyranny, or that the rulers should be sometimes liable to be opposed when they grow exorbitant in the use of their power and employ it for the destruction and not the preservation of the properties of their people? (Locke 1960, 128).

On the question of how to determine whether the people's decision to rebel is warranted, Locke asserts that the people themselves must decide:

..., the common question will be made: Who shall be judge whether the prince or legislative act contrary to their [the people's] trust? .... To this I reply. The people shall be judge; for who shall be judge whether his trustee or deputy acts well and according to the trust reposed in him but he who deputes him and must, by having deputed him, have still a power to discard him when he fails in his trust? If this be reasonable in particular cases of private men, why should it be otherwise in that of the greatest moment where the welfare of millions is concerned, and also where the evil, if not prevented, is greater and the redress very difficult, dear, and dangerous? (Locke 1960, 138).
In line with the Lockean conviction on the right to defend life-sustaining property, Rodin (2002, 44) asserts that it is permissible to kill in defence of property upon which one's life directly depends. Thus for Rodin, one may, if necessary, kill a thief who is attempting to steal one's last food, or a vital piece of one's life-support machinery. These cases are for him merely an unusual application of the familiar right to use lethal force to defend one's life. On the basis of this reasoning, Kenyan pastoralists and hunter-gatherers could argue that in seeking to use violence to detach themselves and their ancestral lands from the Kenyan state which impoverishes them on the basis of their numerical disadvantage, they would merely be defending property which they need to sustain their lives. Considering the plight of the Endorois and Ogiek outlined in our second chapter (2.6.1(a) and 2.6.2(a)), this argument seems to be plausible. However, such communities would need to demonstrate that their action subscribes to the principle of last resort, and this, as noted in the previous section (6.3.4), is difficult to accomplish.

Quite often, war breaks out when one political community is plundered by another. This kind of plunder was refined by colonialism - a situation in which a foreign political power invades a community, subdues it, and seizes control of its politics in order to exploit its natural resources. While in this century and the last colonialism has commonly been viewed as the invasion and subjugation by a power from another continent, indigenous Kenyan communities such as the Mukogodo, Ogiek and Sengwer can plausibly argue, along Locke's and Rodin's argument above, that they are victims of colonialism from more numerous ethnic groups that came into the country after them. Such communities can cite Locke's
assertion of the right of an invaded people to do all in its power to stave off the aggression:

That the aggressor who puts himself into the state of war with another and unjustly invades another man's right can, by such an unjust war, never come to have a right over the conquered, will be easily agreed by all men who will not think that robbers and pirates have a right of empire over whomsoever they have force enough to master, or that men are bound by promises which unlawful force extorts from them. Should a robber break into my house and with a dagger at my throat make me seal deeds to convey my estate to him, would this give him any title? Just such a title, by his sword, has an unjust conqueror who forces me into submission. The injury and the crime are equal, whether committed by the wearer of the crown or some petty villain. The title of the offender and the number of his followers make no difference in the offense, unless it be to aggravate it (Locke 1960, 99-100).

The onus would then be on the majority communities to demonstrate an essential difference between their domination of their minority counterparts and the European domination of indigenous Africans through classical colonialism.

In seeking to justify their waging of secessionist wars, indigenous Kenyan communities could also claim that Frantz Fanon’s assessment of decolonisation applies to their circumstance:

National liberation, national renaissance, the restoration of nationhood to the people, commonwealth, whatever may be the headings used or the new formulas introduced, decolonization is always a violent phenomenon (Fanon 1967, 27).

For Fanon, in a situation where colonised people decide to liberate themselves, violence is not only indispensable as a pragmatic tool to overthrow the colonial government, but is also cathartic and re-humanising:

At the level of individuals, violence is a cleansing force. It frees the native from his inferiority complex and from his despair and inaction; it makes him fearless and restores his self-respect (Fanon 1967, 74).
Some thinkers have sought to justify self-defense through the balance-of-evil argument. They assert that allowing individuals under threat to kill their assailants is likely to maximise benefit and minimise disadvantage for society. Indeed, in several jurisdictions, a single victim is permitted to kill any number of intentional aggressors if it is necessary for his or her survival. However, if the aggressors' lives retain any value, as the restrictions on defensive force certainly suggest, their combined weight must eventually exceed that of the victim's (Wasserman 1987, 359). Yet our intuition is contrary to this reasoning, inclining us to the conviction that the individual is morally justified to kill any number of aggressors to save his or her own life.

One alternative to the consequentialist approach to self-defense such as the one above is a rights perspective. A number of philosophers regard the right to self-defense as a corollary of the right to life (Wasserman 1987, 361). However, Kaufman (2004) questions a rights approach to self defense:

Even supposing we were to identify a natural right (or rights) from which one could derive the right to defensive force, the rights approach would be left with a daunting problem. Self-defense situations would seem to resist treatment in terms of rights, in that they are intrinsically conflictual situations. If the victim has a fundamental right to life, then so does the aggressor. So if this right is important enough to protect me, then it would seem prima facie to protect him as well, and prohibit me from harming him. It appears paradoxical to invoke the right to life as the basis for a right to take someone else's life (Kaufman 2004; see also Rodin 2002, 50).

In response to objections along the line of Kaufman's above, other thinkers adopt a forfeiture approach to the justification of self-defense. They argue that by attacking a victim, the assailant gives up his or her right to life. For example, Rodin (2002) argues as follows:
The present proposal about the role of fault provides a non-circular explanation of the moral asymmetry between the victim and aggressor. It does so in the following way: I have the right to life. Therefore, if an aggressor makes an attack upon my life, in the absence of any special justifying circumstances, he wrongs me. Because I am innocent and he is at fault for the aggression, his claim against me that I not use necessary and proportionate lethal force against him becomes forfeited (or fails to be entailed by his right to life). Therefore I have a right (liberty) to kill him. Therefore when I attack him to defend myself, I do not violate his right to life, and hence I do not wrong him. Because I do not wrong him, I do not forfeit (or fail to possess) my right to life. .... I want to suggest that this dynamic - this careful intimate moral relationship, is capable of explaining the aggressor's forfeiture of his right to life, the defender's procurement of right to kill, and the moral asymmetry between the two (Rodin 2002, 79).

While Kenyan ethnic minorities might seek to apply Rodin's forfeiture argument to their circumstances, some thinkers question the notion of group self-defense. For example, Calhoun (2001, 49-50) has asked whether self-defense only includes the protection of citizens' lives and property, or also national ideology and a people's "way of life". Even Rodin (2002) is of the view that the forfeiture argument, although correct in cases where two individuals are in conflict, is inapplicable to conflicting political communities because of the involvement of individual soldiers who are themselves not the conflicting states:

The Just War Theory maintains that by culpably attacking the territorial integrity and political independence of another state, the aggressor state forfeits certain of its own rights to territorial integrity and political independence. But the question is this: how can a forfeiture of sovereign rights on the part of a state explain the forfeiture on the part of its soldiers of their right to life? There is a gap in the moral explanation between a right to act against an aggressive state, and the right to act against the persons who are its soldiery - a conceptual lacuna between the two levels of war (Rodin 2002, 164).

For Rodin, this question is amplified by the case of conscripts into the army:

..., those who enter the army through conscription clearly consent to no such alienation of their rights, yet the rights of war presumably extend to the killing of conscripts. If the state claims to own the lives of conscripts this can only be because it has, as it were, 'nationalized' them. But if the
right to life rules out anything at all, then it stands against such a possibility (Rodin 2002, 165).

Nevertheless, Mcmahan (2004) presents a plausible rebuttal to Rodin’s view that individual soldiers ought not to be killed in a war between states:

First imagine a case in which a person uses violence in self-defense; then imagine a case in which two people engage in self-defense against a threat they jointly face. Continue to imagine further cases in which increasing numbers of people act with increasing coordination to defend both themselves and each other against a common threat, or a range of threats they face together. What you are imagining is a spectrum of cases that begins with acts of individual self-defense and, as the threats become more complex and extensive, the threatened individuals more numerous, and their defensive action more integrated, eventually reaches cases involving a scale of violence that is constitutive of war. But if war, at least in some instances, lies on a continuum with individual self- and other-defense, and if acts of individual self- and other-defense can sometimes be morally justified, then war can in principle be morally justified as well (Mcmahan 2004).

Yet even granting Mcmahan’s position that the idea of forfeiture is applicable to soldiers in situations in which one political community is engaged in aggression against another, the forfeiture account of self-defense is still open to objection. As Kaufman (2004) has correctly pointed out, a forfeiture account will, at the very minimum, need to include a response to the following questions:

(1) What rights are forfeited by an aggressor?
(2) Under what conditions does one forfeit a right?
(3) What is the scope and extent of one’s forfeiture?

It seems to the present writer that the *jus ad bellum* principles of just cause, proportionality and last resort jointly give considerable guidance in the quest for the answers to Kaufman’s three questions, because they (the principles) jointly advocate for some kind of computation before an aggrieved party takes the option
of violence. Below we briefly answer these three questions in the light of the three principles.

On the question of what rights are forfeited by an aggressor, we can infer from the three principles that they are the same rights that the aggressor seeks to take away from the victim. Going by these principles, it would be morally unjustifiable to take a life when only a slight convenience is threatened. Thus if an assailant only threatens to soil my suit before a job interview that might enable me to get more pay but which I do not really need for my sustenance, it would hardly seem justifiable for me to kill him or her. If, on the other hand, he or she blocks my only source of water, and if when I protest he points a machinegun at me and is ready to set off a volley of shots, I would probably be justified to take his or her life in order to save mine. Thus if the Kenyan government causes only slight inconvenience to the Kenyan ethnic minorities, they would not be justified to engage in secessionist wars. If, on the other hand, the government consistently subjects them to poverty, disease and ultimate death, their waging of a secessionist war could be morally justified.

The question of the conditions under which the assailant forfeits his or her rights is closely related to the previous one, because the victim’s actions are ultimately performed in order to safeguard his rights by taking away some of the assailant’s rights. This implies that the definitive condition for justifiable self-defensive action is imminence - where it is certain that unless the assailant is thwarted, he or she will deny the victim his or her rights. However, the question of imminence can be challenged in terms of the accuracy of the victim’s assessment of the situation.
Thus if the Ogiek conclude that since in years gone by the government expelled them from a portion of the Mau Forest, and that therefore in future the government is very likely to expel them from their present habitation in the forest, the critic could challenge this forecast, insisting that there is areal possibility that the government will desist from such evictions for the very reason that it is contented with the evictions it has effected already. Nevertheless, it is difficult to see how to avoid giving the victim some latitude on this matter, because by virtue of his or her position as victim, he or she alone must take the decision that he or she deems necessary for his or her self-preservation.

As for the scope and extent of one's forfeiture, it is noteworthy that the victim's aim, from a consequentialist ethical point of view, must always be to exercise maximum restraint, thereby keeping to the necessary minimum the rights that he or she takes away from the aggressor. In this regard, a secessionist Kenyan ethnic minority could argue, quite cogently, that by choosing secession rather than plotting to overthrow the government, it has chosen the lesser evil by allowing for the continued existence of a democratic mode of government in Kenya despite the atrocities that the Kenyan state has unleashed on the community. However, it seems evident that the aggressor's actions will largely determine how much restraint the victim can actually observe as he or she attempts to secure his or her own life.

It is also important to note that the answer to the question of the moral justifiability of secessionist wars by Kenyan ethnic minorities is partly dependent on the answer to the question of our previous chapter, namely, that of whether or
not there could ever be any moral justification for these communities to secede from the Kenyan state. Our answer to that prior question was that if these communities are threatened with outright genocide, they would thereby have been presented with no option except to do all in their power to secure their lives, secession included. Furthermore, while the state might not engage in outright genocide, it could abet it by refraining from using the state security machinery to prevent it. We also noted that the state could consistently jeopardise these communities' traditional means of livelihood without putting in place any concrete measures to ensure that new means of livelihood are secured for them, thereby endangering their prospects for survival in the capitalistic Kenyan economy. We argued that in all these instances, these communities would be morally justified to secede. From the forfeiture perspective of self-defense, Kenyan ethnic minorities could cogently argue that by jeopardising their livelihoods through discriminatory redistribution, and by threatening their very lives through military action to frustrate their secessionist bids, the Kenyan state forfeits the right to its own security.

Quite often, states argue that in crashing secessionist movements, they are engaging in self-defense. However, as Buchanan (1991b) has correctly noted, one cannot validly claim to be exercising one's right of self-defense if one is a culpable aggressor. For example, if a robber breaks into a person's home and attacks him or her, and he or she defends himself or herself against the robber's attack, the robber cannot kill the owner of the home, and then reasonably protest that he (the robber) was only exercising his right of self-defense. Similarly, if the state violates the rights of a group within its jurisdiction and that group seeks to
secede, the state and those who support it cannot justify crushing the secessionists by claiming that they are only exercising the right of self-defense, even if it happens to be true that if secession succeeds, the remainder state will not survive (Buchanan 1991b, 333-334).

It therefore seems to the present writer that by introducing the concept of fault, the forfeiture account of self-defense adequately addresses the weaknesses of both the consequentialist and rights approaches to self-defense. If Kenyan ethnic minorities were to be faced with the danger of losing their lives through the systematic destruction of their means of livelihood or through outright genocide, and if the fault for the danger lay at the doorstep of the majoritarian Kenyan state, it would be morally justifiable for Kenyan ethnic minorities to wage self-defensive secessionist wars. This is due to the fact that extermination of Kenyan ethnic minorities is evidently unethical, as it sacrifices individual and collective rights of such communities to artificial social homogeneity. This becomes clearer when we consider the response of some of the Jews to the Holocaust: many of them complied with the demands of the Nazis instead of putting up resistance. Bruno Bettelheim, one of the spokesmen for the Jewish survivors of the Holocaust, remarked that “Walking to the gas chamber was committing suicide that asked for none of the energy needed in deciding to kill oneself” (cited in Ndirangu-Kihara 1987).

However, others hold that the Jews did not resist because of the incomprehensibility of the Holocaust itself, principles of collective responsibility, lack of arms, and hope of survival (Ndirangu-Kihara 1987, 6-7).
6.5. Conclusion

The purpose of this chapter has been to answer the question as to whether or not there are circumstances in which Kenyan ethnic minorities may be morally justified to wage secessionist wars against the majoritarian Kenyan state. It has set out by examining the three main schools of thought on war, namely, pacifism, realism and just war theory. In this regard, it has contended that only the third school of thought allows the possibility of war while insisting on the need to pay attention to moral considerations before, during and after war. Consequently, the chapter has proceeded to interrogate the six principles of just war theory by which to determine whether or not to go to war (*jus ad bellum*), with a view to ascertaining their applicability to the circumstances of Kenyan ethnic minorities. Finally, the chapter has assessed the most frequently cited justification for war, namely, self-defense, and found the forfeiture version of it to be both internally consistent and relevant to the circumstances of Kenyan ethnic minorities.

Our reflections in this chapter lead to the conclusion that Kenyan ethnic minorities would be morally justified to wage secessionist wars only as a means to self-defense. This is to say that they ought to take this measure as a last resort in line with the principles of *jus ad bellum*. As Macfarlane (1968. 47-48) noted, if constitutional methods are available or if non-violent civil disobedience is possible, then the adoption of physical violence will be difficult to justify, unless it can be shown that the objective is of extreme gravity or necessity, that other methods of struggle are incapable of realizing it in the time required, and that violence is capable of doing so. In view of the need to be guided by the principle of last resort in determining whether or not to execute a secessionist war, the
following chapter provides a rationale for a set of moral principles to serve as a basis for the constitutional protection of Kenyan ethnic minorities within the Kenyan state, thereby hopefully forestalling the kind of discontent that can lead to secessionist bids, and, ultimately, to secessionist wars.
Chapter 7: Towards a Differentiated, Free and Ethnically Accommodative Kenyan Society

7.1. Introduction

Our reflections in the previous six chapters have focused on various aspects of the aspirations of Kenyan ethnic minorities. The first chapter stated the problem under investigation and the scope of the inquiry. The second chapter outlined the variety of aspirations of Kenyan ethnic minorities, ranging from the protection of their rights within a unitary state, self-government within a federal state, and secession. Chapter 3 highlighted the fact that ethnicity has been so politicised in Kenya that any efforts at building a peaceful polity have to address the question of social, political and economic marginalisation along ethnic lines. Chapters 4 to 6 focused on the moral justification for two possible responses of Kenyan ethnic minorities to their socio-political marginalisation, namely, non-violent civil disobedience and secessionist war. From the discussions in the foregoing six chapters, it is evident that there is an urgent need for Kenya’s political theorists to undertake incisive reflection on ways of addressing the inter-ethnic tensions in the country.

As noted in Chapters 5 and 6 above, the realities of contemporary regional and global geo-politics restrict the options of Kenyan ethnic minorities to the struggle for constitutional protection within the Kenyan state. It is for this reason that this
study focuses on the constitutional protection of the rights of Kenyan ethnic minorities within the Kenyan state. Reflection on the fundamental principles of the recently promulgated Kenyan constitution (Republic 2010a) is necessary due to the fact that constitution writing is never a completed process. Indeed, public debate on the content of a country’s constitution is an enduring feature of a democratic society. Such debates often result in advocacy for amendments to the constitution. In addition, citizens can move to court seeking to obtain authoritative interpretations of the constitution, resulting in rulings which become part of the law of the land. Moreover, Kenyans who adopted the current constitution in the August 2010 referendum reserve the right to advocate for its amendment or even replacement (see Republic 2010a, Chapter Sixteen). The reflections in this chapter will therefore hopefully contribute to an informed public discourse on future amendments to the constitution.

Utilising the critical, rational, analytical and speculative techniques of philosophical reflection (see 1.8), this penultimate chapter seeks to provide a rationale for a set of moral principles to serve as a basis for the constitutional protection of Kenyan ethnic minorities. As such, it is located within the discourse on human rights, namely, entitlements that are morally owed to human beings by other human beings (Wiredu 1996, 172). Violations of human rights may come from individuals or from governments: in the former case they are private transgressions; in the latter they constitute political oppression (ibid.). As Preece (2001) has noted, the idea of human rights is predicated upon the notion that every individual human being, by virtue of his or her humanity, should have the freedom to define, pursue and realize his or her conception of the good life. Discourse on
human rights currently acknowledges three categories of entitlements, referred to as "generations" of rights.

First, there are the entitlements that constitute free and equal citizenship and include personal, political, and economic rights, usually jointly referred to as "civil rights". These have been advocated most articulately by the Western liberal tradition, and espoused in numerous political documents such as the constitutions of many countries, including Kenya's independence constitution.

Second, there are economic welfare entitlements, including rights to food, shelter, medical care, and employment. The increasingly dominant view is that such welfare rights are preconditions for promoting free and equal citizenship envisaged by the first generation rights described above (Marshall 1965; Waldron 1993; Sunstein 2001). The United Nation's International Covenant on Economic, Social, and Cultural Rights provides that the state parties to the agreement "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions" (United Nations 1966a, Art.11 (1)).

Third, there are what may be broadly termed "rights of cultural membership". These include language rights for members of cultural minorities and the rights of indigenous peoples to preserve their cultural institutions and practices, and to exercise some measure of political autonomy (Kymlicka 1995). There is some overlap between this category of rights and the first-generation rights above, as is evident with regard to the right to religious liberty, but rights of cultural
membership are broader. The United Nations' *International Covenant on Civil and Political Rights* declares that third-generation rights ought to be protected:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language (United Nations 1966b. Art.27).

More specifically, the present chapter is located within normative democratic theory, which is distinct from descriptive and explanatory democratic theory undertaken by the social sciences, in that it (normative democratic theory) does not carry out an empirical study of those societies that are called democratic. Instead, it aims to provide an account of when and why democracy is morally desirable, as well as moral principles for guiding the design of democratic institutions (Christiano 2006). The ultimate goal of the reflections in this chapter is to answer the last of the four research questions of this study:

To what extent could John Rawls' principles of liberty and difference serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy? (1.2.4).

The chapter sets out with a critical examination of several models of representative democracy, with a view to illustrating their inadequacy for the protection of Kenyan ethnic minorities, and thus the necessity of moral principles to serve as a basis for the constitutional protection of these communities. Consequently, the chapter presents a rationale for three such principles, namely, the principle of equal liberty, the principle of difference in the provision of primary goods in order to promote the welfare of the least advantaged in society, and the principle of the recognition and protection of ethnic identities and
interests. The first two principles are taken from John Rawls *A Theory of Justice* (1971), while the third is developed from the thought of several democratic theorists and scholars of ethnic minority rights.

The reflections in the present chapter are illuminated by John Rawls’ (1971) “veil of ignorance”, which is his way of appealing to those involved in negotiating constitutions to set aside short-term personal interests in pursuit of principles that would guarantee the welfare of the least advantaged in society (see 1.9).

### 7.2. Democratic Representation

#### 7.2.1. Background

Canon (1999) distinguishes three categories of literature on representation, namely, normative, legal and empirical studies. The present section approaches the topic mainly from a normative standpoint, but such a standpoint must take cognisance of certain important empirical facts. At a minimum, democratic theory is concerned with processes by which ordinary citizens exert a relatively high degree of control over leaders through a method of group decision making characterized by a kind of equality among the participants at an essential stage of the collective decision making (Dahl 1956, 3; Christiano 2006). Nevertheless, in contemporary complex societies, it is impossible for each and every individual to have his or her voice heard on matters pertaining to the day-to-day running of the state. Consequently, at the core of contemporary thinking on democracy is the idea of representation. For Pitkin (1967), to “represent” is simply to “make present again.”
On this definition, political representation is the activity of making citizens’ perspectives “present” in the public policy making processes. Pitkin asserts that political representation occurs when political actors speak, advocate, symbolize, and act on behalf of others in the political arena.

However, for Dovi (2006), Pitkin’s definition above is inadequate, because it leaves the concept of political representation underspecified. For Dovi (2006), our common understanding of political representation contains different, and conflicting, conceptions of how political representatives should represent, and so holds representatives to standards that are mutually incompatible. For her, in leaving these dimensions underspecified, Pitkin’s definition fails to capture this paradoxical character of the concept. Dovi asserts that there are three persistent problems associated with political representation, namely, the proper design for representative institutions within democratic polities, ways in which democratic citizens can be marginalized by representative institutions, and the relationship between representation and democracy. The second of the three features is the focus of this section.

Manin (1997) identifies four principles distinctive of representative democratic government:

(1) Those who govern are appointed by election at regular intervals.

(2) The decision-making of those who govern retains a degree of independence from the wishes of the electorate.
(3) Those who are governed may give expression to their opinions and political wishes without these being subject to the control of those who govern.

(4) Public decisions undergo the trial of debate.

While the world has learned about democracy from ancient Athens, that democracy was far from inclusive. Only Athenian men over the age of 20 were eligible for active citizenship. Women, children, immigrants and slaves were excluded from political participation (Held 1996, 23). In the Athenian and other ancient Greek democracies, the concept of representation was non-existent, as all citizens directly participated in the legislative, judicial and executive processes of their city-states. This was possible because intra-state communication was relatively easy, and the impact of particular social and economic arrangements was fairly immediate (Held 1996, 15). However, in the contemporary political communities that include tens of millions of citizens, direct democracy in the pattern of ancient Athens is not practicable (Walzer 1983, 320). This is what necessitated the development of the theory and practice of political representation.

The theory of representative liberal democracy, developed since the European Enlightenment (in the 18th century C.E.), fundamentally shifted the terms of reference of democratic thought: the practical limits that a sizeable citizenry imposes on direct democracy, which had been the focus of so much critical attention, were practically eliminated. Representative democracy could now be celebrated as both accountable and feasible government, potentially stable over great territories and time spans (Held 1996, 118-119). Nevertheless, the consolidation of representative democracy through the inclusion of a wide
Chapter 7: Towards a Differentiated, Free and Ethnically Accommodative Kenyan Society

spectrum of society, particularly women and the poor men, was a late twentieth-century phenomenon in the West and beyond (Held 1996, 119-120). Thus while Barber (1984) famously argued that representative institutions are opposed to strong democracy, most democratic theorists now agree that democratic political institutions are representative ones (Dovi 2006).

While many have idealised direct democracy as practised in ancient Athens, Mencken (1962) contends that it shares most of the weaknesses of representative democracy. He observes that under both forms the sovereign mob must employ agents to execute its will, and in either case the agents may have ideas of their own, based upon interests of their own, and the means at hand to do and get what they will. Moreover, their very position gives them a power of influencing the electors that is far above that of any ordinary citizen. Worse, both forms of democracy encounter the difficulty that the generality of citizens, no matter how assiduously they may be instructed, remain congenitally unable to comprehend many of the problems before them, or to consider all of those they do comprehend in an unbiased and intelligent manner (Menken 1962, 145).

The world’s more than 184 independent states contain over 600 living language groups, and 5000 ethnic groups. In very few countries can the citizens be said to share the same language, or belong to the same ethno-national group. This diversity gives rise to a series of important and potentially divisive questions. Minorities and majorities increasingly clash over such issues as language rights, regional autonomy, political representation, education curriculum, land claims, immigration and naturalization policy, even national symbols, such as the choice
of national anthem or public holidays. Finding morally defensible and politically viable answers to these issues is the greatest challenge facing democracies today (Kymlicka 1995, 1).

The rules and institutions used to translate preferences into electoral outcomes have a profound impact on the nature of representation provided in a political system. This is especially so when it comes to representing divergent racial and ethnic group interests (Canon 1999, 331). Nevertheless, representation in the legislature needs to be situated within the context of other mechanisms for representing the views or interests of a group, such as legal challenges to unfavourable legislation in the courts and interest-group advocacy (Kymlicka 1995, 150). Yet many of the difficulties which affect disadvantaged groups in the electoral process also affect their access to these alternative mechanisms of representation (see 4.2).

In the Western liberal democratic tradition, two main alternative courses of action have been resorted to in seeking to deal with ethnic minority-majority tensions, namely, assimilationism and pluralism. Both of these alternatives have been advocated by some African scholars and politicians. Below we briefly examine the extent of their applicability to the aspirations of Kenyan ethnic minorities.

7.2.2. Assimilationist Approaches to Minority-Majority Tensions

In the assimilationist approach to ethnic minority-majority tensions, the aim is to submerge the distinguishing features of the ethnic minority by the majority culture. Thus an ethnic group might be persuaded to conduct the education of its
young using the language of a majority group, knowing very well that this would sooner or later lead to the death of its own language. The almost complete disappearance of Yaaku (the language of the Mukogodo) through their interaction with the numerically advantaged Maa-speaking communities is a case in point (see 2.6.2). The one-party African states of the 1960s to 1990s, and the no-party system of Yoweri Kaguta Museveni’s Uganda from the mid 1980s to the first few years of this millennium, are both efforts at assimilation. In Africa, assimilationist policies are usually pursued in the name of “nation-building” - the endeavour to forge a single political identity out of a country’s ethnic diversity.

In Chapter 3, we outlined the way in which President Jomo Kenyatta shunted the structures of the one-party system in favour of ethnically based associations in his patron-client autocracy (3.3). We also highlighted the way in which President Daniel arap Moi banned the ethnic associations, and used the single-party structures to consign his opponents to political oblivion (3.4). Thus both Kenyatta and Moi were able to successfully pursue their personalised ambitions for political dominance because of the existence, de facto and/or de jure, of a one-party state. Representation became non-functional in the one-party system, as the only people whose voice was heard were those who had the reins of power. Thus when Kenyatta, from a majority ethnic group was in power, minority ethnic groups felt marginalised. Similarly, when Moi, from a minority ethnic group was at the helm, some from majority ethnic groups viewed his presidency as illegitimate, as they considered him to have no substantive political following.
Due to its tendency to facilitate the growth of autocracy, the single party system of governance has widely been rejected in Africa, and its negative effects on the Kenyan state are well documented (see e.g. Odinga 1967; Kibwana 1988; Atieno-Odhiambo 2002; Muigai 2004). Consequently, it is not necessary to undertake a detailed exposition of the negative effects of the one-party system on Kenya here. Suffice it to note that while the one-party system was touted as an effective measure for unifying the various communities in the nascent Kenyan state, it turned out to be an effective tool for the establishment and maintenance of autocratic regimes.

However, Museveni’s approach to assimilationist governance, the no-party system in Uganda between 1986 and the dawn of the 21st century, is worth scrutinising, with a view to determining the extent to which it could serve as a solution to ethnic minority-majority tensions in Kenya. Museveni’s one-party system is not an entirely novel idea. Identical anti-party calls had already been made in the West by politicians such as USA’s George Washington (Coleman and Rosberg eds. 1966, 663) and France’s Charles De Gaulle (Palombara and Weiner eds. 1966). Furthermore, the Yugoslav philosopher Mihailo Markovic (1978) has advocated for a no-party system. According to Wiredu (1996, 179), “A non-party system is one in which parties are not the basis of power. People can form political associations to propagate their political ideas and help to elect representatives to parliament. But an association having the most elected members will not therefore be the governing group. Every representative will be of the government in his personal, rather than associational, capacity.”
As soon as Yoweri Kaguta Museveni took power in Uganda in 1986, he banned political parties, claiming that they had been used to promote ethnic division and internal armed conflicts (Carbone 2005). Museveni instead adopted a "no-party" or "movement" system, based on the structure of his National Resistance Movement. The No-party system was endorsed by the 1995 Ugandan Constitution, in which Parties were prohibited from organizing party congresses, holding public rallies, and openly campaigning on party tickets, being only permitted to issue statements to the press. In effect, the parties had their activities restricted to their headquarters offices in the capital. Everyone belonged to the "Movement", which was touted as a multi-ideological, noncompetitive, and all-embracing political system of governance (Oloka-Onyango 1998). The National Resistance Movement (NRM) and National Resistance Army (NRA) had been created following elections in December 1980 that were widely believed to have been rigged by Obote's Uganda People's Congress (UPC). Museveni decided to take the fight against the electoral fraud to the bush, where he crafted the ideology of the NRM/A into a 10-point program that emphasized participatory democracy, the elimination of sectarianism, and respect for human rights (Oloka-Onyango 1998).

In support of his no-party system, Museveni asserts that in view of the pre-industrial character of Ugandan and other sub-Saharan African countries, the masses make political choices on the basis of sectarian considerations, chiefly ethnicity and religion (Museveni 1997, 187). For him, "What is crucial for Uganda now is for us to have a system that ensures democratic participation until such time as we get, through economic development, especially industrialization,
the crystallization of socio-economic groups upon which we can then base healthy political parties" (Museveni 1997, 195). On decision-making in a no-party parliament, Museveni asserts that the members vote as individuals, according to their own judgment of the issue. For him (Museveni 1997, 195), the advantage of this system is that the members of parliament divide differently on different issues, so that decisions are arrived at more objectively, and the possibility of permanent, built-in, unhealthy fissures is eliminated. Museveni further contends that the no-party system is distinct from, and superior to, the single party model. This is evident when he faults Uganda’s first president, Milton Obote, for suspending the Ugandan Constitution in 1966 and replacing it with a one-party system of governance (Museveni 1997, 189).

Museveni could cite the partial adoption of his no-party system in Ghana and Rwanda as evidence of its potential to promote unity in various African countries. Individual-merit or no-party political competition was the basis of local level politics in Ghana since 1989 (Crook 1999), and of post-genocide local elections in Rwanda (Carbone 2005).

It cannot be gainsaid that in multi-ethnic societies with intense ethnic consciousness, electoral politics can easily turn into a contest between sectarian parties competing on identity issues. Thus the 1993 elections in Burundi, which were supposed to elect a power-sharing government, instead mobilised population groups along ethnic lines and served as a catalyst for the ethnic genocide that was to follow (Reilly 2003). Wamala (2004) has outlined several shortcomings of the
multi-party system of government in Ganda society in particular, and in Africa in general.

First, the party system destroys consensus by deemphasizing the role of the individual in political action: with the rise of the party system, the party replaces the “people”. As a consequence, party members do not really have loyalty to the people whom they are supposed to represent; rather, their loyalty is to the party that ensured their success in the elections. The same being true of members of opposing parties, no room is left for consensus building.

Second, in order to acquire power or retain it, political parties act on the notorious Machiavellian principle that the end justifies the means, thereby draining political practice of ethical considerations, which had been a key feature of traditional political practice. As the traditional values that are thrown overboard were the guiding mechanism of consensus formation, we are left with materialistic considerations that foster the welfare not of society at large, but of certain suitably aligned individuals and groups.

Third, as only a few members at the top of a party wield power, even the parties that command the majority and therefore form the government are really ruled by a handful of persons. The powerful party bosses, as a matter of fact, personalize power, and whoever wants favors will try to come under their wings. Thus personal rule, after seeming to be eliminated, makes a return to the political arena of the modern state (Wamala 2004, 440-441).
Furthermore, Wiredu (1996) is of the view that the no-party system has evident advantages over the multi-party system:

When representatives are not constrained by considerations regarding the fortunes of power-driven parties they will be more inclined in council to reason more objectively and listen more openmindedly. And in any deliberative body in which sensitivity to the merits of ideas is a driving force, circumstances are unlikely to select any one group for consistent marginalisation in the process of decision-making. Apart from anything else, such marginalisation would be an affront to the fundamental human rights of decisional representation (Wiredu 1996, 180).

In the case of Kenya, the very small ethnic minorities have remained marginalised almost two decades after the restoration of multi-party politics (see 3.5 and 3.6). Nevertheless, the solution to ethnic polarisation in the country is not necessarily the abolition of multi-party politics. An alternative to such a measure could be the legislation of an electoral system in which ethnic consciousness is recognised and managed. Using the Indian experience, Chandra (2005) contends that ethnic parties can sustain a democratic system if they are institutionally encouraged. For Chandra, “the threat to democratic stability, where it exists, comes not from the intrinsic nature of ethnic divisions, but from the institutional context within which ethnic politics takes place. Institutions that artificially restrict ethnic politics to a single dimension destabilize democracy, whereas institutions that foster multiple dimensions of ethnic identity can sustain it” (Chandra 2005, 235).

Chandra (2005) goes on to argue that divided on the basis of language, tribe, caste, region and religion, India meets the classic definition of an ethnically divided society. Parties based on these divisions have often emerged in Indian politics. While they have often engaged in an initial spiral of outbidding, this has typically given way, over a longer stretch of time, to centrist behavior. The roots
of this pattern lie, paradoxically, in the institutional encouragement of ethnic politics by the Indian state. Acting on the inherent multidimensionality of ethnic identities, such encouragement forces initially extremist parties toward the center (Chandra 2005, 236).

Besides, although Museveni would have his readers believe that he was totally committed to the no-party system, he unintentionally reveals a party orientation in his analysis of his electoral victory in 1996:

The Constituent Assembly approved the new constitution in 1995 and it was promulgated on 8 October. The date for the country's first direct presidential elections was set for 9 May 1996. I was opposed by Paul Ssemogerere, a former DP politician who formed an unofficial alliance with the UPC group, to be their combined candidate, although, of course, in theory, no party political campaigning was allowed under the terms of the constitution. Another candidate, Mohammed Mayanja, also stood for president in the election. Although I was campaigning as an individual, I had been leading the movement for 26 years. Therefore, the success of the NRM and my success were intertwined (Museveni 1997, 196; emphasis added).

When Museveni came to power, he leaned towards Marxian socialism, having spent many years in neighbouring Tanzania, where Julius Nyerere's Ujamaa ("African Socialism") flourished. However, on assuming power, he vigorously adopted free market policies. As a result, in the 1990s, his views on economic reform were regarded by Western powers as providing the panacea for economic stagnation in Africa. Consequently, Western financiers were more hesitant to push for the restoration of multi-party politics in Uganda than they were in other African countries such as neighboring Kenya, Malawi, and Zambia (Oloka-Onyango 1998). Museveni's response to Western powers' muted unease with a no-party system was that the form of democracy should be in accordance with local circumstances (Museveni 1997, 195). While that assertion is agreeable to
many African political theorists, the adequacy of Museveni's application of it is debatable for at least two reasons. First, Museveni's no-party system was not substantially different from an autocratic single-party system, as both systems greatly limited political expression. Second, the no-party system did not eliminate inter-ethnic animosities in Uganda, as the cases of violent uprising in the north and west of the country, as well as the discontent among the Baganda demonstrate (see Doom and Vlassenroot 1998; Finnström 2006; Pham et. Al. 2008; Karlström 1996; Prunier 2004).

The kernel of the movement system was the Resistance Councils and Committees (RCS), later renamed “Local Councils”. These nine person assemblies of directly elected individuals (with reserved places for women and young people) were charged with the overall administration of their local areas, the settlement of petty disputes, and the creation of municipal regulations. Local Councils commenced at the village level and extended to the parish, the county, and eventually the district. At the surface of it, through the Councils, political and administrative powers, that had been highly centralized, were dispensed to more local levels of organization. However, the councils suffered from at least two serious limitations. First, only village-level elections were universal - the larger the scale, the more restricted the suffrage. At the highest level elections were by an electoral college that was largely unrepresentative and wholly unaccountable. Second, the councils were only able to influence local politics and developments; issues relating to the economy and social services were decided at the national level by a parliament dominated by NRM stalwarts (Oloka-Onyango 1998).
Furthermore, critics of Museveni’s government charge him with an autocratic approach to politics. They point out that in the 1996 Ugandan elections, Museveni’s rallying cry changed from “Fundamental Change” to “No Change”, a metamorphosis meant to denounce any efforts to replace his regime. What is more, during the 1996 elections, NRM candidates got state backing, while the opposition was harassed by the state (Oloka-Onyango 1998).

Besides, on 29th June 2000, a referendum was held in Uganda, in which citizens were asked to choose between the retention of the no-party system and the reintroduction of multi-party politics. In that plebiscite, the no-party system was resoundingly endorsed (Bratton and Lambright 2001). However, Museveni’s regime freely used state resources to campaign for the no-party side, while proponents of multipartism received nominal support for their campaigns from the state (ibid.). In addition, the two major parties, the Democratic Party and the Uganda People’s Congress boycotted the poll, so that the results were not necessarily a true reflection of the people’s choice. Indeed, only 50% of the eligible voters cast their votes. Moreover, in the lead-up to the March 2001 general elections in Uganda, Human Rights Watch expressed its deep concern over numerous violations of human rights perpetrated by the Museveni regime against other presidential aspirants (Human Rights Watch 2001).

In view of the foregoing observations, the assessment of Bratton and Lambright (2001) of Museveni’s no-party system as political monopoly seems to have been vindicated. Indeed, even at the height of the single-party rule in Kenya, the Kenya African National Union (KANU) exerted pressure on citizens to register as
members of the party. In some instances, benefits such as the opportunity to trade in a market were withheld from those who did not register. Consequently, Ugandan political parties seem to have been justified in their assertion that the Movement system was a one-party system in disguise, and that it took away the citizens’ fundamental freedom of association (Onyango-Obbo 1997).

In February 2003, Museveni surprised both friends and foes when he approved the re-introduction of multiparty politics in Uganda. However, the unease of Museveni’s critics was vindicated, when in 2006 his NRM ran a “no term limits” campaign, resulting in a controversial amendment of the country’s constitution enabling him to stand for presidency for a third term (Carbone 2005). It is noteworthy that the “third term” commenced in Museveni’s twentieth year in power, since he had been president for about ten years (from 1986) before the first elections under his watch. What is more, upon the release of the February 2011 Ugandan election results in which Museveni was declared to have won 68% of the votes, his main challenger, Dr Kizza Besigye, dismissed the results, citing widespread irregularities that included voter bribery, intimidation by the military and stuffing of ballot boxes (Mathangani 2011). While Besigye’s objection might be dismissed by many as the typical African loser’s reaction, the Commonwealth observer group also cited the use of massive resources by the state, deployment of the military and other tactics that influenced the elections in favour of Museveni’s National Resistance Movement (ibid.).

The upshot of the foregoing reflections is that the no-party system in Uganda has proved to possess the inherent weaknesses of the one-party system that decimated
the African continent for more than two decades. As Oloka-Onyango (1998) stated, "The movement system has failed to institutionalize mechanisms of governance distinct from the personality of Museveni. As a result, major doubts about sustainability remain." Furthermore, the no-party system is as much an assimilationist model as the single party mode of governance, and Kenyan ethnic minorities, like most cultural minorities, are likely to be unwilling to be assimilated into the majority culture, as they feel a patriotic or religious duty to preserve their cultural identities (Brown 2000, 153).

7.2.3. Pluralist Systems of Government

In pluralist systems of government, the cultural majorities in a society commit themselves to acknowledging and respecting the unique features of ethnic minorities in it. For example, ethnic minorities might be allowed to adopt their languages as the media of instruction for their young, while the rest of society uses majority languages for this purpose. In other words, such systems of government recognise that people are different, and rather than trying to change this, focus on a functional approach which accommodates the differences (Castelino 1999, 407). A satisfactory pluralistic adjustment implies not only that the dominant group will accept a minority’s distinctive traits without prejudice, but also that the minority will have a more equitable share in the material and nonmaterial wealth of the country. This means that the minority must improve its power position, which may be done by legal, political, and economic means, or by strengthening the unity of the group (Wagley and Harris 1964, 288). Pluralist systems of government include federalism, devolutionism, multi-partism and proportional representation.
One approach to pluralistic governance is the provision for some autonomy for various ethnic groups, sometimes referred to as autonomy regimes, that is, governmental systems or subsystems within a state that are directed or administered by a minority or its members (Steiner and Alston 1996, 991). Mute (2002, 165-166) identifies three major types of autonomy regimes that, in his view, could be relevant to Kenya.

First, there are personal law regimes, where a group is given latitude to run its own affairs by a law distinct to it, usually a religious law, in matters such as marriage, adoption or inheritance. This type of autonomy regime is also known as corporate decentralisation, and usually occurs where territorial autonomy is impossible because of interminglement or undesirability. The accommodation of African customary law and Islamic Kadhi courts in Kenya's legal system are cases in point.

Second, there is autonomy regime by territorial organisation, as occurs through federalism or devolution (the two are distinct, as indicated below). As noted in Chapter 2 (2.3), Kenya's independence constitution had a provision for regional governments, but the Kenyatta regime quickly replaced it with provisions for a unitary state. Autonomy regime by territorial organization is applicable where a defined ethnic group is concentrated in a particular region.

However, the county system in Kenya's new constitution does not fit into the category of autonomy regime by territorial organization as understood in this
context (for the promotion of ethnic aspirations). Indeed, ethnicity is not acknowledged in the relevant chapter (Chapter 11), and there even seems to be an attempt at denying the ethnic identities of the counties. This becomes manifest when we consider that although the Constitution declares that among the objects of county government are “to protect and promote the interests and rights of minorities and marginalised communities” (Republic 2010b Article 174 (e)), it is not clear that the “minorities” envisaged are ethnic. Indeed, the object that precedes the one just cited is “to recognize the right of communities to manage their own affairs and to further their development” (Republic 2010b, 174 (d)). The term “community” is ambiguous, as it could be interpreted to refer either to an ethnic group, or simply to any group of people living in a locality.

Third, there are power sharing regimes, that ensure that one or several ethnic groups benefit from participation in governance by being granted certain designated positions. This may be effected through the legislature, where special seats may be reserved for defined groups. A minority group may also be given powers to override constitutional changes, and may also by law be given stated protections. Furthermore, certain positions in the public service may be reserved for minority groups.

One of the most commonly used pluralist mechanisms for recognizing claims to self-government is federalism, which is traceable to the United States of America (Dikshit 1975, p.ix). In the American constitution, the field of government is divided between a general authority and regional authorities which are not subordinate one to another, but co-ordinate with each other (Wheare 1964, 2;
Eleazu 1977, 18-19). Nevertheless, what is necessary for the federal principle is not merely that the general government, like the regional governments, should operate directly upon the people, but, further, that each government should be limited to its own sphere and, within that sphere, should be independent of the other (Wheare 1964, 14). The underlying principle of federalism is the fact of coming together of units for common purposes without thereby losing their individual being (Schwarz 1965, 194; Eleazu 1977, 16). As a form of human organization, federalism has at least four important dimensions: economic, social, political and spatial (Dikshit 1975, p.x).

A federation differs from a confederation in that in the latter the central government is subordinate to the unit governments in the sense that it functions at the mercy of its regional governments. In a federation, in contrast, neither level of government is at the mercy of the other (Dikshit 1975, 3). Furthermore, a federation differs from a unitary government in that in a unitary polity "states", if any, exist at the mercy of the central government; while in a federation each level of government is, in theory, autonomous within its allocated sphere of competence, and is free from any non-agreed intervention from the other except in an emergency, if the constitution so provides (dikshit 1975, 3-4). Thus what has often been referred to in Kenya as "federalism", where regions are granted some autonomy by the central government, is more accurately referred to as a confederation or "devolved government" (Raco 2003; Soss et. Al. 2008), and is what is provided for in Kenya’s new constitution (see Republic 2010b, Chapter 11).
Where ethnic minorities are territorially concentrated and ethnic loyalties are strong, as is the case in Kenya, the boundaries of federal subunits can be drawn so that ethnic minorities form majorities in specific sub-units. Whereas electoral choice is largely an ethnic affair at a multiethnic competitive level, it is an individual or group affair when conducted in a uni-ethnic environment (Chweya 2002, 23-24). Under these circumstances, federalism can provide extensive self-government for ethnic minorities, guaranteeing their ability to make decisions in certain areas without being outvoted by the larger society (Kymlicka 1995, 27-29; Rothchild 1964, 48). Even in the later imitative federations such as Canada, Australia and India, there was no doubt that the adoption of a federal structure was a conscious and rationally motivated attempt to solve problems of pluralism existing in the respective societies (Eleazu 1977, 28).

As long as federal arrangements strike a fair balance between the various claims, the option of ethnic minorities to secede is constrained not only by feasibility conditions (such as geographical contiguity), but also by the commitments their representatives have accepted through co-operating in the federal institutions. A well-ordered federation may under these conditions provide a point of convergence from which the options of centralized government and separation both appear as illegitimate (Bauböck 2000, 382).

Since the formation of Canada, Britain consistently resorted to the federal formula as she handed over power to the multi-ethnic or multi-racial entities that comprized her former colonial empire. Out of that empire has arisen India, Malaya, (later Malaysia), Australia, Pakistan, Nigeria, Uganda and Kenya, as well
as the ill-fated federation of Rhodesia and Nyasaland and the federation of British
West Indies, both of which had to be abandoned in favour of separate
independence for the units concerned. The high hopes placed on these post-World
War II federations have been dampened by the incessant instability and the
subsequent modification of their structures. The only post-War federation that
seems to have made a success of it was Western Germany (Eleazu 1977, 19). At
the dawn of Kenya’s independence, Okondo (1964, 37) declared that “Federalism
is more likely to create the necessary ground for the healthy growth of personal
freedom than unitarism, and especially so where society is unsophisticated and
power has to be wielded by a small sophisticated minority.”

However, critics of federalism point out that there seems to be no natural stopping
point to the demands for increasing self-government. If limited autonomy is
granted, this may simply fuel the ambitions of nationalist leaders who will be
satisfied with nothing short of their own nation-state (Kymlicka 1995, 182).

Even when a country adopts federalism, it must determine the mode of
representation both at the central and regional levels. The most basic types of
formal political representation are single member district representation,
proportional representation and group representation. In addition, many societies
have opted for multicameral legislative institutions. In some cases, combinations
of the above forms have been tried (Christiano 2006; Kymlicka 1995, 32, 134,
141). In a situation where constituencies are drawn purely on the basis of
population distribution, single member district representations are most favourable
to majorities and most unfavourable to minorities. The plight of the Ilchamus of
Greater Baringo, marginalised by the more numerous Turgen, is a case in point (see 2.6.1b).

As for proportional representation, the very small ethnic minorities such as the Sengwer and Ogiek are not likely to be catered for through it, as it still relies on numbers much larger than theirs. Consequently, several such communities would have to join forces to secure representation in a proportional framework. Yet in view of the highly communal and insular nature of many of these groups, they would only consider themselves as individual communities to be adequately represented if "one of their own" was assigned the role of representative. Multicameral legislative institutions, such as are provided for in the new Kenyan constitution, are also likely to fail to cater for very small ethnic minorities, as the county system and the central legislative structures are based on a majoritarian framework.

Another approach to pluralist governance is the one sometimes referred to as mirror representation. According to it, a legislature is said to be representative of the general public if it reflects the ethnic, gender, or class characteristics of the public (Birch 1964, 16; Pitkin 1967, ch.4). This contrasts with the more familiar idea in democratic theory which holds that members of a group of citizens is represented in the legislature if they participated in the election of one or more members of the assembly, even if the elected members are very different in their personal characteristics (Kymlicka 1995, 138). However, to renounce the possibility of cross-group representation is to deny the possibility of a society in which citizens are committed to addressing each other's concerns (Kymlicka
1995, 141). Furthermore, in view of the great cultural diversity of Kenyan society, such an approach to representation would be difficult to implement. For example, among the so-called Kenyan Indians, there are many ethnic groups, and the same is true of pastoralists and hunter-gatherers (see 2.5.2 and 2.6). It would therefore be difficult to have a legislature which mirrors this great diversity. Moreover, the criteria by which to determine the characteristics to be mirrored - whether ethnicity, gender, class, religion, etc., or a combination of some of these - is itself controversial.

One measure that could be put in place to promote the representation of Kenyan ethnic minorities is affirmative gerrymandering. The classical definition of gerrymandering is the dividing of a geographic area into voting districts so as to give unfair advantage to specific contestants in elections. Gerrymandering is usually considered to be an election malpractice. However, in affirmative gerrymandering, the aim is to guarantee that important groups in the population will not be substantially impaired in their ability to elect representatives of their choice (Grofman 1982, 98). However, such a measure would be impracticable with regard to very small minorities such as the Ilmolo and Mukogodo who number only a few hundreds, because to try to accommodate them in this way would produce an unreasonably large number of constituencies. Further, the larger ethnic groups are likely to block such a measure on the grounds that such small groups would get attention disproportionate to their numbers.

There is increasing interest in the idea that a certain number of seats in the legislature should be reserved for the members of disadvantaged or marginalized
groups (Kymlicka 1995, 32). However, it has often been argued that it is a better strategy to design structures which give rise to a representative parliament naturally rather than mandate the representation of members who may be viewed as "token" parliamentarians who have representation but often do not have genuine influence. Quota seats may also breed resentment in majority populations and increase mistrust between various minority groups (Reilly and Reynolds 1999; Kymlicka 1995, 133).

However, the above argument against special seats for ethnic minorities hinges on a Western liberal framework, whose aim is to create a society in which ethnic consciousness is discouraged in favour of loyalty to the state. Yet as shown in Chapters 2 and 3 of the present study, this model of managing public affairs has proved to be a monumental failure in post-colonial Kenya, where leaders have consistently preached against "tribalism" while promoting the social, economic and political advantage of their own ethnic groups at the expense of the rest. The upshot of this duplicitous practice was the post 2007 elections near cataclysm.

From a Western liberal point of view, one source of unease about group representation is that it tends to freeze some aspects of the agenda that might be better left to the choice of citizens. For instance, Christiano (2006) asks us to consider a population that is divided into linguistic groups for a long time, and to suppose that only some citizens continue to think of linguistic conflict as important. Christiano holds that in such circumstances, a group representation scheme may tend to be biased in an arbitrary way that favors the views or interests of those who do think of linguistic conflict as important. Nevertheless, according
to Iris Young (1989, 261; 1990, 40), there are five forms of oppression: exploitation, marginalization, powerlessness, cultural imperialism, and "random violence and harassment motivated by group hatred or fear". For Young (1990, 187), once we are clear that the principle of group representation refers only to oppressed social groups, then the fear of an unworkable proliferation of group representation should dissipate.

Representative democratic government relies on the conducting of regular elections. Yet as Reilly and Reynolds (1999) correctly observe, there is no single electoral system that is likely to be best for all divided societies. For Reilly and Reynolds, the optimal choice for peacefully managing conflict depends on several identifiable factors specific to the country, including the way and degree to which ethnicity is politicized, the intensity of conflict, and the demographic and geographic distribution of ethnic groups. In addition, the electoral system that is most appropriate for initially ending internal conflict may not be the best one for longer-term conflict management. Moreover, the results of particular electoral mechanisms depend heavily on the political culture of the country, such as the way parties are organized, and the voting patterns of citizens (Kymlicka 1995, 150-151).
7.2.4. Overview: The Inadequacy of Assimilationist and Pluralist Systems of Government in Addressing Kenyan Ethnic Minority Concerns

It is evident from the foregoing reflections that both assimilationist and pluralist systems of government have serious shortcomings as far as addressing the aspirations of ethnic minorities is concerned. Ethnic minorities outrightly reject assimilationist policies, insisting that they are designed to force them to adopt the culture of their majority counterparts. Yet Kenya still exhibits significant assimilationist tendencies. For example, we earlier referred to the Political Parties Act (Republic 2007), which criminalises the formation of ethnically-based political parties, requiring instead that every party have a "national" outlook (see 2.2).

Pluralist approaches to government (such as federalism, devolutionism, the provision for special seats, etc.) are more acceptable to ethnic minorities, as they give such communities latitude to express their cultural identities. Kenya currently exhibits a willingness to accommodate ethnic diversity, as is manifested by the passing of the National Cohesion and Integration Act (Republic 2008), which aims to promote equal access to public services by persons of all ethnic and racial communities. Even more significant are the pluralist elements in the new Kenyan constitution. The Preamble of the new Kenyan constitution states, "We, the people of Kenya— .... PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation: ...".

Furthermore, the new Kenyan constitution emphasises the need for ethnic balance in appointments to public office. For example, Article 197 (2) states that
“Parliament shall enact legislation to—(a) ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and (b) prescribe mechanisms to protect minorities within counties.”

The same approach is evident in the constitution’s stipulations concerning the composition of various institutions of the central government. Nevertheless, as long as a pluralistic model is majoritarian as is the case in Kenya, ethnic minorities are at a disadvantage. Thus the assimilationist tendency in Kenya’s constitution and subsidiary legislation, favoured by ethnic majorities, seems to be dominant over the pluralist element. This might explain why devolution was chosen over federalism in the new constitution.

Moreover, as outlined in Chapter 2 of the present study, the aspirations of Kenyan ethnic minorities vary according to the history and current situation of specific groups (national minorities, pastoralists and hunter-gatherers). As such, a comprehensive catalogue of measures for addressing such aspirations would be difficult to formulate and include in the country’s constitution, which seeks to reflect the aspirations of a variety of interests within the state (see for example Mute 2002). This implies that whatever model of governance and representation is adopted in Kenya is likely to arouse dissent from one or more ethnic minorities. Thus what is more practicable is to identify a set of moral principles to serve as a basis for the constitutional protection of Kenya’s ethnic minorities. It is for this reason that we now turn to a presentation of the rationale for three such principles.
7.3. Rationale for Three Principles for the Constitutional Protection of Kenyan Ethnic Minorities

In the previous section, we argued that even if Kenya adopts federalism, devolutionism, proportional representation, affirmative gerrymandering, or the proviso for special seats in the legislature, some ethnic minorities are likely to be discontented with it, as long as the country retains a majoritarian approach to representation. We went on to contend that in these circumstances, the most effective way of protecting ethnic minority rights is to identify a set of moral principles to serve as a basis for the constitutional protection of such communities. Such a set of principles can be a basis for advocacy and litigation by these communities whenever they feel subjected to unfair treatment by their majority counterparts or by the state. Moral principles, such as Aristotle’s Golden Mean, Immanuel Kant’s categorical Imperative or Jeremy Bentham’s utility express moral values.

A norm is developing in constitution writing of including principles that inform a whole constitution. Thus the Ugandan Constitution begins with “National Objectives and Directive Principles of State Policy” (see Uganda 1995). Similarly, while the 1963 Kenyan constitution did not contain such principles, the third chapters of the various drafts leading to the new constitution - the “Ghai Draft” (2002), the “Bomas Draft” (2004), the “Wako Draft” (2005), and the “Harmonised Draft” (2009) - were all devoted to “National Goals, Values and Principles”. Most importantly, in its second chapter, the Constitution of Kenya 2010 includes “National Values and Principles of Governance” (Article 10). The article begins as follows:
The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions (Republic 2010a, Art. 10 (1)).

Thus if moral principles for the protection of Kenyan ethnic minorities were included and articulated in the above article of the country’s constitution, the concerned communities would be substantially empowered to pursue their interests within the country’s political and legal systems.

In this section, we undertake normative reflection, with a view to presenting a rationale for three principles to serve as a basis for the constitutional protection of Kenyan ethnic minorities:

(1) John Rawls' principle of equal liberty for all, with the only justification for any limitation on an individual's liberty being the guaranteeing of liberty to others.

(2) John Rawls' principle of difference in the distribution of primary goods, with the only justification for any differentiation being the promotion of the welfare of the least advantaged in society.

(3) In contradistinction to John Rawls, we defend the principle of the right of citizens to participate in the democratic process as ethnic groups.

In view of the fact that there has been considerable debate on Rawls' two principles over the past four decades, and that the current constitution by and large has a liberal democratic orientation that concurs with Rawls' two principles (see the Bill of Rights in Chapter 4 of the Constitution), the present section will give greater attention to the third principle.
7.3.1. The Principle of Equal Liberty for All

Following Berlin (1958), philosophers sometimes distinguish between negative and positive liberty. Negative liberty is the absence of obstacles, barriers or constraints. On the other hand, positive liberty is the possibility of acting — or the fact of acting — in such a way as to take control of one's life and realize one's fundamental purposes (Carter 2007). Rawls (1971) focuses on both kinds of liberty, but with a greater emphasis on negative liberty.

Rawls assumes that liberty can always be explained in reference to three considerations: the agents who are free, the restrictions or limitations which they are free from, and what it is that they are free to do or not to do. For him, "The general description of liberty, ..., has the following form: this or that person (or persons) is free (or not free) from this or that constraint (or set of constraints) to do (or not to do) so and so. Associations as well as natural persons may be free or not free, and constraints may range from duties and prohibitions defined by law to the coercive influences rising from public opinion and social pressure" (Rawls 1971, 202). For Rawls, a rather intricate complex of rights and duties characterizes any particular liberty. Not only must it be permissible for individuals to do or not to do something, but government and other persons must have a legal duty not to obstruct (Rawls 1971, 203). For Rawls (1971, 542-545), the basis for the priority of liberty is that as the conditions of civilization improve, the marginal significance for our good of further economic and social advantages diminishes relative to the interests of liberty, which become stronger as the conditions for the exercise of the equal freedoms are more fully realized.
Crucial to Rawls’ argument that the liberty principle must have absolute priority over the difference principle is his conviction that among the primary goods self-respect is central, and that a fundamental characteristic of human beings is their desire to express their nature in a free social union with others. He then argues that “the basis for self-esteem in a just society” is “the publicly affirmed distribution of fundamental rights and liberties” (Rawls 1971, 544). If self-esteem is the most valuable of primary goods, and if it is dependent on an equitable distribution of liberties, then no negotiator in a constitutional convention will risk being in a position that is disadvantaged with respect to liberties, lest he or she be impeded in his or her pursuit of associations and activities through which to express his or her nature and thereby to achieve self-esteem.

Rawls refers to the principle of equal liberty, when applied to the political procedure defined by the constitution, as the principle of (equal) participation. He is of the view that if the state is to exercise a final and coercive authority over a certain territory, and if it is in this way to affect permanently people’s prospects in life, then the constitutional process should preserve the equal representation of the original position to the degree that this is feasible (Rawls 1971, 221-222). According to Rawls, there are three ways to limit the application of the principle of participation. The constitution may define a more or a less extensive freedom of participation; it may allow inequalities in political liberties; and greater or smaller social resources may be devoted to insuring the worth of these freedoms to the representative citizen (Rawls 1971, 228).
For Rawls (1971, 234), equal political liberty enhances the self-esteem and the sense of political competence of the average citizen. This is because the formation of his or her political views in preparation for voting is an activity enjoyable in itself that leads to a larger conception of society and to the development of his or her intellectual and moral faculties, free from considerations of material gain.

Rawls’ insistence on the supremacy of the principle of liberty is consistent with a considerable portion of Western political philosophy. More than two millennia before Rawls, Aristotle, in his *Politics*, had already asserted that the defining characteristics of a democracy are equality and liberty. For Aristotle, there are two criteria of liberty: (1) “ruling and being ruled in turn” and (2) “living as one chooses”. In order to establish the first criterion as an effective principle of government, equality is essential: without ‘numerical equality’, ‘the multitude’ cannot be sovereign. As Held (1996, 20) explains, so long as each citizen has the opportunity of ‘ruling and being ruled in turn’, the risks associated with equality can be minimized and, therefore, both criteria of liberty can be met.

After Aristotle, many other scholars have reflected on the place of liberty in democratic governance. In Chapter 4 of this study (4.3.1), we cited the 16th century work of Étienne de la Boétie, which was a scathing attack on tyranny, focusing on the psychology of the tyrant, and contending that all that the oppressed need to do in order for the tyrant to fall is to cease to co-operate with the tyrant (see la Boétie 2002). We also cited similar views by David Hume (1870, 23). In his introduction to *The Rights of Man* (1792), Thomas Paine graphically described the effects of the illiberal governments of the so-called old world prior
to the American revolution as follows: “Freedom had been hunted round the
globe; reason was considered as rebellion; and the slavery of fear had made men
afraid to think” (Paine 1792).

One of the most memorable defenses of the citizen’s liberty is John S. Mill’s *On
Liberty*, in which he argues that mankind’s knowledge of the truth suffers
whenever any opinion is suppressed: if the suppressed opinion is true, mankind
robs itself of the opportunity to know it; if the suppressed opinion contains a half-
truth, mankind holds the other half of the truth as though it were the whole truth;
if the suppressed opinion is false, mankind robs itself of the opportunity to refine
its understanding of the truth through the process of showing the holder of the
false opinion his or her error (Mill 1999).

Rawls’ principle of equal liberty for all is crucial to the creation and maintenance
of a society in which citizens are protected from totalitarianism. Most people
nowadays take it for granted that individual liberty is an essential component of
democracy. Yet concurrently with the liberal type of democracy there emerged
from the same premises in the eighteenth century a trend towards what Talmon
(1960) calls “the totalitarian type of democracy”. Talmon goes on to explain that
totalitarianism recognizes ultimately only one plane of existence, treating all
human thought and action as having social significance, and therefore as falling
within the orbit of political action (Talmon 1960, I). Totalitarianism is a system of
government in which all social, political, economic, intellectual, cultural, and
spiritual activities are subordinated to the purposes of the rulers of a state. Among
the decisive, technologically conditioned features of totalitarian dictatorships are a
monopoly of mass communications, a terroristic secret-police apparatus, a monopoly of all effective weapons of destruction, and a centrally controlled economy (Talmon 1960; Friedrich ed. 1954).

Among the countries whose governments have been characterized as totalitarian were Germany under the National Socialism of Adolf Hitler, the USSR, particularly under Joseph Stalin, and the People's Republic of China under the Communist rule of Mao Zedong (Mao Tse-tung). In Africa, the many one-party states, with intelligence agencies charged with the task of crushing all opposition, were akin to the European totalitarian states listed above. Within a totalitarian state, the issue of ethnic minority rights has no place, since the ultimate justification for ethnic minority rights is the right of the individual to identify with whatever group he or she chooses.

It cannot be gainsaid that representative and majoritarian government as envisaged by Rawls, especially when it is open and pluralistic, with no gender, racial, ethnic, religious or other forms of discrimination, is much superior to authoritarian rule. Furthermore, this system of governance can enhance the liberty of the individual by allowing open criticism of public policy and officials, free speech and free media, free parliamentary elections open to the participation of all interested ideological groups at short regular intervals to replace corrupt, incompetent or insubordinate representatives. Nevertheless, even this does not satisfy the requirements for a society free from domination and social inequality, as the experience of Western "democracies" has sadly shown (Mojola 1996, 338). Indeed, in many Western liberal democracies, various segments of society
(women, persons of non-European descent, etc.) remained largely unrepresented in the structures of governance until after the mid 20th century.

Furthermore, while Rawls advocates equal liberty for all, it is evident that such liberty must remain an ideal. Indeed, Rawls himself points out that it is important to recognize that the basic liberties must be assessed as one system because when they are left unrestricted, they collide with one another. Rawls gives the example of freedom of speech, which must be regulated by rules of order in a constitutional convention or in a legislature if meaningful communication between delegates or citizens is to take place (Rawls 1971, 203). Besides, an assertion of the supremacy of liberty is likely to seem excessively idealistic in a society such as Kenya’s where rampant poverty demands immediate attention, and where political power is seen as a means to improving the material well-being of those who acquire it.

Moreover, contrary to Rawls’ emphasis on equal liberty for all, Walzer (1983, 19-20) is of the view that the equality worth pursuing is not comprehensive and perfect equality, but rather what he calls “complex equality”. As Walzer explains, the regime of complex equality is the opposite of tyranny. It establishes a set of relationships such that domination is impossible. In formal terms, complex equality means that no citizen’s standing in one sphere or with regard to one social good can be undercut by his or her standing in some other sphere, with regard to some other good. Thus, citizen X may be chosen over citizen Y for political office, and then the two of them will be unequal in the sphere of politics; but they will not be unequal generally so long as X’s office gives him or her no advantages over Y in any other sphere—superior medical care, access to better schools for his
or her children, entrepreneurial opportunities, and so on. So long as office is not a dominant good, office holders will stand, or at least can stand, in a relation of equality to the men and women they govern.

Nevertheless, in Kenya as in many other countries, the kind of separation of spheres envisaged by Walzer is non-existent. Instead, political power brings with it economic and social advantage. Even Walzer admits that there is need to promote complex equality in the sphere of politics. According to Walzer (1983, 310), in the sphere of politics, complex equality means that every citizen is a potential participant, that is, a potential politician. Yet even with the promulgation of the new Kenyan constitution, the so-called ethnic super-minorities such as the Mukogodo, Ogiek and Sengwer are unlikely to have an upper hand in the country’s political affairs in the foreseeable future. As such, the guiding principles of the constitution ought to affirm the rights of such communities to be protected against the dominance of their majority counterparts. At the same time, the said principles ought to affirm the need for reasonable limits on each citizen or group of citizens, whether they belong to ethnic minorities or majorities, with a view to protecting the equal liberty of all other citizens.

In addition, while Rawls assumes that human beings yearn for self-respect above all else, other theorists view liberty as being inextricably bound up with human needs. For example, according to Oruka (1991, 55), we can only speak of liberty with regard to an individual in a society where the individual has, in equality with others in the said society, ability and opportunity to satisfy his or her primary and secondary needs; or else that the individual (even though lacking ability and
opportunity) has all his or her primary and secondary needs met in the said society. The assumption here is that the individual is a member of a society that exercises authority over him or her, but also has some obligations towards him or her (Oruka 1991, 56).

Furthermore, for Oruka the concept of liberty is inextricably bound up with the removing of obstacles to the meeting of human needs. In this regard he asserts that "one cannot survive if one is restricted in all ways" (Oruka 1991, 86). He goes on to identify six kinds of liberties, namely, economic, political, intellectual, cultural, religious and sexual - which jointly constitute the complex freedoms necessary in any social order whatever else may be necessary, and all based on human needs, and with economic liberty being basic to all the rest (Oruka 1991, 67-84). What is more, Oruka avers that in so far as all human beings have qualitatively similar needs, the formal meaning of liberty in terms of needs can be established as an objective truth (Oruka 1991, 87).

Similarly, Wiredu (1996, 34-41) contends that ethical norms have a biologic basis, as they contribute to the survival of human groups, and of humankind in general. Wiredu further contends that there are connections among our logical, epistemic and ethical norms with our situation as organisms in necessary interaction with the environment and with our kind, illustrating the fact that we are a part of "nature".

Oruka's and Wiredu's view that human rights are inextricably bound up with the meeting of human needs is in line with a long Western tradition, which Abraham Maslow (1943) expressed in terms of a hierarchy of needs. Thus Heywood (2004,
296) writes that "The attraction of a needs-based theory of social justice is that it addresses the most fundamental requirements of the human condition. Such a theory accepts as a moral imperative that all people are entitled to the satisfaction of basic needs because, quite simply, worthwhile human existence would otherwise be impossible."

The adequacy of a needs-based definition of liberty seems to be supportable by a consideration of the fact that it is our collective existence that gives rise to the necessity for the limitation of the individual's actions. For instance, an individual's freedom to sing at the top of his or her voice at midnight is limited by his or her neighbours' need for undisturbed sleep. In the same way, the liberty of Kenyan ethnic majorities ought to be limited by the need of their minority counterparts for recognition, preservation of cultural identities, and representation in all decision-making bodies in the country's governance structure. Thus while the liberty principle as espoused by Rawls is necessary for the promotion of an open society in contemporary Kenya, it is inadequate for the socio-political conditions in the country, where the bulk of the population lives in abject poverty, and is therefore unable to appreciate the luxury of Rawls' formal liberty.

7.3.2. The Principle of Difference in the Distribution of Primary Goods

In his defense of the difference principle, Rawls insists that it asks less of our judgments of welfare than does utilitarianism: we never have to calculate a sum of advantages involving a cardinal measure. While qualitative interpersonal
Comparisons are made in finding the bottom position, for the rest the ordinal judgments of one representative person suffice (Rawls 1971, 92). The difference principle also avoids difficulties by introducing a simplification for the basis of interpersonal comparisons. These comparisons are made in terms of expectations of primary social goods, that is, things which it is supposed a rational person wants whatever else he or she wants. With more of these goods people can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be. For Rawls (1971, 92), the primary social goods, given in broad categories, are rights and liberties, opportunities and powers, income, wealth, and a sense of one's own worth. Commenting on the Difference Principle, Lamont and Favor (2007) write that "The main moral motivation for the Difference Principle is similar to that for strict equality: equal respect for persons. Indeed the Difference Principle materially collapses to a form of strict equality under empirical conditions where differences in income have no effect on the work incentive of people."

Gorovitz (1976) has stated:

While Rawls is not an egalitarian in the sense that he wants the available economic and social advantages distributed equally no matter what, he is surely an egalitarian in his respect for the value and personal autonomy of each individual. Moreover, he is clearly a redistributionist in that he takes the proper function of government to include not merely the maintenance of a social order, but the achievement of distributive justice by placing the highest social value on the needs of the neediest (Gorovitz 1976, 186).

However, a critic could challenge Rawls' assumption that everyone would desire the same set of primary goods. As Gorovitz (1976, 288) observes, "...the primacy of the primary goods can be called into question. Might not an ascetic anticipate that an equitable distribution of material goods and power would impose on him
more than suits his own life plan? And is it not necessary for the negotiators to contemplate the possibility that when the veil lifts they will discover themselves to be such ascetics, to whom serenity, a sense of oneness with nature, and freedom from entrapment in the affairs of the world constitute the goods of life?"

Furthermore, Oruka (1997, 115 ff.) plausibly argues that it is difficult to formulate a universal theory of social justice, which, to be relevant, needs to take into account the level of economic advancement, historical traditions and experience and ideological realities of the societies for which it is meant. It is precisely these factors that would dictate what the people regard or ought to treat as primary goods and fundamental rights in any society which they must want to have whatever else they may want.

Besides, it is evident that Rawls' designed his theory to provide a rationale for the welfare capitalism of his time. or, as James (2005) puts it, Rawls was "constructing justice for existing practice". Welfare capitalism is distinguished from Laissez Faire capitalism by the fact that in the latter, the market forces are allowed to wholly dictate the citizens' economic status. In the former, however, the government intervenes to ensure that the least economically advantaged citizens enjoy an acceptable minimum level of economic well-being (Oruka 1997, 117-118). As Lamont and Favor (2007) have noted, "The most common way of producing more wealth is to have a system where those who are more productive earn greater incomes. This partly inspired the formulation of the Difference Principle."
Similarly, Wilkins (1997, 360) notes that "The basic rights and liberties which comprise Rawls' first principle and the provision which his second principle makes for equality of opportunity reflect our [United States] (ongoing) constitutional history ..." Along the same lines, James (2005) contends that "..., his [Rawls'] focus on individuals in A Theory of Justice reflects his judgment that major domestic institutions assign offices and roles chiefly to individual persons."

What is more, Oruka (1997, 120) asserts that in Rawls' theory, the egalitarian principles or expressions are only formal, not substantive, requirements. By this he means that the equality enunciated does not directly and positively govern the day-to-day interaction of individuals within a polity, because the differences allowed by a capitalist economy such as the one Rawls envisages override any such influence.

In addition, it is doubtful whether or not Rawls' difference principle is universally applicable. For Wright (1977, 74), a more egalitarian substitute for the difference principle will be more appropriate as a criterion of justice for societies above a certain level of economic advancement and less so for societies below that level. Wright goes on to contend that "Rawls' assumption that permissible inequalities in the primary social goods do not tend to undermine a system of equal liberties is a key to how the theory can morally sanction significant inequalities of primary social goods, and it is a conceptually arbitrary and empirically unsanctioned disappointment" (Wright 1977, 76-77).

Moreover, as suggested at the end of the previous subsection (7.3.1), it is doubtful whether or not the difference principle ought to always be subordinate to the
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principle of equal liberty. In societies such as contemporary Kenya in which there is an economic elite and a mass of poor people, economic rights ought to take precedence over political ones. On this Oruka (1997) has written:

Generally, Rawls considers political liberty (the right to vote and stand for public office, freedom of speech and assembly) and intellectual liberty (freedom of thought and conscience) to be more fundamental than economic equality and social welfare. But in a society where the majority are illiterate and there is widespread poverty, political and intellectual liberties are luxuries. The people either do not understand them, or they have no motivation to exercise them. Poverty-stricken people want bread, not freedom of thought and speech. Neither do they care about the right to vote and stand for public office, unless this is clearly explained to them in terms of their social frustration. Otherwise, a potential voter would easily sell his voting card for a loaf of bread or a small sum of money. What the majority of semi-literate and poverty-stricken people want is not liberty as “equal freedom”. What they want is “the worth of liberty” .... Such people long for economic equality, not for the materially valueless political democracy (Oruka 1997, 123).

Oruka concludes that in order for Rawls’ theory to be suitable for a typical Third World country, it ought to be revised so as to have the first principle as the second and vice-versa (Oruka 1997, 123). The purpose of this reorganisation is to salvage the egalitarian element in Rawls’ theory and to make it serve the aims of ensuring a communitarian social order (Oruka 1997, 124). The present study concurs with Oruka’s prescription, on the basis that the liberal democratic order which Kenya set out to build with the attainment of independence has failed due to the socio-political realities in the country that are markedly different from those in the countries in which liberal democracy developed (see 7.3.3A below).

Kenyan ethnic minorities are likely to argue that Rawls’ difference principle ought to serve as a guide to the constitutional protection of their rights. However, on the basis of Rawls’ insistence on the supremacy of the principle of equal liberty, Western liberals would object that a differentiation of rights along ethnic lines
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raises concerns about equality as well as liberty. First, individuals belonging to different groups might be treated in a way that violates standards of equal citizenship; and, second, such rights may involve pressure either to deny individuals their inherited membership or to force them to stay within a group they want to leave (Bauböck 1999).

Nevertheless, in order to get marginalized Kenyan ethnic minorities out of abject poverty and thereby enable them to enjoy the various liberties traditionally advocated by liberal democratic thought, it is necessary to uphold the priority of Rawls' difference principle above the liberty principle. Yet even after re-ordering these two principles, Kenyan ethnic minorities would still be grossly disadvantaged in a polity that operates within a liberal democratic framework, with its emphasis on the rights of the individual. It is therefore necessary to uphold a third principle, namely, the recognition and protection of ethnic identities and interests. To a presentation of the rationale for this third principle we now turn.

7.3.3. The Principle of the Recognition and Protection of Ethnic Identities and Interests

Rawls (1971, 179) is confident that his two principles of equal liberty and difference are sufficient for the creation of a just society, as together they promote a sense of self-respect in all citizens. However, in line with traditional Western liberal democracy, he assumes that the political actors in a democracy are individuals, no more and no less. His focus is on the freedom of citizens who find
themselves, as individuals, at a disadvantage in society. Thus Rawls does not see the need to cater for a minority view that is specific to a particular cultural group.

Yet as pointed out early in this work (1.2), studies in the social sciences attest to the fact that the individual’s point of view is significantly influenced by his or her social environment, whose major feature is often ethnicity (Jenkins 1997; Kellas 1998). As such, a human rights framework that disregards the right of an individual to associate with his or her cultural group is evidently defective. As Narang (2002, 2698) correctly noted, both individual and collective human rights derive from the fundamental nature of humankind. On the one hand, individual human rights represent the principle of biological unity, the oneness of all human beings as members of humankind. On the other hand, collective human rights represent the principle of cultural diversity, that is, the distinctiveness of various ethno-cultures developed by different ethnic groups among humankind.

Furthermore, group identity is an essential component of the sense of self-respect. By identity we refer to both a person's own and other people's understanding of the fundamental defining characteristics of the person as a human being. A crucial aspect of an individual's identity formation is the communication from other people about how they perceive him or her. Consequently, as Taylor (1994, 25) has stated, a person or group of people can suffer real damage if the people around them mirror back to them a demeaning picture of themselves, imprisoning them in a false, distorted and reduced mode of being.
Moreover, Rawls' perspective assumes, for the most part, an almost ethnically homogenous society, contrary to the ethnically plural nature of Kenyan society. Despite globalisation, ethnocentrism continues to be a salient feature of society in many parts of the world, Kenya included. Ethnocentrism is the tendency to see the world from our cultural group's point of view. From this vantage point, our customs and values become the standard by which the rest of the world is judged. Our cultural ways seem natural; those of other groups fall short (Johnson 2001, 216-217). It is imprudent to ignore the fact of ethnocentrism, because its impact on social tranquility is considerable. Even Rawls, despite his traditional Western liberal democratic orientation, observed that the hardships arising from political and civic inequality, and from cultural and ethnic discrimination, cannot be easily accepted (Rawls 1971, 545).

Below we offer a rationale for the inclusion of the principle of the recognition and protection of ethnic identities and interests into Kenya's constitution. Towards this end, we first examine the inadequacy of Western liberal democracy for the African context. Next, we advance several arguments in support of the inclusion of the principle of the recognition and protection of ethnic identities and interests into Kenya's constitution. This is followed by a brief reflection on the possibility of developing a democratic model that draws from Africa's pre-colonial heritage, with a view to accommodating the aspirations of Kenyan ethnic minorities.

A. Western Liberal Democracy: an Inadequate Model for Kenya

Since most African colonies began to gain independence in the 1960s, violent ethnic mobilization has become endemic in the continent (Wiredu 1996, 189;
Mbaku 2000a). According to Walzer (1983, 11), social conflict is all about distribution of resources. In the case of Kenya as in many other African countries, the conflict between ethnic minorities and majorities is aggravated by the fact that politics is seen as the means to the acquisition of resources such as land, business and job opportunities. The tension arises from the fact that some ethnic groups have found themselves at the periphery of the country’s political life for several decades, some of them (pastoralists and hunter-gatherers) from the inception of colonialism to date (see 2.6 above).

Yet the common wisdom is that ethnic consciousness is one of the greatest obstacles to democratisation in African countries. Thus when banning ethnic-based associations (such as Gikuyu Embu Meru Association and Luo Union), former Kenyan President Daniel arap Moi declared that “These tribal unions distract our attention from national issues. We are, first and foremost, Kenyans. Tribalism is a cancer to the society: so let us do without these tribal organisations” (Moi 1986, 173). Moi is also remembered for repeatedly encouraging his listeners to refrain from revealing their ethnic identities when asked to do so, and instead to simply reply that they were Kenyans. Yet as illustrated in Chapter 3 of this study (3.4), Moi pursued overtly ethnicised politics. Partly as a result of Moi’s anti-ethnic moralising, Kenyan politicians frequently derogatorily refer to the various cultural groups in the country as “tribes”, or more courteously as “ethnic groups”. Yet many of these groups have long histories, encompassing rich political cultures. A country which contains more than one cultural group is not a nation-state but a multination state, and the smaller cultures in it form “national minorities” (Kymlicka 1995, 11).
During the colonial era in Africa, the indigenous African liberation movements stressed the unity of peoples struggling against imperialism, going beyond the limited horizons of distinctions such as ethnicity and religion. This was partly a reaction to the divide-and-rule policies of the colonizers. Consequently, as Amin (1997) notes, the multiethnic "new nation" in sub-Saharan Africa is largely mythical in nature, giving the false impression that the Senegalese, Nigerian or Congolese nationality eliminated the Wolof, Jula, Igbo, Yoruba, Hausa, or Baluba ethnic groups.

Many African political theorists and activists have analysed their countries' predicaments from a liberal democratic perspective, which precludes considerations of ethnicity. For example, In the 1980s, Kenyan advocates of political reform appealed to the principles of liberal democracy in their agitation for the re-introduction of multi-party politics (Badejo 2006, 156-176; see also Kibwana 1988, 1990). What is more, after the re-introduction of multi-party politics in Kenya at the end of 1991, a number of Kenyan writers advocated for the dismantling of the one-party structures that remained intact in order to achieve a Western-style liberal democracy (see Ngunyi 1996; Kibwana *et al.* eds. 1996; Kibwana ed. 1998; Mutua 2001; Wanjala *et al.* eds. 2002; Mute and Wanjala eds. 2002; Mute *et al.* eds. 2002; Oyugi *et al.* eds. 2003; Kindiki and Ambani eds. 2005; Wanyande *et al.* eds. 2007). Furthermore, in pursuit of a Western liberal model of democratisation, the Kenyan government has outlawed the formation of political parties along ethnic, religious or regional lines. The Political Parties Act (Republic 2007) and the new constitution (Republic 2010) both stipulate that
parties must have a "national character" (see Republic 2010, Art.91 Clause 1a).

The Constitution actually states that a political party “shall not be founded on a
religious, linguistic, racial, ethnic, gender or regional basis ...” (Republic 2010, Art.91 Clause 2a).

Similarly, in his defense of a no-party system of government, Yoweri Kaguta Museveni professes a liberal vision of de-ethnicised African states as follows:

A leader should show the people that those who emphasise ethnicity are messengers of perpetual backwardness. This process of undermining a sectarian mentality of “my tribe, my religion” is linked with the process of modernization and overcoming underdevelopment. When subsistence farming is undermined and the exchange of commodities is introduced, there will be more efficiency and, in time, savings, which will in turn result in investible capital. Eventually, the society will be transformed and modernized. The moment that process takes place, one's tribe or religion cease to be of much consequence (Museveni 1997, 189).

Nevertheless, as we pointed out in the previous section (7.2.2), Museveni's actions have suggested that there is no real difference between a single-party and a no-party system of government.

The commitment of many African scholars and politicians to the de-ethnicisation of the African masses is based on the Western liberal democratic tradition, with its emphasis on individual rights to the exclusion of ethnic group entitlements (see for examples Hoor 1954; De Smith 1964; Nozick 1974; Walzer 1983; Beran 1984; Fukuyama 1992; Held 1996; Heywood 2004). Indeed, traditional Western liberal democratic thought posits human rights as inherent and as belonging to individuals, not social groups (Mute 2002, 154-155). In the words of Jurgen Habermas (1995, 849-850), “Liberalism is supposed to advocate a state which is blind to skin color and other differences. It grants everybody equal rights for the
free pursuit of her own life project. It grants equal chances to everybody for the development of personal identities, independently of the kind of persons they are and their relation to collective identities.”

In 1859, John Stuart Mill classically stated the centrality of the autonomy of the individual in Western liberal democratic thought in his *On Liberty* (see Mill 1999). In that essay, Mill contended that under no condition should the majority assert its will on the individual in pursuit of the individual’s own good. For Mill, the individual must be protected against the tyranny of the majority in the same way as he or she ought to be protected against political despotism. In that work Mill did not acknowledge the existence of minority ethnic groups suffering a host of injustices in societies claiming themselves to be democratic. We earlier pointed out (5.3.6) that in his *Considerations on Representative Government* (1890), Mill advocated for what could be interpreted as mono-ethnic liberal democratic states. Nevertheless, he did not, and could not specifically address the kind of circumstances in which many multi-ethnic post-colonial African states find themselves.

The traditional Western liberal democratic aversion for the recognition of ethnic identities is perhaps most strikingly enacted in France, where mention of ethnic categories encounters deep suspicion, and where it is widely - though by no means universally - held that the ideal of citizenship prohibits, on normative grounds, the use of ethnic categories in social-science inquiry, even for the most trivial empirical purposes (Crowley 2001, 100). Several Western liberal writers have also
argued that ethnicity is a mere creation of those who claim it (see e.g. Barth 1969; Anderson 1983).

Thus most contemporary Western liberals reject the claim that group-specific rights are needed to accommodate enduring cultural differences rather than to remedy historical discrimination. Even where they assent to affirmative action, they see it as a means to promoting the integration of society (Reilly and Reynolds 1999). As Rawls (1971, 542) put it, “The denial of equal liberty can be accepted only if it is necessary to enhance the quality of civilization so that in due course the equal freedoms can be enjoyed by all.” Consequently, liberal theories of group rights have concentrated on finding ways to balance the autonomy of the individual and the identity of the group (see for example Hunt and Walker 1974, 438; Kymlicka 1995). The vision of a liberal democratic polity is espoused by Wagley and Harris (1964, 293-294), who aver that in dealing with minority-majority tensions in the process of nurturing a democracy, assimilation is preferable to pluralism, because the latter keeps alive the prospect of conflict and domination of one group by another.

The gist of the Western prescription for new African states is that they minimize the multiplicity of ethnic identities. For example, Lynch (2006, 54) laments the fact that different Kenyan communities such as the Sengwer, Endorois, Tharaka, Suba and Giriama have been asserting their ethnic identities. Lynch seems to ignore the fact that many of these ethnic identities pre-date colonial times (see Chapter 2 above). In support of an ethnically-blind society, Western liberals cite
several undesirable effects of ethnocentrism. For example, Johnson (2001, 217) asserts that high levels of ethnocentrism can lead to the following negative consequences:

- Inaccurate attributions about the behavior of strangers (we interpret their behavior from our point of view, not theirs)
- Expressions of disparagement or animosity (ethnic slurs, belittling nicknames)
- Reduced contact with outsiders
- Indifference and insensitivity to the perspectives of strangers
- Pressure on other groups to conform to our cultural standards
- Justification for violence, including all out war, as a means of expressing cultural dominance.

However, those African scholars who continue to avidly espouse Western liberal democracy will do well to take note of the fact that even in the West liberal democracy has been under siege for more than a century now. Indeed, towards the mid 19th century, Karl Marx contended that while liberalism was a great improvement on the systems of prejudice and discrimination which existed in the Germany of his day, it overlooked the possibility that real freedom is to be found in human community rather than in isolation. Thus he was of the view that the achievement of the rights of the individual must be transcended on the route to genuine human emancipation (see Marx 1844).

In addition, the concept of "social democracy" gained currency in Western Europe during the latter half of the 19th century as a critique of liberal democracy. It was
argued that liberal democracy grants direct producers only formal democracy and not the substance of democracy, namely, social equity (Mafeje 2002). The Russian Revolution of 1917 and the founding of the Communist International in 1919 precipitated an irrevocable split between the revolutionary and evolutionary wings of the social democratic movement, with the former emerging as communist parties and the latter as social democratic parties (Sheehan 1993; Carlsson and Lindgren 2007, 48-49). Nevertheless, albeit for different reasons, both communists and social democrats consider liberal democracy to be an inadequate system of government.

Besides, in the last few decades, a sizeable number of Western political theorists have recognised that liberal democracy is in a crisis that is not confined to the politico-economic sphere, but which has also permeated the sociocultural sphere (Pantham 1983, 172). Thus towards the end of the 20th century, some Western political theorists, dissatisfied with the highly individualistic orientation of liberalism, espoused communitarianism instead - a view which criticises the image presented by liberalism of humans as atomistic individuals. Communitarians stress the importance of collective interests. For them, there is no such thing as an unencumbered self; the self is always constituted through the community (Heywood 2004, 33). In other words, communitarians point out that values and beliefs are formed in public space, in which debate takes place. In this space, both linguistic and non-linguistic traditions are communicated to children and form the backdrop against which they formulate and understand beliefs. Communitarianism draws attention not merely to the process of socialization, but also to the conceptual impossibility of separating an individual's experiences and
beliefs from the social context that assigns them meaning (Heywood 2004, 35; see also Macedo 1990; Etzioni 1993, 1995a, 1995b; Taylor 1994; Gutman 1994; Mulhall and Swift 1996; Mason 2000; Masolo 2004; Bell 2009).

Additionally, some Western liberals, while declining to embrace communitarianism, have recently sought to accommodate group rights in their theories. For example, the Canadian political philosopher, Will Kymlicka, has sought to develop Western liberal democratic theory to account for contemporary cosmopolitan societies. While liberalism has often been criticized for being excessively individualistic, Kymlicka argues that "liberalism also contains a broader account of the relationship between the individual and society - and, in particular, of the individual's membership in a community and a culture" (Kymlicka 1989, 1). It is this argument that Kymlicka pursues in Multicultural Citizenship (1995), where he argues that group rights are part of liberal thought. For him, group rights can be viewed as admissible within liberalism, and even necessary for freedom and equality. For Kymlicka (1995, 144), there are two contextual arguments that can justify limited forms of group representation under certain circumstances, namely, overcoming systemic disadvantage and securing self-government.

What is more, throughout the Western democracies, there is increasing concern that the political process is unrepresentative and non-participatory, in the sense that it fails to reflect the diversity of the population. Legislatures in most of these countries are dominated by middle-class, able-bodied, "white" men. A more representative process would include members of ethnic and racial minorities,
women, the poor, persons with disabilities, among others (Kymlicka 1995, 32).

Kymlicka (1995) faults the individualistic approach to human rights within Western liberal democracy as follows:

The problem is not that traditional human rights doctrines give us the wrong answers to these questions [on the specific issues pertaining to minorities]. It is rather that they often give no answer at all. The right to free speech does not tell us what an appropriate language policy is; the right to vote does not tell us how political boundaries should be drawn, or how powers should be distributed between levels of government; the right to mobility does not tell us what an appropriate immigration and naturalization policy is. These questions have been left to the usual process of majoritarian decision-making within each state. The result, ..., has been to render cultural minorities vulnerable to significant injustice at the hands of the majority, and to exacerbate ethnocultural conflict (Kymlicka 1995, 5).

Similarly, Bauböck (1999) contends that there are at least two reasons why prima facie the liberal hostility towards group rights is hard to understand. First, rights of both kinds exist in every liberal democracy and not merely for cultural groups: voting rights are group-differentiated by age; social welfare is differentiated for the able-bodied and disabled citizens; wage negotiations involve collective bargaining rights for the members of unions; local and provincial self-government establishes collective rights for the inhabitants of municipalities and territorial units of federal states. Second, there is neither a clear line between individual and collective rights, nor is it true that rights are more disputed the closer they are to the purely collective pole.

Most importantly, African political theorists need to bear in mind that the liberal democratic model, as espoused by influential thinkers such as John Lock, Jeremy Bentham, John Stuart Mill and John Rawls, was designed for Western modern industrial societies (Held 1996, 97). Indeed, Liberal democracy works
considerably well in the West arguably because of its symbiotic relationship with other factors in the society such as capitalism, industrial technology, nation state and professional knowledge - factors that either do not all exist in Africa, or do not do so to any appreciable degree (Chweya 2002, 27). Yet Western scholars confronted with non-Western societies such as the ones in contemporary Africa, have by a sort of retrospective determinism tended to argue that such societies must follow the path trodden by Western societies in their confrontation with industrialization (Eleazu 1977, 34; Reilly and Reynolds 1999). Thus while Europe’s industrialisation and modernisation arose largely from its own internal dynamics, Africa’s modernisation and industrialisation began with the colonial invasion, and has been perpetuated in the neo-colonial milieu, with negative social consequences, not least negative ethnic consciousness. In the words of Eleazu (1977, 31), “The problem of political change in Africa is the situation created by new institutions embodying new values being imposed upon old institutions with their old values.... What we then have are two political cultures facing each other.”

Thus while Western liberal democracy is often touted as the panacea for Africa’s political woes, the model is actually alien to Africa, having arisen out of different facets of the social development of Europe. Two of the most influential factors in the rise of liberal democracy were the 17th and 18th century secularization of Europe beginning with the separation of power between the Church and State, and the works of political philosophers of the time (Owakah and Aswani 2009, 91-92). Indeed, at the core of Western liberal democracy are such ideas as the Kantian concept of the autonomy of the will, Jean Jacques Rousseau’s theory of the state
as based upon the will of the people. Karl Popper’s idea of an open and pluralistic society, and John Stuart Mill’s notions of freedom and of the absolute sovereignty of the individual (Mojola 1996, 335). Consequently, it is ill-advised for African political theorists to embrace this model without interrogating the extent of its internal consistency and its applicability to African realities. As Mafeje (n.d.) notes, the greatest mistake African states made at birth was to adopt pre-conceived forms of government which were at variance with the socio-historical realities of their societies. For Mafeje, a supreme example of this is the adoption of the nation-state model and parliamentary democracy, where the winner takes all. Under African conditions this led to the worst perversions of the model.

Mafeje (n.d.) further points out that although it is often thought that the one-party state was a creation of scheming African dictators, ironically enough, it was a result of certain predisposing factors which aspirant presidents for life took advantage of retrospectively. At independence, African leaders accepted the idea of a multi-party system and an official opposition. However, the principle of the winner takes all predisposed the incumbents towards absolute power. This was given substance by the fact that under African conditions the government was not only by far the biggest potential employer, but also the sole distributor of public resources. In turn, this created a predisposition among the leadership of opposition parties to join the government in order to benefit from state largesse. The ultimate outcome of this was the one-party state which enjoyed absolute power and could afford to suppress its opponents with impunity and to reward its supporters at will. It legitimized corruption and created the ideal conditions for vicious intra-elite struggles and negative ethnic consciousness (Mafeje n.d.). Thus as Mafeje (2002)
observed, attempts to adopt liberal democracy in post-colonial Africa only succeeded in producing one-party dictatorships under a veneer of European bureaucratic structures and procedures, so that the outcome was neither African nor European.

Similarly, Chweya (2002) correctly blames the repeated failure of liberal democracy in Africa on the Euro-centricity of the liberal democratic structures and values that are introduced into Africa in disregard of the peculiar local situation. He points out that the African situation is a complex outcome of the confluence of Africa's indigenous systems of government, many of which are still embedded in the fabric of African societies and African personality, and of the colonial social and political order whose relics continue to have a strong presence in society. Chweya goes on to note that “The coexistence of unfailing faith in the theory of liberal democracy with its practical failure is a paradox that underscores the ideologisation of liberal democracy in Africa” (Chweya 2002, 14). For Chweya (2002, 20), the vicious cycle of doing and undoing liberal democratic schemes in Africa, and the failure to break away and to explore possible avenues to indigenous forms of democracy for the continent, pave way for the reproduction of both authoritarian rule and social disorder in African countries.

Thus liberal democracy in Kenya, as elsewhere in Africa, has failed to nurture constitutionalism, that is, a process for developing, presenting, adopting, and utilising a political contract that defines not only the power relations between political communities and constituencies, but also the rights and obligations of citizens (Ihonvbere 2000a). According to Ihonvbere (2000a), constitutionalism
focuses on two issues: first, the process of constitution-making and the extent to which it is popular and democratic; and second, the available openings, institutions and processes of making the constitution a living document by taking it to the people so that they understand it, claim ownership of it, and use it in the defense of the democratic enterprise. Yet pre-independence constitutional discourses in most African countries were dominated by elites, so that the bulk of the African peoples - the main stakeholders - were excluded from it. Consequently, the outcomes of these deliberations were rules that did not reflect the people's interests, and were generally not understood by them (Mbaku 2000a).

As Chapters 2 and 3 of this study indicated, Kenya's independence constitution was repeatedly amended for the benefit of ruling ethnic elites. Thus this study concurs with Reilly and Reynolds (1999) that the task of the constitutional engineer is not only to find which institutional package will most likely ensure democratic consolidation, but also to persuade those domestic politicians making the decisions that they should choose long-term stability over short-term gain.

The liberal democratic insistence on an ethnically-blind model of democratisation also contravenes the right to freedom of association, narrowing the scope of political participation and competition (Hameso 2002). The fact is that banned or discouraged, ethnicity continues to be a salient feature of the African reality (ibid.). As such, it ought to be accommodated and managed in whatever model of democracy is adopted. What traditional Western liberal democracy fails to recognise is that basic human rights such as freedom of speech, association and conscience, while attributed to individuals, are typically exercised in community with others, and so provide protection for group life (Kymlicka 1995, 3). In social
and political theory, the term "community" usually suggests a group within which there are strong ties and a collective identity. A genuine community is therefore distinguished by the bonds of comradeship, loyalty and duty. In that sense, community refers to the social roots of individual identity (Heywood 2004, 33).

The continent-wide agitation for constitutional reform in Africa, which gained momentum in the late 1980s, is evidence that the imposition of constitutions based on traditional Western liberal democracy has resulted in disfunctional states. Even more alarming is the fact that the re-introduction of multiparty democracy in several African countries from the early 1990s met with challenges very similar to the ones experienced at the dawn of independence. For example, newly elected governments were overthrown either through military coup d'état (Sierra Leone, Burundi and Côte d'Ivoire), or at the hands of armed guerrilla movements (Congo-Brazzaville). In other cases, adulterated multiparty elections resulted in the retention and legitimisation of the continent's longstanding authoritarian civilian regimes (Burkina Faso, Cameroon and Kenya). Even where there was a successful change of guard through multi-party elections, new, ostensibly democratic regimes quickly assumed an authoritarian character, typical to their predecessors (Zambia and Malawi). A few others remained aloof to these democratisation initiatives (Sudan) (Chweya 2002, 1-2).

Thus it is crucial that African political theorists extricate themselves from the Western mould of conceptualising democracy, so that they can examine the essence of democracy afresh for the benefit of their continent. In this regard, Mafeje (n.d.) has written:
While any ‘dialogue between cultures’ cannot be denied apriori, it is important to note that current processes of globalization which aim at homogenization are antithetical to such a dialogue. Monopolarity subsequent to the collapse of the Soviet Union seems to have given western imperialism a new confidence to silence other cultures and to deny in advance alternative or novel styles of life even by violent means in the name of world peace.

Around the time when African countries were gaining their political independence, Frantz Fanon warned them against imitating their erstwhile colonizers:

If we want to turn Africa into a new Europe ..., then let us leave the destiny of our countries to Europeans. They will know how to do it better than the most gifted among us.

But if we want humanity to advance a step further, if we want to bring it up to a different level than that which Europe has shown it, then we must invent and we must make discoveries (Fanon 1967, 315; see also Thairu 1975, 200).

The upshot of the foregoing discussion is that Western Liberal democracy has failed to respond adequately to Africa’s socio-political realities. Yet from the late 1980s, Western academics, governments and financiers advocated for a world in which all countries embrace liberal democracy. For example, with the collapse of Communism and the emergence of the U.S.A. from the Cold War as the only super-power, Fukuyama (1992) declared the liberal State as universally victorious, and contended that industrial development necessarily follows a universal pattern – that is set by the leading Western capitalist economies. Nevertheless, as Fayemi (2009, 108) observed, Fukuyama’s liberal democracy cannot be the end of human history, simply because we are not at the end of human intelligence. As such, various countries have every right to construct new conceptions of democracy which respond to their religious, economic and social needs. It is for this reason that we next present a rationale for the principle of the recognition and protection
of ethnic identities and interests as a crucial component of the set of values that ought to underguard Kenya's constitutional order.

B. The Rationale for the Principle of the Recognition and Protection of Ethnic Identities and Interests in Kenya's Constitution

During the era of single party rule, African states combined the free trade policies of Western countries with the centralist political framework of the former communist countries to produce an oppressive monstrosity that perpetuated the subjugation of those ethnic groups that did not have a grasp of state power: this is what Hellsten (2009) refers to as Afro-libertarianism. By the time multiparty politics was re-introduced in the early 1990s, many ethnic groups were so economically and politically disadvantaged that it was relatively easy for the single-party rulers to retain power. The win-lose nature of multiparty competition continues to act as an important element in reducing the willingness of those in power to concede electoral defeat to the opposition (Hameso 2002). This is reason enough for African political theorists to invest their efforts on identifying strategies for promoting social cohesion through the constitutional recognition and protection of ethnic identities and interests in multi-ethnic societies such as Kenya's.

In our effort to understand the aspirations of Kenyan ethnic minorities, it is crucial that we acknowledge the inextricable link between politics and culture. Walzer (1983) contends that one of the criteria by which human beings can be said to be equals is the fact of their being creators of culture:
We are (all of us) culture-producing creatures; we make and inhabit meaningful worlds. Since there is no way to rank and order these worlds with regard to their understanding of social goods, we do justice to actual men and women by respecting their particular creations. And they claim justice, and resist tyranny, by insisting on the meaning of social goods among themselves. Justice is rooted in the distinct understandings of places, honors, jobs, things of all sorts, that constitute a shared way of life. To override those understandings is (always) to act unjustly (Walzer 1983, 314).

In addition, as Kymlicka (1995, 126) has noted, our capacity to form and revise a conception of the good is intimately tied to our membership in a societal culture, since the context of individual choice is the range of options passed down to us by our culture. Consequently, minority cultures in multi-ethnic states need protection from the economic or political decisions of the majority culture if they are to provide this context for their members.

Furthermore, what is called "common citizenship" in a liberal democratic multi-ethnic state, where the citizens ethnicity is officially ignored, in fact involves supporting the culture of the majority ethnic groups (Taylor 1994, 43; Kymlicka 1995, 110-111). For example, in Western countries, the languages of the majorities become the official languages of the schools, courts and legislatures. While in the context of the new Kenyan constitution the official languages (English, Kiswahili and Kenyan sign language) are not the languages of majority ethnic groups, the government’s policies on other cultural elements such as economic activity (hunting and gathering, pastoralism or agriculture) has a direct negative impact on ethnic minorities. This is a significant inequality which, if not addressed, becomes a serious injustice (see Chapter 2 of the present study and Kymlicka 1995, 109, 183).
Indeed, the idea of an ethnically-blind common citizenship almost inevitably results in the marginalisation of some ethnic groups. Thus when indigenous peoples in North America (the so-called “Red Indians”) were accorded citizenship (often against their will), they became a numerical minority within the larger body of citizens, rather than a separate, self-governing people (Kymlicka 1995, 184). The same is true of numerous Kenyan ethnic groups who endure a minority status mainly because of the formation of the Kenyan state. In their pre-colonial existence, each of them was a body politik in its own right, with minimal minority-majority conflicts within it. It is therefore evidently unjust to demand that such communities disown their ethnic identities in favour of a “Kenyan identity”.

When ethnic consciousness is ignored or castigated in the name of “nation-building”, resentment develops among those who value their ethnic identities. In this regard, Narang (2002) has written:

People invariably retain an attachment to their own ethnic group and the community in which they were brought up. There is an interdependence between the individual and collective processes of identity formation. Thus individuals expect to recognise themselves in public institutions. They expect some consistency between their private identities and the symbolic contents upheld by public authorities, embedded in the social institutions, and celebrated in public events. Otherwise, individuals feel like social strangers, they feel that the society is not their society (Narang 2002, 2696).

Aristotle correctly noted that a state is a community of interests based on the family (Aristotle 2009). Among the Kenyan masses, the deep sense of kinship, with all it implies, is one of the strongest forces governing social life. As Mbiti (1969, 104) put it, “Almost all the concepts connected with human relationship can be understood and interpreted through the kinship system. This it is which largely
governs the behaviour, thinking and whole life of the individual in the society of which he is a member." Consequently, it is inconsistent for the Kenyan state to profess to support marriage and the family, while castigating loyalty to ethnic groups which are seen by the vast proportion of its population as constituting their extended families. Just as it is necessary for one to accept and to have a degree of pride in one's ancestors, so it is desirable to draw strength from association with an ethnic group whose traditions enrich one's life (Okondo 1964, 37; Hunt and Walker 1974, 442). Thus while many view ethnic consciousness as being antithetical to Africa's democratisation, it can actually catalyse it by complementing other forms of representation in multi-ethnic African states (Hameso 2002).

Thus in our efforts at democratisation, we need to ensure that the political environment is not threatening to the security and well-being of ethnic minorities. If, in our Bills of Rights, zealous support is given to the protection of the rights of an individual, then that individual's right to promote his or her ethnicity should also be recognized (Hameso 2002). As Preece (2001) cautions, "our fundamental human desire for a language, culture and value system which is an expression of ourselves means that political attempts to forcibly suppress or alter these hallmarks of identity are unavoidably destructive of both human freedom and creativity." The most effective way to protect the rights of minority ethnic groups is to develop and adopt institutional arrangements that guarantee minority rights and enhance the ability of these groups to have significant input into policies that affect their lives (Mbaku 2000a). Such an adequate institutional framework must
draw from the masses' understanding of their reality, if they (the masses) are to embrace it (Okondo 1964, 38).

Additionally, the very concept of a “nation-state” in the contemporary African context can be traced to colonialism. Faced with demands for political independence, European colonialists referred to those who challenged them as “nationalists”, and the territories for which they claimed independence as well as the people living within them as “nations” (Eleazu 1977, 23). No wonder the global political body, established by the Western powers after the Second World War, and which the new African states eagerly joined, is called “the United Nations”. Notably, despite joining the United Nations, African states continue to talk about the need for “national integration”, indicating that they have not yet achieved “nationhood” (Eleazu 1977, 23-24). In fact, even in Western political theory and practice, the idea of the state as an impersonal and privileged legal or constitutional order with the capability of administering and controlling a given territory can be traced to the late 16th century (Held 1996, 73-74), which suggests that it is not necessarily the only practicable model of political organisation. It is therefore regrettable that the independent African states uncritically embraced the concept of “nation-state”, leading them to perpetuate the colonial agenda of de-ethnicising the African masses.

John Stuart Mill argued that a portion of mankind may be said to constitute a nationality if they are united among themselves by common sympathies which do not exist between them and any others, making them co-operate with each other more willingly than with other people, desire to be under the same government,
and desire that it should be exclusively government by themselves or a portion of themselves (Mill 1890, 285). Mill also pointed out that an army formed out of a multi-national state has no real loyalty to the state, but only to its leaders, and therefore finds it easy to oppress the citizenry. Consequently, he asserted, it is most preferable that each state be constituted by a single nationality (Mill 1890, 286-288).

While Mill uses the term “nationality” rather than “ethnicity”, his observations are evidently applicable to the inter-ethnic tensions in Kenya today. An important part of the cause for the disfunctioning of the Kenyan state is the fact that the masses’ loyalties are to their ethnic groups rather than to the Kenyan state. Yet the masses ought not to be blamed for this, because their incorporation into the Kenyan state was not voluntary, but rather through colonial coercion. As Deng (2004, 506) has written, “The process of state formation and nation-building has ... denied Africa’s peoples the dignity of building their nations on their own indigenous identities, structures, values, institutions, and practices.” Thus Davidson (1992) is justified to refer to the introduction of the state in Africa as a burden and a curse.

It is noteworthy that a number of societies have factored their ethnic diversity into their governance structures, yet they have not fared worse than Kenya. For example, the Lebanese constitution predetermines the ethnic composition of the entire parliament, and of key positions such as the president and the prime minister (Reilly and Reynolds 1999). Indeed, in some multiethnic societies in which ethnic groups are recognized as legitimate, as is the case in Mauritius and Botswana, ethnic politics has been shown to be compatible with democracy. This
is due to the fact that the recognition of group political rights reassures ethnic minorities about their liberties and security, reducing the incentive for civil war, secession and the defence of co-ethnic across their borders (Rothchild 2000, 6; Talbott 2000, 160). Thus while the present study concurs with the argument of Amartya Sen (2006) for a rational awareness of our multiple identities in combination with policies promoting such awareness to mitigate ethnic hatred, Sen's position does not necessarily imply an ethnically blind public policy. Indeed, it is because human beings frequently choose to highlight one of their identities above others that politicised ethnicity has thrived in many countries, Kenya included. Simply preaching against negative ethnic consciousness while allowing the flourishing of ethnically based politics, as the Kenyatta, Moi and Kibaki regimes have consistently done, did not avert the near cataclysm that was the post-2007 elections crisis.

Besides, it is becoming increasingly accepted in many countries that some forms of cultural difference can only be accommodated through special legal or constitutional measures, above and beyond the common rights of citizenship (Kymlicka 1995, 26; Mute 2002, 145). The upholding of ethnic minority rights entails the protection of their existence, non-exclusion, non-discrimination, and non-assimilation (Narang 2002, 2699). This is usually achieved through ethnic-differentiated rights such as territorial autonomy, veto powers, guaranteed representation in central institutions, land claims and language rights, all of which are intended to minimise or eliminate the vulnerability of minority cultures to majority decisions (Kymlicka 1995, 109). These rights may impose restrictions on the members of the larger society, by making it more costly for them to move into
the territory of the minority (e.g. longer residency requirements, fewer government services in their language), or by giving minority members priority in the use of certain lands and other natural resources (e.g. indigenous hunting and fishing rights). Yet the sacrifice required of members of majority ethnic groups by the upholding of these rights is far less than the sacrifice members of ethnic minorities would face in the absence of such rights (ibid.).

In addition, the protection of any rights requires the support of a legislative majority. Yet members of an ethnic minority cannot count on the permanent support of a majority for the protection of their rights as a minority. To be fully secure, therefore, minority rights, once they have been first legally recognized by the majority, must be removed from the subsequent jurisdiction of the majority. This is simply a practical recognition that in a democracy, attitudes and circumstances may change over time, and that the indifference of the majority can sometimes be as damaging to minority rights as its outright hostility. The protection of minority rights against the risk of being jeopardized by the whims of the majority can thus best be achieved by enshrining minority rights in the supreme law, that is, the constitution of the country, where they cannot be altered except with the consent of the minorities in question (Oloo 2007, 210).

It is important to concede that recognising minority rights has obvious dangers. The language of minority rights has been used and abused not only by the Nazis, but also by apologists for racial segregation and apartheid. It has also been used by intolerant and belligerent nationalists and fundamentalists throughout the world to justify the domination of people outside their group, and the suppression of
dissenters within the group (Kymlicka 1995, 6). The case of apartheid in South Africa, where people of European descent, constituting under 20% of the population, controlled 87% of the land mass of the country, and monopolized all the important levers of state power, is a graphic illustration of this danger (Kymlicka 1995, 110).

Nevertheless, the kind of constitutional orders inherited from the colonialists, and which a number of African countries are now abandoning, also had their own dangers, chief of which was the marginalisation of ethnic minorities in the name of nation-building. This has been Kenya’s experience for more than four decades (see Chapters 2 and 3). Thus the risk of ethnic minority domination cannot justifiably be used as a basis for denying ethnic minorities their rights. Instead, the law must uphold human rights while also preventing abuses in the name of rights. To use Mute’s illustration in this regard, the state protects its citizens against street crime, but it does not force civilians off the streets (Mute 2010, 12). Similarly, there is need to prevent both ethnic minority and ethnic majority domination.

Thus what is urgently needed is for the Kenyan state to be structured in such a way that the ethnic loyalties of the masses are accommodated, not ignored. Such an arrangement will be of particular benefit to ethnic minorities, each of which will thereby have the freedom to organise its life in a manner consonant with its cultural heritage, albeit with some limitations. Thus in spite of incessant calls for the integration of various ethnic groups in each multi-ethnic African state, the present study concurs with Ake (1993) that Africa’s problem is not ethnicity, but rather socio-political conditions conducive to its being abused:
... ethnicity supposedly epitomizes backwardness and constrains the development of Africa. This presupposition is misleading, however, for it is development rather than the people and their culture which has to be problematized. Development has to begin by taking people and their culture as they are, not as they might be, and proceeding from there to define the problems and strategies for development. Otherwise, the problematic of development becomes a tautology. The people are not and cannot be a problem just by being what they are, even if part of what they are is ethnic consciousness. Our treatment of ethnicity and ethnic consciousness reflects this tendency to problematize the people and their culture, an error that continues to push Africa deeper into confusion. ... The point of course is not to romanticize the past and be captive to it but to recognize what is on the ground and strive to engineer a more efficient, less traumatic, and less self-destructive social transformation (Ake 1993).

Ake (1993) goes on to warn that the usual easy judgments against ethnic consciousness are a dangerous luxury at a time when long-established states are decomposing under pressure from ethnic and nationalist assertiveness, and when the international community is shrugging off their demise. For him, the enormous implications of this for Africa, where hundreds of ethnic groups are squeezed chaotically and oppressively into approximately 50 states, are easy enough to imagine.

According to Reilly and Reynolds (1999), "For many new democracies, particularly those which face deep societal divisions, the inclusion of all significant groups in the parliament can be a near-essential condition for democratic consolidation. Failing to ensure that both minorities and majorities have a stake in these nascent political systems can have catastrophic consequences." At the height of the Kenyan post 2007 elections crisis, Kioi Mbogu asserted that it was time to address the major fault line of the Kenyan polity, namely, perceived ethnically based competition for political power. Mbogu correctly observed that constitutional engineering is required to go
beyond the winner-takes-all system and eradicate ethnic exclusion and fear of domination and persecution (Mbugua 2008).

Thus the call by Ojanga (2009) for a system of government specially designed for Kenya's unique circumstances, different from the two main Western liberal democratic Models (parliamentary and Presidential), is timely. For Ojanga, a key plank of this design is the overt recognition of ethnic interests through a council of ethnic elders, with every ethnic group enjoying equal representation in the council, and with the council holding ultimate executive authority. While Ojanga's call for equal representation of all ethnic groups is likely to be contested for violating the majoritarian principle which for many is the hallmark of democracy, the essence of his proposal, that ethnic diversity be acknowledged in the country's governance structure, is admissible. Indeed, such an acknowledgement would be a justifiable assertion of Africa's unique socio-political heritage. Below we briefly explore possible directions in the formulation of an African democratic model that adequately recognises and protects the rights of Kenyan ethnic minorities.

C. Towards an African Democratic Model

In view of the preoccupation of African political theorists with foreign democratic models for about half a century now, they have hardly explored the relevance of pre-colonial African political systems to contemporary African conditions. Almost four decades ago, Kihumbu Thairu lamented the fact that many Africans only explore the alternatives for political organisation imported from the West:
The problem with modern Africans is their phenomenal ability of copying other nations. .... You will hear such people praise or decry communism, socialism, capitalism etc., etc. If you talk to them of an African system which may even antedate any of these imported "isms" they try hard to label it under one or other of the non-African isms. If they fail they dismiss the African system as lacking in "ideological content" (Thairu 1975, 200).

Regretably, Thairu’s assessment remains largely accurate. Consequently, there is an urgent need for African scholars to develop new models of democratic governance utilizing insights from indigenous African political systems. The new models may benefit from elements of foreign democratic models, but must take seriously the largely unexplored pre-colonial African models of governance. The outcome would be models of democratic governance which may be said to be African, not in their applicability, but in their orientation.

Nevertheless, a number of African thinkers have advocated for an application of pre-colonial African political theory and practice to Africa’s modern technologised societies. Thus for Nkrumah (1967), "..., socialism in Africa introduces a new social synthesis in which modern technology is reconciled with human values, in which the advanced technical society is realised without the staggering social malefactions and deep schisms of capitalist industrial society." Similarly, Nyerere (1968) contends that African socialism has a firm foundation in pre-colonial African communalism. Furthermore, on the basis of the decentralised political structures in a considerable number of precolonial societies, Mojola (1996, 337-338) prescribes a restructuring of the global system through radical decentralisation that no longer has the nation-state at its core. For Chweya (2002), the development of a stable and enduring democracy in Africa is contingent upon a fusion of elements from two civilisations that make up Africa’s socio-political
heritage (the abiding African indigenous forms of democracy and Western liberal democracy), so as to produce a special variant of democracy for the continent.

On his part, Mafeje (2002, 11) has proposed that African scholars abandon the Western debate between liberal democracy and social democracy, and adopt a new approach to democracy instead, entailing three crucial components. First, the sovereignty of the people ought to be recognised as both a basic necessity and a fundamental right. Second, social justice, not simply formal rights, must constitute the foundation of the new democracy. Third, the livelihood of the citizens must not be contingent on ownership of property, but rather on equitable access to productive resources.

Some African political theorists might defend their preoccupation with Western models of democracy by pointing out that a considerable number of African leaders, both in pre-colonial and post-colonial times, have been autocrats. This might lead some to conclude that present day African autocrats have taken a leaf from their pre-colonial predecessors, and that therefore Africa has nothing to learn on governance from its pre-colonial past. Yet such an argument “cuts both ways”, because Western Europe has also had many autocrats, some as recently as the twentieth century (Germany’s Hitler, Italy’s Musolini and Spain’s Franco, for examples). In fact, according to Mojola (1996, 333-334), pre-colonial African societies without autocratic rulers were as numerous as those who had them or maybe even possibly outnumbered the latter. These societies, usually referred to as stateless or acephalous, existed without centralised authority, administrative machinery and formally constituted judicial institutions. Thus as Mojola (1996,
334) wrote, “It could be argued that long before the West learned about 'liberte, egalite and fraternite' through the struggles of the French Revolution, these values were already being practised in our traditional classless societies. The Banyole, the Tiv, the Tallensi, the Nuer, the Nyakyusa, the Somali, the Lugbara and hundreds of others were already practising these values.”

It is also noteworthy that several Western democracies still cherish institutions that pre-date liberal democracy, and that are akin to some of the pre-colonial African political institutions (Chweya 2002, 24-25). One of the most obvious examples of these are the monarchies in countries such as Britain and the Netherlands. Yet rarely do people question the essentially democratic nature of such societies. As such, it should not be surprising that Wamala (2004) contends that in pre-colonial Ganda society under the reign of the Kabaka (monarch), ideas we would consider crucial for democracy were very much in operation. There is therefore no reason why African states should capitulate to the pressure to adopt political systems that reflect nothing but modern Western models.

Thus if we are to achieve the constitutional protection of the rights of Kenyan ethnic minorities, Rawls' liberal principles of liberty and difference (7.3.1 and 7.3.2 above) must be supplemented by the communitarian principle of the recognition and protection of ethnic identities and interests. This requires that decision-making be undertaken not merely through putting into practice the views of ethnic majorities, but also finding ways of accommodating the concerns of ethnic minorities. While many today see democracy as being inextricably bound up with the rule of the majority, this was not so in ancient Athens and other ancient Greek city
states from which the West got the idea of democracy. Although the Athenian assembly voted on some issues and upheld the decision of the majority, consensus was preferred as a means to promoting the common interest (Held 1996, 21).

Even more noteworthy, we earlier observed (7.2) that Wiredu (1996, 172 ff.) prescribes consensual democracy for contemporary Africa, avering that many pre-colonial African communities were effectively governed through it. Wiredu (1996, 174-175) is emphatic that while unanimity might be the perfection of consensus, it need not be achieved in every instance. Instead, quite often, it will be enough to ensure that all views are adequately articulated in the course of decision-making in order to secure the goodwill of those whose wishes are not adopted for implementation. He contends that this kind of approach to governance was characteristic of Akan society. Similarly, Wamala (2004) asserts that pre-colonial Ganda society practised a consensual form of democracy, in which if after due deliberations the council reached a consensus, it was taboo for the monarch to oppose or reject it. This study highly recommends that theorists explore ways of putting consensual representative democracy into practice in Kenya, with a view to enhancing the inclusion of ethnic minorities into the affairs of the state.

D. Overview

The pluralist elements in the National Cohesion and Integration Act (Republic 2008) and in the new constitution (Republic 2010a) are steps in the right direction, since a policy of officially disregarding ethnicity has for more than four decades failed to stem ethnic discrimination. Forty years ago, Rawls (1971, 234) asserted
that "The public will to consult and to take everyone's beliefs and interests into account lays the foundations for civic friendship and shapes the ethos of political culture." Although Rawls would probably have doubted it, his observation is applicable not only to individual citizens, but also to ethnic groups. In other words, ethnic groups must be treated as interest groups whose views are carefully considered in the process of building Kenya's democracy. Those who doubt the necessity of catering for ethnic diversity need to consider that in 2002, in about 190 countries, there were 3,000 ethnic groups who were engaged in one or other form of struggle for their identity (Narang 2002, 2696). As such, Kenyan ethnic minority rights are ignored to the country's detriment.

According to Curry and Wade (1968, 2), a political decision is often an exchange decision, in which one has to balance what one can get against what one has to forego in order to get it. In present day Kenya, ethnic majorities enjoy considerable material well-being due to their access to political power, while many ethnic minorities languish at the periphery of society. If the majorities choose to ignore the concerns of their minority counterparts, the majorities risk suffering the kind of social instability that was experienced after the discredited 2007 general elections. On the other hand, if ethnic minorities insist on perpetrating measures that are socially and politically destabilising, the majorities would be inclined to use their numerical might and their access to state resources to suppress, or even further marginalise, their minority counterparts. Consequently, it is necessary that some kind of exchange between the two protagonists be undertaken.
It is also noteworthy that while the earlier drafts of the new Kenyan constitution (Ghai 2002, Bomas 2004 and Wako 2005) each dedicated a whole chapter to “National goals, values and principles”, the constitution ratified at the 2010 referendum only dedicates a single article to “National values and principles of governance” (Republic 2010a, Article 10). Furthermore, unlike earlier drafts which in their chapters on values and principles explicitly recognised Kenya’s cultural diversity, this single article is extremely vague in this regard. After spelling out how the values and principles are to be applied, it simply states:

The national values and principles of governance include— (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development (Republic 2010a, Article 10(2)).

Besides, while the next article (Article 11) of the Constitution is dedicated to culture, it seems to disregard the country’s cultural diversity, as it refers to Kenyans as a “people” and a “nation” with a single culture. This suggests that the drafters of the constitution had a bias towards assimilationism and against pluralism. The article begins as follows:

This Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation (Republic 2010a, Article 11 (1)).

In sum, the inclusion of the principle of the recognition and protection of ethnic identities and interests in Kenya’s constitution can be justified on the basis of at least three considerations:
(1) Kenyan ethnic minorities have found themselves in a modern polity that threatens to obliterate their way of life, unless their interests are protected by the country’s constitution.

(2) The persistent diatribe against ethnic consciousness is a relic of colonialism which masks the fact that ethnic tensions are due to political mismanagement rather than the result of ethnic consciousness *per se*. As such, ethnic consciousness ought to be recognised and managed instead of being denied or castigated.

(3) However evident the previous two points are, it is unrealistic to expect Kenyan ethnic majorities to safeguard the interests of their minority counterparts in the absence of constitutional provisions enjoining them to do so.

### 7.4. Conclusion

Utilising the critical, rational, analytical and speculative techniques of philosophical reflection, this chapter has sought to provide a rationale for a set of moral principles to serve as a basis for the constitutional protection of Kenyan ethnic minorities. Towards this end, it has first undertaken a critical examination of several models of representative democracy, with a view to illustrating their inadequacy for the protection of Kenyan ethnic minorities, and thus the necessity of moral principles to serve as a basis for the constitutional protection of these communities. In this regard, the chapter has argued that assimilationism, whether the one-party or no-party variety, is evidently not conducive to the representation of ethnic minority interests, because it seeks to homogenise a pluralistic society in a manner sharply skewed towards majority cultures. Furthermore, the chapter has contended that while various forms of pluralism (multipartism, federalism,
devolutionism, proportional representation etc.) seem to have considerably higher potential to represent ethnic minority aspirations than assimilationism. Ethnic minorities easily continue to suffer marginalisation under them as long as the majoritarian principle is upheld. The chapter has also noted that even if consensual democracy were to be adopted, it would be difficult to totally dispense with majoritarianism, because of its much faster method of arriving at decisions.

In view of the foregoing observations, the chapter has contended that the aspirations of Kenyan ethnic minorities would be better achieved through the inclusion into the country's constitution of a set of moral principles to serve as a basis for their protection. The chapter has gone on to present a rationale for three such principles. Following Rawls (1971), the chapter has proposed the principle of equal liberty with a view to protecting the individual from the excesses of government. In this regard, it has contended that without the individual being thus adequately protected, there is the real danger of totalitarianism, which has no room for individual liberty, and by extension, no place for ethnic group rights. The chapter has also argued that Rawls' principle of difference in the distribution of primary goods for the benefit of the least advantaged in society could to a considerable extent check the marginalisation of Kenyan ethnic minorities. Nevertheless, in view of the rampant abject poverty in contemporary Kenya, the chapter concurs with Oruka (1997) that the principle of difference ought to take precedence over that of liberty. This would ensure that the principle of liberty is more than a formal affirmation, since the material well-being of citizens is pivotal to their ability to make real choices regarding various facets of their lives.
The chapter has further argued that in order to adequately cater for the aspirations of Kenyan ethnic minorities in the country’s emerging democracy, there is need for a third moral principle, namely, the principle of the recognition and protection of ethnic identities and interests. This is necessitated by the fact that Rawls’ two principles presuppose a liberal democratic framework, with its emphasis on the autonomy of the individual to the exclusion of ethnic identities and interests. In contrast to liberal democratic theory, the chapter has contended that Kenyans have a right to identify with their ethnic groups, as such identification is an expression of their freedom of association, and an important ingredient of their wholesome social existence. Moreover, accommodating ethnic group rights in our constitution would be an acknowledgement of our African heritage, in which one’s ethnic identity is seen as an integral part of the kinship system.

It therefore seems evident that through the inclusion into the constitution of the three moral principles presented in this chapter, it is possible to cater for many of the aspirations of Kenyan ethnic minorities, and thereby contribute to the country’s socio-political stability.
8.1. Summary and Conclusions

As earlier noted (1.1), this study is a work in political philosophy. We also observed that the essential nature of the task of political philosophers is to take what is known about human societies and the ways in which they are governed, and then to ask what the best form of government would be, in the light of aims and values that they believe their audience will share (Miller 2003, 14-15). As noted in Chapter 1 (1.1.4), the assumption is that the said audience is one which is able and willing to engage in incisive philosophical reflection. The goal of this study has been to undertake philosophical reflection, with a view to providing a rationale for a set of moral principles to serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy. Towards this end, it has sought to answer the following four questions:

(1) What are the political aspirations of Kenyan ethnic minorities?

(2) Are there any conditions under which a Kenyan ethnic minority may be morally justified to disregard the authority of the Kenyan state?

(3) Are there any conditions under which the Kenyan state may be morally justified to quash the aspirations of a Kenyan ethnic minority?

(4) To what extent could John Rawls' principles of liberty and difference serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy?
Chapter 1 presented a background to the study, as well as a statement of the problem, operational definitions, research goal and objectives, justification of the study, scope and limitations of the study, assumptions of the study, research methodology, theoretical framework and literature review.

Chapters 2 and 3 utilised empirical studies by social scientists (chiefly historians, political scientists and lawyers) to answer the first research question, namely, that of the political aspirations of Kenyan ethnic minorities (1.2.1). Chapter 2 presented a historical outline of the specific aspirations of Kenyan ethnic minorities. It set out with an examination of the legal framework for ethnic minority rights in Kenya. It went on to note that the ethnic minorities in the country can be categorised into pastoralists (such as the Endorois and Ilchamus), hunter-gatherers (such as the Ogiek and Sengwer) and national minorities (such as Nubians and Asian communities). The chapter argued that Although no single Kenyan ethnic group is large enough to enjoy long term dominance of the country's politics on its own, the country experiences what can be properly described as ethnic minority-majority conflicts. This is due to the fact that the considerably large ethnic groups have frequently joined hands to form what can properly be termed as majorities, and have gone on to put in place policies that marginalise their numerically disadvantaged counterparts.

Chapter 2 also noted that three of the classical approaches to ethnic minority-majority conflicts (federalism, secessionism and assimilationism) (Wagley and Harris 1964) have been advocated by various Kenyan ethnic minorities: at the
dawn of political independence, a number of minority ethnic groups such as some of the Rift Valley pastoralists agitated for federalism; during the same period, the Somali sought the right to secede to enable them join the Somali Republic, while some coastal communities express secessionist sentiments to mitigate their ongoing marginalisation; the Nubian national minority, in demanding citizenship rights from the dawn of independence to the present, has sought some kind of assimilation.

In addition, Chapter 2 outlined the passionate debate between Kenyan ethnic minorities and majorities on the issue of representation, with specific reference to the creation of new parliamentary constituencies and the delineation of counties. The chapter also observed that a consideration of the interaction among various ethnic communities in Kenya reveals that a hierarchy has developed based on unequal political power which translates into unequal access to, and control over, land. From colonial times, alien Western capitalism has encroached on land, whether it belongs to agriculturalists, pastoralists or hunter-gatherers; agriculturalists have moved into pastoralist lands, and agriculturalists and pastoralists have taken over hunter-gatherer territories (Campbell 2004, 7-8). Except for alien Western capitalist encroachment, numerical strength or weakness has been pivotal to this hierarchical process of socio-political dispossession. The agriculturalists are more numerous than the pastoralists, and the latter have a demographic advantage over the hunter-gatherers. In addition, national minorities continue to live at the fringes of Kenya's political life. Due to their links to their countries of origin and to their economic strength, the European and Asian communities do not bear the brunt of political exclusion. However, the Nubians
find themselves suffering statelessness, with its attendant socio-economic deprivations. This situation is not sustainable, as the marginalised communities are likely to become increasingly desperate, thereby threatening the country's socio-political tranquility.

Furthermore, Chapter 2 noted that the winner-take-all system of elections which was in place up to 2010 created a situation in which a minority in power did not wish to risk losing it, and, conversely, a minority without power had no hope of winning it (Jonyo 2002, 105). The chapter urged that while the three post-independence regimes (Kenyatta, Moi and Kibaki) have sought to gloss over the discontent among ethnic minorities in the name of “nation-building”, the problem must be urgently addressed if the country is to achieve long term political stability.

Chapter 3 contended that the wellspring of ethnic minority discontent in Kenya is politicised ethnicity - the mobilization of sections of the population on the basis of cultural identities with a view to capturing or retaining state power. The chapter traced this phenomenon to the colonial policy of divide-and-rule, to Jomo Kenyatta’s Kikuyu supremacist policies pursued through the concentration of power in the presidency, to Daniel arap Moi’s revitalisation of the Kenya African National Union (KANU) to enhance his Kalenjin supremacist policies, to Mwai Kibaki’s re-introduction of Kikuyu supremacist policies during his first term, all of which culminated in the post-2007 elections crisis. Thus the chapter pointed out that by and large, post-independence Kenya has been what Ogude (2002) refers to
as an ethnocratic state, one whose basic political rhetoric is nation building, while in practice it undermines any real desire for nationhood (Ogude 2002, 205).

Chapter 3 also avered that ethnicity as such is not a source of friction. Indeed, it can perform positive functions in civil society as a means of checking the excesses or frailty of political leaders. The claims and counterclaims of members of ethnic groups over real and imagined discrimination over access to scarce resources can have a balancing effect on the country's politico-economic system. The challenge is how to harness these positive attributes (Makoloo 2005, 24). The chapter concluded that Kenyans must urgently find ways of mitigating the effects of decades of politicized ethnicity by putting in place constitutional provisions that make it difficult, if not impossible, for politicians to perpetuate political cleavage along ethnic lines. They must also put in place a set of moral principles to serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy.

Chapters 4 to 6 employed the critical, rational and analytical techniques of philosophical reflection to answer the second and third research questions of the present study, namely, the conditions under which a Kenyan ethnic minority may be morally justified to disregard the authority of the Kenyan state, and circumstances under which the Kenyan state may be morally justified to quash the aspirations of a Kenyan ethnic minority (1.2.2 and 1.2.3). In view of the plan of this study, it was not possible to undertake a moral evaluation of all of the many forms of political disobedience. Instead, the three chapters focused on two extreme responses to persistent marginalisation, namely, non-violent civil
disobedience and secessionist war. This was done in the hope that insights gained thereby would also give some indications on the ethical ramifications of intermediate forms of political disobedience. Assuming that Kenyan ethnic minorities would adopt a gradualist approach to the pursuit of their aspirations, the three chapters examined the basis upon which Kenyan ethnic minorities would be morally justified to move progressively from legally sanctioned action (such as litigation and participation in constitutional review), to non-violent civil disobedience, to agitation for secession, and finally to the waging of secessionist wars.

Chapter 4 examined the possibility of morally justifying non-violent civil disobedience in pursuit of Kenyan Ethnic Minority aspirations. It set out by assessing the efforts of these communities at litigation and at participating in the constitutional review process. Next, it examined the nature of non-violent civil disobedience, and outlined the views of four of its most influential advocates, namely, Étienne de La Boétie, Henry David Thoreau, Mohandas Karmachand Gandhi and Martin Luther King, Jr. Finally, it offered a critique of this method of political disobedience. The chapter concluded that while there are many plausible arguments for non-violent civil disobedience, there are also a number of formidable objections to it. Above all, in view of the gross numerical disadvantage of many Kenyan ethnic minorities, this form of political disobedience is not likely to produce the results they desire.

Our fifth chapter reflected on possible moral justification for secession by Kenyan Ethnic minorities. Towards this end, it examined the nature of secession, the vital
concepts of political legitimacy and obligation from a Kenyan ethnic minority perspective, current international thinking on secession, the background to contemporary philosophical reflections on secession, and moral arguments for the right to secede. The chapter contended that a plausible moral justification for secession by Kenyan ethnic minorities can be found in a purely teleological approach to it. If an ethnic minority is faced with overt or covert genocide, the teleological Hobbesian principle that the right to life cannot be transferred to a sovereign would lead to the conclusion that the community has the right to attempt to secede rather than endure the annihilating effects of the state upon it. If it arrives at such a conclusion, it would have chosen the risk of war instead of the certainty of extermination.

Partly building on the insights gained in Chapter 5, Chapter 6 examined the possibility of morally justifying secessionist wars by Kenyan Ethnic minorities. It set out by interrogating the three main schools of thought on war, namely, pacifism, realism and just war theory. In this regard, it contended that only the third school of thought allows the possibility of war while insisting on the need to pay attention to moral considerations before, during and after war. Consequently, the chapter proceeded to interrogate the six principles of just war theory by which to determine whether or not to go to war (*jus ad bellum*), with a view to ascertaining their applicability to the circumstances of Kenyan ethnic minorities. Finally, the chapter critically examined the most frequently sited justification for war, namely, self-defense, and found the forfeiture version of it to be both internally consistent and relevant to the circumstances of Kenyan ethnic minorities. The chapter concluded that Kenyan ethnic minorities would be morally
justified to wage secessionist wars only for the purpose of securing their lives. This is to say that they ought to take this measure as a last resort in line with the principles of *jus ad bellum*.

Chapter 7 utilised the critical, rational, analytical and speculative techniques of philosophical reflection to answer the fourth research question, namely, that of the extent to which John Rawls' principles of liberty and difference could serve as a basis for the constitutional protection of ethnic minorities in Kenya's emerging democracy (1.2.4). Towards this end, it first assessed various models of representative democracy, with a view to illustrating their inadequacy for catering for ethnic minority interests, and thus the necessity of moral principles to serve as a basis for the constitutional protection of these communities. In this regard, it indicated that assimilationism, whether the one-party or no-party variety, is evidently not conducive to ethnic minority interests, as it seeks to homogenise a pluralistic society in a manner sharply skewed towards majority cultures. The chapter went on to contend that while various forms of pluralism (multipartism, federalism, devolutionism, proportional representation, etc.) seem to be preferable to assimilationism, ethnic minorities easily continue to suffer marginalisation under them as long as the majoritarian principle is upheld. The chapter also noted that even if representative consensual democracy were to be adopted, it seems that majoritarianism cannot be totally dispensed with because of its much faster method of arriving at decisions, thus the need for specific measures to protect the interests of ethnic minorities.
In view of the foregoing observations, Chapter 7 contended that the aspirations of Kenyan ethnic minorities would be best achieved through the inclusion into the country's constitution of certain moral principles that could be appealed to regardless of the model of representative democracy adopted, thereby contributing to the country's socio-political stability. Consequently, the chapter went on to present a rationale for three such principles, as outlined hereunder.

First, following Rawls (1971), Chapter 7 proposed the principle of equal liberty with a view to protecting the individual from the excesses of government. In this regard, it contended that without the individual being thus adequately protected, there is the real danger of totalitarianism, which has no room for individual liberty, and by extension, no place for ethnic group rights.

Second, the chapter argued that Rawls' principle of difference in the distribution of primary goods for the benefit of the least advantaged in society could to a considerable extent check the marginalisation of various segments of Kenyan society, ethnic minorities included. Nevertheless, the chapter concurred with Oruka (1997) that in view of the rampant poverty in contemporary Kenya, the principle of difference ought to take precedence over that of liberty. This would ensure that the principle of liberty is more than a formal affirmation, since the material well-being of citizens is pivotal to their ability to make real choices regarding various facets of their lives.

Third, the chapter contended that there is need to uphold the principle of the recognition and protection of ethnic identities and interests. This is necessitated by
the fact that Rawls' two principles presuppose a Western liberal democratic framework, with its emphasis on the autonomy of the individual to the exclusion of ethnic identity. The chapter avered that Kenyans have a right to identify with their ethnic groups, as such identification is an expression of their freedom of association, and an important ingredient of their wholesome social existence. Moreover, accommodating ethnic group rights in our constitution would acknowledge our African heritage, in which one's ethnic identity is seen as an integral part of the kinship system.

In sum, Chapter 7 contended that the inclusion of the principle of the recognition and protection of ethnic identities and interests in Kenya's constitution can be justified on the basis of at least three considerations:

(1) Kenyan ethnic minorities have found themselves in a modern polity that threatens to obliterate their way of life, unless their interests are protected by the country's constitution.

(2) The persistent diatribe against ethnic consciousness is a relic of colonialism which masks the fact that ethnic tensions are due to political mismanagement rather than the result of ethnic consciousness per se. As such, ethnic consciousness ought to be recognised and managed instead of being denied or castigated.

(3) However evident the previous two points are, it is unrealistic to expect Kenyan ethnic majorities to safeguard the interests of their minority counterparts in the absence of constitutional provisions enjoining them to do so.
Chapter 8: Summary, Conclusions and Recommendations

In the light of the reflections in the preceding seven chapters, the present study draws the following five conclusions:

1. While the three post-independence regimes (Kenyatta, Moi and Kibaki) have sought to gloss over the discontent among ethnic minorities in the name of "nation-building", the problem must be urgently addressed if the country is to achieve long term socio-political stability.

2. Kenyans must urgently find ways of mitigating the effects of decades of politicized ethnicity by putting in place constitutional provisions that make it difficult, if not impossible, for politicians to perpetuate political cleavage along ethnic lines. They must also put in place constitutional provisions that protect the fundamental rights of ethnic minorities in Kenya's emerging democracy.

3. While in theory non-violent civil disobedience is morally preferable to violent resistance, it is not likely to produce the results desired by Kenyan ethnic minorities.

4. If an ethnic minority is faced with overt or covert genocide, the teleological Hobbesian principle that the right to life cannot be transferred to a sovereign would lead to the conclusion that the community has the right to attempt to secede rather than endure the annihilating effects of the state upon it. Thus Kenyan ethnic minorities would be morally justified to wage secessionist wars only in self defense and as a last resort in line with the principles of *jus ad bellum* ("the justice of going to war").

5. It is necessary to cater for the aspirations of Kenyan ethnic minorities by including the following three moral principles into the country's constitution as part of the national values and principles of governance:
(a) The principle of difference in the distribution of primary goods, with a view to promoting the well-being of the least advantaged citizens.

(b) The principle of equal liberty for all, with a view to forestalling totalitarianism, which would endanger both individual and group rights.

(c) The principle of the recognition and protection of ethnic identities and interests, with a view to ensuring that ethnic majorities do not perpetuate the marginalisation of their minority counterparts.

8.2. Recommendations for Further Research

In view of the scope and limitations of this study (1.6), it recommends further research in the following areas:

1. Case studies by social scientists of the political aspirations of specific Kenyan minority ethnic groups.

2. Normative studies by political philosophers of specific principles in Article 10 of the new Kenyan constitution.

3. The development by political philosophers of a detailed model of representative democracy which utilises insights from indigenous African political thought and practice, with a view to promoting harmony in multi-ethnic African states.


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