Kenya Human Rights Commission
COMMISSION

ETHNICITY AND POLITICIZATION IN KENYA

	Original Text (In Bold)	Correction made
Cover page	ETHNICITY AND POLITICIZATION IN KENYA (Kenyan Map Picture) *The National Study*	ETHNICITY AND POLITICIZATION IN KENYA (Graphic Map)
Table of Contents	*Missing Table of contents*	Table of contents inserted.
Page 1	*Acknowledgement (The whole text)*	Replacement of the whole acknowledgment text.

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FOREWORD

Published in the aftermath of a bitterly contested and highly divisive 2017 election cycle, KHRC's *National Study* seeks to map the terrain of ethnicity and the political process in Kenya. Not unlike 2010, when Kenyans came together to establish a new constitutional dispensation, we are once again at a crossroads whose decision on the way forward could make or break our social fabric.

The papers that make up this study discuss a wide range of issues from the elite discourses that shaped ethnicity as "the single most important variable in the Kenyan political arena," to an analysis of the contours of "negotiated democracy" in the country under the devolved system of government, to the fluid notion of ethnicity as well as the problems of determining the moral claims to "ethnic balance" in the public service, to, lastly, a bold proposal for the infusion of new ideas of representation that transcend ethnic identity by positing cross-ethnic cooperation as opposed to ethnic competition.

Our current political moment compels us to think innovatively and radically about how to live in an ethnically diverse society that works for all of us. We hope this Volume will contribute to current discussions as to how Kenya can best move forward in a way that pays respect to and learns from the past but that also looks refreshingly to the future. It is for this reason that we have intended for this Volume to have a wide readership including students, scholars, and policy-makers.

I would like to take this opportunity to thank the four independent researchers for contributing to this volume. I am grateful to the team at KHRC who contributed to the development of this publication at various stages. I would also like to thank the anonymous reviewer and participants of the review meeting for their valuable comments that shaped this volume. KHRC is thankful to the Embassy of Switzerland and the Norwegian Embassy for their generous financial support that led to this book's publication.

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Introduction

Beyond Ethnicity

The instrumentalization of ethnicity as the primary means of mobilization has become an inescapable fact of political life in Kenya. However, how ethnicity came to be so elevated in Kenyan politics is a topic not well understood by the broader Kenyan public. For too long, the resignation by scholars, activists, and civil society on the politicization of ethnicity in Kenya has led to a stagnating of the discourse when it comes to approaches to address ways of "managing" ethnic identity in relation to the sharing of power, resources, and opportunities.

In as far as scholars and activists have worked to address the topic of ethnic divisiveness in the country; their efforts have been limited in two ways. First, scholarly work has not been effective in influencing discussions on ethnicity beyond academic circles. Many Kenyans may experience the vast effects of ethnic politics without necessarily ever having encountered analyses and explanations for this phenomenon. Many of these analytical tools have the potential of revolutionizing how Kenyans view ethnic identity, ethnocentrism, and ethnic discrimination by, for example, making light of the intersection between ethnic, gender, and class discrimination or the fluidity of ethnic identity in Kenya's pre- and post-independence history. Second, many activists, perhaps due to the urgency of addressing the consequences of ethnic politics such as corruption and political violence, employ simplistic explanations for this phenomenon, leaving the public with an incomplete picture of the nuances and idiosyncrasies of ethnicity and politics across Kenya.

The *National Study* is part of KHRC's efforts to demystify the role ethnicity plays in Kenya's political system in a way that is accessible to scholars, activists, and the wider public. Covering a broad range of issues from the origins of elite mobilization of ethnicity, to the role of negotiated democracy within Kenya's devolved system of government, the uses of ethnic markers in determining the inclusivity of the public service, and radical approaches aimed at reducing ethnic competition while promoting cross-ethnic cooperation, this work seeks to expand the boundaries of the way Kenyans think about ethnicity beyond headcounts of the number of high-level appointments in a certain ministry or the ethnic composition of the public service. Although we do present data on the ethnic composition of cabinet since independence as well as data by the National Cohesion and Integrated Commission (NCIC) on the ethnic composition of the public service, we also present analysis on how exactly these phenomena came to pass. The aim of the *National Study* is to bridge the gap between a broad range of descriptions for the "problem" of ethnicity in Kenya to solutions that promise change beyond ethnicity and other social cleavages that bedevil Kenyan society.

The 2017 Elections and Its Aftermath

Marked by an acrimonious campaign period, a Supreme Court annulment, and a boycott of the second round of Presidential Elections by the opposition, the 2017 election cycle proved

to be one of the most divisive in Kenya's recent history, coming close to the chaos witnessed in the 2007 elections. Predictably, the trends in the elections, including party affiliation, mobilization of voters, and views about the freedom, fairness, and credibility of the elections were premised first and foremost on ethnic identity.

If the *National Study* is an analysis of previous trends regarding the politicization of ethnicity, then the 2017 election cycle is a confirmation of most, if not all, of the findings contained in this Volume. Like in previous elections since Independence, most Kenyans voted along ethnic lines in support of ethnic "Big Men" at the helm of national political leadership. Ethnicity was once again given a sense of fixedness as many Kenyans travelled from urban to rural areas to "vote at home" and also escape the risk of violence in ethnically mixed urban centres. When the results for the first round of presidential elections were announced, their credibility was also contested and affirmed by the public along ethnic lines and, when the opposition boycotted the second round of the presidential elections, "opposition areas" were marked by incidences of near-zero turnout and the shuttering of polling stations. Worryingly, state violence also followed ethnic patterns, with parts of the country said to "align" with the opposition witnessing cases of police brutality including extra-judicial killings, widespread sexual violence, unlawful use of crowd-control weapons and techniques, and destruction of property.

Dr. Japhet Biegon's paper which provides an overview of the concept of politicization of ethnic identity in Kenya and its historical evolution, examines the various manifestations of the intersection between politics and ethnic identity at different epochs in Kenya's political history. Although ethnic identity has served as a tool for political mobilization throughout Kenya's history, the specific reasons for its deployment appear to shift with time as well as with context. Dr Biegon's paper is instrumental in its assessment of the fluidity of ethnic identity and the "consolidation" of ethnic markers by political elites. Additionally, Dr Biegon finds that, over time, other social identities such as gender and youth, as well as ideology, are becoming as influential as ethnicity when it comes to decision-making by voters.

Like in previous administrations, President Kenyatta's cabinet conformed to previously observed ethnic patterns outlined in Dr Patrick Asingo's *Ethnicity and Political Inclusivity in Kenya: Retrospective Analysis and Prospective Solutions*, where the data indicates that a majority of cabinet members hail from an incumbent's ethnic community. In addition, the announcement of Cabinet Secretaries and Principal Secretaries, a drawn-out affair that took place over the course of several months, saw the creation of a new post of Chief Administrative Secretaries (CASs) who would be "responsible for helping the Cabinet Secretary to better coordinate the running of the affairs of their respective ministries."

The expansion of cabinets and other senior positions in Africa has been found to be a tactic by incumbents to "make credible their promises to maintain the distribution of patronage among elites and the constituencies whom they represent."[1] This finding conforms closely to

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[1] Leonardo R. Arriola, 'Patronage and Political Stability in Africa,' (2009) Vol. 42, No. 10, Comparative Political Studies.

the experience of the new cabinet which is composed of close allies of the president as well as "defectors" from the opposition. As with the cabinet, the number of appointed Principal Secretaries conformed to earlier trends in which the majority of PSs hail from the ethnic group of the incumbent.

The expansion of the number of senior officials in the national executive did not have the effect of increasing the representation, young people under 35 years of age, or persons with disability in high office, however. Based on KHRC's own analysis, the composition of the cabinet fails to adhere to the 2-thirds gender principle. The same can be applied to the composition of Principal Secretaries and Chief Administrative Secretaries. Worryingly, not a single Cabinet Secretary, Principal Secretary, or Chief Cabinet Secretary is under 35 years of age or a self-identified person with disability. The lack of diversity in the ranks of senior national executive officials confirms previous research showing that, in sub-Saharan Africa, "women's share of cabinet appointments is significantly lower in countries where leaders must accommodate a larger number of politicized ethnic groups."[2] The continued elevation of ethnicity as "the single most important variable in the Kenyan political arena," and its concomitant politicization, is shown to negatively impact other categories of diversity in Kenya.

The composition of the new cabinet and the staffing of senior government officials conforms to Winluck Wahiu's assessment in *Who belong in the Civil Service? Ethnicity and discrimination in Kenya's civil service*. Mr Wahiu argues that the civil service appears to be a site for the mobilization of ethnic networks, essentially an extension of the contest for public power. Mr Wahiu's contribution to this volume charts the evolution of the civil service from its "Africanization" early in the post-independence era, to neoliberal reforms proposed by the World Bank, and to the reconfiguration of values brought by the new constitutional dispensation from 2010 to date. Crucially, Mr Wahiu's paper addresses data on the ethnic composition of the public service as presented by the National Cohesion and Integration Commission (NCIC). While bringing to sharp focus the ethnocentrism and (neo)patrimonialism that marks out civil service, Mr Wahiu's paper also makes note of flaws in the data while proposing a more radical role for the NCIC in changing our conception of who belongs to the civil service.

Dr Joshua Kivuva, in his *Negotiated Democracy and its Place in Kenya's Devolved System of Government: An Examination of the 2013 General Elections* maps the terrain of Kenyan politics in the wake of the devolved system of government. Dr Kivuva makes an impassioned case for the role of negotiated democracy, arguing in favour of its utility especially in highly competitive political systems such as Kenya's. Most interestingly, Dr Kivuva presents fresh analyses on the role of negotiated democracy in Kenya, finding nuances between ethnically diverse and ethnically homogenous counties as well as the "negotiations" between elites (as the "brokers" of negotiated democracy) and the public. Whether negotiated democracy is still

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[2] Leonardo R. Arriola & Martha C. Johnson, 'Ethnic Politics and Women's Empowerment in Africa: Ministerial Appointments to Executive Cabinets' (2014) Vol. 58, No. 2, American Journal of Political Science.

relevant as a way to "manage" competitiveness and diversity within the context of the 2017 general election remains to be seen, but Dr Kivuva's analysis remains relevant as a guide for future analyses on the particular idiosyncrasies of negotiated democracy in the country.

President Kenyatta's second term is plagued by a crisis of legitimacy in view of the election boycott of the opposition. Initially reticent regarding dialogue to overcome the political stalemate, President Kenyatta and opposition leader Raila Odinga surprised the country when they announced plans to work together to address longstanding problems facing the country including ethnic discrimination and ethnocentrism, corruption, insecurity, and other development-related challenges. Whether this détente will lead to efforts to address longstanding challenges regarding inclusion and equal participation in decision-making as well as the equitable distribution of resources remains to be seen.

What next?

If anything, the *National Study* has only teased out the manifold opportunities for expanding our understanding on the challenge of inclusivity in Kenya. Ethnicity, it turns out, is only but one cleavage among many that defines politics and the making of politics. A lot of works needs to be done to map the terrain of inequalities and their politicization in Kenya.

Worryingly, the lack of gender, age, and class analyses, likely contributes to the perpetuation of the worst elements of ethnic politics in the country. Without analyses that recognize competing identities in the shaping of Kenyan social, economic, and political life, scholars and activists in favour of more inclusive systems risk addressing some ethnic wounds while leaving others to fester.

We must continue to grapple with the role devolved government has brought to the way politics and governance is conducted at both levels of government. This study points out that the ethnic division and negotiations that have featured at the national level play out to some degree in the counties. Although devolution addresses a key complaint in how Kenya's ethnic-based political and economic systems have favoured some ethnic communities over others (i.e. through resource allocations tightly controlled by previous central governments), the opportunity to address other forms of exclusion and how to solve them is yet to be "devolved" in the counties as well. However, with new streams of income and political systems outside of Nairobi, the potential for solidarity across ethnic, gender, class, and age exist and points to interesting times ahead.

KHRC's *National Study* has made us alive to the need for innovative and creative ways of addressing legacies of exclusion, not restricted to ethnicity, that have bedevilled Kenya since independence. The period immediately after the 2017 elections has seen a clamour for a national dialogue process to cover election reform, ethnic discrimination and divisiveness, the derogation of the rule of law, unequal distribution of resources, and rampant corruption. The recent détente between Kenyatta and Odinga, although an end to a bitter election campaign and, hopefully, a bitter dynastic rivalry that has unfolded with dire consequences upon the

Kenyan people, still needs to be fleshed out. What, for instance, are some of the ways the two leaders are going to cooperate to address the skewed distribution of opportunities and resources between the Kenyan people on grounds of ethnicity? Additionally, in light of the alienating effects elite pacts have on representation of women at the higher levels of administration, what would yet another deal between "big men" mean for women? These are important questions that need to be raised and addressed going forward.

The *National Study* hearkens to the need for even deeper conversations about inclusion and governance in the country. Some questions that could guide the work of explicating the question of ethnicity and ethnocentrism in Kenyan political life going forward include how ethnicity, ethnic discrimination, and ethnocentrism in general affect Kenyans in terms of access to health, education, employment, infrastructure, and social amenities from one's birth to their adulthood. Further, although this volume looks at the evolving interaction between ethnicity and other social cleavages, more work needs to be done to see how class, gender, and age complicates our notions of ethnic identity. More radically, perhaps it is time to yet again rethink Kenya's winner-takes-all electoral system which, even with the advent of devolved government, continues to be plagued by a heightened degree of competitiveness that highlights social cleavages such as ethnicity instead of transcending them. And in this regard, perhaps it is also time to rework our collective notion of democratic Kenyan citizenship that addresses our country's founding myths, acknowledging the country's diversity without "managing" it, as well as creating transcendent national identities that do not ascribe to crude ethnic (or even state-centric) nationalism.

KHRC's *National Study*, in a nutshell, promises to be a first of many as part of our efforts to push forward the conversation on inclusiveness in Kenya. Clearly, the work of scholars and activists is cut out for them. We must reimagine the scope and boundaries of what amounts to exclusion and discrimination in Kenya as well as what a Kenya for all Kenyans looks like.

Politicization of Ethnic Identity in Kenya: Historical Evolution, Major Manifestations and the Enduring Implications

Japhet Biegon[*]

1   Introduction

Ethnic identity is arguably the single most important variable in the Kenyan political arena. Political parties are commonly viewed as ethnic enclaves while elections are considered to be nothing more than a measure of the numerical strength of ethnic groups. Ethnic identity defines why and how politicians seek, retain, or cede power. This instrumentalization or politicization of ethnic identity is regarded as "the single most intractable problem in Kenya",[3] and is one of the causes of the many political ills that have tormented Kenya's body politic ever since the country gained independence from British colonial rule. Surprisingly, ethnic identity appears to also influence the kind of lawyers that politicians hire to litigate election petitions in the courtroom. According to Musumba, there was a noticeable and "remarkable coincidence" between the ethnicity of the individual parties in the main 2013 presidential petition (*Raila Odinga v. IEBC, Issaak Hassan, Uhuru Kenyatta, and William Ruto*) and their respective lead counsel.[4]

The specific rationale behind ethnic mobilization in Kenyan politics appears to shift with time as well as context. This paper examines the various manifestations of the intersection between politics and ethnic identity at different epochs in Kenya's post-independence political history. It interrogates how ethnic identity has intersected with other tools of political mobilization (e.g. gender, religion and ideology) during these different times and contexts. The analysis focuses on four main expressions of politicization of ethnic identity or ethnic politics in Kenya: patronage and ethnic favouritism; ethnicity and succession politics; ethnic parties and coalitions; and ethnic voting. To build a solid background for the analysis,

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[3]   W   Oyugi   'Politicized   ethnic   conflict   in   Kenya: A   periodic   phenomenon'   available   at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.550.1709&rep=rep1&type=pdf (accessed on 23 May 2017).

[4] L Musumba 'Best foot forward: A critical assessment of the lawyering demonstrated during the 2013 presidential election petition in Kenya' in C Odote & L Musumba (eds) *Balancing the scales of justice: Resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence* (2016) 305, 323.

the paper first defines the notion of "ethnic identity" and then attempts to locate where its conceptual nexus with politics lies.

The central argument of the paper is that ethnic politics in Kenya is the result of a complex interweaving of a host of factors including colonial policies and practices and historical grievances and experiences. Although it may be too early to conclude that ethnic politics is on the decline in Kenya, the paper presents evidence showing that the "new" identities of gender, religion, and youth are increasingly weakening the dominance of ethnic identity in Kenya's political sphere. Moreover, performance and policy considerations are gradually becoming crucial determinants of voter behavior. At the end, the paper makes some legal policy recommendations for addressing ethnic politics and the attendant implications.

2   Ethnic identity: Understanding an elusive concept

Like most African countries, Kenya is multi-ethnic. In fragmentation studies, Kenya is considered to be one of the most ethnically fragmented society in Africa.[5] The exact number of ethnic groups in Kenya is a contested issue.[6] For quite a long time, it was thought or claimed that the number stood at 42. This figure is said to have originated from the questionnaire administered during the 1969 population census. A consensus seems to have emerged in recent years that there are more than 42 ethnic groups in the country. As such, the questionnaire or data sheet for the 2009 population census listed no less than 111 ethnic groups. The expansion of the list of ethnic groups from 42 in 1969 to at least 111 in 2009 is partly the fruit of the struggles by historically marginalized communities, such as the Endorois, Ogiek, and Sengwer, to be officially recognized by the state. It similarly reflects the ever-growing assertion by certain sub-groups that they are actually distinct or different from the larger groups into which they were subsumed during the colonial period. For instance, the 2009 population census included figures for the Marachi, Maragoli, Marama and other groups which were previously counted as part of the Luhya ethnic group. It also included Mijikenda and Kalenjin sub-groups, such as the Boni, Choli, and Dahalo, and the Kipsigis, Marakwet, and Nandi, respectively.

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[5] See P Asingo in this volume.
[6] See G Lynch 'Kenya has more than 42 tribes, so why is this still the magic number?' available at http://www.nation.co.ke/oped/Opinion/Kenya-has-more-than-42-tribes/440808-2450876-e2tkw8/index.html (accessed on 20 April 2017).

The compilation of an extended list for purposes of the 2009 population census begs the following question: what precisely defines one's ethnic identity and his or her membership in an ethnic group? A simple and primordialist answer to this question is that one is born with an ethnic identity. This means that ethnic identity is not only natural and immutable but it is also defined by one's culture, biological heritage, and territorial roots.[7] Various categories of social scientists do not easily buy this answer although it is a popular one especially amongst politicians. Instrumentalist scholars define the ethnic identity of an individual or group in terms of its relationship with the identity of other individuals or groups. Seen in this light, "ethnicity is a subjective way of interpreting a group's identity, often in the hope of maximizing the members' interest[s]".[8] In other words, individuals choose to associate with a certain ethnic identity because of the incentives and advantages it offers. However, as Lynch correctly points out, an ethnic group should not be confused with an ordinary interest group.[9] Over and above shared interests, there must be ties that bind together an ethnic group such as language and culture. Other ties include "an idea of blood ties and a shared past, of common descent and a history of union".[10]

A third and dominant approach to understanding ethnic identity is based on the argument that identities are socially constructed. From a constructivist point of view, primordialist and instrumentalist definitions of ethnic identity are insufficient particularly because they do not appreciate the fact that identities can and do often evolve. Ethnic identity evolves because the factors that define it, such as "social relationships, the everyday practices of perceiving and treating others, and the institutions in which we are embedded",[11] change over time. According to Lynch, ethnic identities are "complex and contested social constructions, perpetually in the process of creation".[12] Karega-Munene similarly notes that ethnic identity is "fluid and malleable and, therefore, negotiable, contestable, destructible and reconstructible".[13] In essence, people play an important role in constructing ethnic identities,

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[7] F Yieke 'Ethnicity and development in Kenya: Lessons from the 2007 general elections' (2010) 3 *Kenya Studies Review* 3, 10.
[8] As above.
[9] G Lynch 'Negotiating ethnicity: Identity politics in contemporary Kenya' (2006) 33 *Review of African Political Economy* 49, 50.
[10] As above.
[11] P Arthur 'Introduction: Identities in transition" in P Arthur (ed) *Identities in transition: Challenges for transitional justice in divided societies* (2011) 1, 5.
[12] Lynch (n 7 above) 61.
[13] Karega-Munene 'Production of ethnic identity in Kenya' in K Njogu *et al* (eds) *Ethnic diversity in Eastern Africa: Opportunities and challenges* (2010) 41, 47.

a role that may include giving names or labels to such identities,[14] and is defined by social, cultural, economic, and political experiences. This author adopts, as many others do, a view of ethnic identity that blends the instrumentalist and constructivist approaches.

If ethnic identities are socially constructed, then it should be possible to speak, as Karega-Munene does, of "production of ethnic identity",[15] and to point to particular moments in history when certain ethnic groups claimed to be or emerged as distinct entities. For example, the term "Kalenjin", which is now widely associated with the Nandi-speaking' peoples, and partly created by the colonial administration, served as a form of ethnic identity in the 1940s and 1950s for a small group of academic and political elites such as Daniel arap Moi and Taita Towett.[16] The term gained popularity from mid-1950s when these politicians promoted its use in order to establish a broader political base. In 1979, and with Moi as the President, the national population census included a category called "Kalenjin" for purposes of disaggregating ethnic affiliation. The terms "Luhya" and "Sabaot", coined in the 1920s and 1940s respectively, evolved in more or less the same fashion.

As mentioned earlier, certain sub-groups within the Kalenjin and Luhya ethnic groups have in the recent past insisted on being recognised as separate and distinct ethnic identities. Members of the Endorois, Sengwer, and Ogiek sub-groups, for instance, now largely regard themselves as ethnically separate from the Kalenjin.[17] The Mbeere and Tharaka have also sought to differentiate themselves from the Embu and Meru, respectively. These detachments point to the fact that ethnic identity is at its core a matter of personal choice: individuals and groups have the autonomy to choose an ethnic identity of their preference and may adopt multiple identities. An individual may describe himself as a Kikuyu, Kenyan, farmer, and East African, all at once. However, the Kenyan High Court has frowned upon the idea that ethnic identity is a matter of personal choice. In a case concerning the ethnic identities of certain individuals appointed to public office, a High Court judge observed that allowing people to choose their ethnic identities will run counter to the constitutional objective of ensuring regional or ethnic balance in the public service because "persons may be able to

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[14] G Lynch 'What's in a name? The politics of naming ethnic groups in Kenya's Cherangany Hills' (2016) 10 *Journal of Eastern African Studies* 208.
[15] Karega-Munene (n 11 above) 41.
[16] Karega-Munene (n 11 above) 44-46.
[17] Lynch (n 7 above).

choose their ethnicity or regional background depending on the benefit that may accrue to them".[18]

Despite what may be seen as the gradual fragmentation of the Kalenjin ethnic group, some people chose to be identified as "Kalenjin" for purposes of the 2009 population census. They did so notwithstanding the fact that they were at liberty to alternatively indicate that they belonged to one of the sub-groups that comprise the Kalenjin. Similarly, they are those who preferred to be identified as Luhya or as Mijikenda as the case may be. Interestingly, slightly more than 600,000 people or 1.6% of the total population stated that their ethnic affiliation is "Kenya". This choice is interesting because ethnic identity is often considered to be "the primary alternative to national identity".[19]

However, a 2008 scientific survey by Bratton and Kimenyi find no evidence that ethnic identity and national identity are mutually exclusive in Kenya.[20] It is curious, though, that the percentage of the population that described itself as Kenyans in the 2009 census (1.6%) is significantly lower than what Bratton and Kimenyi found in their survey. In particular, as high as 22% of the sampled people claimed that they feel "only Kenyan" and nothing else. Even a higher percentage, 29% to be exact, said that they feel "more Kenyan" than anything else. Only a paltry 12% indicated that they preferred their ethnic identity over the national identity.

The 2009 population census placed Kenya's total population at 38.6 million. Like the five national population surveys preceding it, the 2009 census revealed that five large ethnic groups account for more than 66% of the country's total population (See Table 1 below). The "Big Five", as they are sometimes called, are: Kikuyu (17.7%), Luhya (14.2%), Kalenjin (13.3%), Luo (10.8%), and Kamba (10.4%). Other relatively big ethnic groups are the Somali (6.4%), Kisii (5.9%), Mijikenda (5.2%) and Meru (4.4%). This ethnic configuration has direct implications on Kenyan politics, and especially, on the formation of political parties or coalitions and voting patterns. I return to this topic in greater depth below.

Table 1: Population share of the five big ethnic groups

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[18] *Awareness Trust & 8 Others v Attorney General* [2012] eKLR, para 118.
[19] A Robinson 'National versus ethnic identity in Africa: State, group, and individual level correlates of national identification'.
[20] M Bratton & M Kimenyi 'Voting in Kenya: Putting ethnicity in perspective', Afrobarometer Working Paper No. 95 (2008) 3.

Ethnic group	% share of national population					
	1962	1969	1979	1989	1999	2009
Kikuyu	19.0	20.1	20.9	20.8	18.5	17.7
Luhya	12.6	13.3	13.8	14.4	14.2	14.2
Luo	13.3	13.9	12.8	12.4	10.8	10.8
Kamba	10.8	10.9	11.3	11.4	10.3	10.4
Kalenjin	10.5	10.9	10.8	11.5	12.1	13.3
Total	66.2	69.1	69.6	70.4	65.9	66.4

Source: Kanyinga (2006:354); NCIC (2016:29).

Controversy has almost always accompanied the release of the official population figures of ethnic groups. The results of the 1989 census, for example, was bitterly disputed because it showed that the highest growth rates were amongst those ethnic groups aligned to the government at the time (Kalenjin, Maasai and Luhya).[21] A further bone of contention revolved around the fact that the Kalenjin had displaced the Kamba as the fourth largest ethnic group.[22] The census was conducted in August 1989 but the results were released four years later (1994), a fact that led many to believe that the government had adjusted the "true" results for partisan political reasons. For the 1999 census, the government chose not publish data relating to ethnic groups.

Like the 1989 census, the results of the 2009 elicited considerable controversy. The census report indicated that the results for eight districts located in what are now Garissa, Mandera, Wajir and Turkana counties presented implausibly high or low growth rates which "deviate[d] significantly from the patterns portrayed not only by the rest of the country but by their respective neigbouring districts as well".[23] On this basis, the government not only advised that the results should be treated with caution but also went ahead to cancel them altogether. A few residents of the eight districts successfully applied for a High Court order barring the government from circulating or using any other results apart from those contained

[21] C Hornsby *Kenya: A history since independence* (2012) 452.
[22] As above.
[23] Republic of Kenya *2009 Kenya population and housing census volume IB* (2010) 17.

in the report of the 2009 census.[24] In the end, however, the Court of Appeal lifted the High Court order.[25]

3 Ethnic identity and politics: Locating the nexus

Ethnic identity has long been regarded as "a powerful force in the politics of many countries".[26] Across the world, and certainly in Africa, ethnic identity is frequently used or manipulated by political elites to achieve or pursue partisan ends. This practice is what is commonly referred to as "politicization of ethnic identity" or simply as "ethnic politics". In the literature, Mozaffar offers a relatively good articulation of what politicization of ethnic identity entails. He observes that politicization of ethnic identity is "a strategically rational behavior involving the contingent (as opposed to the reflexive) activation of objective ethnic markers by political elites to form groups, define group interests, and organize collective action to advance political goals".[27] Ethnic politics is a sub-set of *identity politics* which may be organized around any of the following identity markers: race, religion, gender, age, ethnicity, and so forth. As Oloo puts it, ethnic politics is animated by the claim that it "represent[s] and seek[s] to advance the interests of particular groups in society, the members of which often share and unite around common experiences of actual or perceived social and economic injustice, relative to the wider society of which they form part of and exist".[28]

There are a number of features that are always present in societies in which ethnic politics is deeply embedded. Here, the focus is on three major features. First, political parties draw the majority of their membership from and are founded to basically advance the interests of specific ethnic groups, and by extension, to counter the interests of perceived "enemy" ethnic groups. What distinguishes parties in such societies is who rather than what they represent. In many instances, there are no major variations in the ideologies and programmatic policies that different political parties subscribe to or seek to pursue. With parties playing the ethnic card, almost everything else in the political arena ends up taking an ethnic flavor. As Dowd

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[24] *Noor Maalim Hussein & 4 Others v Minister of State for Planning, National Development and Vision 2030 & 2 others* [2012] eKLR.
[25] *Republic & 10 others Ex-parte Minister of State for Planning, National Development and Vision 2030 & 8 Others v Republic Ex-parte Noor Maalim Hussein & 4 Others* [2016] eKLR.
[26] D Horowitz 'Structure and strategy in ethnic conflict', paper prepared for at the Annual World Bank Conference on Development Economics, Washington, D.C., April 20-21, 1998.
[27] S Mozaffaar 'The politicization of ethnic cleavages: Theoretical lessons with empirical data from Africa", paper prepared for presentation at the 2007 workshop on "politicizing socio-cultural structures: Elite and mass perspectives on cleavages", Helsinki, Finland, 7-13 May 2007.
[28] A Oloo 'Party mobilization and membership: Old and new identities in Kenyan politics' in K Kanyinga & D Okello (eds) *Tensions and reversals in democratic transitions: The Kenya 2007 general elections* (2010) 31, 33.

and Driessen observe, "when and where ethnicity and race are politicized and that politicization is institutionalized in the party system, the political landscape becomes frozen along an ethnic dimension".[29] A good number of scholars agree, and empirical evidence suggests, that such a situation is generally bad for democracy. Amongst other things, politicization of ethnic identity significantly diminishes citizens' trust in and satisfaction with political processes and institutions.[30] At its worst, politicization of ethnic identity foments deadly conflicts.

Second, elections are by and large decided by ethnic votes. Ethnic groups vote as a block, and in many cases, for one of their own. This practice reduces elections to what Horowitz referred to as "ethnic census" in his 1985 book *Ethnic Groups in Conflict*. In other words, elections are simply a head count of the individual members of competing ethnic groups. Ethnic voting is often directly linked to the ethnic nature of political parties. With no rational basis for distinguishing between political parties, a voter has little choice but to vote for the party that presumably represents the interests of his or her ethnic group. Ethnic voting is also a product of ethnic mobilization especially during campaign periods. Politicians marshal voters around ethnic identities and stoke fear of rival ethnic groups. On their part, voters rally behind political elites from their own ethnic groups if only to ensure that rival ethnic groups do not ascend to or continue to retain power. Even if voting for one of their own does not necessarily translate into direct material benefits to them, voters still do so because of expected symbolic benefits: "There is the 'feel good factor' about having 'one of our own' in charge of the state apparatus or a public office – it is a psychological status symbol".[31]

Third, the exercise of political power often translates into ethnic hegemony because "where there are ethnically dominated party systems, one's ethnic group is either in or out of power".[32] To be in power means to use (or misuse) state authority to access and channel resources, public goods, services and other benefits almost exclusively to one's own ethnic group or to the relevant alliance of ethnic groups. It also means that public service appointments are significantly influenced by ethnic identity as patronage and favouritism take centre stage in appointments and recruitments. Over time, these practices result in deep

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[29] R Dowd & M Driessen 'Ethnically dominated party systems and the quality of democracy: Evidence from sub-Saharan Africa', Afrobarometer Working Paper No. 92 (2008) 8.
[30] See Dowd & Driessen (n 27 above) 22.
[31] K Kanyinga et al 'Contradictions of transition to democracy in fragmented societies: The Kenya 2007 general elections in perspective' in K Kanyinga & D Okello (eds) *Tensions and reversals in democratic transitions: The Kenya 2007 general elections* (2010) 6.
[32] Dowd & Driessen (n 27 above) 9.

inequalities which in turn provide further basis and reason for politics to be organized around ethnic identity. In this regard, the following words of Oyugi are instructive.

> Politicization of ethnicity often takes place in a situation characterized by an inequitable structure of access. Such a structure gives rise to the emergence of the "in group" and the "out group" with the latter trying to break the structure of inequality as the former responds by building barriers to access that ensure the continuation of its privileged position. At the centre of this scenario are the elites who, feeling excluded or threatened with exclusion, begin to invoke ethnic ideology in the hope of establishing a "reliable" base of support to fight what is purely personal and/ or elite interests.[33]

Ethnic favouritism and patronage in the provision of public services and social goods also account for the failure of many African countries, Kenya included, to nurture a strong national identity amongst all its citizens. Politicization of ethnic identity has the effect of deepening tensions between national and ethnic identities. In a study that proceeded from the premise that "[t]he most visible reminder of the state in Africa is the availability of public services", Peterson found that where individuals self-identify first and foremost as belonging to a specific ethnic group, this ethnic identification reduces if they are reminded of the range of public services which are available at their disposal.[34]

In conclusion, it is important to note that ethnic politics is often contrasted with issue-based politics. In this context, issue-based politics is defined as "programmatic style of politics".[35] The main feature of issue-based politics is the focus on values, principles, ideologies, policies, and issues of the day, rather than on personalities and their ethnic identities.[36] If Kenya were to fully embrace issue-based politics, as opposed to ethnic politics, some of the major issues that elections would probably revolve around the provision of basic needs, infrastructural development, unemployment, corruption, and leadership qualities as articulated in Chapter Six of the 2010 Constitution of Kenya.

4   Politicization of ethnic identity in Kenya

Kenya is one of the African countries with a deeply embedded practice of ethnic politics. Political elites have traditionally used ethnic identity to pursue partisan ends to the extent that it is near impossible to discuss Kenyan politics without reference to the notion of ethnic

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[33] Oyugi (n 1 above).
[34] B Peterson 'Kikuyu or Kenyan? Government service provision and the salience of ethnic identities', 14 June 2016.
[35] J Mangwanda & B Lacombe 'Issue-based politics and personality-based politics: A tale of two nations', Africa Institute of South Africa Policy Brief No. 115 (2015) 2.
[36] As above.

identity. This section examines the various manifestations of the intersection between politics and ethnic identity at different epochs in Kenya's post-independence political history. But before delving into that inquiry, it is important to recall when and where the seeds of ethnic politics were first sowed.

Historical accounts trace the emergence of ethnic politics back to the colonial period. Prior to the imposition of colonial rule in Kenya, ethnic groups were largely egalitarian and interacted amongst each other in multiple ways including through migration, intermarriage and even warfare. These interactions were rarely loaded with the ideological notion of "ethnic other" because ethnic identities were fluid and flexible. Intersections between politics and ethnic identities were very limited and less visible or pronounced than they are today. Conceptions of power were different from those that the colonialist introduced. In particular, "to be in power", if such a notion ever crossed the minds of pre-colonial societies, basically meant that one presided over "intricate networks of clientage involving reciprocal but unequal relations with 'small boys', as well as power over women and children, and those held in the diverse forms and degrees of servitude, pawnship, and slavery".[37]

Colonial policies, rules and practices significantly altered African conceptions of ethnic identities and power. On its establishment, the colonial state begun to define and regulate almost all aspects of people's lives, including their ethnic identity, occupation, movement, and access to resources. With time, the encounter between the state and African societies resulted in the birth of ethnic politics. Berman explains broadly how this happened:

> The state in colonial Africa, within the broader context of the intrusion of capitalist modernity, was the central institutional force in the organization, production and distribution of social resources. It also shaped the accompanying changes in the social criteria of access to those resources; and the resulting social structural differentiation between individuals and communities. By authoritatively defining rules of behaviour that specified for Africans what was required, prohibited and permitted, the colonial state structured the choices of individuals by constructing social, economic and political situations; assigning individual roles and identities; and defining the choice of goals, strategies and behaviours. In so doing, that state delineated the strategic contexts in which ethnicity was or was not salient, and moulded the choices of political actors with regard to both the ascriptive markers of ethnicity and the organizational

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[37] B Berman 'Ethnicity, patronage and the African state: The politics of the uncivil nationalism' (1998) 97 *African Affairs* 305, 310-311.

forms in which it was expressed. This shaped, in turn, the scope of ethnic politics, its relationship with other social cleavages, and the complex interaction of ethnic identities and interests.[38]

Put differently, the colonial state begun to politically deploy ethnic identity in a manner that was neither possible nor necessary before.[39] But what exactly did the colonial state "require, prohibit and permit" in relation to ethnic identities? To begin with, colonial administrators actively encouraged Africans to think and act ethnically.[40] They downplayed or accentuated commonalities and differences between ethnic groups depending on the circumstances. They also perpetuated ethnic stereotypes, by instance, allocating jobs on the basis of one's ethnic identity.[41] Perhaps more importantly, in a bid to stem resistance and the possibility of a united struggle against it, the colonial administration applied the "divide and rule" policy which entailed creating administrative units demarcated along ethnic lines. This policy had several lasting implications insofar as the origins of ethnic politics are concerned.

First, it led to the amalgamation and classification of numerous ethnic communities under new common names or labels. The Bantu-speaking groups assigned to the North Kavirondo region became collectively known as the "Luhya".[42] The Nandi-speaking groups were labelled the "Kalenjin". In essence, when the colonial administration thought two or more communities had some close affinity, they lumped them together. That this was an official policy of the colonial administration is patently evident, for instance, from the pages of the report of the committee established in 1929 to examine the "Ndorobo question". This committee recommended that "wherever possible, the Dorobo should become members of, and be absorbed into, the tribe with which they have the most affinity".[43]

Second, the execution of the policy necessarily required the colonial state to employ African chiefs and headmen to administer sub-divisions and villages on its behalf. The chiefs and headmen reported to European district administrators or commissioners. The nature of this relationship is the foundation of present-day political and ethnic patronage. To win and maintain their loyalties, European administrators frequently extended goodies and benefits to

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[38] Berman (n 35 above) 313.
[39] L Althoff 'Identities and the colonial past in Kenya and Tanzania', CERS Working Paper, available at http://2m1wji4fi7mw252rpnmo25u6.wpengine.netdna-cdn.com/files/2014/07/dissertation-on-Ethnicity-in-East-Africa-for-publishing-as-a-CERS-working-paper-Laura-Althoff.pdf (accessed on 27 April 2017).
[40] Lynch (n 7 above) 60.
[41] Republic of Kenya *Report of the Truth, Justice and Reconciliation Commission: Volume III* (2013) 15-16.
[42] S Ndegwa 'Citizenship and ethnicity: An examination of two transitional moments in Kenyan politics' (1997) 91 *American Political Science Review* 599, 601.
[43] Colonial Office *Kenya Land Commission: Evidence and memoranda* (1943) 2131 cited in Lynch (n 7 above) 54.

chiefs and headmen. The chiefs and headmen often accepted these benefits, and with time, they became amongst the wealthiest people in society. This practice planted the idea amongst Africans that the state was the primary custodian and distributor of "the benefits of modernity and development".[44] More importantly, it succeeded in sending the message that patronage was the foremost avenue for accessing state resources and benefits.[45]

Third, the divide and rule policy propagated the idea that certain ethnic groups are the "true" owners of specific geographical parts of the country. Ethnic identity played a crucial role in the colonial demarcation of administrative units such as districts and provinces. Specifically, the country was divided into eight provinces. Predictably, each province ended with a dominant ethnic group. For instance, the Kalenjin were the majority ethnic group in Rift Valley, the Luhya in Western, the Kikuyu in Central, and the Mijikenda in the Coast. Table 2 below shows the dominant ethnic group in each province. To date, provinces and districts are associated with specific ethnic groups including in official government documents. For instance, the ethnic and diversity audit reports of the National Cohesion and Integration Commission use the "home district origin" of government employees as the proxy for their ethnic identity.[46]

Table 2: Dominant ethnic group in each province

Province	Dominant ethnic group	Percentage
Central	Kikuyu	93.8
Coast	Mijikenda	54.4
Eastern	Kamba	53.9
Nairobi	Kikuyu	32.4
North Eastern	Somali/Ogaden	36
Nyanza	Luo	57.9
Rift Valley	Kalenjin	46.4
Western	Luhya	86.2

Source: Alwy & Schech (2004: 268)

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[44] Berman (n 35 above) 318.
[45] As above.
[46] See W Wahiu 'Who belongs in the civil service? Ethnicity and discrimination in Kenya's civil service' in this volume.

Fourth, the policy necessitated the formation of ethnic-based political parties. Due to restrictions on movement and interaction, political organizations that mushroomed during the early years of the colonial period, such as the Baluhya Political Union, Kalenjin Union and the Kikuyu Central Association, were bound to be ethnically motivated. Agitation for independence and the emergence of the Mau armed revolt prompted the colonial government to ban the formation of nationwide political parties from 1955 onward. Political party formation was permitted at the district level only. The result was the formation of such parties as the Taita African Democratic Union, Nandi District Independence Party, and Nakuru African Progressive Party. By default, they were all formed along ethnic lines.[47] Things did not change with the lifting of the ban on nationwide political parties in 1960.

The two major political parties formed to contest the 1961 elections were based on and pursued the interests of specific ethnic groups; they were, in the words of Barkan, "loose coalitions of the district and local level political organisations".[48] The Kenya National African Union (KANU) was mainly an ethnic alliance of Kikuyu and Luo while the Kenya African Democratic Union (KADU) brought together those communities that felt politically threatened by the large numbers and possible ethnic domination of the Kikuyu/Luo alliance. In particular, KADU was an ethnic alliance of mainly the Kalenjin, Luhya and Mijikenda. The Northern Province Progressive People's Party (NPPP) that also participated in the 1961 elections drew its membership from the Somali ethnic group.

By 1963 when Kenya attained independence, ethnic politics had already pervaded the political arena. For the remainder of this section, the manifestations and implications of ethnic politics in the post-independence period is examined. For analytical purposes, the post-independence period is divided into two major epochs: the one-party era (1963-1991) and the multiparty era (1992-present). At independence, Kenya was a multiparty state with two main political parties: KANU and KADU. In November 1964, just about a year into independence, KADU dissolved and its members joined KANU. The dissolution of KADU effectively made Kenya a *de facto* one-party state. This state of affairs did not last for long. Ideological differences between the first president of the country, Jomo Kenyatta, and his vice-president,

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[47] F Wanyama 'Voting without institutionalized political parties: Primaries, manifestos and the 2007 general elections in Kenya' in K Kanyinga & D Okello (eds) *Tensions and reversals in democratic transitions* (2010) 61, 65.

[48] J Barkan 'The electoral process and peasant-state relations in Kenya' in F Hayward (ed) *Elections in independent Africa* (1987) 213, 218 cited in S Carey 'A comparative analysis of political parties in Kenya, Zambia and former Zaire', paper prepared for the 29th ECPR Joint Sessions, 6-11 April 2001, Grenoble, France, available at https://ecpr.eu/Filestore/PaperProposal/6b093bf4-eed9-42da-8505-60db10cffae0.pdf (accessed on 23 May 2017).

Oginga Odinga, resulted in the resignation in 1966 of the latter. Oginga subsequently formed an opposition party, the Kenya's Peoples' Union (KPU). Once again, Kenya became a multiparty state. In the aftermath of Tom Mboya's assassination in 1969 which was blamed on the government, KPU was outlawed.

From 1969 to 1982, Kenya remained a *de facto* one-party state. In 1982, a constitutional amendment made the country a *de jure* one-party state for the next decade or so. During this period, KANU was the sole political party in the country by operation of the law. In December 1991, Kenya returned to a multiparty status after the Constitution was amended to allow for the formation of multiple political parties. The paper considers the period between 1963 and 1991 as a one-party era because moments of multiparty politics during this period were very brief and short-lived. More fundamentally, it was a period during which mere dissent, let alone the operations of opposition parties, was severely repressed. As Mueller cogently demonstrates, the government basically blunted efforts by KPU between 1966 and 1969 to organize and meaningfully participate in national politics.[49]

4.1   Ethnic politics and one-party state

At the end of its rule, the colonial government handed over the reins of power to Jomo Kenyatta. He embarked on a project aimed at promoting nationhood by encouraging citizens to abandon parochial ethnic identities and embrace the Kenyan national identity. He publicly condemned ethnic politics which he claimed polarized the country and undermined national unity and development.[50] This public stance was largely a façade. Kenyatta's public pronouncements on the question of ethnic politics were the exact opposite of what he did in practice. Ethnic politics flourished during his tenure and became etched in the country's political fabric. Daniel arap Moi, who succeeded Kenyatta in 1978, did little, if at all, to change the rules of the game. Like his predecessor, he perpetuated and thrived on ethnic politics.

Two major expressions or manifestations of ethnic politics dominated the one-party era: (a) patronage and concentration of wealth and resources in the president's ethnic group; and (b) political maneuvers to ensure power remains in the ruling ethnic group.

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[49] S Mueller 'Government and opposition in Kenya: 1966-9' (1984) 22 *Journal of Modern African Studies* 399.
[50] Yieke (n 5 above) 13.

4.1.1 Patronage and ethnic favouritism

The dissolution of KADU in 1964 provides a good glimpse into how patronage creeped into Kenyan politics almost immediately after independence. The government orchestrated the dissolution of KADU by making "promises of Cabinet and sub-cabinet appointments and state development resources to leaders who would defect from KADU to KANU, and the denial of government development services to the constituencies of those leaders who remained in KADU".[51] It is in this this context that KADU's Ronald Ngala, Daniel arap Moi and Masinde Muliro secured positions in Kenyatta's cabinet.[52]

Kenyatta and Moi applied this "sticks and carrots" approach during the entire of their respective tenures. State resources and services were channelled to and concentrated in regions inhabited by ethnic communities that were or perceived to be in the good books of the president, the government, or the ruling party. It was common for political and community leaders of various ethnic groups to visit the president to pay homage, present their grievances and seek for state intervention and fringe benefits. In response, the president would issue a directive, for example, for a specific infrastructural development to be initiated in the region occupied by the visiting delegations. "Although they had begun as spontaneous events", observes Branch, "these visits steadily became highly regulated modes of interaction between citizens and their head of state".[53] Branch was speaking about Kenyatta's tenure but his observation is also true of Moi's tenure.

Kenyatta and Moi also rewarded loyalty and political support with public appointments. As it became routine, they also punished dissent with dismissal. For instance, shortly after KPU was formed, all its members who served in statutory boards were sacked.[54] But perhaps more importantly, Kenyatta and Moi flooded the public service with members of their Kikuyu and Kalenjin ethnic groups, respectively. There were growing concerns about the rise of Kikuyu hegemony as early as 1966.[55] Table 3 below shows that all the cabinets constituted by Kenyatta during his tenure were dominated by the Kikuyu. This group did not just have high numbers, it was, more importantly, overrepresented if its share of the population during this

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[51] Wanyama (n 45 above) 66.
[52] K Kanyinga 'Governance institutions and inequality in Kenya' in D Okello & M Gitau (eds) *Readings on inequality in Kenya: Sectoral dynamics and perspectives* 2006) 345, 373.
[53] D Branch *Kenya: Between hope and despair, 1963-2011* (2011) 73.
[54] Mueller (n 47 above) 421.
[55] D Rothchild 'Ethnic inequalities in Kenya' (1969) 7 *Journal of Modern African Studies* 689, 698.

period is considered.[56] Kikuyu dominance in the cabinet was replicated in other key institutions of government. By 1971, it is reported that Kenyatta had "abandoned all but the most perfunctory pretense that his was a government for all Kenyans".[57] He had succeeded in creating a relatively strong Kikuyu hegemony.

Upon becoming president, Moi maintained the composition of the cabinet he inherited from Kenyatta but only for a short period of time. He steadily established a Kalenjin hegemony by reducing Kikuyu's numerical strength in public service while increasing that of the Kalenjin. As Table 4 below shows, the proportion of Kikuyu ministers in Moi's cabinet stood at 30%. It reduced to 25% in 1982 and further down to 20% in 1985. By the time multiparty politics was reintroduced, the proportion was below 20%. On the contrary, the proportion of the Kalenjin gradually increased. There was only one Kalenjin minister in Kenyatta's last cabinet (1978). Moi appointed three Kalenjins into his 1979 cabinet bringing their proportion to 11% down from 4.8%. By 1998, Kalenjin ministers constituted 22% of the cabinet.

Table 3: Representation of ethnic groups in Kenyatta cabinets, 1966-1978

Ethnic group	1966		1967		1968		1970		1978	
	No	%	No	%	No	%	No	%	No	%
Kikuyu	6	28.6	6	28.6	8	31.6	6	28.6	6	28.6
Luhya	2	9.5	2	9.5	1	5.3	2	9.5	1	4.8
Luo	3	14.3	3	14.3	3	15.8	2	9.5	3	14.3
Kalenjin	1	4.8	1	4.8	1	5.3	2	9.5	1	4.8
Kamba	1	4.8	2	9.5	2	10.5	2	9.5	2	9.5
Kisii	2	9.2	2	9.5	1	5.3	2	9.5	2	9.5
Meru	1	4.8	1	4.8	1	5.3	1	4.8	1	4.8
Mijikenda	2	9.3	2	9.5	2	10.5	2	9.5	3	14.3
Other	3	14.3	2	9.5	1	10.5	2	9.5	2	9.5

Source: Kanyinga (2006: 374)

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[56] Kanyinga (n 50 above) 374.
[57] Branch (n 51 above) 102.

Table 4: Representation of ethnic groups in Moi cabinets, 1979-2001

Ethnic group	1979		1982		1985		1987		1994		1998		2001	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%
Kikuyu	8	30	7	25	5	20	4	14.2	1	4.2	1	4	1	4
Luhya	3	11	3	11	2	8	3	10.7	4	16.7	5	19	4	14
Luo	3	11	3	11	4	16	5	17.8	1	4.2	0	0	2	7
Kalenjin	3	11	3	7.4	3	12	2	7.1	4	17	6	22	5	17
Kamba	2	7.6	2	7.4	2	8	3	10.7	4	16.6	4	14.8	4	14.3
Kisii	2	7.6	2	7.4	1	4	2	7.1	2	8.3	2	7.4	2	7.1
Meru	1	3.8	2	7.4	1	4	1	3.5	2	8.3	1	3.7	1	3.6
Mijikenda	2	7.6	2	7.4	2	8	2	7.1	2	8.3	2	7.4	2	7.1
Other	2	7.6	3	11	5	20	6	21.2	4	16.6	6	22	7	25

Source: Kanyinga (2006: 375)

Statistical analysis by Kanyinga reveals that the ethnic identity of Kenyatta and Moi dictated appointments into other important and influential public offices including those of the assistant minister, permanent secretary, provincial commissioner, district commissioner, high court, and chairperson or managing director of a public corporation.[58] The impact of this practice on the composition of the civil service remains evident today.

A 2012 ethnic diversity and audit of the civil service by the NCIC revealed that Kikuyu and Kalenjin representation in the civil service is disproportionate to their population. In particular, the Kikuyu dominate all ministries and departments save for the prisons department, national police service, and the office of the prime minister which existed at the time.[59] The Kalenjin are the second largest ethnic group in the civil service.[60]A 2015 evaluation report of the Public Service Commission (PSC) corroborates the 2012 NCIC findings.[61] In fact, the PSC report revealed that the proportion of over-representation of five

[58] Kanyinga (n 50 above) 373-393.
[59] National Cohesion and Integration Commission *Towards national cohesion and unity in Kenya: Ethnic diversity and audit of the civil service*, volume 1 (2012) 5-7.
[60] As above.
[61] Public Service Commission *Evaluation report on public service compliance with the values and principles in article 10 and 232 of the Constitution for the year 2014/2015* (2015).

specific ethnic groups (Kikuyu, Kalenjin, Luo, Kisii and Taita) increased during 2014/2015 rather than decreasing.[62]

4.1.2   Ethnicity and succession politics

Kenyatta and Moi governed the country for relatively long periods of time, 15 and 24 years respectively. Many reasons account for the longevity of their presidencies including repression of dissent and consolidation of executive power in the office of the president. They also used the ethnic card to shield themselves from real or imagined political threats against their presidencies. Kenyatta grip on power for 15 years into independence was also sustained by political manoeuvres aimed at preventing other ethnic groups, especially the Luo and Kalenjin, from having their own as president. These manoeuvres focused on which ethnic group should neither get power nor the opportunity to control state resources. They may be likened to Mueller's "exclusionary ethnicity" which refers to a practice in which voters are primarily concerned about who should not ascend to power rather than who should.[63]

As noted earlier, the Luo and Kikuyu ethnic groups were political allies in the period before independence. Cracks in their unity begun to develop shortly after independence and mainly as a result of ideological differences between Oginga and Kenyatta. In 1966, Oginga was forced to resign from KANU and the government after his post as party vice-president was abolished and replaced by eight posts to match with the country's eight provinces. This move was meant to close the door on Oginga's prospects of ever rising to the helm of the party or the country. After resigning from government, Oginga formed KPU. This action led to a bitter political war in which KPU was dismissed as a "Luo party" while Oginga was cast as a subversive element.[64] A Kikuyu who supported Oginga was seen as a traitor who was engaged in activities aimed at "jeopardizing the Kikuyu hold over the state and its resources".[65]

With Oginga out of KANU, another Luo in the person of Tom Mboya sought to position himself as a possible successor of Kenyatta. This ambition was quickly stemmed through the same machinations that were used against Oginga. In June 1968, the government enacted a constitutional amendment that shifted the responsibility of selecting a president's successor

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[62] Public Service Commission (n 59 above) 19.
[63] S Mueller 'The political economy of Kenya's crisis' (2008) 2 *Journal of Eastern African Studies* 185, 201.
[64] Mueller (n 47 above) 423-426; Branch (n 51 above) 55-65.
[65] Branch (n 51 above) 60.

from parliament to the ruling party.[66] The amendment was followed by concerted efforts by Kikuyu political elites to weaken Mboya's control of KANU and chances of succeeding Kenyatta. It is the assassination of Mboya in July 1969, however, that brought Mboya's presidential ambitions to an ultimate and abrupt end.

In the 1970s, the focus of exclusionary ethnicity shifted to preventing Daniel arap Moi, the vice-president at the time, from succeeding Kenyatta. Operating under the auspices of GEMA, a group of Kikuyu and allied political elites formed the *Change the Constitution Movement* whose main purpose was to block Moi from automatically ascending to the presidency in the event of Kenyatta's death.[67] The group never succeeded in its mission primarily because opinion amongst Kikuyu elites was sharply divided.[68] Moi ascended the presidency in August 1978 with a promise to follow in the footsteps of Kenyatta.

4.2   Ethnic politics and multiparty state

Towards the end of 1991, Moi yielded to local and international pressure to transform the country from a one-party to a multiparty state. In December 1991, parliament repealed the relevant section of the constitution that declared the country a one-party state.[69] This paved way for formation of political parties and holding of multiparty elections. Kenya has held six general elections since transforming to a multiparty state. Four of these, the 1992, 1997, 2002 and 2007 elections, were held under the independent Constitution. The 2013 and 2017 general elections were held under the 2010 Constitution which provides for a devolved system of government in which citizens vote for national as well as county government political leaders.

As the analysis here will show, many legal and institutional steps have been taken in the last two decades to minimize ethnic politics and address its legacies. However, ethnic politics continues to be the "default" form of political engagement in Kenya.[70] Manifestations and implications of ethnic politics are many and include the following: proliferation of ethnic parties and coalitions; ethnic voting; and ethnic violence. In addition, patronage, ethnic

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[66] The Constitution of Kenya (Amendment) (No 2) Act No 16 of 1968.
[67] See J Karimi & P Ochieng *The Kenyatta succession* (1980).
[68] Oloo (n 26 above) 36.
[69] The Constitution of Kenya (Amendment) No. 12 of 1991.
[70] F Holmquist & M Githinji 'The default politics of ethnicity in Kenya' (2009) XVI *Brown Journal of World Affairs* 101.

favouritism and exclusionary ethnicity continue to hold sway. The discussion below focuses on the twin phenomena of ethnic parties and ethnic voting.

4.2.1 Ethnic parties and coalitions

One of the clear manifestations of ethnic politics since 1992 has been the formation of ethnic parties. Political parties are often overshadowed by their founding leaders who "double up as the perceived political heads of their ethnic communities".[71] This trend is not entirely new. It has only become more pronounced. During the one-party era, KANU claimed, after merging with KADU, that it was a national party drawing its membership from virtually all ethnic groups in the country. However, analysts have pointed out how KANU gradually transformed into a "Kikuyu party",[72] especially after 1966 when some of its members defected to form KPU. In what signifies the malleable and transitory nature of political parties in Kenya, KANU later transformed into a "Kalenjin party" during Moi's tenure. This gives some credence to the observation by Chege that "Kenya has never had experience of a single party with a genuinely national following: even in the days of a one-party state (1969–91) it was always clear beneath the surface who constituted the bedrock of ethnic support, who was on the periphery and who was perceived to be in opposition".[73]

As highlighted, during the short stint of its existence, KPU was labelled as a "Luo party" as part of KANU's campaign and propaganda to halt its expansion. Amongst KANU supporters, KPU was, in the words of Kuguru, "a Luo party, fighting the Kenyatta, or the Kikuyu government".[74] Pundits have a different view. Writing in 2010, Wanyama noted that KPU was "the first, and so far the only, political party that was formed on the basis of an ideology".[75] This claim is informed by KPU's embrace of socialism and its strong position on Africanization of the economy and redistribution of land and other state resources. Mueller equally rebuffs the notion that KPU was an ethnic party. According to her, KPU received the bulk of its support from Nyanza not for being a Luo party but primarily because the restrictions and hurdles directed against it made it difficult for the party to organize and penetrate into other parts of the country.[76] Mueller concludes as follows:

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[71] Wanyama (n 45 above) 72.
[72] Ndegwa (n 40 above) 606.
[73] M Chege *Political parties in East Africa: Diversity in political party systems* (2007) 29.
[74] P Kuguru *Trailblazer: Breaking through in Kenya* (2008) 94.
[75] Wanyama (n 45 above) 66.
[76] Mueller (n 47 above) 423-426.

> The KPU as a party may have been as catholic in its appeal as KANU; however, the regime's monopoly over the key socio-economic resources and sanctions in the society weakened the opposition party and over time both the Kikuyu and other non-Luo support for the KPU either diminished or became less visible.[77]

In the current era of multiparty politics, many argue that it is difficult to find a party or coalition that is founded on ideology.[78] Most political parties, if not all, have a strong ethnic base. In 1992, numerous political parties were quickly formed ahead of the first multiparty general elections that were to be held that same year. Among the first to be registered was the Forum for the Restoration of Democracy (FORD). It is said that FORD had "an appeal across the country and across ethnic lines".[79] Unfortunately, FORD did not last long. It splintered along ethnic lines into FORD-Kenya headed by Oginga and perceived to be a Luo party and FORD-Asili headed by Kenneth Matiba and considered to be a Kikuyu/Luhya party. Other major parties that took part in the 1992 elections included Democratic Party (DP) which was associated with the Kikuyu and KANU which drew its support mainly from the Kalenjin. In the end, one has to agree with Kanyinga when he asserts that in the 1992 elections, "[e]ach of the main ethnic groups had at least its own political party and/or was allied to a party formed by another ethnic group".[80] This trend was replicated in the 1997 general elections. The only slight change was the shift in allegiances. The Luo shifted their support to a new party, the National Development Party (NDP), while the Luhya moved to FORD-Kenya.

From around 2000, "ethno-regional coalitions" begun to emerge.[81] In March 2002, KANU (representing the Kalenjin) and NDP (representing the Luo) formally merged. The merger collapsed about five months later when Moi named Uhuru Kenyatta as his preferred successor. In the general elections that followed later that year, Kenyatta lost the presidential election to Mwai Kibaki of the National Rainbow Coalition (NARC) which was an ethno-regional coalition formed just prior to the elections. It was comprised of the National Alliance Party of Kenya (itself composed of 13 different parties) and the Liberal Democratic Party (LDP).

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[77] Mueller (n 47 above) 426.
[78] See e.g. A Oloo 'The triumph of ethnic identity over ideology in the 2013 general election in Kenya' in K Njogu & P Wekesa (eds) *Kenya's 2013 general election: Stakes, practices and outcomes* (2015) 48, 51
[79] Carey (n 46 above) 6-7.
[80] Kanyinga (n 50 above) 357. See also D Kadima & F Owuor 'Kenya's decade of experiments with political party alliances and coalitions: Motivations, impact and prospects' (2014) 13 *Journal of African Elections* 150.
[81] Kanyinga (n 50 above) 359.

Like FORD before it, NARC did not hold together for long. It was split in the middle by the politics around the 2005 constitutional referendum in which NAK supported the adoption of the proposed constitution while LDP opposed it. From the ashes of this fallout, at least four new parties emerged: Orange Democratic Movement (ODM); ODM-Kenya; NARC-Kenya; and Party of National Unity (PNU).

Similarly, the two major coalitions established ahead of the 2013 general elections had strong ethnic inclinations: Coalition of Reform and Democracy (CORD) brought together the Luo and Kamba while Jubilee Alliance was a union between the Kalenjin and Kikuyu. A third coalition, Amani, was largely associated with the Luhya although in the end CORD received more votes amongst the Luhya compared to Amani. While all the coalitions appealed to their ethnic bases during the campaign period, ethnic polarization was particularly central to Jubilee's eventual win.[82]

One possible overall conclusion that may be drawn from the foregoing discussion is that political parties in Kenya are not based on and do not follow any particular ideology. Indeed, this is a frequent claim in the literature.[83] The problem with this claim is that it sees ethnic identity as naturally and diametrically opposed to ideology. Yet, in many cases, ethnic groups coalesce into a political party or seek alliances with other ethnic groups as part of a political struggle to correct what they perceive as historical injustices. In such cases, it could be that "mobilization around ethnicity coincides with certain policy interests".[84] It is thus important to look beyond the ethnic identity of a political party's support base; to focus on the political interests that they seek to achieve.

In the 2007 general elections during which ODM had a fierce political battle with PNU eventually leading to the 2007/2008 post-election violence,[85] what informed the choice of ethnic groups and voters came down to their stand on the issue of majimbo (regionalism or devolution). According to analysts, "ethnic groups made policy and political choices on the matter [majimbo] based on their historical experiences with the centre and their current circumstances".[86] Indeed, a number of political parties have been recently established to mainly serve as vehicles for redressing "historical experiences with the centre". These

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[82] S Mueller 'Kenya and the International Criminal Court (ICC): Politics, the election and the law' (2014) 8 *Journal of Eastern African Studies* 25, 25-36.
[83] See Holmquist & Githinji (n 68 above).
[84] Kanyinga et al (n 29 above) 7.
[85] Republic of Kenya *Report of the Commission of Inquiry into Post Election Violence (CIPEV)* (2008).
[86] Kanyinga *et al* (n 29 above) 7.

include the United Republican Party (URP), Patriotic Party of Kenya (PPK), Chama cha Mashinani (CCM), and the Frontier Alliance Party (FAP). The URP and FAP seek to advance the interests of pastoralists while the PPK's main goal is to foster the interests of the coastal region of the country. The CCM champions for more resources to be allocated to county governments.

In a nutshell, ethnic identity alone is too narrow a lens to examine political parties. As Nyong'o argues, to dismiss a political party on the basis that it is ethnically-based, as has been done for decades, is to proceed on the assumption that:

> Only policies and ideologies are acceptable, or somehow legitimate, in forming political parties. This may be the rhetoric and not necessarily the true story. The story may very well be that behind the personalities and ethnic identities are interests that coincide with other social relations and identities, relations and identities that cannot be pursued without framing them ideologically and pursuing them under certain policies, regardless of how one may disagree with them from a given ideological perspective.[87]

Nyong'o points to NARC's 2000 manifesto as an example of a party manifesto that somehow embodied an ideological position even though it was an ethno-regional coalition. The manifesto had "strong doses of social democratic values that informed the party's championing of universal social health insurance once it ascended to power".[88] For others, that NARC was motivated by social democracy is neither unique nor surprising because nearly all parties in Kenya tend to subscribe to this ideology whether or not they explicitly state so.[89] The Social Democratic Party (SDP) is perhaps the only political party in the country that has explicitly and consistently stated its ideological position. In a recent manifesto, the party states that all its activities are "guided by the philosophy and principles of Marxism-Leninism which shows to the toiling masses the correct way to the ending of exploitation of person by person, their complete emancipation".[90]

Another popular assumption is that since Kenya's political parties are essentially ethnic parties, their campaigns and strategies solely revolve around the mobilization of their

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[87] A Nyong'o 'Political parties and coalition politics in Kenyan general elections(s): The 2013 presidential and general elections' in Njogu & Wekesa (n 81 above) 81-82.
[88] Nyong'o (n 85 above) 81.
[89] Oloo (n 76 above) 51.
[90] Manifesto of the Social Democratic Party of Kenya (SDP) available http://sdpkenya.org/documents/archived/Manifesto%20of%20the%20Social%20Democratic%20Party%20of%20Kenya.pdf (accessed on 19 June 2017).

respective ethnic groups. A 2009 empirical study by Horowitz finds that, on the contrary, presidential candidates spend a larger proportion of their time campaigning outside their home turfs in order to court other ethnic groups.[91] For instance, most of Kibaki's rallies (79%) during the 2007 presidential election were held out of his home turf (Central).[92] Similarly, Odinga held 95% of his rallies outside his stronghold province (Nyanza).[93] Both candidates largely avoided the regions of which they thought their chances of getting a significant number of votes were very slim. Instead, they invested and concentrated on "swing" regions, that is, those regions without a co-ethnic in the presidential race.

4.2.2   Ethnic voting

According to a recent observation, "by the end of the first decade of multiparty politics, Kenyans had proven their penchant to vote along ethnic lines".[94] This is a claim that has been repeated for as long as Kenyans have engaged in electoral politics. On the 1961 elections which marked the very first elections in which relatively nationwide political parties participated, Ndegwa notes that the votes garnered by KANU and KADU "roughly approximated the population distribution of the ethnic groups backing each party".[95] Tabulation of the results of the presidential elections conducted in the 1990s similarly shows that each ethnic region voted for one of their own (see Table 5), as was the case in the 2007 presidential election (See Table 6).

Table 5: Presidential election results, 1992 and 1997

Region	Moi (Kalenjin)		Kibaki (Kikuyu)		Oginga/Odinga (Luo)		Matiba (Kikuyu)		Ngilu (Kamba)		Others	
	'92	'97	'92	'97	'92	'97	'92	'97	'92	'97	'92	'97
	Percentage share of vote											
Nairobi	17	21	19	44	20	17	44	-	-	11	0.5	0.7
Central	2	6	35	90	1	0.7	62	-	-	3	0.7	0.7
Eastern	38	35	50	27	1.6	0.8	11	-	-	37	0.8	0.6
Rift	68	72	8	20	6	1.6	19	-	-	0.7	0.2	0.3

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[91]   J Horowitz 'Ethnic groups and campaign strategy in Kenya's 2007 election', available at http://cega.berkeley.edu/assets/miscellaneous_files/wgape/17_Horowitz.pdf (accessed on 25 May 2017).
[92] As above.
[93] As above.
[94] Oloo (n 76 above) 53.
[95] Ndegwa (n 40 above) 605.

Region												
Valley												
Coast	64	63	11	14	17	8	8	-	-	11	0.8	0.5
Western	40	45	3	1.3	18	2	39	-	-	0.5	0.3	1.2
Nyanza	14	24	6	16	75	55	3.3	-	-	1.7	1.7	1.3
North Eastern	78	73	4	19	7	0.3	10	-	-	0.6	1.0	0.2

Source: Kanyinga (2006: 358)

Table 6: Presidential election results, 2007

Region	% Kibaki (PNU)	% Raila (ODM)	% Kalonzo (ODM-K)
Nairobi	47.7	44.0	8.1
Central	97.0	1.9	0.7
Eastern	50.4	5.0	43.8
North Eastern	50.3	47.2	2.3
Coast	33.1	59.4	6.5
Rift Valley	33.5	64.6	1.4
Western	32.2	65.9	0.7
Nyanza	16.9	82.4	0.3
Total	46.4	44.1	8.9

Source: Oloo (2010: 52)

Based on the results of the 2007 presidential election, Oloo predicted that "[o]verall, in the foreseeable future, ethnicity will remain salient in party mobilization and membership strategies used by political parties in Kenya".[96] True to this prediction, the 2013 presidential election came down to a typical ethnic census. Jubilee Alliance, received 93.92% and 72.22% in Central and Rift Valley provinces, respectively. The CORD Coalition received 86.83 and 48.8% in Nyanza and Eastern provinces, respectively. The percentage for Eastern province was not as high as that of Nyanza because only the Akamba considered CORD as "their" coalition while the rest of ethnic groups residing in the province (Aembu, Ameru, etc.) were largely of a different political party persuasion.

Table 7: Presidential election results, 2013

Region	Jubilee %	CORD %	Amani %
Central	93.92	4.16	0.21
Coast	19.34	74.9	1.29

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[96] Oloo (n 26 above) 53.

Eastern	46.96	48.8	0.71
Nairobi	46.75	49.0	1.56
North Eastern	59.58	33.63	0.28
Nyanza	10.47	86.83	0.88
Rift Valley	72.22	23.35	2.12
Western	5.45	62.22	29.14
Diaspora	40.85	52.58	0.86
Total	50.07	43.31	3.93

Source: Oloo (2015:56)

An important question is whether the above statistical display of the results of recent presidential elections reveal that ethnic identity is the only factor that influences voting patterns in Kenya. Framed differently, do other factors (e.g. performance and policy or campaign issues) or identities (e.g. gender, youth, and religious identities) influence voting patterns? Contrary to popular opinion, Kenyans consider a variety of issues during elections which may or may not coincide with the interests of their ethnic groups. A survey published by Bratton and Kimenyi in March 2008 established that voters consider policy issues in determining whom to vote for. Consider this: the predicted probability of voting for Kibaki in the 2007 presidential election was 55% for those who approved his performance.[97] He received positive performance ratings from a range of ethnic groups.[98] In essence, "the presence of policy issues in an election campaign dilutes the impact of an ethnic census for almost all voters in Kenya".[99]

Even when there is lack of a clear incumbent in a presidential race, performance plays a part in influencing voter behavior. In the 2013 presidential election, Ferree *et al* find that, for the most part, voters treated Kenyatta as the incumbent as opposed to Odinga, although both of them served in the sitting government.[100] Their analysis of data from an exit poll reveals that voters who rated government's performance as "excellent" or "good" were more likely to vote for Kenyatta (58%) over Odinga (42%).[101] Similarly, voters with positive perceptions of the economy were more inclined to vote for Kenyatta (60%). When Ferree *et al* ran tests to find the correlation between ethnicity, performance, and campaign issues and the voting

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[97] Bratton & Kimenyi (n 18 above) 9.
[98] Bratton & Kimenyi (n 18 above) 9.
[99] Bratton & Kimenyi (n 18 above) 9.
[100] K Ferree et al 'Voting behaviour and electoral irregularities in Kenya's 2013 election' (2014) 8 *Journal of Eastern African Studies* 153, 154 & 160.
[101] Ferree *et al* (n 98 above) 161.

pattern, they discovered that: (a) "ethnicity strongly predicts vote choice, as do many performance categories"; and (b) "[s]imilar to ethnicity and performance, campaign issues also correlated with vote choice in substantively important ways".[102]

Performance is also a critical factor in parliamentary and ward elections. In many parts across the country, constituencies and wards are ethnically homogenous. As such, the salience of ethnic identity is fairly weakened at these levels. A closer look at the results of the 2007 parliamentary elections, for instance, reveals that performance, rather than ethnic identity, influenced the voting pattern. In a piece published in 2010, Njeru compared the results of the 2007 parliamentary elections with the use of Constituency Development Fund (CDF) as a measure of the level of a parliamentarian's performance.[103] He found that the majority of parliamentarians who had huge balances of CDF lost in the election. He concludes as follows:

> [A]lthough some MPs were voted back in 2007 with relatively huge amounts of unspent CDF, voter preference for candidates with a track record of local level development, particularly measured in terms of CDF use, was evident throughout the country. This suggests that more and more Kenyans could be shifting from ethnicity and political patronage as determinants of voter choice towards the more rational considerations of local level development.[104]

In the 2013 parliamentary elections, some relatively homogenous constituencies went further and turned the notion of ethnic voting on its head by electing individuals of a completely different ethnic or racial group. In Nyanza province, Kisumu Town East and Suna East constituencies, elected non-Luos although the two constituencies are dominated by the Luo ethnic group. North Imenti, a constituency largely composed of people of the Meru ethnic group, elected a non-Meru. That Odinga received more votes than Mudavadi in Western province indicates that the voting pattern witnessed in these three specific constituencies may be transposed to a presidential election. But one should not be too quick to make such a bold conclusion. It may be that voters in Western decided to vote for Odinga because he stood a better chance of winning as compared to Mudavadi. In other words, "voters [may] prefer a viable non-co-ethnic candidate over a nonviable co-ethnic".[105]

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[102] Ferree *et al* (n 98 above) 162.
[103] G Njeru 'Local level politics: The 2007 parliamentary elections in Kenya' in Kanyinga & Okello (n 20 above) 175, 191.
[104] As above.
[105] Ferree *et al* (n 98 above) 153, 159.

Policy or issue-based politics appear to be also taking root in cosmopolitan cities. In Nairobi, certain politicians have won elective seats without necessarily relying on their ethnic base. The story of Mike Sonko, Nairobi's Senator (2013-2017) and Governor from 2017, presents a clear illustration of a politician who has mobilized huge support from a large cross-section of the electorate by mainly delivering, on personal account, basic goods and services to low-income communities. In particular, Sonko runs a philanthropic outfit, the Sonko Rescue Team, which delivers basic goods, such as water, to Nairobi's urban poor. The works of Sonko Rescue Team has endeared him to thousands of urban poor across the ethnic divide.[106]

Still on policy issues as determinants of voting patterns, it is important to recall that the question of majimbo was a critical factor in the 2007 general elections. In their analysis mentioned above, Bratton and Kimenyi added majimbo into the equation. The results are telling: those who were opposed to majimbo had an increased probability of voting for Kibaki.[107] This choice was informed by how such voters defined the term "majimbo". For Kibaki supporters, and especially for Kikuyu voters, majimbo was not a code word for redistributive politics as some would wish them to believe. It simply meant that "people living outside their homelands will return to where they came from".[108] It could thus be argued that, more than anything else, their vote in the presidential election of that year reflected exclusionary ethnicity. They voted against Raila (the political face of majimbo) and not necessarily for Kibaki (the political face of a centralized government). A similar logic determined, in part, the results of the 2013 presidential election.[109] The Jubilee Alliance mobilized its ethnic bases to vote for Uhuru and against Odinga.[110]

A connected issue that could have influenced the voting behavior in both the 2007 and 2013 presidential elections was the candidates' policy on matters related to land ownership, access and use. Given the prominence attached to land and its linkage to ethnic identity, Mbote observes that any party or coalition that places land reforms as a key priority issue in its campaign will have a "head start" in a presidential election.[111] However, Ferree *et al* surprisingly find that although the "land question" was a campaign issue during the 2013

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[106] See 'The Sonkonization of Nairobi: How Mike Sonko is reshaping city politics' available at https://www.theelephant.info/future/2017/08/07/the-sonkonization-of-nairobi-how-mike-sonko-is-reshaping-city-politics/ (accessed on 24 August 2017).
[107] Bratton & Kimenyi (n 18 above) 10.
[108] Bratton & Kimenyi (n 18 above) 10.
[109] Mueller (n 80 above) 35.
[110] G Lynch 'Electing the "alliance of the accused": The success of the Jubilee Alliance in Kenya's Rift Valley' (2014) 8 Journal of Eastern African Studies 93, 107-109.
[111] P Mbote 'The land question and voting patterns in Kenya' in Njogu & Wekesa (n 81 above) 34, 35.

general elections, it did not predict support for either Kenyatta or Odinga, the top two contenders.[112] Like the question of majimbo, voters' position on land issues is determined by their subjective interpretations and experiences. For some, "land reforms" means that historical injustices will be (finally) addressed. For others, it means that the land they already possess, either legally or illegally, will be taken away. Such hopes and fears have an influence on voter behavior.

Apart from performance and policy position on critical issues, other factors that have been empirically established to influence voting patterns in Kenya include grievances, economic wellbeing, and access to public and private goods.[113] The weight attached to these factors is dependent on how a voter self-identifies. In particular, those who place emphasis on their ethnic identity are most likely to vote depending on the extent to which they access public services.[114] Gutiérrez-Romero interprets this trend to mean that "ethnicity is used by voters as a proxy for expected gains such as access to public services".[115]

The weight attached to performance and policy issues is also dependent on whether a voter's co-ethnic is contesting for a presidential seat. Voters with a co-ethnic in the race tend to ascribe more weight to the ethnic identity of the candidates while those without consider a wider range of factors including performance and policy positions.[116] Coastal voters have never had a viable co-ethnic candidate in any presidential election. Yet, in the last two elections, they have overwhelmingly voted for Odinga. For the 2007 elections, one may argue that the presence of Najib Balala in ODM's top leadership channeled coastal votes towards Odinga. However, as Asingo notes, this argument holds little water if it is considered that Balala was unable to move with coastal voters when he defected to the Jubilee Alliance during the 2013 elections.[117]

To what extent does an identity other than ethnic identity influence voting behavior in Kenya? Political elites regularly seek to appeal to identities other than ethnic identity, including identities based on gender, age, and religion. Yet, Oloo has consistently argued that

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[112] Ferree et al (n 95 above) 162.
[113] R Gutiérrez-Romero 'The role of ethnic identity and economic issues in the 2007 Kenyan election', CSAE WPS/2010-06,
[114] Gutiérrez-Romero (n 111 above) 27.
[115] Gutiérrez-Romero (n 111 above) 27.
[116] Ferree *et al* (n 98 above) 159.
[117] P Asingo 'Party strengths, partisan identities and voter mobilization in the Kenya elections of 2013' in Otieno (n 80 above) 144, 164.

ethnic identity triumphs over these other "new" identities.[118] He predicts that for the foreseeable future, ethnic identity will continue to trump other identities which are destined to "take a long time to acquire the requisite weight to be contenders as drivers of victory".[119] But it should be borne in mind that in any election, an identity other than ethnic identity may influence the voting choices of at least some of the voters even if in the end the preferred identity fails to be a "driver of victory". In other words, that ethnic identity triumphs over other identities should not be construed to mean that these other identities are completely irrelevant.

In Kenya's modern history, the age of presidential candidates first meaningfully featured in the 2002 election in which the contest was between the elderly Kibaki and the youthful Uhuru Kenyatta. The latter's candidacy, "Project Uhuru" as it came to be popularly known, was anchored on the idea that desirous of an inter-generational change, voters would prefer a youthful president over an elderly one. Instead, Project Uhuru appealed to Mungiki, a proscribed ethnic-based Militia group drawing its membership from Kikuyu youths.[120] In the end, the project flopped miserably but not before tearing KANU apart. In the 2007 presidential election, age took a backseat as a relevant determinant of voting behavior because the two main challengers, Kibaki and Odinga, were both of advanced age.

The issue of age re-emerged more forcefully as a campaign issue in the 2013 elections. Jubilee's Kenyatta, and his running mate (William Ruto) presented themselves as youthful "digital" candidates while casting their main rival, CORD's Odinga (and Kalonzo Musyoka) as old and "analogue". The duo's campaign also relied heavily on information technology in a bid to appeal to the younger generation of voters. Another pair, Peter Kenneth and his running mate, also hoped to sway voters by portraying an image of a youthful team. There is, however, no concrete evidence to suggest that age was a significant determinant of the voting pattern in the 2013 elections.[121] Still, commentators concede that Jubilee's strategy of linking youth and technology was a "clever" one as it enabled the coalition to frame itself as "a team that offered change".[122] Others have gone as far as to suggest that Jubilee's victory could be

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[118] Oloo (n 26 above); Oloo (n 76 above).
[119] Oloo (n 76 above) 61.
[120] P Kagwanja 'Power to uhuru: Youth identity and generational politics in Kenya's 2002 elections (2006) 105 *African Affairs* 51.
[121] Asingo (n 115 above) 169-170; Oloo (n 76 above) 60.
[122] N Cheeseman *et al* 'Democracy and its discontents: Understanding Kenya's 2013 elections' (2014) 8 *Journal of* Eastern *African Studies* 1, 9.

attributed to, amongst other factors, the coalition's ability to "inspire, mobilize and direct youth imagination towards a possible electoral victory".[123]

The question of gender equality in Kenya's political sphere has interested scholars for decades.[124] However, studies on the specific issue of gender identity as a determining factor of voter choice are fairly recent and mostly concern the election of women into political offices. In the 1997 general elections, two women, Charity Ngilu and Wangari Maathai, unsuccessfully contested for the presidential seat. The results suggest that the few who voted for the two were appealed by their ethnic rather than gender identity.[125] In subsequent elections, party affiliation and ethnic identity have similarly appeared to take precedence over gender identity,[126] a fact that is to blame for the low number of women elected into parliament since independence.

In the 2007 general elections, the Kalenjin community broke the record by electing six women parliamentarians, the highest number to be ever elected by a single ethnic community. The six were successful in their bid despite the fact that patriarchy is deeply entrenched amongst the Kalenjin. Remarkably, scholars who have examined the intriguing case of the six do not necessarily attribute their success to their gender identity. Akech traces their victory to the widening political space in Rift Valley after the decline of Moi's dominance and their "good leadership experience, a fairly sound financial base, and familial networks".[127] Chebet-Choge identifies almost a similar set of determining factors: the candidates' party affiliation; their educational qualifications; voter education through mainstream media and mobile phone text message service; and their personalities.[128]

The determining factors identified by Akech and Chebet-Choge are not gender-specific and apply equally to men and women. This revelation lends credence to Adika's argument that once women cross the party primaries, their success rate is more or less that of men.[129] In reaching this conclusion, Adika analyzed the success rate of men and women in the five

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[123] M Orwa & C Wafula 'Digital slogans, analogue habits: Youth and the 2013 general elections in F Otieno (ed) *New constitution, same old challenges: Reflections on Kenya's 2013 general elections* (2015) 190, 194.
[124] For recent studies see e.g. J Biegon (ed) *Gender equality and political processes in Kenya: challenges and prospects* (2016); W Kabira & P Mbote 'Gender issues in electoral politics in Kenya: The unrealized constitutional promise' in Odote & Musumba (n 2 above) 177.
[125] Oloo (n 26 above) 41.
[126] Oloo (n 26 above) 41.
[127] A Akech '(Re)turn of women: Post-Moi's Kenya and electoral politics in Kalenjin-Rift Valley' in Kanyinga & Okello (n 26 above) 599, 616.
[128] S Chebet-Choge 'Matriarchy rises to leadership among patriarchal Kalenjin: The dynamics and perspectives of the 2007 general elections in Kenya' in Kanyinga & Okello (n 26 above) 619, 642-645.
[129] E Adika 'Much promised, little delivered: Women in the 2013 general elections' in Otieno (n above) 175.

multiparty general elections conducted since 1992. She defined "success rate" to mean "the proportion of each gender that is elected against the absolute number of that gender contesting a position".[130] As Table 8 reveals, apart from 1997 where there was a huge gap between the success rate of men and women, both genders have "similar odds of success" because "[i]n regions where parties enjoy a great degree of popularity, voters tend to choose candidates presented to them in the ballot papers by these parties, the gender of those candidates notwithstanding".[131]

Table 8: Success rate for men and women, 1992-2013

Year	Total candidates	Men	Women	% Women	Elected Men	Elected Women	Success rate (men)	Success rate (women)
1992	854	835	19	2	182	6	22	31
1997	882	829	53	6	206	4	25	8
2002	1081	1037	44	4	201	9	19	20
2007	2548	2279	269	11	195	15	9	6
2013	2097	1968	129	6	274	16	14	12

Source (Adika 2015: 186)

In addition to age and gender, political elites increasingly seek to appeal to voters' religious identity during campaigns. The recent past has also seen an increase in the number of clerics seeking political office, including the office of the president.[132] However, definitive conclusions are yet to be drawn on the relevance of religious identity in voting patterns. In the 2007 general elections, the two major presidential candidates actively sought to endear themselves to Muslim voters. Indeed, Odinga signed a memorandum of understanding with the National Muslim Leaders Forum (NAMLEF). The split in the number of votes garnered by both candidates in Muslim dominated regions suggests that religious identity was not

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[130] Adika (n 127 above) 185.
[131] Adika (n 127 above) 188.
[132] See B Chacha 'Pastors or bastards? The dynamics of religion and politics in the 2007 general elections in Kenya' in Kanyinga & Okello (n 25 above) 101; T Kavula 'Our enemies are God's enemies: The religion and politics of Bishop Margaret Wanjiru, MP (2008) 2 *Journal of Eastern African Studies* 254.

necessarily a crucial determining factor.[133] A similar situation obtained during the 2013 general elections.[134]

5   Overcoming ethnic politics: Constitutional and legislative tools

In the aftermath of the 2007/2008 post-election violence, the law has been robustly deployed to reduce ethnic politics and mitigate its adverse effects and implications. The Constitution of Kenya (2010), the country's supreme law, envisages a society in which ethnic identity is a force for good. It proceeds from the premise that individuals and communities are proud of Kenya's "ethnic, cultural and religious diversity" and are determined to "live in peace and unity as one indivisible sovereign nation".[135] More importantly, the Constitution contains provisions directly addressing the question of ethnic identity in politics and governance. These constitutional provisions are further fleshed out in a string of legislative enactments. This section looks into how the law addresses the question of ethnicity in five main areas of politics and governance: electoral system; political parties; public appointments; devolved system of government; and inter-ethnic relations.

5.1   Electoral system

An electoral system is the mechanism by which votes garnered in an election are converted into seats in the legislature.[136] A detailed discussion on the various forms of electoral systems is beyond the purview of this paper. Suffice it to note that electoral systems fall under three broad categories: plurality or majority systems; proportional representation systems; and mixed systems. Depending on context, these systems have the potential to either encourage or discourage the need to resort to ethnic politics. Plurality systems, especially its first-past-the-post (FPTP) variation, operates on a majoritarian or winner-take-all basis. In essence, the winner (not necessarily the absolute majority winner) has his way while the loser has no more than his say. An FPTP system heightens the need for politicians and political parties to mobilize numbers through all possible means including ethnic mobilization. In a deeply divided society such as Kenya's, political elites have been forced to establish ethnic parties or

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[133] Oloo (n 26 above) 45.
[134] Asingo (n 115 above) 169.
[135] Constitution of Kenya, 2010, Preamble, para 3.
[136] A Reynolds *et al Electoral system design: The new international IDEA handbook* (2005) 5.

enter into ethnic coalitions for the sole purpose of winning elections and securing state power.[137]

In proportional representation (PR) systems, seats in the legislature are allocated to political parties in proportion to the votes they garner in a general election. The attractive feature of PR systems is well articulated by Reynolds *et al*: "The rationale underpinning all PR systems is to consciously reduce the disparity between a party's share of the national vote and its share of the parliamentary seats".[138] Mixed systems, such as the mixed member proportional (MMP) system, combine the essential features of both plurality systems and PR systems. Allocation of seats in the legislature is determined using a plurality system as well as a proportional representation system. The need to resort to ethnic politics is relatively low in countries with PR or mixed systems. This is mainly because plurality and mixed systems push politics to revolve around parties rather than ethnic leaders. More importantly, these systems promote inclusivity in the sense that both majorities and minorities have a place and stake in national governance. For ethnically divided societies like Kenya, a PR or mixed system may well be considered as "a near-essential condition for democratic consolidation".[139]

Kenya has had an FPTP electoral system since independence, albeit with small and occasional doses of features that attempt to mimic the main characteristics of PR systems.[140] Although it has long been recognized that it is largely to blame for the entrenchment of ethnic politics in the country, the FPTP electoral system remains in place to date. Previous proposals to change Kenya's electoral system from FPTP to MMP have not been taken on board.[141] In fact, the Independent Review Commission on the 2007 General Elections (Kriegler Commission) specifically made the case against the idea of introducing an MMP system in Kenya.[142]

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[137] K Kanyinga Kenya: 'Democracy and political participation – discussion paper' (2014) 21.
[138] Reynolds (n 134 above) 29.
[139] A Oloo 'Elections, representations and the new constitution', Society for International Development Constitutional Working Paper Series No. 7, available at https://www.sidint.net/sites/www.sidint.net/files/docs/WP7.pdf?utm_source=twitterfeed&utm_medium=twitter (accessed 21 February 2018).
[140] See G Mukele 'The Kenyan electoral system: Comments by ECK vice-chairman' in Africa Research and Resource Forum & Hans Seidel Foundation (eds) *The electoral system and multipartyism in Kenya* (2007) 35.
[141] M Chege 'The case for electoral system reform in Kenya' in Africa Research and Resource Forum & Hans Seidel Foundation (eds) *The electoral system and multipartyism in Kenya* (2007) 1.
[142] Republic of Kenya *Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007* (2008) 20-21.

The 2010 Constitution retains the FPTP system. However, it provides for a two-round-system in the presidential election. A candidate must receive "more than half of all the votes cast in the election" as well as "at least 25% of the votes cast in each of more than half of the counties" in order to be declared the president.[143] If no candidate meets this threshold, then the two candidates with the greatest number of votes are required to face-it-off in a second round of the presidential election.[144] In essence, the Constitution demands that for anyone to be president, he or she must appeal to a wider section of the Kenyan society, and specifically, beyond his or her ethnic group. This requirement is intended to reduce ethnic politics. Instead, it has had the exact opposite effect. It encourages presidential candidates or their political parties to enter into ethno-regional coalitions. As a result, the 2013 presidential election was reduced to a race between the two major ethno-regional coalitions, Jubilee and CORD.

The Constitution also provides for gender quotas and special seats for representatives of special interest groups, mainly persons with disabilities, youth, and workers, in the National Assembly, Senate and County Assemblies.[145] Representatives of special interest groups are elected on the basis of proportional representation by use of party lists.[146] By providing for party lists and reserved seats for specific groups, Kenya has borrowed inspiration from PR electoral systems. In fact, Chege claims that Kenya has "intuitively moved into the realm of MMP without acknowledging it".[147]

The experience of the 2013 presidential election has prompted renewed calls for the full and deliberate introduction of an MMP electoral system in Kenya. According to Kanyinga, had the 2010 Constitution adopted an MMP system, the country's democracy would have been strengthened in multiple ways:

> MMPR would have weakened ethnicity as a basis for political organising and representation by ensuring that membership of parties is national and that the parties have a membership that represents the diverse interests and groups that make up Kenya. By allocating seats in Parliament to political parties on the basis of their share of the national vote, the contentions around representation that arise with the delimitation of boundaries for single member districts in a first-past-the-post system would

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[143] Constitution of Kenya, Article 138(4).
[144] Constitution of Kenya, Article 138(5).
[145] Constitution of Kenya, Articles 97, 98 & 177.
[146] Constitution of Kenya, Article 90.
[147] M Chege 'Reforming the electoral and governance system in Kenya: The mixed-member proportional representation with consociational safeguards' in Njogu & Wekesa (n 81 above) 362, 365.

have been addressed. The system would have provided incentives for parties to organise nationally rather than regionally. It would have reduced disparities in the representation of different groups and interests in society.

Similarly, Oloo and Chege separately make the case for the adoption of an MMP electoral system in which the current FPTP system will run parallel to a PR system.[148] They both suggest that Kenya could borrow lessons from countries which allocate certain percentages of legislative seats on the basis of FPTP and PR systems.[149] Another suggestion is to make the current FPTP system fairer by extending the two-round system to parliamentary elections and/or reserve a certain number of seats for ethnic minorities. There are many proposals regarding the exact form in which an MMP system should take in Kenya. What is clear, though, is that the current FPTP electoral system deepens ethnic cleavages and is likely to continue doing so unless radical changes are introduced to counter its effects.

5.2   Political parties

A country's electoral system is only as strong as the political parties present within it. Until 2008, political parties in Kenya operated without any meaningful regulation. As they fell under the Societies Act, nothing distinguished political parties from other forms of groupings. In July 2008, a new law for the registration and regulation of political parties came into force. As at 2013, the enforcement of the Political Parties Act, 2007, had the effect of reducing the number of political parties in the country from 200 to 48.[150]

The 2010 Constitution seeks to bring to an end the phenomenon of ethnic parties. It categorically bars the formation such parties.[151] It also requires all political parties to possess "a national character".[152] The Political Parties Act of 2011 further provides that any political party seeking full registration must demonstrate the following: (a) it has more than a thousand registered voters from each of more than half of the 47 counties in the country; (b) its membership reflects, *inter alia,* regional and ethnic diversity; and (c) the composition of its governing body equally reflects, *inter alia*, regional and ethnic diversity. The Constitution

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[148] Oloo (n 137 above) 9; Chege (n 145 above) 380-381.
[149] As above.
[150] Kristelig Folkeparti *A guide to political party management in Kenya* (2013) 8.
[151] Constitution of Kenya, Article 91(2)(a).
[152] Constitution of Kenya, Article 91(1)(a).

also requires party lists for potential nominated members of parliament to reflect regional and ethnic diversity of the Kenyan people.[153]

Political parties have, mainly on paper, complied with the above statutory requirements for registration. They have complied "on paper" because, as discussed above, political parties remain strongly associated with certain ethnic groups. In essence, the 2010 Constitution and the 2011 Political Parties Act have not significantly changed the nature and operations of political parties. In other words, political parties of the new constitutional order are not any different from those of the past.[154] To borrow from the first part of the title of one of the many books published in the aftermath of the 2013 general elections, the current state of political parties present a classic case of a "new constitution, same old challenges".[155]

The Office of the Registrar of Political Parties (ORPP) is partly to blame for the continued formation of ethnic parties.[156] The office has largely neglected its regulatory function mainly because of the more than four-year delay in appointing, through a competitive process, a substantive holder of the office.[157] The present holder of the office discharges the duties of the office in an acting capacity. If political parties are to live to the dictates of the law, the ORPP must be more vigorous and independent in its regulatory and enforcement role.

5.3   Public office appointments

The 2010 Constitution contains relatively bold provisions aimed at tackling patronage and ethnic favouritism in state governance. To begin with, all national state organs are required to make their services available to all parts of the country.[158] The Constitution also requires the composition of the national executive to "reflect the regional and ethnic diversity of the people of Kenya".[159] Another important constitutional requirement is that members of all ethnic groups should be afforded "adequate and equal opportunities for appointment, training

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[153] Constitution of Kenya, Article 90(2)(c).
[154] Cheeseman (n 135 above) 6.
[155] F Otieno (ed) *New constitution, same old challenges: Reflections on Kenya's 2013 general elections* (2015).
[156] See 'Petitioner wants political parties registrar removed for incompetence' available at http://www.the-star.co.ke/news/2016/08/22/petitioner-wants-political-parties-registrar-removed-for-incompetence_c1407746 (accessed on 26 May 2017).
[157] See Commission on Administrative Justice 'Advisory opinion to the President on delay in appointing a substantive holder of the Office of the Registrar of Political Parties', available at http://www.ombudsman.go.ke/wp-content/uploads/2016/04/ADVISORY-OPINION-TO-THE-PRESIDENT-ON-DELAY-IN-APPOINTING-A-SUBSTANTIVE-HOLDER-OF-THE-OFFICE-OF-THE-REGISTAR-OF-POLITICAL-PARTIES.pdf (accessed 24 August 2017).
[158] Constitution of Kenya, Article 6(3).
[159] Constitution of Kenya, Article 130(2).

and advancement, at all levels of the public service".[160] To ensure that public appointments are merit-based, the Constitution provides for parliamentary or county assembly approval of certain public appointments.[161]

In essence, the Constitution clearly singles out ethnic identity as a critical factor in ensuring that the public service reflects the "face of Kenya".[162] The 2008 National Cohesion and Integration Act (NCIC Act) further provides that public institutions should not have more than one third of its staff from the same ethnic community.[163] These constitutional and legislative requirements have had little expected impact. President Uhuru Kenyatta and his deputy, William Ruto, have been regularly accused of running a "tribal government".[164] The present cabinet is dominated by the Kikuyu and Kalenjin who cumulatively account for about 50% of the cabinet.[165] Indeed, the President views appointments to cabinet and other positions as political rewards to ethnic communities.[166]

5.4   Devolution and public resources

One other way that the Constitution tries to deal with the enduring legacies of ethnic politics is through the devolved system of government.[167] In this context, devolution is seen as "an institutional mechanism for the political inclusion of ethnic communities".[168] Article 174 of the Constitution provides that the objectives of devolution include: fostering national unity by recognising diversity; recognition of the right of communities to manage their own affairs and to further their development; and protection and promotion of the interests and rights of minorities and marginalized communities. The Constitution establishes a total of 47 counties.[169] A country government consists of a county assembly, on the one part, and a county executive committee headed by a governor, on the other. The powers, functions and

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[160] Constitution of Kenya, Article 232(1)(i).
[161] See e.g. Constitution of Kenya, Article 155. See also Public Appointments (Parliamentary Approval) Act No. 8 of 2011 & Public Appointments (County Assemblies Approval) Act No. 5 of 2017.
[162] See *Awareness Trust & 8 Others v Attorney General* [2012] eKLR, para. 117.
[163] National Cohesion and integration Act, No. 12 of 2008, Section 7(2).
[164]   See   e.g.   'Jubilee   accused   of   running   "tribal   government"'   available   at https://www.standardmedia.co.ke/article/2000146877/jubilee-accused-of-running-tribal-government (accessed on 19 June 2017).
[165] Asingo in this volume.
[166]   See   'Chief   justice   Maraga   tells   President   Uhuru   Kenyatta   he   is   not   his   project'   available   at https://www.standardmedia.co.ke/article/2001235864/chief-justice-maraga-tells-president-uhuru-kenyatta-he-is-not-his-project (accessed on 19 June 2017).
[167] See generally M Kangu *Constitutional law of Kenya on devolution* (2015).
[168] B Nyabira & Z Ayele 'The state of political inclusion of ethnic communities under Kenya's devolved system' (2016) 20 *Law Democracy & Development* 131,
[169] Constitution of Kenya, Schedule

responsibilities of county governments are outlined in detail in the 2012 County Governments Act.[170]

County governments are entitled to not less than 15% of the national revenue collected in any budget year. In addition to this share of the national revenue, some counties benefit from the Equalization Fund which is established under Article 204 of the Constitution. The purpose of the fund is restricted to provision of basic services to "marginalized areas" with a view to bring the quality of such services in those areas to "the level generally enjoyed by the rest of the nation". The establishment of county governments in 2013 has generated an economic boom in almost all regions of the country. Moreover, some hitherto excluded communities are now been included in the governance of county affairs through County Assemblies and County Executives.

On the flipside, devolution has resulted in the emergence of "intra-county ethnic minorities".[171] At present, the boundaries of the majority of the counties coincide with the territorial boundaries of regions considered to be the ancestral homes of certain ethnic communities. These communities form the majority in those counties, and as such, smaller ethnic communities have found themselves excluded in county politics and economic governance. This exclusion persists despite the fact that the County Governments Act demand that county executives reflect the "community and cultural diversity" of the respective counties.[172] In fact, a county assembly is under an obligation not to approve nominations for appointment to the County Executive Committee if such nominations do not take into account, *inter alia*, "representation of the minorities, marginalized groups and communities" as well as "community and cultural diversity within the county".[173]

Ethnic exclusion at the county level is caused by similar factors that cause it at the national level. Authors have particularly pointed out the adverse effects of the FPTP electoral system which is used to elect county governors as well as the majority of members of county assemblies. Under the FPTP electoral system, observes Bosire, "it is unlikely that county minorities will secure the governor seat or even, in some cases, county ward seats".[174] The challenge posed by the FPTP system is compounded by the fact that demarcation of county

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[170] Act No. 17 of 2012.
[171] Nyabira & Ayele (n 166 above).
[172] County Governments Act, Section 53(1)(a).
[173] County Governments Act, Section 35(2)(b) & (c).
[174] C Bosire, Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010', Unpublished PhD thesis, University of Western Cape (2013) 254.

wards do not seriously take into account the distribution of ethnic communities in the counties.[175]

In the final analysis, it may well be said that devolution has given with one hand and taken with the other. It has decentralised power from the centre to the county level, giving communities greater autonomy in the management of their affairs and crafting of their political and socio-economic destiny. Devolution has also brought a vibrant economic life to previously slumbering cities, towns and market places. Infrastructural development can now be seen in traditionally marginalized regions. However, devolution has decentralized ethnic politics in almost the same way it has decentralized state power. The emergence of county majorities and minorities has revealed that ethnic cleavages are as important in county politics as they are in national politics. Perhaps more importantly, devolution has failed to limit the resort to ethnic politics at the national level. As discussed in previous sections, post-2013 politics and electoral competition in Kenya remains heavily ethnicised. In the words of Nyabira and Ayele, '[r]epresentation in the national government is still viewed as the single most critical factor in terms of evaluating the inclusiveness of the government in Kenya'.[176]

5.5   Inter-ethnic relations

The 2007-2008 post-election violence revealed deep-seated inter-ethnic suspicion and hatred. According to the Commission of Inquiry into the Post-Election Violence (Waki Commission), one of the root causes of the post-election violence was the "underlying climate of tension and hate" amongst the various ethnic groups in Kenya.[177]   In order to tackle this problem, parliament enacted the NCIC Act in December 2008. The NCIC Act prohibits 'ethnic discrimination' at all times and places. This provision is complemented by Article 27(4) and 27(5) of the Constitution both of which prohibit discrimination on the basis of ethnic identity.

The NCIC Act singles out ethnic discrimination in the field of employment,[178] membership organizations,[179] property ownership, management and disposal,[180] and access to and

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[175] As above.
[176] Nyabira & Ayele (n 166 above) 138.
[177] Republic of Kenya *Report of the Commission of Inquiry into Post Election Violence (CIPEV)* (2008) 25.
[178] NCIC Act, Section 7 & 8.
[179] NCIC Act, Section 9.
[180] NCIC Act, Section 11.

distribution of public resources.[181] On this last aspect, the Act provides that public resources should be distributed equitably across the country. It makes it unlawful for a public officer to distribute public resources in an "ethnically equitable manner". Although the NCIC Act deals extensively with the question of ethnic discrimination, it is popularly known for its prohibition on hate speech.[182]

In relation to institutional arrangement, the NCIC Act establishes the National Cohesion and Integration Commission (NCIC). The primary responsibility of the NCIC is to "facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya".[183] Since its establishment, the NCIC has conducted numerous audits on the level of inclusivity and ethnic diversity in public institutions. Reference to these audits have been made in previous sections. It thus suffices to note that the audits cumulatively show that the public service remains dominated by members of a handful of ethnic communities.

6   Conclusion and recommendations

This paper begun by referring to a common claim or belief amongst Kenyans and non-Kenyans alike. That is, ethnic identity is arguably the single most important variable in the political arena in Kenya. For sure, there is some truth in this assertion. Many Kenyans approach and construe political and other national or local issues through an ethnic lens. References to ethnic identity saturates everyday conversations and interactions. Yet, this paper has made an attempt to demonstrate that the nexus between politics and ethnic identity in Kenya is much more complex and nuanced than ordinarily imagined. Ethnic identity remains a crucial determinant of the manner in which politics is structured but other "new" identities and factors are increasingly weakening its dominance. Politicization of ethnic identity or ethnic politics is more and more operating alongside the politicization of identities such as gender, religion, and youth.

Perhaps more importantly, the paper shows that much more than ethnic identity defines the formation of political parties as well as voting patterns in the country. Building from the concern that discussions on ethnic politics in Kenya "gloss over the fact that ethnic behavior

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[181] NCIC Act, Section 12.
[182] NCIC Act, Section 13.
[183] NCIC Act, Section 25.

could be a response to policies of exclusion from the centre of power",[184] it is argued that ethnic identity alone is too narrow a lens to examine political parties. Focus should also be directed to examining the interests that the political parties seek to achieve and/or the injustices that they strive to address. The paper also demonstrates that although voters almost always consider ethnic identity in electing political leaders, they also attach varying degrees of weight to a wide range of issues including policy positions, performance, and access to public services. The circumstances under which they give more weight to one factor as opposed to another are constantly changing and depend on their historical experiences and evolution of their ethnic group or region.

In the recent past, especially following the promulgation of the 2010 Constitution, laws have been deployed to discourage the resort to ethnic politics and to address its enduring legacies. These include laws relating to formation of political parties, distribution of public resources, public appointments, inter-ethnic relations, and, most notably, the structure of government. Still, ethnic politics thrives without much hindrance. Ethnic patronage and favouritism, both real and perceived, continue to impede the possibility of rendering ethnic politics less powerful. In this regard, this paper makes the following recommendations:

a) Mechanisms for ensuring equitable access to public services and resources across the country should be further strengthened. In particular, much more financial resources should be channeled to the counties within the framework of devolution and equalization fund;

b) The Public Service Commission and the NCIC should ensure strict adherence to Articles 10 and 232 of the Constitution. It should take appropriate measures to ensure the proportional representation of all of ethnic communities with a specific commitment by the government to increase the proportional representation of under-represented communities;

c) Changes should be introduced to Kenya's electoral system. In particular, the current first-past-the-post system should be replaced by a mixed system. Certain percentages of legislative seats, at the county and national levels, should be allocated both on a proportional and a first-past-the-post basis; and

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[184] Kanyinga *et al* (n 29 above) 7.

d) The Office of the Registrar of Political Parties should be strengthened by the appointment of a substantive holder, delinking the office from the electoral body, and allocating it sufficient resources.

In conclusion, it is important that Kenyans reflect on a question posed recently by Philip Ochieng, the renowned Kenyan newspaper columnist. "As a Kenyan", he asks, "what exactly would you lose by clearing your whole mind of all the ethnic debris that you have allowed to accumulate there as a result of years of bad ethnic upbringing?"[185]

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Negotiated Democracy and its Place in Kenya's Devolved System of Government: An Examination of the 2013 General Elections

Joshua M. Kivuva [1]

1   Introduction

Kenya has since independence been a de jure majoritarian democracy, in which governmental decisions reflect the will of the (majority) people, through the leaders they (citizens) freely elect. In practice, however, Kenya's majoritarianism has incorporated elements of negotiated democracy—where election outcomes reflect pre-negotiated arrangements. The form of majoritarianism has also varied, alternating between simple and absolute majority. While at independence all elective positions were determined by a simple majority, the advent of the multiparty system saw the law change to require winning presidential candidates to garner at least 25% of votes in at least five of Kenya's former eight provinces, in addition to winning the national popular vote. With the introduction of devolution, the law requires an absolute majority (50%+1) for a presidential election win and a simple-majority win for other elective positions.

Theoretical models of negotiated democracy are mainly derived from country studies, where negotiations take place at the national level to reduce or neutralize divisions that unchecked political competition can breed. Negotiated democracy assumes that ethnic groups and regions represent holistic interests that are only incompatible with interests of other competing ethnic groups and regions. Hardly has any study looked at negotiated democracy within ethnic groups or regions, where groups negotiate among themselves at the local-regional level. Studies on negotiated democracy in Africa are rare, with South Africa being the most studied African country. However, there is hardly any study on negotiated democracy at the micro-(regional) level.

In March 2013, Kenya conducted its's first elections under the devolved system of government. Despite being a majoritarian system, the country witnessed elaborate cases of negotiated democracy in many counties, especially those in Kenya's Northern and North-Eastern regions. Mandera, Wajir, Isiolo, Marsabit, and Garissa went to the 2013 general elections with some form of negotiated democracy. [2]   The multi-ethnic counties of Nakuru, Migori and Embu also had similar negotiations. During the 2017 elections, many of these negotiations either collapsed or came under serious challenges. This paper examines the nature and dynamics of negotiated democracy—the legal, social, political, and historical contexts globally and in Kenya.

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[2] See for example, Jacob Ngetich, Elders Negotiated Democracy stirs debate as Leaders fight Back", The Standard, Sunday August 28, 2016; Ahmed Shukri, Negotiated Democracy still eliciting sharp reactions from leaders, KNA, December 30, 2016

Specifically, the paper examines Kenya's negotiated democracy at the micro (county) level, during the 2013 general elections.

Using secondary data, the paper seeks to answer the following questions: What accounts for the rise of negotiated democracy in Kenya's devolved units? Is negotiated democracy a viable alternative to majoritarian democracy? Does it enhance democratic practice or undermine it? To what extent is negotiated democracy an affront to human (political) rights? How can negotiated democracy in the counties be enhanced to ensure better electoral governance and enjoyment of human rights?

The paper makes three findings: 1). Negotiated democracy in Northern and North-Eastern counties of Kenya differ from that in other multi-ethnic counties. In North and North-Eastern Kenya counties, negotiations revolved around local-regional politics, while in other multi-ethnic counties, they were driven by national politics, reflecting political settlements at the national level; 2). While elders (and elites) have influence on voter behaviour, negotiated democracy is not necessarily antithetical to majoritarian democracy. Elders in Kenya's North and North-Eastern counties play almost a similar role as that played by "ethnic" leaders and political parties in the rest of the country. Voters in North and North-Eastern Kenya counties were not bound to the negotiated agreements more than voters in Nyanza or Central Kenya, for example, are bound to decisions made by Raila Odinga (and ODM party) or Uhuru Kenyatta (and Jubilee party), respectively; and, 3). While the negotiations are driven by elites (and elders in the case of Kenya's North and North-Eastern counties), these elites (elders) have little control over the voting behaviour of the masses. Since Kenya is a multiparty democracy, candidates who are negotiated out have other avenues of presenting their candidature, providing voters who do not agree with elders' candidate opportunity to elect the candidate or candidates of their choice.

2   Defining Majoritarian and Negotiated Democracy

Democracy, defined as government by the people, is practiced in two forms—majoritarian and negotiated democracy (Kaiser, 1997; Armingeon, 2002; Lijphart, 1999; 2002). In majoritarian democracy, governmental decisions are made by majority or popular vote and the government has adequate majority in Parliament to rule without requiring a coalition. The United Kingdom, the United States, Australia and New Zealand are examples of majoritarian democracies (Powell, 1982). In the Westminster model, one of the best examples of a majoritarian democracy is the legislature, which is elected by a simple majority and which governs and can be removed any time by the voters (Lijphart, 1997). Important characteristics of the Westminster model include:

- Competitive parties, each of which has a significant opportunity to become the ruling party without having to form a coalition (Lewin, 1989);
- Winners in elections implement their powers with limited institutional constraints; and,
- Government is heavily influenced by interest and pressure groups (Armigeon, 2002).

In an ideal negotiated democracy, governmental decisions are made through negotiations, bargaining, and compromises among key stakeholders (Lijphart, 1999; 2002). When elections are held, their outcomes are supposed to reflect (and legitimize) these agreements and compromises. That is, the voter is not meant to freely choose a candidate of their choice, but one already agreed upon. This is however, not always the case, as voters still retain their right to vote the way they wish.

Negotiated democracy is driven more by a desire to ensure peace and stability in divided societies (ensuring divisions do not worsen) (Lijphart 1997), encourage diversity, and protect minorities (Vatter, 2008), than attaining majority rule (Armigeon, 2002). By enhancing peace and stability and removing the elements of extreme competitiveness, which have made politics a zero-sum game, negotiated democracy enhances the very essence of majoritarian democracy. It is therefore the ideal form of governance for any state, not just divided ones (Lijphart, 1999). Negotiated democracy is also common in situations where: a). no group can form the majority on their own; b). certain groups are required to enhance economic development, efficiency and transparency; and, c). where players with powers or authority are required to counter- balance the majority groups (Armingeon, 2002). Negotiated democracy and consensus democracy are used interchangeably (Kaiser 1997; Armingeon, 2002; Lijphart 1997; Mitullah 2015).

Sweden, the Netherlands, Belgium, and Germany are given as good examples of negotiated democracies. Almost all are truly multiparty, with fragmented parties making majoritarian democracy harder to achieve than in a predominantly two-party system such as the US or the UK (Armingeon, 2002). They are also politically accommodating, seek compromises[3] and their politicians are accustomed to power-sharing.[4] For Sweden, this was achieved when it changed its electoral system from majority to proportional representation, thus making it easier for all parties to be represented in Parliament.[5]

2.1   Majoritarian vs Negotiated-Consensus Democracy

What is the relationship between majoritarian and negotiated-consensus democracy? Two schools of thought have emerged concerning this. The first views the two as diametrically opposed to each other, especially on issues of power and representation; the second sees the two as different ends of the same phenomenon. Klaus Armingeon (2002) represents the first school, while Arendt Lijphart (1999) represents the other.

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[3] This is especially the case for the Netherlands. See, for example Arendt Lijphart, 1968, The Politics of Accommodation: Pluralism and Democracy in the Netherlands. Berkeley, University of California Press

[4] For a detailed discussion on this see: Lijphart, A., Consensus and Consensus Democracy: Cultural, Structural, Functional and Rational-Choice Explanation, Lecture given by the Winner of the Johan Skytte Prize in political science, Uppsala, October 4, 1997: 106

[5] For more on this see: Leif Lewin, 1998. Majoritarian and Consensus Democracy: the Swedish Experience: Scandinavian Political Studies, Vol. 21 - No. 3, 1998. Pp. 195-206: 196. Ibid.

To Klaus Armingeon (2002), the concentration of power is the major distinguishing character of a majoritarian system, where the executive is dominant over the legislature. On the other hand, power is diffused and shared in a negotiated democracy. There is also a balance of power between the executive and the legislature. For Armingeon, true multiparty democracies—where no single party is large enough to produce an absolute majority—tend towards negotiated democracy. Manfred Schmidt provides a good summary of the two. Majoritarian [democracy] "concentrates power" while negotiated democracy "aims to divide power, to create checks and balances against the majority in the legislature and against executive state authority".[6]

Lijphart (1997) rejects the dualistic characterization of Armingeon and Schmidt. To him, the contrast between majoritarian and negotiated is not a dichotomy but a continuum from a strong majoritarian system on one end to a strong consensus-based system one on the other. Democracies are either "more or less majoritarian," or "more or less consensual". To him, some societies can even start with a negotiated democracy owing to the deep societal divisions and the lack of a consensual political culture. However, with time, the consensus that develops from negotiated democracy develops into a culture of cooperation that facilitates a shift towards majoritarian democracy. This makes the dichotomous division drawn between majoritarian and negotiated-consensus democracy artificial (Lijphart, 1997). This paper is premised on the latter's contention: that majoritarian and consensus democracy do not present a dichotomy but a continuum.

2.2   The superiority of majoritarian over negotiated democracy

Prior to publication of Lijphart's *Patterns of Democracy* (1999), it was generally accepted that majoritarian democracies were superior to consensus, which were recommended for "divided" societies with a belief that once these divisions were reduced substantially, it would lead to the adoption of majoritarian democracy. It was this perceived superiority of majoritarian democracy that Lijphart's (1999) study in Patterns of Democracy sought to examine. However, after examining microeconomic management, quality of democracy and democratic representativeness and government policies, Lijphart (1999), and Armingeon (2002) did not find any evidence of the superiority of majoritarian over consensus democracy. On the contrary, they, and others, established that consensus democracies performed better (Lijphart 1999; Mitullah 2015). Negotiated democracy produced more legitimate government (Andeweg & Irwin, 2005), higher levels of equality (Armingeon, 2002) and better coexistence (Lewis, 1965); it prevented civil war (Shapiro, 2007) by mitigating conflict better (Lustick, 1979) and was kinder and gentler. In addition, negotiated democracies also elected more women had a higher electoral turnout, reduced

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economic disparities and produced citizens who were more satisfied with their democracy as well as leaders with opinions that corresponded more closely to the citizens (Lijphart, 1997).

This romanticized view of negotiated-consensus democracy is not shared by all. Examining Kenya's experience, Winnie Mitullah (2015) for example, points out that negotiated democracy is a "double barrelled sword." On the one hand, it is a mechanism for power-sharing among elites, but on the other it creates conflicts and tensions between those negotiated in and those negotiated out (and their respective political parties and communities).

3   Kenya's complex de jure majoritarian and de facto negotiated democracy

At independence, Kenya inherited a de jure majoritarian multiparty democracy modelled on the British Westminster system with a dual executive and a devolved system of governance. The Governor General shared power with the Prime Minister who was assisted by the cabinet and a bureaucratized Provincial Administration—of Provincial Commissioners, District Commissioners, District Officers and, Chiefs—acting as agents of state mobilization. Kenya's brand of majoritarian democracy has incorporated and integrated, ipso facto, elements of negotiated democracy. This was done in three ways: one, by negotiating with or incorporating ethnic hegemons in government; two, through party alliances; and, three, negotiating with both ethnic and party leaders.

While at independence all elective positions were determined by a simple majority, the advent of the multiparty system in the 1990s saw the law changed to require winning presidential candidates to garner at least 25% of votes in at least five of Kenya's former eight provinces, in addition to winning the popular vote.[7] This forced every presidential hopeful to negotiate with ethno-regional leaders from at least 62% of Kenya's territory. This was further changed with the introduction of devolution under the Constitution of Kenya (2010), requiring an absolute majority (50%+1) for the presidential elections in addition to victory in at least 24 of the 47 counties. This again has forced major presidential candidates to bargain, negotiate and even form pre-election coalitions to meet the Constitutional requirement.

Before the 1990s, ethno-regional kingpins served as important linkages between the voter and the national political leadership.[8] With the advent of political pluralism, these ethno-regional leaders divided the country by the multitude of political parties they created whose membership they controlled and mobilized for themselves, their candidate, party, or coalition. The lack of party ideology and institutionalization strengthened existing ethno-regional kingpins, and elevating ethnicity to "major status mobilizer"[9] to the extent that "virtually all parties shed any pretence of

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[7] Republic of Kenya, Election Laws Amendment Act of 1992, Government Printers.

[8] See for example, Joel Barkan, 1987, "The Electoral Process and Peasant State Relations in Kenya" in Fred Hayward, ed. Elections in Independent Africa. Westview Press: Boulder. Pp. 213-238

[9] For a fuller discussion on this see: Branch D., Cheeseman N., Gardener L., (Eds)., *Our Turn to Eat: Politics in Kenya Since*

registering members". Each leader assumed that people from the ethnic group and region from which the party leader comes will provide support for the party (Wanyama 2010: 73). It is the presence of these ethno-regional kingpins controlling regional parties that has combined with an electorate willing to be used as vote(r) banks that has given rise and sustained Kenya's negotiated democracy. While Individuals get into politics to gain access to resources and positions of power, communities support "one of their own" for what Kanyinga et al (2010) call a "feel good factor".

With the devolved system of government, many of these kingpins have used these parties to contest for governors and Senators of their respective counties. Others like Kalonzo Musyoka (Wiper Democratic Movement), Moses Wetangula (Ford Kenya), Musalia Mudavadi (Amani National Congress) and William Ruto (United Republican Party) have used these party to rise to national positions. Kenya's zero-sum electoral system—the First-Past-the-Post (FPTP) winner-take-all has forced many to negotiate for certain positions to avoid tearing apart their multi-ethnic counties. Since in Kenya, as Kanyinga, Okello and Akech contend, the aspirations of an ethnic group repose in an individual, the "winner-take-all" system under the FPTP makes an electoral loss too costly for the community involved as well (Kanyinga, et al, 2010).

The formation of Kenya's two major political coalitions—Jubilee and Cord—in 2013 and the National Super Alliance and Jubilee Party in 2017 is the direct result of such negotiations. In 2013, for example, William Ruto of United Republican Party (URP) and Charity Ngilu of Narc gave up their presidential bids to join forces with Uhuru's party, The National Alliance Party (TNA) to form the Jubilee Alliance. Similarly, Kalonzo Musyoka (Wiper-Movement) and Moses Wetangula (Ford-K) gave up theirs to join Raila Odinga's ODM to form the Cord Coalition. The expectations were that voters in pro-Jubilee and pro-Cord regions will vote in support of the respective agreements and coalitions. Thus, even though Kenya is a de jure majoritarian system, absolute majority can only be attained through negotiations and coalitions. Such negotiation can be credited with the increased electoral competition whose voter turnout increased from 66% in 1992 to 70% in 2007 and to 86% in 2013.[10]

To understand the complex interplay of Kenya's de jure majoritarian and de facto negotiated democracy, we need to understand three important elements of Kenya's social-political development, namely: Kenya's social-regional diversity; efforts to address this through the social engineering of ethnic *hybridization*; and political mobilization through these hybridized parties to achieve a winning majority through negotiations.

1950, Lit Verlag, Berlin, 2010
[10] See national statistics at: http://psephos.adam-carr.net/countries/k/kenya/kenya2013.txt (accessed September 27, 2017)

3.1   Kenya's social-regional diversity

Kenya is made up of 43 ethnic groups,[11] occupying different regions and with different customs and religious practices. Large ethnic groups coexist with others that are composed on only a few thousand members. Five of Kenya's largest ethnic groups—the Kikuyu, Luhya, Kalenjin, Luo, and the Kamba, account for over 64% of Kenya's population. As Table 1 demonstrates, when Somalis, Kisii, Miji Kenda, Meru, Turkana and Maasai are included, the eleven ethnic groups account for over 90% of Kenya's population. This means that the remaining 32 ethnic groups account for less than 10% of the total population. This makes a purely majoritarian system extremely disadvantageous to the minority groups in a winner-take-all system. More importantly, without an ethnic group that can guarantee an absolute majority victory in a two-party contest, negotiations are the only way to win a majoritarian contest. Table 1.

TABLE 1: Kenya's Ethnic Composition

Ethnic Group	Population (Million)	Percentage
Kikuyu	6.62	17.2
Luhya	5.34	13.8
Kalenjin	4.97	12.7
Luo	4.04	10.5
Kamba	3.89	10.1
Somali	2.39	6.2
Kisii	2.21	5.7
Mijikenda	1.96	5.1
Meru	1.66	4.3
Turkana	0.99	2.6
Maasai	0.84	2.1
(32) Others	3.40	9.7
Total	38.61	100.00

Source: The Republic of Kenya, 2009 Census Report

Kenya's ethnic diversity and population disparities have far-reaching implications in a majoritarian system, providing both opportunities and challenges for those contesting for national office, especially the presidency. Candidates are forced to negotiate with leaders of other ethnic groups for support, resulting in ethnicity becoming an important agency of mobilization. As

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[11] This is after the Makonde people were issued with Kenyan national identity cards and officially declared Kenyan by the President January 31, 2017. See https://www.standardmedia.co.ke/article/2001227966/president-uhuru-declares-makonde-43rd-tribe-of-kenya accessed September 27, 2017)

competition has increased, especially in the multiparty era, election outcomes have become increasingly more zero-sum, with the perception that Kenya's political system favours large communities. This has not only intensified the nature of negotiations undertaken, but made them more complex.

Further, according to Kanyinga et al, negotiation democracy becomes inevitable because politics in Kenya is not viewed only on concrete material terms but also in symbolic terms—as an "esteem good" for the community. This makes communities "feel good" when one of their own controls state apparatus. This "feel good factor" unifies communities against others and transforms elections "not into an instrument for consolidating democracy, but an instrument of enhancing their esteem as a group" (Kanyinga, Okello and Akech 2010: 6). This feel-good factor attracts communities to negotiate and make alliances with "strong" presidential candidates and, under devolution, with strong gubernatorial candidates as well.

3.2 Negotiated democracy through "hybridization"

Another important phenomenon that has led to the convergence of majoritarian and negotiated democracy in Kenya is the hybridization of ethnic groups. To consolidate their numbers, a systematic hybridization of ethnic groups has taken place in four key regions in Kenya—Rift Valley, Western, North-Eastern, and the Coast. In the Rift Valley, eleven ethnic groups that had separate existence[12] united and hybridized to become the Kalenjin. In the multiparty era of the 1990s, threats from a united opposition to the Moi regime forced a further hybridization to form KAMATUSA (Kalenjin, Maasai, Turkana and Samburu).[13]

In Western Kenya, another 16 ethnic groups[14] hybridized and acquired the name Luhya.[15] A similar thing happened at the Coast, where non-"upcountry" peoples and the those of Arab origins united as "Coastal Peoples", while in the former North Eastern Province attempts were also made to unite peoples of Somali origin in demand for independence from Kenya or to join their cousins in Somalia.[16] In the 1970s hybridization went a notch higher with the formation of community associations. To further unite the various groups, key political leaders spearheaded the formation

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[12] They include the Kipsigis, Marakwet, Nandi, Pokot, Elgeyo, Keiyo, Sabaot, Sebei, Dorobo, Terik and Turgen. For an ethnographic study on this See, for example Henry Mwanzi's History of the Kipsigis (1977), William Ochieng's An Outline History of the Rift Valley of Kenya (1975), B. A Ogot's Kenya Before 1900 (1978) and C. Chesaina (1991) Oral Literature of the Kalenjin.

[13] Though not part of this hybridized Kalenjin, the Turkana, Maasai and Samburu are closely related with the Kalenjin (Ahluwalia and Zegeye 2002:107). The KAMATUSA as a recognized group has however not fully concretized.

[14] They comprised of Bukusu, Tiriki, Maragoli, Isuha, Idaho, Marachi, Khayo, Kisa, Marama, Samia, Tachoni, Tsotso, Wanga, Kabras, Nyala and Nyore

[15] See for example, Ayot (1977), Barker (1975) and Ogot (1978).

[16] On this see Keith Kyle, 1999. The Politics of the Independence of Kenya (Contemporary History in Context), New York, Palgrave Macmillan

of "cultural" organizations to unite communities that considered themselves one.[17] Examples include, the Gikuyu, Embu, Meru Association (GEMA), Luo Union of East Africa (LU), Abaluya Union, and New Akamba Union (NAU).

The above established in Kenya a practice where ethnic groups had their spokesmen to be consulted for electoral help. These are the ones referred above as ethnic hegemons who are consulted when presidential candidates need support. Jomo Kenyatta, Mwai Kibaki and Uhuru Kenyatta have relied heavily on the GEMA communities to win and defend their presidency. Just like the Kenyattas, the Odingas have also relied a lot on the unity of the Luo community, whose leadership they have controlled since before independence. The failure of either Moses Mudavadi or Moses Wetangula and Kalonzo Musyoka to recreate either Luhya or Kamba unity respectively, and to control these communities partly accounts for their failure to rise to dominant positions in Kenya's politics. This is because, leaders of the various groups were instrumental in all negotiations that their communities engaged politically.

As the hybridization described above was taking place, the ethnic group increasingly became the theatre for political mobilization, which elevated not just the importance of ethnicity, but of these ethno-regional leaders. The hybridized ethnic groups became the basis for political mobilization. Initial political parties in Kenya were founded on, and reflected these hybridized ethnic groups. They included the Kalenjin Political Alliance (KPA), Kenya African Peoples Party (KAPP), the Maasai United Front (MUF), the Coast Peoples Union (CPU) and the Somali National Association (SNA), which later became the Northern Province Peoples Progressive Party (NPPPP).

The importance of both hybridized ethnic groups and political parties in Kenya, especially during the single party rule (1969-1990), was enormous. Both Presidents Jomo Kenyatta and Moi negotiated with them to win support in key regions. In the 1990s, with the introduction of the multiparty system, many of them formed political parties to compete in the liberalized political space. These political parties and their founders became the basis for political negotiations in the country.

4   Negotiated democracy in the multiparty era

With the return of multiparty system, Kenya's majoritarian democracy was only tenable through party negotiations, whose conduct also changed from informal ad hoc to (semi-) formal ones. The most discussed were those seeking to establish a common opposition to contest against KANU and Moi in both 1992 and 1997 elections.[18] While under the one-party rule, negotiations had

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[17] For a recent analysis of why and how this happened see Shadrack A. Bulimo's two books, Luyia Nation: Origins, Clans and Taboos (2013), and Luhya of Kenya: A Cultural Profile (2013).

[18] For a better discussion of this see Bratton, Michael, and Nicolas van de Walle, 1997. *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (New York, NY: Cambridge University Press) and Throup, David W. and Charles

mainly been between the president and leaders of "friendly" ethnic groups, which were concluded with the former offering the latter (and probably a few others from the same community) a cabinet position and parastatal appointments, in the multiparty era, ad hoc, semi-formal and formal negotiations took place between and among representatives of the recently formed political parties, with the sole objective of removing President Moi and KANU from power.

Negotiations started taking shape in the readiness for the 1992 elections through the formation of loose alliances among parties. This started with the transformation of the social movement FORD to became FORD, the party, which however split soon after, forming FORD-Kenya and FORD-Asili. FORD-K would further split creating the National Development Party (NDP).[19] Several other regionally based parties, were formed including the Democratic Party of Kenya (DP), Kenya Social Congress (KSC), Kenya Democratic Alliance (KENDA), Party of Independent Candidates of Kenya (PICK) and the Kenya National Congress (KNC).

The most common negotiations in the run up to the 1992 elections were by (leaders of) these newly formed political parties. Efforts to negotiate a common opposition (platform) however proved futile. The formation of these parties was not just a manifestation of political pluralism in the country. Rather, it reflected deep rooted ethnic and class divisions, and personality differences that split what was expected to be a united opposition against the oppressive Moi regime. In 1992 the negotiations failed to produce a united opposition party, forcing the opposition to field several candidates. They included FORD-K's Jaramogi Oginga Odinga, DP's Mwai Kibaki, FORD-A's Kenneth Matiba, KNC's Chibula wa Tsuma, PICK's John Harun Mwau, and KSC's George Anyona. With these divisions, Moi and KANU won.

The failure by political parties to unite did not dampen enthusiasm for a united opposition. Rather it energized and ignited fresh negotiations and new strategies bringing together "Young Turks"[20] from the different political parties, including KANU (Cowen and Kanyinga 2002). The Young Turks joined forces with NGOs and the church under the umbrella of the "civil society" (Mutunga, 1999) demanding for comprehensive constitutional reforms. Threats of losing their leadership to the "civil society" reawakened opposition party leadership, forcing them to continue renegotiating the elusive common opposition vehicle to face KANU in 2017 (Cowen and Kanyinga, 2002; Kanyinga, 2003). These negotiations took place in a more polarized

Hornsby, 1998. *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election* (Oxford, United Kingdom: James Currey Ltd.).

[19] For a more detailed discussion on this, see Karuti Kanyinga, Limitations of Political Liberalization: Parties and Electoral Politics in Kenya, 1992-2002, in Walter Oyugi, Peter Wanyande and Odhiambo Mbai (eds.) 2003. The Politics of Transition in Kenya: From KANU to NARC. Nairobi: Heinrich Boll Foundation. Pp 96-127.

[20] This is a term that came to refer to youthful politicians drawn from different parties who wanted to replace the older generation politicians.

environment. Young Turks against "elderly" politicians in both parties; radicals against moderates within the opposition parties; and, civil society initiatives against opposition politicians.

The opposition formed the United National Democratic Alliance (UNDA), soon after the 1992 elections, which collapsed almost immediately due to internal differences and power-struggles (Kanyinga, 2007: 91), giving way to the formation of other alliances–the radical National Opposition Alliance (NOA), which was formed in 1995, and the moderate National Solidarity Alliance (NSA), formed mainly by Kenneth Matiba's FORD-Asili and Raila Odinga's wing of the FORD-Kenya. NSA joined forces with the civil society forming the National Convention Executive Council (NCEC) to spearhead constitutional reforms before the 1997 elections (Kanyinga 2003). To avoid being outdone, NOA joined forces with KANU parliamentarians to undertake Parliament driven reforms. The different factions, however, managed to agree on minimal constitutional reforms before the 1997 through the formation of the Inter-Parliamentary Parties Group (Kanyinga, 2007). This however, coincided with the formation of more political parties, which divided the opposition further. They included Ford-People, Safina, Social Democratic Party (SDP), and the National Development Party (NDP). Thus, 1997 elections also failed to produce a negotiated opposition unity, and once again KANU and Moi won.

The history of post 1990 Multiparty Kenya is therefore, one of these failed "negotiated democracy" characterized by ad hoc, semi-formal and, later, formal agreements whose promises and settlements have generally been unfulfilled. It is also a history of mistrust, personality differences, power struggles and shear ambition by party leaders. Further, despite the negotiating parties declaring publicly that they were negotiating with a view to forming a united front against Moi and KANU, the details of such negotiations remained a secret to the voters. Even when the negotiations resulted in a formal written MoU or other forms for example, the document was generally kept secret and voters never got to know of its contents. When new alliances were formed immediately after the opposition lost the elections, the old agreements and promises were forgotten.

Things changed in the run up to the 2002 elections, which Moi was not contesting. New alliances emerged aimed at strengthening different political parties. KANU, which was already factionalized and faced with succession struggles, formed an alliance with the National Development Party (NDP), led by Raila Odinga. Moi rewarded Raila by appointing him into the cabinet, together with other Nyanza politicians. In March 2002, KANU and NDP had a merger agreement, forming the New KANU, but mistrust and a bitter power struggle driven by the politics of succession within KANU gravely divided the alliance. It soon disintegrated when Moi chose Uhuru Kenyatta as his successor and KANU's presidential candidate in the December 2002 presidential elections.

As a sign of protest, politicians allied to Raila Odinga formed the Rainbow Alliance, which later gave rise to the Liberal Democratic Party (LDP) (Kanyinga 2007). Negotiations and alliance

politics continued to shape up despite lack of concomitant gains in the reform process. This culminated in the formation of NARC, which was a coalition of the LDP and NAK, itself a coalition of the DP, FORD-K, and NPK, to face KANU in the elections. NARC won with a landslide capturing 125 seats against KANU's 64 (Wanyande 2007: 116).

That notwithstanding, mistrust and power struggle among the leaders and parties continued to dog the new alliance. No sooner had the new government been in place than a disagreement occurred between the two main coalition partners over the failure to honour the agreement between the LDP and NAK, which divided the NARC government. LDP had expected a 50–50 control of government, and that the position of Prime Minister and two deputies would have been created to be occupied by its supporters. Disagreements over the membership of the Constitution of Kenya Review Commission (CKRC), the Parliamentary Select Committee on Constitutional Review (PSC), and the National Constitutional Conference (NCC) made things worse.[21] The old political conflicts over the control of the state during the Moi rule were rekindled, climaxing during the 2005 referendum, which polarized the country, setting the stage for the 2007 elections whose disputed presidential results pushed Kenya into its worst political crisis since independence (Andreassen and Tostensen, 2006).

The 2002 agreement between Mwai Kibaki (Narc) and Raila's (LDP) collapsed soon after the elections, leading to the defeat of the government position in the 2005 referendum. The National Accord also signed between Kibaki and Raila after the 2007 postelection violence was also dysfunctional for the five years it was on, for the same reasons. More recently, Kalonzo Musyoka has been complaining about Raila's failure to honor a pre-election agreement they had in 2013, in which the latter was to be the joint presidential candidate in 2013 and the former in 2017. Negotiated democracy in Kenya seems to have been meant to be an instrument of attaining a power and a governing majority.

The failure of the Kibaki coalition's political settlement brought to the fore the deep rooted ethno-political and personality differences that characterized Kenya's negotiated democracy. It also brought to the fore the unwillingness of Kenya's political leaders to compromise or desire to fulfil the negotiated agreements. The Kibaki coalition provided evidence that negotiations were meant purely to win an election, and that they could not last beyond the election victory. Victorious parties and political leaders, rather than fulfilling the promises negotiated with their coalition partners, began new negotiations after the elections to form new governing coalitions. The failure to fulfil pre-election agreements led to the collapse of almost every negotiated agreement.

Despite the above history of failed negotiated democracy and unfulfilled agreements in Kenya, negotiated democracy every election cycle has been very important in ensuring reasonable peace

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[21] For a detailed discussion of this see: Wanyande P., *Reflections on the Kenyan Electoral System and Practices*, in *Hekima: Journal of the Humanities and Social Sciences,* Vol 2, No. 1, 2003, University of Nairobi, Hekima Publications, pp. 103

and stability during electioneering and a semblance of stability after elections. Negotiations have provided important opportunities and spaces for the political class to compromise their ethnic, regional, and other sectarian interests, facilitating the holding of relatively peaceful elections. That is, they have provided opportunities and spaces for political contestation without threatening the political system itself. The negotiations reduced the "passions" and other negative sentiments normally associated with ethnicity, regionalism and other sectarian interests. Whether negotiated with political parties or ethnic groups, they have always taken place at the leadership level but were assumed to have had the support of rank and file. They also neglected important constituents--women, youth, and special interest groups including persons with disabilities, the marginalized and minority groups. The excluded were assumed not capable of arousing significant ethnic or clan passions that could threaten peace or stability in any significant way.

5   Negotiated democracy in Kenya's 2013 General Elections

The 2010 Constitution created a second level of government—the 47 county governments—each with its own executive and legislative arms, both with elected officials. The March 4, 2013 general elections were the first under Kenya's 2010 Constitution and under the devolved system of government. It was also the first to elect chief executives (governors) at the county level.

The 2013 elections witnessed continued negotiations to form larger political coalitions and alliances at the national level, aimed mainly at winning the presidential vote. Towards this end, existing political parties signed MoUs and other coalition documents. Uhuru Kenyatta's The National Alliance (TNA) and William Ruto's United Republican Party (URP) formed the Jubilee Alliance Party (JAP). Although not part of the formal MoU, Charity Ngilu's NARC also identified with the Jubilee Alliance. The second major alliance was formed by ODM, Ford-K and Wiper-Movement to form the Cord Coalition. These are the major coalitions that contested the 2013 presidential vote and dominated other contests for Governor, Senator, Women Representatives MPs and MCAs.

In addition to the negotiations that formed the two broad coalitions, Jubilee and Cord, there was a second tier of negotiations that was county specific that produced two unique set of negotiated democracy in different counties. The first took place in the multiethnic counties of Migori, Nakuru and Embu and was driven by the national objective of winning the presidential elections. The negotiations were spearheaded by either of the two broad national coalitions. In Nakuru and Embu, negotiations were driven by the Jubilee Alliance Party, while Migori's were driven by Cord Coalition. The second took place in almost all counties in North and North-Eastern Kenya. Marsabit, Isiolo, Garissa, Wajir and Mandera all experienced negotiated democracy. While the circumstances of each county's negotiated democracy were different, each sought to achieve purely local-regional (county-specific) objectives. Luhyaland and Kisii, though not discussed in this paper, present cases where negotiated democracy resulted from local politics but with

influence from Nyanza (ODM-Cord) politics. In Luhyaland, the push for negotiated democracy was also from the civil society, which leaned heavily towards ODM. [22]

6   Why did Counties resort to negotiated democracy?

There is no one explanation why these counties decided to negotiate. The reasons vary from county to county. Like previous ones, negotiated democracy was influenced either by local-regional politics or national politics. At the national level, the broad negotiations that formed JAP and Cord were first and foremost driven by national objectives of: a). winning the presidential elections; b) winning enough local seats to control both houses of Parliament—the National Assembly and the Senate, and, c) winning as many gubernatorial and Senate seats as possible. The desire to avoid splitting votes if each ethnic group in a county voted differently forced Jubilee members in Nakuru and Embu counties, and, Cord in Migori, to negotiate.

In Nakuru, Jubilee wanted to safeguard against the eruption of another Kikuyu-Kalenjin ethnic conflict in the Rift Valley and to ensure that the Kikuyu and Kalenjin vote remained undivided, in support of Uhuru Kenyatta. Kikuyu-Kalenjin conflict was at the center of the 2007/8 postelection violence. Conflicts between the two communities have regularly threatened Kenya's stability since the advent of the multiparty politics in the 1990s. Since Uhuru Kenyatta and William Ruto, the president and deputy president, had already agreed to work together, such negotiated democracy ensured that there were no cracks in the agreement.

Migori and Embu counties were different. In Embu County, Jubilee sought to ensure that Embu and Ndia communities remained united in Jubilee Party. In Migori, the Cord Coalition sought to ensure that the Kuria and Luo remained united in support of Raila Odinga's presidential bid. Despite being multi-ethnic, the fear of eruption of conflict was not a major factor in the two counties. Rather, Cord and Jubilee led to negotiations in the two counties, respectively, to consolidate their national vote. The former was fully Cord, the latter Jubilee.

Kenya's negotiated democracy was also driven by County-regional (local) issues, meant to unite locals while ensuring stability. Four of them predominate: 1). desire to avoid or reduce conflict among local groups. Election related violence, especially in Kenya's North and North-Eastern regions, has the potential to cause as much violence as resources, pasture, water and land and hence the desire to avoid or reduce conflict among local groups ranked high on why these counties negotiated; 2). need to unite local communities and clans to increase their bargaining power, ensuring faster economic development; 3). fear of ethnic conflict where two or more ethnic groups coexist in the county, where it was meant to address ethnic and sub-ethnic cleavages. As has already been pointed out, this was the case in Nakuru and Embu counties; and, 4). need to neutralize the numerical strength of the dominant and majority groups. For example, in

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[22] Osinde Obare, Activists push for negotiated democracy as Bukusu elders trash talks, The Standard Digital, February 9, 2017

Marsabit County, the Gabra, Rendille, Burji, and some Somali clans formed an alliance to neutralize the numerical majority of the Borana community. In Mandera, the Gari and Murule clans of the larger Somali ethnic group formed a coalition to lock out the dominant Degodia clan. However, although the overriding issues are local, one cannot discount the influence of national politics. Those contesting for national offices, particularly the presidency, also tried to influence local politics in counties and therefore, the negotiations that have taken place have not been entirely driven by just local issues. Thus, even when regional negotiations are predominantly driven by local issues, national politics have had an influence as well.

For the marginalized counties in the North and North-Eastern regions, negotiated democracy ensured peace and stability, two things that the region lacks, enabling communities to coexist in harmony as neighbours. It also assured unity, providing them an opportunity to negotiate among themselves and with others from a position of strength. Unity with equally marginalized neighbours provided important numerical strengthen. With peace and stability, these counties could concentrate on education and infrastructure business. Further, with unity, they could pool resources together to deal with their marginal position and to attract more investment to better manage their resources.

6.1   *Negotiated democracy and voter choices*

Data from 9 counties was used to help answer the effects of negotiated democracy on voters' choices. The data is presented in three tables each examining voter's choices in the three main elections at the county level—voting for county-wide seats (Governor, Senator and Women Representative); voting for the Member of Parliament; and, voting for the Member of County Assembly in each county. The assumption made in the study is that where the influence of negotiated democracy was felt the most, voters would in the county would gravitate towards voting for a common party in all the elective positions. The opposite is also true, that the more the vote is distributed among different parties, the less the influence of the negotiated democracy on voter's choices.

Table 2 shows the voting patterns for two elective positions: the Presidential Vote and voting for the county-wide positions of Governor and deputy Governor, Senator and the Women Representative. The shows that there was an almost even split in the percentage of the presidential votes between Jubilee and Cord in Wajir, Marsabit and Garissa counties, 39/50; 47/47 and 45/49, respectively. This is despite Wajir and Marsabit counties voting overwhelmingly for ODM candidate in county-wide positions. In Migori, where Cord's presidential candidate got 86% of votes, ODM won only two county-wide seats.

As Table 2 shows, elders and party elites did not seem to have the overriding influence in determining the voting patterns of the presidential or county-wide contests. For the county-wide

seats only 5 of the 9 Counties (Wajir, Marsabit, Mandera, Nakuru and Kisii) had all the seats won by the same party. In Garissa, the seats were won by parties that are in different coalitions.

Table 2: Elections to National and County-Wide Offices

	COUNTY	WINNER'S POLITICAL PARTY					
		GOVERNOR	D/GOVERNOR	SENATOR	WOMEN REP	PRESIDENTIAL VOTE (%)	
						Jubilee*	Cord*
1.	WAJIR	ODM	ODM	ODM	ODM	39%	50%
2.	MARSABIT	ODM	ODM	ODM	ODM	47%	49%
3.	ISIOLO	URP	URP	TNA	TNA	55%	30%
4.	GARISSA	WDM-K	WDM-K	TNA	WDM-K	45%	49%
5.	MANDERA	URP	URP	URP	URP	93%	4%
6.	NAKURU	TNA	TNA	TNA	TNA	80%	17%
7.	EMBU	TNA	TNA	APK	TNA	89%	8%
8.	KISII	ODM	ODM	ODM	ODM	27%	68%
9.	MIGORI	PDP	PDP	ODM	ODM	10%	86%

Source: Compiled from County 2013 Election Review [@http://idadihalisi.blogspot.co.ke]

*Jubilee Alliance has TNA and URP, while Cord had ODM and WDM-K

The presidential vote was no different. Except for Mandera where URP was the dominant party (winning all county seats) and 93% of the presidential vote, all other counties had mixed results. In Wajir and Marsabit where ODM won all county-wide seats, its presidential candidate/and Cord Coalition won only 50% and 49%, respectively of the presidential votes. Similarly, in Kisii, despite ODM winning all county-wide seats, almost one in three people in the county voted for Jubilee Alliance. In Migori, despite their negotiated democracy agreement specifically binding the people to vote for ODM and Raila for president, the Governor's position went to People's Democratic Party (PDP).

Looking at the winning party at the constituency level (Table 3), it also is apparent that the influence of the Elders was limited, since few of the constituencies in any county voted their MPs overwhelmingly from the same party. Other than in Isiolo, Embu and Mandera where they elected all MPs from the same party, the other counties had them mixed. In Marsabit for example, despite all county-wide seats going to ODM, the party had only 50% of MPs' seats. The same happened in Kisii, where ODM won all County-wide seats, but managed only 33% of the MPs. Table 3. In Garissa County, despite WDM-K winning all but one county-wide positions, the party did not win a single position at the constituency level. In Kisii, despite ODM winning all county-wide seats, it only won a third of the Constituency seats.

Table 3: Winning Political Party at the Constituency Level

	COUNTY	WINNING PARTY FOR NATIONAL ASSEMBLY (MPs)				
		URP	TNA	ODM	OTHERS	TOTAL
1.	WAJIR	**1**		**5**		**6**
2.	MARSABIT	1		2	1	4
3.	ISIOLO	2				2
4.	GARISSA	2	1	2	1	6
5.	MANDERA	6				6
6.	NAKURU	1	7	1	2	11
7.	EMBU		4			4
8.	KISII		2	3	4	9
9.	MIGORI	1		5	2	8

Source: Compiled from County 2013 Election Review [@http://idadihalisi.blogspot.co.ke]

The authority of the Elders to determine the people's voting patterns was most challenged at the grassroots—election of MCAs, where one expects elders to be most influential. In Wajir and Marsabit, where ODM won all county-wide seats, of the 30 and 20 elected MCA seats, the party won only 7, and 8 seats, respectively. This means that despite ODM winning 100% of county-wide elective seats, in Wajir and Marsabit, the party won a mere 19% and 40%, of MCA seats, respectively.

In Garissa, where WDM-K won all but one county-wide seats, the party won less than 10% of MCA seats. In Isiolo County where Jubilee coalition won 100% of county-wide seats, the coalition only won 60% of MCA seats in the county. Other counties' results show similar results where different parties won a significant number of seats. This points to the elections having been fairly competitive, rather than one determined by elders. Table 4.

Table 4: Elected Members of the County Assemblies

	COUNTY	POLITICAL PARTY AFFILIATION						
		URP	TNA	ODM	Ford-P	WDM-K	OTHERS	TOTAL
1.	WAJIR	2	6	7		4	10	30
2.	MARSABIT	5	4	8		2	1	20
3.	ISIOLO	4	2	1			3	10
4.	GARISSA	5	6	11		2	6	30
5.	MANDERA	23	3				4	30
6.	NAKURU	9	38	4			5	55
7.	EMBU		13				7	20
8.	KISII		4	21	7		13	45

9.	MIGORI	1	1	27		3	8	40

6.2   Why doesn't negotiated democracy reduce choices?

Kenya is a multiparty system that also allowed for party hopping even after party nominations. Until 2016, Kenya's election laws had been quite lax, allowing candidates to switch political parties until days to the elections. Efforts to prevent party-hopping by amending the Political Parties Act seem to have borne fruit. Defections from one party to another were minimal in the 2017 party primaries. This however, caused the rise of Independent Candidates, challenging the dominance of nominees from major parties, once again allowing losers in party nominations to contest as independent candidates. This was the case especially in the major parties' strongholds of Nyanza and Mount Kenya.

The freedom to, and practice of party-hopping is not confined to any one region in Kenya or any political parties. In every region and in all political parties, many candidates who lost in party nominations declared themselves independents to contest for the same seats. The spirit driving those who lost in the party nominations to contest as independent candidates is the same spirit driving many of those who are negotiated out in North and North-Eastern counties to reject Elders demands for them not to defend their seats.

The politics in most of North and North-Easter counties of Kenya has not been so different from the rest of Kenya. Elders in these Counties have had the same effect on the region's politics, the same way political parties and their leaders have had in the rest of Kenya. Elders and the negotiated agreements that they have come up with have served the same purpose, provided the same opportunities and limited political choices in the same way political parties have in the rest of Kenya. This means that the actions by Elders have not in any significant way hindered people's politicking or limited political choices more than political parties have anywhere else in the country. The Councils of Elders in the various counties in North and North-Eastern Kenya have operated like de facto political parties. This explains why, even in the 2017 nominations, those that were negotiated out could still test their popularity by running independently or joining one of the many parties available to anybody else in the country to contest in. Negotiated democracy in Kenya's multiparty system therefore, has not in any significant way taken away an individual's right to contest for any elective position. The fact that anyone wishing to contest can, means that voters are also not denied the opportunity to vote for their preferred candidate.

One of the major differences between North and North-Eastern counties and the rest of Kenyan counties where negotiations took place is that there were no credible primaries done. That is, rather than determining that a specific clan or ethnic group was to produce the Member of Parliament and allow several members of that clan or ethnic group to compete, clan Elders in

North and North-Eastern Kenya selected not just the clan/ethnic group, but the individuals to contest. Voters had no say at all in the choice of the person who was selected by Elders.

It should, however, be noted that, the above does not underplay the role of Elders and the importance of their endorsement of a candidate. Like is the case with political parties and leaders, those candidates that have the blessing of the party or party leadership have significant advantages: they legitimize some candidates and not others, the candidate they support tends to be supported by the rank and file of the party as well, raise more funds, use party machinery and other party resources to campaign. A party's or leaders' open preference for a candidate has also the effect of influencing supporters to vote for that candidate. The Councils of Elders have similar advantages that they bestow on the candidates in the same way political parties do. They provide similar opportunities and limit choices in the same way political parties do. This however, only applies where the party or Elders are powerful and popular.

The point being made in the foregoing is that political parties, their leaders as well as Elders and Council of Elders are all elite (and elite institutions) that both provide (and limit) opportunities and choices in the same way. It is therefore misleading to single-out Elders and discuss them as if they present a unique phenomenon. Though different from, Elders play exactly similar roles as political parties and their leadership have in Kenya's politics. Indeed, even the claims that have been advanced against Elders and negotiated democracy—they determine a candidate's electability, do not encourage gender equality etc. such claims are not uniquely Elders. They have been made against political parties as well.

Negotiated democracy is therefore neither a threat nor an affront to multiparty democracy. There is no obligation for anybody to vote the candidate selected by the elders just the same way there is no obligation for anyone to vote for a particular party. Since other parties have their candidates (and others may be running as Independents) electors have a wide choice of candidates. Thus, the presence of a negotiated settlement does not in any significant way take away citizens' right to elect a leader of their choice. On the contrary, it is the very mechanism for consolidating democracy, or switching to majoritarian democracy. This, however, does not in invalidate the power of Elders, which like any other elites and political parties, influence politics in a significant way.

6.3   The simple elders' decision outcomes matrix

The answer to whether negotiated democracy limits choices or constrains peoples' political rights can be illustrated by a simple action-outcome matrix. The matrix assumes that the actions or decisions of elders will either be popular and supported by the people (if they are inclusive and participatory) or they will be unpopular and not supported by the people (if the actions/decisions are exclusive and non-participatory). In the former, the elders' choice of candidate is accepted while in the latter their choice of candidate will be rejected. Since negotiated democracy can

either be inclusive or non-inclusive and participatory or non-participatory, the people's reaction to the elders' choice or choices will result in one of the following four outcomes as represented in Table 5 below.

Outcome I: If the elders' actions are inclusive and participatory, the selected candidate will be popular and supported by the people. Its candidate will be strong and easily win the elections. This has the same outcome as in a majoritarian democracy.

Outcome II: If the Elders' actions are inclusive but non-participatory, the selected candidate will be supported by some, but not others. This means that another candidate will be supported by those who reject the elders' choice. Elections here will be competitive. Same outcome as in a majoritarian democracy.

Outcome III: If the elders' actions are participatory but non-inclusive, a similar thing as Option II will obtain, giving rise to an alternative to the Elders' candidate being also supported. Elections here will be competitive as well.

Outcome IV: If the elders' actions are neither inclusive nor participatory their choice will be weak and not be supported by many. There will be total rejection of the candidate by the people. The result will be that the alternative candidate will have the overwhelming popular support.

TABLE 5: Elders' Action and Outcome Matrix
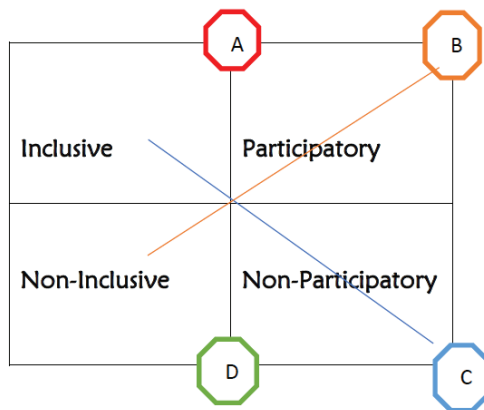
A=Inclusive + Participatory
B=Participatory + Non-inclusive
C=Inclusive + Non-participatory
D=Non-inclusive + Non-participatory

From the matrix, Candidate A (the Elders' choice) will be elected, Candidates B and C will face competition from other candidates, where the more popular one will win, while Candidate D will be rejected for being unpopular, and the challenger will be elected.

The same argument can be made of political parties that are represented in the negotiated democracy. We can assume that A, B, C and D are political parties that elders have identified with. The fact that there is a negotiated democracy does not negate multipartyism. Thus, once the Elders have identified *their* party, A, B, C, and D, different segments and interests in the county will identify with other political parties and each will have a candidate.

The candidate the Elders select will be affiliated to a political party A, B, C, and D. If the process was inclusive and participatory, party A (the Elders' chosen party) will be popular and its candidate secure easy win; if they identify with party B, which is participatory and non-inclusive or party C, inclusive and non-participatory, party B and C will be engaged in competition with others (and so will the candidates). If the process was non-participatory and non-inclusive, then the Elders' chosen party will be weak and hence defeated. Either way, the outcome of negotiated democracy does not differ from a majoritarian system.

7   Allegations against negotiated democracy in Kenya's Counties

The above notwithstanding, several allegations have been levelled against negotiated democracy in the 9 counties. One of the major criticisms has been that under negotiated democracy leadership becomes a "procurable good", with the so-called Council of Elders acting as the procurement Committees. It is claimed that elders have turned their decisions into business, where they blackmail leaders and exchange their positions for tenders. Leaders who do not acquiesce are dropped.[23] The claim is that a quid pro quo develops between those selected and their selectors in exchange for contracts and tenders. Once elders are guaranteed contracts and tenders, they cannot hold the leaders accountable, even if the latter do not perform.[24] While this criticism is valid, it is not uniquely a quality of Elders. The same criticism can be levelled against political parties as well.

There is also no evidence that any of Kenya's Council of Elders operate businesses to supply products that may compromise them. Further, if this was the case, one would expect the Elders to support the incumbent for another term, not negotiating them out as Elders in almost every North and North-Eastern Kenya have done with incumbents. It is also pointed out that negotiated democracy does not respect the gender rule set in Article 81(b) of the Constitution, that required, at the minimum, that Parliament be composed of at least one-third of the lesser represented

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[23] Musdaf Abdullahi, Negotiated Democracy Breeds Theft, The Star, Sunday February 26, 2017.
[24] Musdaf Abdullahi, Negotiated Democracy's Dark Side", The Star February 20, 2017

gender. In addition, "the charters that elders reference to are unconstitutional".

The failure to respect the gender rule, and the cartel-like behaviour of the Elders are not a function of negotiated democracy. Rather, it is a societal thing. Even without the negotiated democracy, gender equality will still have been hard to get in these predominantly Muslim counties. In fact, gender equality and elimination of cartel-like behaviour are easier to achieve under negotiated democracy than under a majoritarian system. Such are part of what Lijphart calls "kinder and gentler" elements of negotiated democracy (1999).

Koigi Wamwere[25] and others have also alleged that negotiated democracy is a threat to multiparty democracy as it entrenches ethnicity, clannism and favouritism of larger groups in the negotiations. Further, it alienates minority groups and leads to the election of unpopular leaders, lacking in merit and skills.

Further, negotiated democracy lacks a mechanism for accountability, including even the basic checks and balances to ensure that what has been agreed upon is implemented. Negotiated democracy as was done in 2013 lacked a mechanism for ensuring adequate transparency. It also lacked institutionalization to ensure predictability and outcomes that did not depend on the whims of the elders.

The process was also not fully inclusive and participatory and without both, it is likely to express the interests of a small minority. Most negotiated democracies are elite driven (by elders or other leaders) and the ordinary voter is usually left out of the negotiations, but is expected to vote endorsing the elite agreements. Further, negotiated democracy creates or perpetuates tension between those negotiated in and those negotiated out.

The problem with negotiated democracy in Kenya is that: a). it has not been institutionalized, even where it is commonly practiced, b). it is neither fully inclusive nor participatory; c). the major processes and decisions are a preserve of a small minority (Council of Elders); d) Councils of Elders are not representative of the diverse interests in the community and consultations are limited; e). some of the elders might even be serving selfish interests of local/national elites; and, f). it is not fully representative of local interests or politics. Even where local interests and politics is the driver of the negotiated democracy, there are noticeable influences from national politics.

8   Conclusion

As the foregoing has demonstrated, there is nothing wrong with negotiated democracy. Rather, it is how it is done that is a problem, especially the rotational leadership. Since it is the first time that leaders from the North and North-Eastern Kenya counties have an opportunity to govern and

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[25] Koigi Wamwere, This negotiated democracy will negate democracy, The Star, October 8, 2016

to manage substantive resources, rotational leadership might be counter-productive. Rotating leaders irrespective of their performance punishes good performers and may encourage corruption as leaders may try to enrich themselves in the shortest way, knowing they will be removed either way. The system should instead reward good performers by retaining them, but replace non-performers with people from the same community. This way the county will also allow leaders to gain experience.

What is happening in North and North-Eastern Kenya and the counties in general is the problem of undertaking negotiated democracy in a political system that is characterized by a winner-take-all mentality, exclusion and a Council of Elders that is neither consultative nor representative of diverse interests in the counties. This is complicated by national politics that are also characterized by exclusion and manipulation. A shift away from the FPTP-winner-take-all system can make a positive a difference.

Alternatively, allow for nominations to take place between those who are being negotiated in and the outgoing (the incumbents vs. new ones). Better still, there could be introduced term limits for every position in the county. This can be strengthened by encouraging those who have performed well to be promoted to the next higher level after the expiry of their two terms. In addition, negotiate with the national government for key positions within the public sector and parastatals for those who have served their two terms. Thus, negotiated democracy should be encouraged to continue in North and North-Eastern counties, but mechanisms should be put in place to institutionalize them. Institutionalization is necessary for any democratic consolidation for it encourages players to pursue their interests through a democratic process.

- Begin a conversation on negotiated democracy (not on negotiations) and on consensus democracy not on consensus);
- Build capacity for elders/elites/decision-makers in these counties to understand what negotiated democracy is as a political concept;
- Institutionalize and establish structures for negotiations;
- Build capacity and create structures to institutionalize both the decisions and the decision-making process; and,
- Ensure negotiations are fully inclusive, politically accommodative, and with reasonable power-sharing.

Fortunately, an interesting development is emerging in North and North-Eastern Counties and in other counties where negotiated democracy was tried in 2013. The two national coalition parties are trying to find footing in these counties and are supporting different elders. The entry of national party coalitions is influencing the behaviour of those that are being negotiated out. It has emboldened them to stand against the elders' decisions. This is what is influencing current leaders who have been negotiated out to stay put defending their seats. They are assured that even when they are at odds with Elders' decisions or of other powers that be locally, one or the other major

coalition will support them. Thus, once rejected by Elders, those negotiated out are going to parties that are not controlled by or affiliated to the Elders. Like in Mandera, MCAs who were rejected have defected to KANU. This way, with or without negotiated democracy, voters' choices are enhanced.

There is no community in North and North-Eastern Kenya that currently is talking with one voice. The various Councils of Elders seem to be undergoing some serious liberalization and democratization of their own resulting with the emergence, in almost all counties, of new groups calling themselves Elders. Different sets have emerged each with its own line of candidates. Each of these has devised novel and unique methods of selecting their candidates, ranging from nominations to direct selection of candidates, whom they have endorsed. Mandera, Wajir and Isiolo lead in this.

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Who belongs in the Civil Service? Ethnicity and discrimination in Kenya's civil service

Winluck Wahiu

1   Introduction

Shouldn't 1% of staff posts in parastatals and constitutional watchdog commissions be reserved for groups such as the Dasenach, Leysan, Waat, Gosha, Asian Kenyans, and Kenyan Arabs? After all, isn't it only fair that an "ethnic group" that claims a home in Kenya should be represented in the country's largest employer, the civil service? The Kikuyu, Kalenjin, Luo, Luhya and Kamba, Kenya's "big five" ethnic groups by share of population and pre-eminence in national politics, account for about 70% of all civil service staff posts. Under the 2010 Constitution, the civil service is required to reflect the ethnic diversity of the country. Against this principle, the skewed representation of the five largest ethnic groups in the civil service plays a key role in undermining its ethnic diversity. Moreover, it is claimed that ethnic dominance in the civil service reinforces barriers that push other numerically smaller, less politically connected groups into a long-standing disadvantage in civil service employment. This disadvantage in securing a foothold in the instruments that influence and implement government policy in the country is also an important detail within a broader picture of political and economic marginalisation of ethnic minorities in Kenya.

Ethnic identity claims have gained increased attention in debates about the legitimacy and quality of the Kenyan civil service, now synonymous with *public service* in the nomenclature of the 2010 Constitution. What relationship exists between the composition of the civil service and the goals of national integration? How will changing the former affect the latter? Taking its cue from legislation enacted after the election violence in 2007/2008, the *National Cohesion and Integration Commission (NCIC)* has accentuated these questions in its audits of ethnic diversity in the general civil service, the constitutional commissions, and state corporations or parastatals. The power-sharing parties represented in the parliament that enacted the National Cohesion and Integration Act (2008) faced the dilemma of preventing inter-ethnic group violence without granting legal recognition to the disparate ethnic groups that call Kenya home. The result is a statute that loosely defines ethnic groups, yet prohibits hate crimes targeted at such groups. It mandates the NCIC to investigate the salience of ethnic discrimination in Kenya's conflicts, but its remedies turn on attempts to articulate ethnic identity claims. Under this statute, the number of employees in public institutions belonging to the same ethnic group should not exceed one-third of the total number of employees, but it is completely silent on the remedies for ethnic groups with zero representation in the ranks of the civil service.[1]

With its audits of ethnicity in the civil service, the NCIC has provided new empirical evidence to the discussion of ethnic discrimination. For Kenyans who have been aware of the skewed representation of ethnic groups in public sector employment, the evidence by the NCIC is less controversial than its accompanying recommendations for the implementation

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[1] Section 7(2), National Cohesion and Integration Act (No 12 of 2008)

of positive measures in civil service employment in favour of Kenya's numerically smaller, politically disconnected and visibly "forgotten" ethnic groups. Kenya has many of these small, forgotten communities that one cannot find serving in any public institution. Such exclusion sits incongruously with the promise of the Constitution. Essentially, the NCIC proposes consolidating the place of ethnicity in the mainstream, "normal", criteria of 'constitutionalised' entitlements, alongside age, gender, disability and citizenship. Hence, this is a strategy of normalisation of ethnicity. Its premise is simply that if we do not address civil service diversity in terms of ethnic group inclusion, then we are bound to marginalise millions of Kenyans who perceive their marginalisation through lenses of ethnic identity. The normalisation strategy entails mainstreaming the acceptance that belonging in certain ethnic groups has a marginalising effect, just as belonging in others has the opposite privileging effect. Accordingly, any criteria for civil service recruitment, promotion or retention that do not explicitly weigh ethnic considerations reinforce a disadvantage on those who belong to excluded ethnic groups. The strategy of normalisation is controversial because of the intuitive tendency to dichotomise ethnicity and meritocracy, while insisting or assuming that civil service recruitment in Kenya is, or should be, meritocratic.

Putting aside the tensions between ethnicity and meritocracy, this analysis is concerned with NCIC's normalisation of ethnicity strategy in the context of the ongoing transformation of civil service away from its developmental state rationales toward a decentralised, constitutionally limited service. Even if NCIC succeeds to conceptualise belonging to certain ethnic groups as a genuine marker of marginalisation and exclusion at a national level, the question of who belongs in the civil service can no longer be filtered through some state-centric nation-building masterplan. And as long as the Public Service Commission remains committed to recruit staff based on objective criteria, the NCIC's assistance would be more useful were it to point out the hurdles in such criteria that impose a particular disadvantage on members of excluded ethnic groups. Unfortunately, NCIC's analysis does not disclose that discriminatory disadvantage. It proposes a comprehensive scheme of normalisation of positive discrimination proposals whose beneficiaries are not legally ascertainable and it finds outcomes of indirect discrimination without identifying the particular disadvantages in recruitment or retention that feed those outcomes. The NCIC therefore has unfinished business. In spite of these shortcomings, it has helped Kenyan to think more astutely about what it would mean to take ethnic diversity in the civil service seriously.

2 The civil service: the anatomy of conflicting principles

Every modern civil service permits the state both to flex its considerable bureaucratic power and to legitimise itself through direct contact with citizens. Most ordinary citizens can judge the effectiveness of the state only through the actions of its civil service in their daily lives. Max Weber recommended that a civil service should be neutral and impersonal, its cadres protected from partisan politics by guaranteed staff tenure, bureaucratic norms and knowledge and that its essence must be professionalism, rationality, discipline and meritocracy.[2] The civil service was to be guided by a principle of equal treatment of citizens

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[2] Weber, M (1967) "Bureaucracy", in Gerth and Mills, *From Max Weber: Essays in Sociology*, London, pp196-244

to whom it rendered a uniform service across the state, requiring in turn a clear demarcation between the working of the state and the diverse traditions, norms, practices and cultures of its populace. But realists such as Michael Oakeshott understood that the civil service exists to accentuate the rewards of the winners of the great political game in an accumulation of office and public power.[3] His valuable insight is that no succeeding government willingly throws out any usable and effective civil service instruments that it inherits solely because they are irrational or unpopular, since the objective of any government is to exercise power in its favour. It should thus be no surprise that Mwai Kibaki did not abate the use of the coercive provincial administration machinery he inherited when elected president in 2002, notwithstanding promises of its abolition made when he was in the ranks of the opposition.[4]

The British modelled Kenya's colonial civil service as a vital force for the fundamental stability of the colonial state.[5] It was from among the ranks of such a civil service that the post-independence government drew thinking on various official proposals or the brainpower needed to, say, negotiate treaties or conduct public inquiries into sensitive domestic problems.[6]

In the 1960s, Kenya's senior politicians who had been incubated in the civil service had reason to respect its prestige and independence. One-party politics from the late 1970s had a malignant effect on the civil service as employees were made to serve at the pleasure of the President and its purpose expanded to foster a developmental state. This trajectory of decline is conceded in a 1992 official sector paper issued by the government to explain a programme for civil service reform with World Bank credit.[7] Reform objectives then included rationalisation of staffing leading to better resource allocation, productivity, cost-effective delivery of services, and a simplified grading and compensation structure that was hoped would lead to the civil service's better alignment with the external market and better personnel management in order to attract high quality recruits. However, in a 2001 review, the World Bank conceded the failure of the reform project, assessing its outcomes as unsatisfactory and its benefits as unsustainable in light of the resilience of ideas of patronage around the civil service.[8] To date, the civil service philosophy continues to oscillate between different principles, from Weberian rationality to the preservation of the political prerogative.

Rationality of performance is the underlying philosophy of the civil service as articulated in the 2010 Constitution. The drafters of the Constitution kept the term "public service" used in the independence constitution, perhaps to invoke the perception that the people who benefit

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[3] Oakeshott M, (1975) On Human Conduct. Oxford UP pp189-196

[4] In 2009, President Kibaki declined to implement recommendations of the Ransley Report on police reform. See also Klopp, *Kenya's Unfinished Agendas*, Journal of International Affairs, Vol62 No.2 (2009) pp143-158.

[5] A. Kirk-Greene, *The thin white line: The size of the British colonial service in Africa*, African Affairs, Vol 79, Issue 314 (January 1980), OUP, pp.25 - 43

[6] Thanks to the civil service, newly independent Kenya "has been enabled to establish its place authoritatively in the world of diplomacy and international affairs", The Report of the Commission of Inquiry (Public Service Structure and Remuneration Commission) (1971) p.3

[7] See GoK, The Kenya Civil Service Reform Programme and Action Plan, 1992 (unpublished).

[8] World Bank, Implementation Completion Report No, 21363, March 29 2001 stated "One must recognise that progress is being achieved… but not enough had been accomplished when the project was completed, for more than an *unsatisfactory* rating to be assigned overall" p.7

from administrative services ought to be at the centre of focus instead of the employees of government. Nonetheless, the forms and institutions of public service discussed here conform to the narrower meaning of employees of the public governmental sector, excluding the police and military services. Since elected political leaders in Kenya also routinely deploy the language of popular sovereignty to refer to themselves as public servants or servants of the people, the original name "civil service" better conveys the intended reference to the professionals who are employed in the administrative branches of national and county levels governments. The Constitution delineates a number of principles applicable to the civil service, which it must strive to fulfil. One of them is "*representation of Kenya's diverse communities*".[9] Another principle obliges it to afford "*adequate and equal opportunities for appointment, training and advancement…of the members of all ethnic groups.*"[10] Additionally, the civil service should manifest high standards of professional ethics; the efficient, effective, and economic use of resources; equitable provision of services; involvement of people in the policy making process; accountability for administrative acts; fair competition and merit as the basis of appointments and promotions; and affording adequate and equal opportunities for appointment, training, and advancement at all levels of the public service. Hence, the ethnically diverse civil service is still one that conforms to Weber's philosophy of the bureaucracy.

If these constitutional principles are too abstract, attempt to animate them is made in the Public Service (Values and Principles) Act, 2015. It is not too far-fetched to trace a thread of continuity between the statutory restatement and the rationales circulated in the World Bank-funded civil service reform programme. Possibly the only new idea also expressed by the Constitution and implementing legislation is the requirement for the civil service to reflect the diversity of Kenya's population.

Diversity is a term to which many meanings may be applied. One may mean distinctions of physical personal characteristics (race, religion, sex) or ideological postures (multiculturalism, nationalism, liberalism). While calling for civil service ethnic diversity, it also demands the equality of opportunity of all ethnic groups. It does not place a premium on ethnic diversity over efficiency, effectiveness and professional ethics, i.e. the Weberian rationality of the bureaucracy but entrenches the competition for governmental power between political parties whose assumed alternation in office is cast against the stability and continuity of an independent civil service that is constitutionally tenured by the Public Service Commission.

What is important seems to be that the civil service of a democracy does not become a closed system answerable only to itself. A closed civil service means no government can be free to implement its policies since bureaucrats will block what they dislike and create an apathetic system in which any change rewards insiders. This is a civil service that mutates into a force for conservatism quite contrary to the constitutional aspiration to transform Kenya's democratic order. Presumably then, the Constitution must be mobilised to open up the civil

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[9] Art 232 (1) (h) of the Constitution of Kenya, 2010

[10] Art 232 (1) (i) of the Constitution of Kenya, 2010

service. One part of that equation is the ability of ordinary individuals to obtain judicial remedies when actions of the civil service infringe upon their constitutional rights.[11] Another part relates to what is happening *inside* the civil service and "Who belongs in that civil service?" is an integral element. Even if the civil service is independent, the ability of politics to shape it is a price to be paid to keep it open. The problem then arises when politics tracks tribal interests.

This is where the *National Cohesion and Integration Commission* (NCIC) has robustly inserted itself with its new contributions to policy debate. In the wake of post-election violence in 2008, the government of national unity adopted the National Dialogue and Reconciliation Agreement (NDRA) in February aimed at redressing the immediate causes of the political crisis as well as putting in place a framework to address longstanding historical injustices. The long-term goal of consolidating national cohesion and unity, which was included in the NDRA, was eventually codified in the National Cohesion and Integration Act (NCIA) of 2008.

The NCIC was formed essentially to monitor inter-ethnic strife, by investigating and drawing attention to its salient causes and, to a more limited degree, to help redress individuals' complaints of ethnic discrimination. While it has promoted its work in terms of a transformative goal of building a more cohesive and integrated society, preferring not to be defined as the "hate speech commission", the NCIC is still struggling to crystallise its agenda of cohesion and integration.[12] What it has done concretely in these terms boils down to "knowledge enhancement" through its research and more relevantly, its Social Cohesion Index and ethnicity audits. The NCIA was intended to prohibit discrimination on grounds of ethnicity, to enable the conciliation of disputes centred on ethnic identify claims, and to prevent new conflicts, including through the criminalisation of ethnic-based hate crimes. Of interest, Section 3 of the NCIA defined an ethnic group by reference to certain – colour, race, religion, or ethnic and national origin. However, nowhere did the law recognise any particular ethnic group. The one-third rule found in Section 7 of the NCIA animated a series of ethnicity audits that the NCIC carried out on the civil service, treating it as one public institution for this purpose, and on constitutional commissions and state corporations. In its 2016 ethnicity audits, the NCIC has pitched up a fight for the soul of the civil service. These audits deserve some focussed reflection.

General civil service

In its audit report "**Toward National Cohesion and Unity in Kenya**" the NCIC interrogated ethnic diversity in the civil service based on an audit of the integrated personnel and payroll data system. The data system does not list civil service employees by ethnicity or tribe. It does categorise employees by home district origin, which the NCIC used as a proxy for ethnic identity. In subsequent audits, NCIC supplemented the personnel files with self-identification surveys. The report noted that 50% of Kenya's *"ethnic groups are only*

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[11] See Art 23 of the Constitution of Kenya, 2010.

[12] See NCIC "**Building a Cohesive Society: The NCIC Experience**" (2013) available at
http://cohesion.or.ke/images/downloads/Building%20A%20Cohesive%20%20Kenyan%20Society-The%20NCIC%20Experience.pdf

marginally represented in the civil service – the country's largest employer" and that some twenty-three (23) ethnic groups had less than 1% representation in civil service.[13] Among the excluded are Kenyans of Arab, Asian, and European descent. Since no law recognises particular ethnic groups, NCIC adopted the categories used in the population and housing census in 2009[14], which posited that Kenya had forty-two ethnic groups (some with distinctly listed sub-groups). Among these groups, the census listed communities differentiated by language, customary law, and homelands, familiar as Mamdani's native subjects from the colonial era,[15] while others, "Kenyan Americans" in particular, were completely novel.

NCIC reported that the one-third composition rule was a concrete threshold that is exceeded in at least ten (10) of the mixed departments surveyed. It discovered that the largest five communities (2009 census), Kikuyu (18%), Kalenjin (13%), Luhya (14%), Luo (11%) and Kamba (10%) together constituted 70% of all civil service employees. Moreover, the *"Kikuyu and Kalenjin have a disproportionate share of civil service posts compared to their population."* The variance, at 4.7% and 3.5% respectively seems not that large, but it raised a valid point about the absence of binding guidelines on what was reasonable to accept as a variance. On the other hand, the Somali, Luhya, Mijikenda, Luo, and Turkana were slightly under-represented relative to their population. Of the big five, Kikuyu and Kalenjin alone constituted 40% of civil service employees, in addition to their positive variance relative to population share. Accepting there were possibly multiple explanations for the positive variance for only these two groups, the NCIC merely highlighted the political dominance of the two groups as inextricably linked to those explanations.

Constitutional commissions

NCIC also audited constitution watchdog commissions, which in 2016 employed a total of 5679 individuals. In its **Report on Constitutional Commissions**, NCIC recorded that 93% of the fifteen bodies complied with the statutory one-third ceiling. Incredibly, only the *Judicial Service Commission*, a body vital to the rule of law, flouted this rule *"by employing 39% of its employees from one ethnic community, the Kikuyu."* The same 'big five' pattern is repeated in the commissions with these ethnic groups accounting for 67% of the total of their employees. This audit also unearthed some "forgotten" communities, such as the Dasenach, Galla, Konso, Waat, Galjeel, Isaak, Leysan and Gosha ethnic groups, which had zero representation in the employee ranks. Decentralisation of commission structures, whereby institutions had physical addresses outside Nairobi, had a positive effect on the size of diversity, exemplified by the *Teachers Service Commission*, the *Independent Elections and Boundaries Commission*, and the *Ethics and Anti-Corruption Commission* display of higher diversity representation than those only located in the capital.

The leadership of the commission was representative, but even here there were dominant groups – nearly one of every five commissioners was a Kikuyu. NCIC proposed an ethnic

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[13] NCIC (2016) *"Toward National Cohesion and Unity in Kenya"* (unpublished abridged report), p.2

[14] NCIC (2016) *"Toward National Cohesion and Unity in Kenya"*, p.2. This report states the census data was used for comparative purposes. See also NCIC (216) *"Ethnic and Diversity Audit of Commission in Kenya"* Vol. I (unpublished) p.25

[15] Mahmood Mamdani (1996) Citizen and Subject, Princeton, see pp.37-61

quota requirement be written into the law, to provide for a progressive formula for representation of under-represented and forgotten groups in constitutional commissions. It also recommended that 1% of posts be set aside for "minority groups".[16]

Parastatals

The most comprehensive audit was done for state corporations, popularly referred to as parastatals, culminating in the sizeable **Report of the Ethnic Audit on Parastatals** published in 2016.[17] Each state corporation has its own legislative framework and in many cases the legislation predates by far the diversity requirements of the NCIA. Still, according to NCIC, the state corporation sector has the highest diversity, with some employing members from the "forgotten tribes." The now familiar pattern is mirrored here – the 'big five' account for more than two-thirds of the total employees of the sector (actually 80% if members of the Kisii community are added), noting moreover that the Kikuyu enjoyed 20% of the total workforce.[18] Even so, its variance relative to its population was only 2.9%, nearly that for the Luo which was given at 3.09%.[19] Groups that showed a negative variance relative to their population size were the Somali, Turkana, Kamba, Maasai, Meru, Kuria, Tharaka, Teso, Mbeere, Suba, Samburu, Orma, Gosha, Kenyan Asian, Burji, and the Dasenach. Only the Kikuyu seem never to be underrepresented relative to their population size. The study noted that of 185 state corporations surveyed, 129 complied with the one-third ceiling. Similarly, as with constitutional commissions, decentralisation was a positive factor contributing to greater diversity: state corporation headquarters tended to draw in higher margins of local community representation. The NCIC noted for instance that the *Kenya Meat Commission*, headquartered in Machakos benefitted the Kamba (41% total staff); Somalis had a 50% representation at the headquarters of the *Ewaso Ngiro Authority* located in Isiolo, both in fact exceeding by far, the one-third rule. The most diverse state corporation is the *Kenya Ports Authority,* which managed to represent 32 of the country's 42 ethnic groups.

When looking at the leadership in the sector, NCIC expressed disappointment. It noted that the selection of 185 parastatal CEOs drawn from some 18 ethnic groups in total simply reincarnates the dominance of the largest ethnic group in each institution.[20] The ethnicity of the largest group was similar to that of the CEO in 36.8% of the parastatals. Kikuyu and Kalenjin CEOs comprised almost 40% of all parastatal CEOs (71 out of 185). The big five comprised 136 out of 185 parastatals. The importance of the report however, may lie in its observation that *"employment is highly influenced by politics."* This observation needs to be cross referenced with another finding in the report that "*one parastatal chief exercises more influence on job hiring and promotion than a principal secretary...*"[21] So, the selection of

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[16] NCIC (2016) *Ethnic and Diversity Audit of Commissions in Kenya* Report, pp62-63

[17] NCIC Publication No.2/2016

[18] NCIC Publication No.2/2016 p.51. Only four ethnic groups have more than 10% representation in this sector – Kikuyu, Kalenjin, Luhya and Luo.

[19] NCIC Publication No.2/2016 at p. 53. There is no indication whether the variance is going up or down.

[20] NCIC Publication No.2/2016 pp76-82

[21] NCIC Publication No.2/2016 p.56

CEOs by ethnic group ratio offers evidence of a particular state corporation's capture by its dominant ethnic group. At the same time, the power exercised by the CEO allows the consolidation of ethnic interests. If this is the case, the relationship between a state corporation and an ethnic group could be a microcosm of the broader relationship between state power and the mobilisation for its capture by ethnic-based 'political entrepreneurs.'

The NCIC observation also offers another useful insight which is however not articulated in its report. Kenyan ethnic groups unlike the Akan of Ghana, the Batswana of Botswana or the Baganda in neighbouring Uganda, and many similarly placed African ethnic groups, either lack or have only weakly developed durable, stable internal structures of organisation.[22] Political parties may rely on ethnic support but they do not structure ethnic groups in the same way tribal kings, chiefs and their aristocracies do toward some community of purpose. This hints at the crucial role a state corporation may play for an ethnic group lacking its own internal structures of organisation. Around the corporation, ethnic interests can be organised to pay a material dividend to members of the group so that it is the corporation which crystallises ethnic interests beyond cultural kinship and norms. Given that the decision to establish and locate state corporations is an act of national politics, there is a genuine reason for ethnic groups to strive at strengthening their grip on the latter.

According to the NCIC, a sizeable share of posts coupled with capture of its leadership at the level of the CEO is adequate for purposes of ethnic capture. This reading is consistent with the other findings of a high number – 129 out of 185 – of legislation compliant parastatals regarding the one third ceiling. One anomaly in the report is the application of the one-third rule to CEOs, where NCIC finds that the highest share of these positions by the Kikuyu at 22.2%, fell under the permissible one-third ceiling. In its zeal to monitor this rule, NCIC was prone to stretch the meaning of a "public institution" to which the rule applies. With all their separate and distinct legal frameworks, it is hard to see state corporations as a coherent public institution with CEOs subject to the one-third rule. Moreover, in making this finding, the NCIC read too much into the titular equivalence between the CEO of a parastatal such as *Kenya Ports Authority* and the one at *Golf Hotel Kakamega*.

"Sensitive parastatals"

According to NCIC *"Some parastatals have sensitive mandates hence need to be even more inclusive. These mandates include health, security, power etc. The institutions include the Kenya Ordinance (Factories Corporation (KOFC)) which manufactures bullets, the Kenya Power and Lighting Company (KPLC), the National Transport and Safety Authority (NTSA), KEMRI, Kenya Airports Authority (KAA) and the Kenya Civil Aviation Authority (KCAA) among others."*[23] Furthermore, the *"Kenya School of Government (KSG) and the Kenya Institute of Curriculum Development (KICD) are key institutions in the transmission of values*

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[22] See for instance how the traditional authorities have modified their roles to co-manage municipal services in Thornhill and Selepa, *The Role of the Royal Bafokeng Administration in the promotion of municipal service delivery*, **Journal of Public Administration**, Vol 45 No.1, 2010, pp162-174

[23] NCIC Publication No.2/2016 p. 85

to public servants… their compliance with NCI Act should be prioritised."[24] If one added the state corporations with the largest financial allocation to the category of sensitive parastatals, the tabulation is as follows:

Table 1:

	Parastatal	Staff	Estimates (Kshs.)	Largest ethnic group	%	CEO ethnicity
1.	Kenya Ordnance	223	Unknown	Kalenjin	49.8	Kalenjin
2.	KPLC	10,648	Unknown	Kikuyu	26.5	Kalenjin
3.	NTSA	536	4,315,487,127	Kikuyu	32.5	Maasai
4.	KEMRI	937	1,799,462,265	Kikuyu	26.8	Maasai
5.	KAA	1,936	Unknown	Kikuyu	23.8	Kikuyu
6.	KCAA	674	356,000,003	Kikuyu	27.3	Kikuyu
7.	KRA	4,442	15,358,008,761	Kikuyu	30.7	Kikuyu
8.	KSG	207	Unknown	Kikuyu	39.1	Luhya
9.	KICD	411	1,083,724,600	Kikuyu	38.9	Luo
10.	Kenya Roads Board	53	26,178,000,000	Kikuyu	34	Luo
11.	Higher Education Loans Board	114	9,142,881,825	Kikuyu	21.1	Meru
12.	Kenyatta National Hospital	4,541	8,667,461,541	Kikuyu	32.9	Kalenjin
13.	Moi Teaching and Referral Hospital	3,118	5,544,676,867	Kalenjin	68.1	Kalenjin
14.	Kenya Forest Service	5,067	5,137,308,628	Kikuyu	24	Kikuyu
15.	Kenya Wildlife Service	4,760	3,915,248,200	Kikuyu	17.3	Kalenjin

*Estimates are for 2016/17 financial year

There is an observable Kikuyu factor in the NCIC statistics: *"Parastatals that are on either side of the compliance divide have a considerable number of employees from the Kikuyu community. Apart from the Coast Development Authority, where the Kikuyu community is not represented, in other institutions it appears among the first four. This should however be discussed on the backdrop of their dominance in national population*."[25]

For the mainstream civil service based on a cross section of ministerial departments, NCIC considered the Kikuyu and Kalenjin share of civil service as hegemonic. It noted a negative variance relative to their population size in the Luhya, Luo and Kamba ethnic groups share of civil service jobs, even though they were part of the 'big five'. Constitutional commissions charged with watchdog functions over public entities, revealed a similar pattern of ethnic group dominance. It is only in the parastatals where the weight of diversity is felt more keenly, where local community recruitment preferences contribute to a greater prevalence of

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[24] Parastatal audit, p.67

[25] Parastatal audit, p.84

smaller ethnic groups. Yet even this sector is clearly influenced by the pattern of ethnic group disparity. Though they allude to the effects of politics on civil service jobs, NCIC audits do not offer any strong clarity on how those effects are produced and shaped.

PSC observations on ethnic diversity

Almost concurrently with the publication of the NCIC reports, the *Public Service Commission* (PSC) published its own **Evaluation Report for the Year 2015/2016 on Public Service Compliance with the Values and Principles in Art 10 and 232 of the Constitution**. The PSC report applies all constitutional values and principles prescribed for the civil service and offers a better picture of the treatment of equality of opportunity for all ethnic groups against other values such as service delivery, professional ethics and devolution of power. The report reveals that public institutions made better progress on the achievement of values other than diversity. For instance, devolution of public services indicators showed 67% implementation. Moreover, diversity management indicators reveal a real distinction between the four categories (gender, disability, youth, and ethnic identity) used to gauge this value. The prioritised "*thresholds for enhancing diversity in the Kenyan public service are (i) not more than two thirds (2/3) for either gender, and (ii) at least 5 percent for PWDs (Article 54(2))*"[26] Perhaps gender diversity is more pressing for PSC than ethnic diversity – why not if the aggregate of male employees is 98% against a population share of 49% and a constitutional ceiling currently set at 66%?[27] Yet a candid paragraph observed: "*Ethnic diversity in the public service has been quite a thorny issue. Ethnic representation in the service is examined against the corresponding national population proportion. According to the Section 10 of the* <u>Public Service (Values and Principles) Act, 2015</u>, *no specific community should exceed a 33.3 percent share of total public institution staff.*" On this statutory threshold, the "*data show that the serious disproportions are within the largest ethnic groups in the national population. For example, the Kikuyu and Kalenjin each have about 2.5 percentage points more Ministry employees than their respective share of the national population ...*" and that "*the top 6 ethnic groups have a disproportionate 8 percentage points advantage in State Corporation employment with negligible rates for Ministries and Commissions. ... Over-representation in the civil service has oscillated amongst the same ethnic group with the Kikuyu remaining at 4.7 percent a decline from the 6.2 percent recorded in 2015. Eleven ethnic groups were overrepresented.*" So, the only indication of dynamic change in the quantitative data suggested a declining trend in the over-represented Kikuyu bringing its representation closer to its population share, even before the mobilisation of affirmative action policies, since the main recommendation relative to ethnicity was – "*Public institutions to develop time bound affirmative action programmes to enhance proportionate representation of the 19 under-represented communities in the Public institutions. The underrepresented communities represent 49 percent of the 39 ethnic communities covered in the survey.*"[28]

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[26] PSC Evaluation Report on constitutional values, p.25
[27] PSC Evaluation Report on constitutional values, p.26
[28] PSC Evaluation Report on constitutional values, p.35

In its main recommendation, PSC is on the same page with the NCIC. In its audit reports, NCIC paints a picture of ethnic hegemony contrasted against marginalisation and exclusion. In its audits, NCIC makes us aware of the need for policy considerations to redress the three key grievances it sees in the current composition of the mainstream civil service as well as constitutional commissions and state corporations. Firstly, to redress the *ethnic hegemony* of the 'big five' ethnic groups, predominantly Kikuyu and Kalenjin, and the under-representation of all other ethnic groups. Secondly, to redress the *exclusion and marginalisation* of "forgotten" communities and other minority groups. Thirdly, to get public institutions to *give effect to the statutory one-third rule* in the ethnic composition of their employees. The third measure is a straightforward issue of human resource arithmetic. For the first two however, NCIC fingers are pointed at the possibility of politics to reshape the civil service to make it open to more proportional ethnic composition. Either national politics could alter the incentives for civil service to change recruitment practices or it could calibrate preferential treatment of smaller ethnic groups in civil service employment through new affirmative action rules.

When confronted by the big picture tabulation above and on the premise that the civil service is strongly shaped by national politics, the question is: are the NCIC recommendations relevant, realistic and viable?

Before looking closely at NCIC, it is well worth noting that other multi-ethnic African states have grappled with the issue of ethnic diversity of their public sectors. Nigeria is one such state, with according to one measure, some 374 ethnic groups. Nigeria's 1999 Constitution requires all state organs to reflect the federal character of the state but since federal states in Nigeria are forged along ethnic delineations, the composition criteria is not far removed from ethnic balance considerations. A study on ethnic diversity in the Nigerian public service showed that more diversity had a positive impact on the completion rate of projects, thus vindicating mainstream arguments about the utility of workplace diversity.[29] In Nigeria, prior to the constitutional requirement for ethnic diversity in the bureaucracies first introduced in 1979, the main effort to include minorities was through a policy of mandatory quotas in higher education to increase the pool of qualified individuals from minority communities.[30] The key provision introduced in the 1979 Constitution required federal agencies to reflect a federal character but its illuminating light was ethnic identity. It read thus:

> "The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity and also to command national loyalty thereby ensuring that there shall be no predominance of persons from

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[29] Imran Nasur and Daniel Rogger, The Impact of Ethnic Diversity on Bureaucracies: The Evidence from the Nigerian Civil Service (2015) UCL available at http://www.ucl.ac.uk/~uctpimr/research/Ethnic%20Diversity.pdf (accessed September 27, 2017)

[30] Tijani Bande "Managing Diversity in the Civil Service: A Brief Examination of the Nigerian Case" unpublished presentation at UN Experts Group Meeting on Managing Diversity in the Civil Service, May, 2001, p.3. Paper available at http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN000719.pdf (accessed September 27, 2017)

a few states or from a few ethnic groups or other sectorial groups in that government or any of its agencies."[31]

This provision was not self-enforcing – a system of quotas had to be devised to operationalise it. In practice, leaders favoured their own faithful in the filling of quotas, nourishing a new form of political corruption.[32] Nor did employment quotas end the agitation for a more representative civil service. The 1999 Constitution retained the federal character provision. Indeed, it extended it to state and local government and significantly, it established a Federal Character Commission power to devise formulae for the distribution of all cadres of civil service posts in federal and state governments as well as the police and army, government owned enterprises, and parastatals.[33] Moreover, the commission has the power to institute legal proceedings against heads of ministries and public agencies who fail to comply with the federal character provision or formula adopted by the commission. The constitutional provisions have been central to the creation of a more representative institutions in which the instruments of government better reflect the country's ethnic diversity.[34] But the law of unintended consequences also applies. In practice, the commission has difficulty establishing equitable formula for ethnic representation or even ensuring its measures fall on all the extensive entities that comprise the public sector. Then there is the commission's propensity to reinforce the importance of ethnic origins contrary to the other important goal of preservation of a sense of common citizenship. Other arguments against quotas are familiar in the meritocracy-rationality debate. Since merit has become synonymous with academic qualifications, the country has seen rampant malpractice in the acquisition of academic credentials, signalling the adaptation of a highly ethnocentric society's efforts to reform. In addition, quotas have been difficult to enforce while their presence have blurred the objective of fairness in measuring the legitimacy of the bureaucracies in a dynamic multi-ethnic setting, where discrimination based on disability, age, and gender is also severe. Instead of quotas, the goal should be to "continually look at systemic obstacles to recruitment and guarantee open systems so that any charges of non-inclusion could be investigated and rectified, here need be."[35]

Echoes of the federal character provision in Nigeria reverberate in Kenya's constitutional provision for the principle of ethnic diversity in the civil service as well as the two-thirds rule in both the national cohesion and public service statutes. Nigeria however has gone further by devising implementation mechanisms via a dedicated commission. Such a commission is a model for Kenya's NCIC. However, Nigeria's singular focus on quotas for ethnic diversity has offered mixed results but remains an informative model for Kenya when it comes to the goal of enhancing the civil service's legitimacy based on fair representation and ethnic diversity.

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[31] Section 14(3) of 1979 constitution.

[32] Tijane Bande, supra, p.5

[33] See s.153 of 199 Constitution of Nigeria

[34] Tinaje Bande, supra p.7

[35] Tijani Bande supra, p.9

3   Struggle for the soul of the civil service

What would (or should) be gained by requiring the civil service to better "represent" the ethnic composition of the country? What is at stake here? In response to such questions, it is worth pausing to consider the relationship between ethnicity and constitutionalism in Kenya. Of the various takes on this relationship[36], what is specifically relevant here is to ask: if ethnicity is a norm of the Constitution, 2010, what kind of norm is it? In its black letters, the Constitution suggests three normative concepts involving ethnicity – i) diversity of ethnic culture (guaranteed as a "right")[37], ii) diversity of ethnic groups (incompletely theorised, scope delegated to legislators),[38] and iii) political ethnicity or political representation of ethnicity[39] (invalidated, no political party to be formed on ethnic basis).

The Constitution therefore has more to say on ethnicity in cultural terms rather than as group identity. Cultural heritage is a source of pride as noted in the Preamble and in Art 11 of the Constitution. For governance norms, patriotism is the constitutional value to strive at, with its nous of common citizenship. This is what the spirit of the Constitution conveys. Against such a constitutional discount on ethnic group identity counterpoised with the constitutional premium on diversity of ethnic culture, it is an uphill and controversial task for a public institution to espouse a strategy of normalisation of ethnicity of civil service employees.

Why does the PSC, which has the mandate to prescribe common policies, not formulate a framework for affirmative action in favour of ethnic groups instead of kicking that ball down to "public institutions"? Clearly, and unlike with ethnic groups, these categories have a well-developed normative status, backed by international human rights law against discrimination of women and people with disability. [40] They also have a firmer political dividend – since their boundaries cut across all ethnic groups.

Two components are needed for the NCIC strategy of normalisation. One, is legal recognition of protected or entitled ethnic groups akin to Ethiopia's Constitution recognition of the Amhara et al and India's constitutional recognition of Dalits and scheduled tribes.[41] Secondly, a policy backed by some legal enforcement, in favour of positive discrimination is required for standard treatment across the board, at both levels of government. The basic realisation behind NCIC's call for a 1% quota for "forgotten tribes" or other measures in favour of excluded groups, is that the constitutional guarantees of equality alone does not and has not assured representation of smaller ethnic groups in any meaningful measure in the civil service. Ethnic groups are "forgotten" by constitutional watchdogs because they are in fact "forgotten" by the law. But if special action must be taken by public officials in favour of

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[36] See Yash Ghai, Ethnicity and Constitutionalism, unpublished paper with author

[37] Art 44 of the Constitution, 2010

[38] Art 11 requires parliament to legislate for the protection of cultural intellectual property; Art 56 requires the state to develop affirmative action programmes for marginalised groups and minorities in part to allow them develop their culture and practices.

[39] Art 91 prohibits political parties founded on ethnic or regional basis.

[40] E.g. Art 7, <u>Convention on the Elimination of All Forms of Discrimination against Women</u>, 1979; also Art 27 of the proposed Convention on the Rights of Persons with Disabilities

[41] Ethiopia's Constitution, 1994 recognises the rights of nations, nationalities and peoples, defined in reference to common culture and custom, to establish government structures and even to secede (Art. 39). The nations, nationalities and peoples are recognised by name in Art 47. India's Constitution of 1949 gave recognition to certain tribes and castes as well as their lands (Art 244), also regulated under the fifth schedule.

"forgotten tribes" without being arbitrary, then the latter would need some elementary legal recognition. Thereafter, the measures needed for any meaningful degree of civil service employment that constitute positive discrimination must be produced by policy, and hence, politically too.

As the NCIC observes, civil service job categories that require threshold professional qualifications are already placed beyond the reach of individuals in groups who have limited access to formal advanced education. Yet even entry-level jobs requiring basic literacy are still predominantly occupied by members of the dominant ethnic communities. In this context, measures taken to alleviate the exclusion of smaller groups must necessarily include a political discussion of victimisation and its discontents. At the same time, the NCIC itself missed the opportunity to set its normalisation of ethnicity strategy on the basis of existing legislation. If one looks at the National Cohesion and Integration Act and asks who is likely to be a victim of a hate crime, the answer is potentially every Kenyan. On the other hand, only particular, small, ethnic groups with marginal impact on national politics are likely to be forgotten in civil service employment. Under the cohesion statute, discrimination is either direct or indirect.[42] Indirect discrimination occurs because the civil service employer applies a requirement for recruitment or promotion, which applies equally to individuals in other ethnic groups, but which puts individuals in small, politically marginal ethnic groups "at a particular disadvantage when compared to the others."[43] NCIC needed to establish the existence of the "particular disadvantage", for instance a complicated or protracted technical examination or mandatory requirement for language proficiencies, and which the civil service employer cannot show to be a proportionate means of achieving a legitimate aim. Without an analysis of the role indirect discrimination plays in alienating ethnic minorities and 'forgotten communities" from the civil service, NCIC could not show that the audits presented evidence of indirect discrimination against a specific ethnic group in a way that necessitated the fostering of affirmative action schemes as compensation.

In addition to the constitutional normativity of ethnicity, some observations are warranted on the ongoing changes that affect the crucial civil service relationship with politics before reverting to the narrow recommendation of normalisation of ethnicity numbers.

Firstly, while it is possible that the practice of political parties has been to derive support from ethnic bases and financial sponsors with the expectation that political appointments in the civil service will be one of the prizes, the worth of the party organisation in this respect is increasingly questionable. As is evident in the 2017 electoral cycle, whether or not parties have the structures now demanded by political parties legislation[44], the job of getting out the vote when elections are scheduled is increasingly delegated to individual candidates. It is not just a question of ethnic support for party but of candidates who will be acceptable to the dominant strains of the ethnic group at the local level and who will capitalise on that acceptability to enlarge the likelihood of institutional capture. Implied in the party-candidate

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[42] Section 3, NCIA 2008
[43] Section 3 (2) of NCIA 2008
[44] See Sections 7, 9, 17, 28, 30 and 31 of the Political Parties Act, No. 11 of 2011

arrangement is that a candidate may have individual donors who finance the campaign without routing support through party structures. The candidate-donor relationship creates its own pressure for the candidate to secure positions in the civil service if successful, yet the real ability of individual candidates to influence low and middle level civil service jobs is considerably shrunk.[45] What used to hold in the 1980s and 1990s, that loyalty to a politician in national politics will be the tide lifting all boats in the civil service is less valid today.

Secondly, it may no longer be supremely important that the political party appoints its own ethnic group members into the civil service. Parties competing with each other for public power must also focus on rapidly gaining access to the top decision-making levers that direct resources and budgets, which include the procurement and recruitment functions. Many anecdotes are shared by Kenyan social media users of the scramble within URP to place political appointees in carefully targeted positions in the civil service where they may influence procuring of government contracts. But these kinds of positions require the political people to have a network in urban centres where civil service administrative centres are located. Rather than the population dominance of Kikuyu explaining their ubiquity in parastatals as the NCIC unconvincingly stated, the more likely explanation is that Kikuyu by virtue of having the most urbanised regions dominate civil service institutions that require professional or highly skilled networks to direct procurement to companies owned by Kikuyu and their allies. A new outsider party in power such as URP will soon discover that getting skilled and knowledgeable people into correct positions takes time when time is of essence before the next electoral cycle. But this gap may instead be filled by inter-ethnic alliance building of sorts, in reality a network of corporate interests that must cultivate a few knowledgeable civil service employees irrespective of their ethnicity. Ethnic politics alone are not enough to substitute for the dependence on a network of civil servants and private sector that make office patronage profitable for contemporary incumbents, whether they are aligned with *Jubilee* (former TNA/URP coalition) party or *NASA* (the opposition umbrella coalition).

Thirdly, what is happening inside the civil service is also worth weighing in, particularly the general professionalization of the civil service carrying on from the GoK/World Bank aspirations from 1992. Quite significant, moreover, is the new vital force of special units and "advisors" in public service. To start with, the 2010 Constitution disengaged cabinet secretaries from politics and limited their number to no more than twenty-two.[46] In theory, parliament could have vetoed any of the sitting cabinet secretaries if the executive failed to muster a majority vote in their favour. A disconnect between the president's party and the majority party in a future parliament will yet make this scenario an inconveniencing reality, which possibly explains the energy with which President Uhuru Kenyatta and his Deputy President William Ruto marshalled their respective parties into one new united parliamentary party. Constitutionally, each state department is under the administration of a principal secretary appointed by the President from among nominees of the PSC. [47] The President may

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[45] Conversely, the independent recruitment and promotion functions of the PSC are now entrenched in constitutional law.
[46] Art 152 (2) of the Constitution of Kenya, 2010.
[47] Art 155 of the Constitution of Kenya, 2010

reassign them but has lost the power of dismissal, raising the question whether a President who succeeds in office must retain principal secretaries or require PSC to submit new nominees. What is significant is that this design requires only the cabinet secretaries as political appointees to serve on the basis of loyalty. Since parliamentary endorsement is a prerequisite, a prudent President is likely to nominate loyal individuals from diverse ethnic groups. Perhaps this means there will always be a number of cabinet secretaries nominated for window dressing purposes? The remarkable Raychelle Omamo, the first woman elected to chair the *Law Society of Kenya*, now sits as cabinet secretary responsible for defence, another first for a woman. It is also trite that her being Luo conveys something symbolic in the ethnic composition of a cabinet serving a Kikuyu president. However, observers may point out that the material power over military administration and budgets are firmly in the hands of the Chief of Staff, currently a Kikuyu. Whether cabinet secretaries in this fashion become token figureheads is left for another discussion. At any rate, there is another way to ensure loyalty over professionalism in public service.

"Special assistance" within civil service has been ascendant. The law does not bar special assistants who nominally remain within the control of the PSC. But that is the limit of their regular conformity since the purpose of their existence is political. Special advisors and private assistants are outsiders brought into the civil service and tasked with delivering on particular assignments. Their pay scale also differs from regular civil service. How many special assistance posts have been established by the current ruling coalition URP/TNA is not known but the presence of special advisors is easily verified on the President's and Deputy President's websites. President Uhuru has retained the practice from his predecessor. John Githongo who was famously part of President Kibaki's inner team at state house got into trouble for taking seriously the line between his work and his ethnic loyalty to Kibaki.[48] It seems the loyalty of "palace staff" must outweigh all other considerations. President Uhuru's palace staff is predominantly but not exclusively drawn from his ethic group, the common denominator being a close working history. On the State House team, according to the presidency website, is the Secretary to the Cabinet, currently a trusted Kikuyu lieutenant with whom the President worked closely when he was minister for finance. The special team includes a legal advisor, even though the Constitution establishes the political appointment of the Attorney General as the legal advisor to government. Others are communications and economic advisors, functions that are also allocated to professionals in the regular civil service under the direction of principal secretaries. What is suggested is that special civil servants are only nominally controlled by the mainstream civil service. Here, the formal relationship between high political office and regular civil service is changed by the interposed role of the palace advisor. This development means the immediate or sensitive needs of high executive office can be met without involving regular civil service employees who may be highly qualified to undertake the work. Nobody seriously expects that these individually selected advisors must also as a rule include the forgotten tribes.

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[48] John Githongo resigned from his post of Permanent Secretary in the Office of the President in charge of Governance and Ethics in 2005 after leaking his report and submission letter to president Kibaki dated November 2005.

The critical change in the constitutional design for the professional civil service is to shift government from parliament, which henceforth will do the politics, back to the civil service. The executive will have loyal political appointees in the senior civil service, but it is just as likely to retain small pools of special advisors purely on the basis of loyalty for delivery on selected projects. For the mainstream civil service, there is a role here for the Kenya School of Government to become the think tank for civil service as a counterpart to internationally respected KIPPRA, more so because devolution will transform civil service from a cohesive centralised machinery into a conglomeration of public service centres free in varying degrees to experiment with different policy ideas. It is perhaps worth noting that professionalization of the civil service is mandated in parallel to attempts to professionalise politics through rules for higher academic qualifications, internal party democracy and separation between party office holders and elected office holders. Stable parties with leadership alteration will eventually need to inject their staff into civil service platforms that benefit the party ideas as such rather than individual ethnic kingpins. Unfortunately, intelligent parties may well coexist with less intelligent party politicians and ethnic affinities are hard to educate away. As a Ghanaian presidential advisor once told the author, when the Akan king summons you to help whip the neighbouring tribe, you do not answer that you have a PhD.

This is the dynamic milieu in which NCIC recommendations for a strategy of normalisation of ethnicity must be cast. Revisiting ethnic group proportional representation, if the realists are right, a different matrix of the "big five" would have produced the same result. Somali, Maasai, Turkana, Mijikenda or Galla would have at least 70% of civil service jobs were they to replace Kikuyu, Kalenjin, Kamba, Luo and Luhya as the politically dominant large tribes of Kenya. When will the dominance of a 'big five' end and on what kinds of conditions? NCIC comes close to demanding ethnic employment quotas in the civil service and the PSC infers it would accept time-bound quotas.[49] Short of that, NCIC is keen to see proportional representation whether or not quotas are fixed. For its scheme of representation to work, the apportionment of posts in the civil service must adopt ethnic criteria. NCIC implies this apportionment should regard the civil service as a whole but its reports suggest it could pursue a policy of apportionment within categories selected for the purpose. In order to implement the latter, civil service employment would follow two sets of principles, firstly, regular rules on meritocracy and rationality, tweaked by the constitutionally mandated allowance for gender, persons with disability, and marginalised communities and a second set of differential principles would apply to identify and elevate an appropriate ethnic composition.

The major drawback lies with the scope of agreement possible on the rules for differential treatment. After all, even a constitution provision for the allocation of additional budgetary provisions based on the need for affirmative action still engenders sensitive negotiations with every appropriation. There are already issues with the treatment of ethnic group boundaries as fixed and the fallacy of composition entailed in believing that jobs for a few individuals will alter structural disadvantages against their ethnic groups. Or that the problems of under-

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[49] PSC evaluation report on constitutional values, p.34

representation and marginalisation are distinct considering the privileged status of the tiny minority of European Kenyans in spite of occupying less than 1% of civil service jobs. Even if these concerns are placed aside, the reality is that ethnicity lacks its own intrinsic value and the NCIC cannot escape connecting the impact of ethnic diversity in the civil service to the overriding importance of strengthening an inclusive constitutional democracy. If the question of who belongs in the civil service is to be resolved by counting heads relative to population composition then the sterile controversy remains fixated with 'big five' dominance, with Kikuyu expecting a comfortable 18% of civil service jobs and probably gladly willing to forsake the 2.5% positive variance that signifies "over-representation".

To rescue NCIC from obfuscation, we must construe the recommendation for positive discrimination for equal opportunity for all ethnic groups away from numerical reconfigurations, toward substantive justice ideas. Who belongs in the civil service should instead be articulated as a question of substantive equality. This makes it about establishing mutual trust and removing perceived oppression, understanding exclusion and marginalisation as problems of lack of trust between advantaged and disadvantaged groups. Is this particular element of trust aided by treating civil service jobs as a form of reparation to disadvantaged groups? Is there another way to use the civil service to convey a message to these groups by the larger ones that they will not be oppressed by reason of being few and peripheral? This is more substantive than counting heads in quota systems and hardening ethnic curve ups of the civil service.

Substantive justice ideas already accommodate tactics of positive discrimination in order to address inequality. For instance, the Rawlsian concept of justice permits some redistributive action in order to redress the plight of the least well off members of society.[50] The entitlement of the least well off ethnic communities to redistributive state assistance is already legitimised by the constitutional provisions on resource allocation and inter regional equalisation. These could easily be tweaked to redistribute additional civil service resources i.e. jobs, toward the least well off. A rule that stipulated that any qualified members of any ethnic group with less than 1% of the staff posts in the civil service would be deemed to be least well off and the beneficiary of redistributive short term posts subject to periodic reviews would send the signal that the new social contract is about the removal of marginalisation and the justice of public institutions. NCIC must look more closely at how individuals are recruited into civil service and bring substantive ideas about removing any disadvantage that results in ethnic indirect discrimination. It must identify the human resource strategies that need to change to open the door to forgotten ethnic groups.

4   Conclusion

Any serious thought about government institutions in Kenya sooner or later comes to the dilemma of ethnicity. The civil service is no exception. In the years since independence, the Kenyan civil service has been closely associated with the governing regime. Daniel Moi's civil service was merely one more bloated factory of grievances. Mwai Kibaki was not quite

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[50] John Rawls, (1971) A Theory of Justice, Harvard

eager to completely cut the link between politics and a professional civil service. Uhuru Kenyatta has not shown any zeal to do so. The three however are graduates from the same school of politics, the formerly monolithic party Kanu. All three also could never avoid dealing with civil service reform. Today, such reform must conform to the 2010 Constitution which entrenches its basic principles, among them, rationality and meritocracy, but also ethnic diversity.

"Who belongs in the civil service?" is a question that conveys the demand for sociological legitimacy of public service employment in a country with multiple ethnic groups characterised by a troubling inequality. Since the primary impulse is to provide for legal criteria of employment, otherwise the civil service is a free for all, even the unarticulated sociologically pervasive sentiment understood through the natively familiar yet indefinite term "ethnicity", must force its way into the legally stipulated qualifications. This is the demand made by the NCIC after a series of ethnicity audits it carried out in 2016.

NCIC has helped to ask what it would mean if ethnicity was taken seriously in civil service staff composition. Its recommendations entail accepting that ethnicity must be one of the mainstream legal norms that frame Kenya's civil service. It is however a different matter to use ethnicity to filter in the small groups because then the law must distinguish dominant from peripheral ethnic groups, something no parliament as yet has shown much appetite for. Every Kenyan belongs in the civil service, if they have the qualifications for the job. Some Kenyans belong to ethnic groups belonging to which is itself marginalising. We should remember this unfortunate happenstance.

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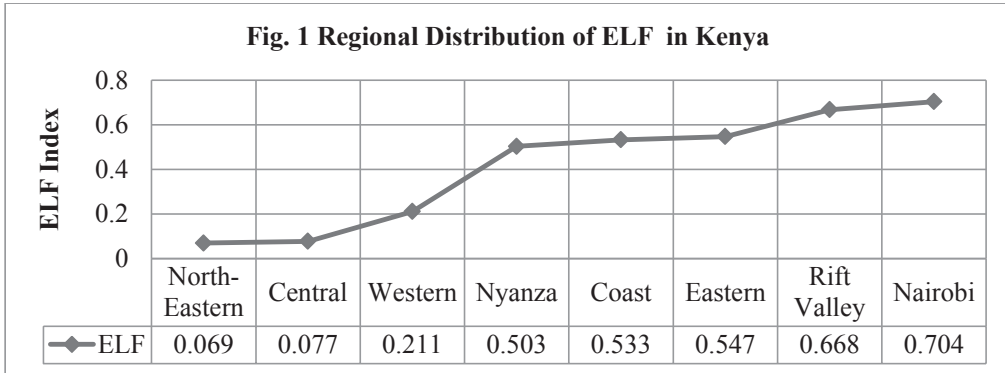
Dr. Patrick O. Asingo

1   Introduction

One of the major challenges that continue to bedevil African countries is the high level of ethnic fragmentation and how to design power and resource distribution frameworks that guarantee inclusivity for all segments of the society. Although the literature has paid sufficient attention to the role of ethnicity in the politics of ethnically fragmented societies, not much focus has been put on the perils of ethnic politics. Yet, ethnic politics has the potential of ethnicizing state power, and influencing the distribution of state resources, jobs and opportunities in a way that undercut ethnic inclusivity. This paper addresses three key issues. First, it demonstrates that Kenya, like many African countries has a high level of ethnic fragmentation. Secondly, it shows that despite ethnic fragmentation in Kenya, successive regimes have presided over an ethnically lopsided distribution of key public service jobs in the country. They have distributed public jobs in a way that seems to benefit their communities at the expense of other communities, in line with the theoretical descriptions of divided societies. Finally, the paper explores the efficacy of three salient political science theoretical perspectives on how to institutionalize democracy in divided societies – *consociationalism*; *power-dividing strategy;* and *centripetalism*.

2   Ethnicity and Ethnic Fragmentation in Kenya

The term *ethnicity* refers to 'a collectivity within a large society which has real or putative common ancestry, kinship and physical appearance' (Bulmer 1986). In Africa, ethnicity is the most salient social cleavage. In fact, it is noteworthy that, 'fourteen out of the fifteen most ethnically heterogeneous societies in the world are in Africa' (Easterly and Lavine 1997: 1219). Kenya has forty-three ethnic groups and, in my calculation, an Ethno-Linguistic Fractionalization (ELF) Index of 0.859. The ELF Index measures the probability that any two randomly selected people in any country would belong to different ethnic groups. It ranges from zero to one, where one is the most heterogeneous and zero is the least heterogeneous (Easterly and Lavine, 1997). An ELF of 0.859 implies that Kenya is so ethnically fragmented that if you randomly pick two Kenyans, there is an 85.9% chance that they belong to different ethnic groups. In fact, Kenya is the third most ethnically fragmented society in sub-Saharan Africa after South Africa and Chad.

Even within Kenya, the level of ethnic fragmentation varies from one region to the other. It is notable that the new 2010 constitution replaced Kenya's eight administrative units known as provinces, with 47 devolved units called *counties*. Nevertheless, provinces remain useful in analyses of regional ethnic configuration given that most counties are single ethnic enclaves. In fact a number of counties such as Nandi, Samburu, Turkana, Kisii, Meru and Embu bare the name of the most dominant ethnic group in the respective counties. Consequently, figure 1 shows the distribution of ethnic fragmentation across the eight former provinces.

Fig. 1 Regional Distribution of ELF in Kenya

	North-Eastern	Central	Western	Nyanza	Coast	Eastern	Rift Valley	Nairobi
ELF	0.069	0.077	0.211	0.503	0.533	0.547	0.668	0.704

Data Source: Author's Computations

Figure 1 shows that Central and North-Eastern provinces are the most homogenous in Kenya. Central province is largely inhabited by the Kikuyu ethnic group, which constitutes nearly 94% of the residents, while 96.4% of the inhabitants of North-Eastern province are Somali (Kanyinga, 2006). While ethnicity may be a political non-issue in these ethnically homogenous regions, other cleavages like clannism remain a major political factor, especially in the former North-Eastern province. Nairobi, being the capital city of Kenya, is the home of virtually all Kenyans, and understandably the most heterogeneous followed by the vast former Rift Valley province.

Fragmented societies are variously referred to in the literature as *plural societies* or *divided societies*. The term *plural society* was coined by Furnivall (1939) who defined it as 'a society comprising two or more elements or social orders which live side by side, yet without mingling, in one political unit' (p. 446). Divided societies refer to those 'societies that are sharply divided along religious, ideological, linguistic, cultural, ethnic, or racial lines into virtually separate sub-societies with their own political parties, interest groups, and media of communication' (Lijphart *et al*, 1993: 303). It is notable that fragmentation is not necessarily problematic if different ethnic groups co-exist harmoniously. Trouble begins when ethnicity become the basis of contest for

political office and the management and distribution of public resources. In fact, 'divided societies are divided precisely in that one group denies the other equal access to human rights – the right to housing, employment, education, protection against arbitrary arrest and detention, and in worst cases, the right to life' (Daly and Sarkin, 2007:204). Indeed, 'the problem in Kenya is not ethnic affiliation per se, but the coupling of ethnic identity with land, a finite resource, political power and access to public resources' (Karega, 2010:50).

3   Ethnic Exclusivity in the Kenyan Public Service

3.1 The Genesis and Evolution of Ethnic Politics in Kenya (1955 – 1963)

The seeds of ethnic politics in Kenya were planted during the colonial period. Indeed, 'the problem of … ethnicity is an impress of the colonial legacy, having been reinforced by the British ruling system' (Materu, 2015: 17). In the first place, 'the colonial administration created Native Reserves for each of the main ethnic groups with a view to securing land for the settler economy. This had the consequence of creating the basis for ethnic consciousness and therefore ethnicization of the society' (Kanyinga, 2006: 355). Moreover, the British set up foreign administrative structures which significantly promoted ethnic politics. One of these structures was the Local Native Councils created through the 1924 Ordinance, and renamed African District Councils in 1950. As Asingo (2008: 295) observes:

> These councils were formed as a strategy by the colonial government to tame the rising tide of African nationalism by diverting the focus of the emerging African leaders from national to local issues. The colonialists hoped that Africans would find the councils a useful avenue for venting out their grievances, thus rendering the budding African nationalist movement obsolete.

Moreover, these councils were geographically circumscribed to coincide with ethnic enclaves. In 1953, the *Mau Mau* uprising was quelled, a state of emergency declared, and all African 'parties' banned. Of course, these were not parties in the strict sense of the term since they did not aspire to acquire state power or independence. The parties lacked a national outlook and had narrow range of grievances limited to their geographical and ethnic bases. In 1955, the colonial government reinstated regional political parties. The short-lived ban had led to the retreat of party leaders to the District Councils. After the reinstatement of these parties, erstwhile party leaders returned having cultivated significant ethno-regional support. Hence, by the time nation-wide political parties were allowed again in 1960, most politicians were either products of or had been nurtured in an environment of ethnic politics.

The antecedents of ethnic politics crystallized into full blown ethnic-based politics which was further fortified by the events preceding Kenya's independence. Arguably, ethnic politics was reignited by the decision of nationalist leaders from minority ethnic groups like Daniel Arap Moi and Ronald Ngala to reject leadership roles reserved for them in the Kenya African National Union (KANU) formed in 1960. They argued that KANU was primarily dominated by the two largest ethnic groups, Luos and Kikuyus, and formed the Kenya African Democratic Union (KADU), ostensibly to represent minority ethnic groups. KADU sought to sanitize its ethnic cloak by adopting a federalist ideology to counter KANU's call for a unitary government. Due to these reasons 'Kenya is often cited as the quintessential example of ethnic politics' (Koter, 2016:155).

3.2 The Jomo Kenyatta Regime: Pulling Together the Ethnic Politics (1963 – 1978)

In 1963, President Jomo Kenyatta presided over the 'transfer of political power [in Kenya] from the colonial government to the government of an independent Kenyan state managed by indigenous Africans' (Asingo, 2003: 16). Citizens of the young nation had great expectations given the shortfalls of the colonial government. One of the major issues that Kenya Africans had fought so vociferously throughout the colonial era was discrimination in its broad sense. It was therefore expected that an African government formed out of a struggle against discrimination would strive to eliminate it in all its forms. This section examines the ethnic configuration of successive Kenyatta cabinets. It is recognized that the distribution of cabinet seats is an indicator of a society's level of cohesiveness. Indeed, 'ethnic groups perceive their inclusion or exclusion from a political system on the basis of their share of cabinet seats…people judge the regime as "just and fair" on the basis of the extent to which the regime has included "our own" at the centre' (Kanyinga, 2006:373). Table 1 shows the ethnic composition of the Kenyatta cabinets:

Table 1 Ethnic Configuration of Successive Kenyatta Cabinets (1963-1978)

Ethnic Group	Year						
	1963	1964	1966	1969	1971	1974	1978
Kikuyu	6	6	7	7	7	7	7
Luo	4	4	3	2	2	2	2
Luhya	1	1	2	2	2	-	2
Kamba	1	2	1	2	2	1	2
Kalenjin	-	1	1	2	1	1	1
Meru	1	1	1	1	1	1	1
Embu	-	-	1	1	1	1	1
Kisii	1	1	2	2	2	-	2
Giriama	-	-	1	1	1	-	1
Taita	1	1	1	1	-	1	1
Maasai/Goan	1	1	1	-	-	1	1

Others	2	1	1	1	-	-	-
Total	16	19	22	22	19	15	20

Note: The Maasai and Goan are lumped together because Joseph Murumbi, who was Kenya's second vice-president, was of a Goan and Maasai mixed parentage. He was in the cabinet until he resigned in 1966. Thereafter it is Stanley Oloitiptip, of exclusive Maasai parentage, who joined the cabinet.

Table 1 reveals that the level of ethnic inclusivity in Kenyatta cabinets was very low. For example, only eleven out of the forty-three ethnic communities (25.6%) ever served in Kenyatta cabinets. While it is illogical to expect all ethnic groups to serve in the limited cabinet positions at the same time, an inclusive government would reorganize and rotate cabinet positions to accommodate as many ethnic groups as possible over time. Similarly, throughout Jomo Kenyatta's tenure, his Kikuyu ethnic group had a disproportionately higher representation in the cabinet than any other community. While Kikuyus are the largest ethnic group in Kenya, the numerical difference between them and the second placed Luos for instance, does not warrant a ratio of 7:2 in the cabinet as was the case from 1969 to 1978.

The steady increase of the Kisii and Luhya cabinet posts at a time when the share of the Luo was plummeting could have served Kenyatta in two ways. First, he may have tried to court other ethnic groups to build alternative power matrix without the Luo. Indeed, 'the first two decades of independence saw the incorporation (on junior terms) of the Kalenjin into Kenyatta's Kikuyu-centred alliance, and the gradual marginalization of the Luo, alongside the embedding of a series of advantages for the Kikuyu community' (Hornsby, 2012: 9). Secondly, he may have sought to assuage his trepidation that Luo politicians, notably Odinga, who had fallen out with him, could co-opt these communities into a grand anti-Kikuyu coalition and destabilize him.

The plight of the Somali is particularly baffling. It will be recalled that one of the key transitional problems that Kenyatta faced at independence was the Somali secessionist movement and the *Shifta war*. To be exact, 'with the support of the Mogadishu government, the Kenyan Somalis who had even boycotted the 1963 elections engaged the Kenyatta government in an armed confrontation, in their effort to secede from Kenya. It took Kenyatta three years of military operations against the *Shifta* to secure the area' (Asingo, 2003:19). One would therefore expect Kenyatta to include the Somali in his cabinet, especially after they were subdued in the *Shifta war* from 1969. This would have been necessary in order to expedite their integration with the rest of Kenyans and give them a sense of belonging and acceptance. Yet, for the entire Kenyatta era, the Somali and by extension, the whole of former North-Eastern province did not get even one cabinet slot. This scenario coupled with the experience of the Luo after the Kenyatta-Odinga

fall out in 1966, suggest that Kenyatta tended to marginalize communities that do not toe his line by either reducing their numbers in cabinet, or completely leaving them out.

Kenyatta also reserved relatively key and strategic cabinet positions like the ministries of Foreign Affairs, Finance, Defence, and the Attorney-General for members of his Kikuyu community. Apart from Tom Mboya's tenure, the Ministry of Justice, Constitutional and Legal Affairs remained in the hands of Kenyatta's trusted kinsman, Charles Njonjo until Kenyatta's death in 1978. At the same time, 'throughout the 1960s and 1970s, Kenyatta stacked the military with loyal Kikuyu and non-aligned British and Kamba personnel' (Balaton-Chrimes, 2016:40). Kenyatta reserved space for his relatives in the cabinet, perhaps out of a desire to have cabinet members he trusted at a personal level. A good example is his brother-in-law, Peter Mbiyu Koinange, who was viewed as 'the second most powerful man in the government, after Kenyatta himself' (Khapoya, 1980:21). Koinange served as Minister of State in the Office of the President from 1963 to 1979, the totality of President Kenyatta's tenure.

The lopsided distribution of cabinet posts was replicated in other public service appointments, especially Permanent Secretaries (PSs). Yet, 'in Kenya, Permanent Secretaries are extremely powerful people, often more knowledgeable than the assigned ministers' (Khapoya, 1980:20). In 1969, for instance, the president's ethnic group had eight Permanent Secretary slots, compared to second placed ethnic group, Luos, who had only three. Luhyas, Kamba, Kalenjin and Kisii had two slots each, while Mijikendas and Taitas had one each. Several ethnic minorities were not represented in the Permanent Secretary cadres at all. In fact, 'by 1964, there was already disquiet among other ethnic communities that Africanization was "Kikuyunization" in disguise' (Balaton-Chrimes, 2016: 39). Kenyatta's ethnicization of public service jobs had significant implications for public service delivery. For instance, the systematic marginalization of the Luo after the 1966 Odinga-Kenyatta fallout, and the concomitant empowerment of the Kikuyu created a situation whereby 'by the late 1970s, there was a fifteen-year difference in life expectancy at birth between central province (majority Kikuyu) and Nyanza [majority Luo]' (Balaton-Chrimes, 2016:42).

3.3 The Moi Era: Walking in the Footsteps of Ethnic Politics (1978 – 2002)

Upon the death of Kenyatta, Daniel Arap Moi assumed the presidency and adopted *Nyayoism* as his guiding philosophy, signalling intentions to follow President Kenyatta's footsteps. Critics of this philosophy have argued that 'Nyayoism led Moi to perfect some of the negative practices predominant in the closing years of the Kenyatta era such as neo-patrimonialism and corruption' (Asingo, 2003:22). Table 2 shows the ethnic composition of cabinet positions under Moi.

Table 2 Ethnic Configuration of Successive Moi Cabinets (1978-2002)

Ethnic Group	Year			
	1978	1979	1983	1992
Kikuyu	6	8	4	1
Luo	3	3	3	1
Luhya	2	3	3	3
Kamba	2	2	2	4
Kalenjin	2	4	4	4
Kisii	2	2	1	1
Meru	1	1	1	1
Embu	1	1	1	1
Digo	1	1	1	-
Taita	1	1	1	1
Maasai	1	1	2	2
Somali	-	-	1	1
Others	-	-	-	5
Total	22	27	24	20

Data Source: Computed from Various Sources

Consistent with his *Nyayo* philosophy, Moi inherited the last Kenyatta cabinet with very modest changes. One notable change was the reassignment of Mbiyu Koinange from Ministry of State to that of Natural Resources. He also moved Stanley Oloitiptip from Ministry of Natural Resources to that of Home Affairs. This was viewed as a reward for those who stood with him when a cabal of Kikuyu political elite schemed to bar him from succeeding Kenyatta in 1978 (Khapoya, 1980). Up to 1979, Moi maintained Kikuyu dominance in the cabinet, even increasing their numbers from five to eight in his expanded cabinet. This was necessary to ensure continuity in government, appease the Kikuyu in the short-run, solidify his power base, and build new and deeper networks. Thus, 'Moi followed Kenyatta's footsteps from shin to toe by choosing not to drop any minister who had been re-elected, a practice followed by Kenyatta since independence' (Khapoya, 1980: 22).

Meanwhile, Moi began to bring more of his Kalenjin tribesmen into the cabinet by increasing their numbers from two to four. Indeed, under Moi, 'not surprisingly, the Kalenjin group, Moi's own, is one group whose share of cabinet positions has improved markedly' (Khapoya, 1980: 23). A possible explanation for this is that Moi may have been driven by the need to redistribute the patronage resources to his Kalenjin kinsmen. In doing so, he had to accommodate the different sub-tribes of the larger Kalenjin community, hence the sudden rise in their cabinet slots. Kalenjin is actually a collective ethno-linguistic term that comprises diverse distinct sub-ethnic groups like the *Kipsigis, Nandi, Tugen, Marakwet, Keiyo, Pokot* and *Sabaot*.

On the same vein, Moi empowered some communities that had been utterly ignored by Kenyatta, especially the Somali. Unlike Kenyatta who preserved key cabinet posts to his Kikuyu kinsmen,
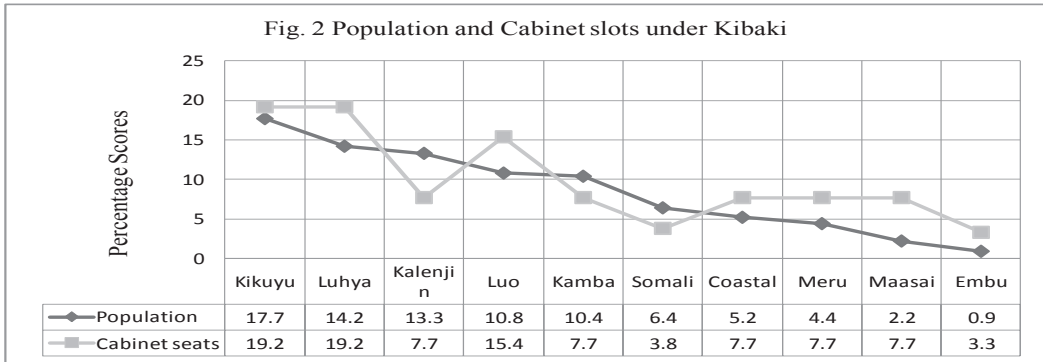
Moi dismantled ministries like Defence and brought strategic ministerial functions under his office. He initially redistributed cabinet positions liberally, by appointing even non-Kalenjins to key ministries like Foreign Affairs (Luhya), Finance (Maasai) and Attorney-General (Kamba), while assigning Kalenjins modest ministerial portfolios like Education, Transport and Energy in his 1983 cabinet. Once settled in office, Moi tried to weaken Kikuyu political and economic power, empower the Kalenjin, and build new alliances without Kikuyus.

Meanwhile, between 1979 and 1988, Moi doubled the number of Kalenjins appointed as Permanent Secretaries from 11% to 22%, while steadily reducing Kikuyu PSs from 30% to 22%. The sharp rise in the number of Kalenjin PSs was also achieved at the expense of the Luhya whose representation in PS ranks reduced from 11% to 6% as well as the minority communities like the Kisii whose representation reduced from 7% to 3% and the Meru whose representation reduced from 11% to 3%. Luo representation among PSs increased from 4% to 13%, along with the representation of the Kamba with an increase of 7% to 13%. These shifts seem to indicate that Moi wanted to abandon or at least marginalize Kikuyus, while working closely with Luos and Kambas. After KANU won the 1992 elections, the Kikuyu and Luo were represented in cabinet by one Minister each. A majority of members of the Kikuyu and Luo communities had overwhelmingly voted for the opposition. The sharp decrease in ministerial appointments from members of these two communities point to retaliation against the Kikuyu and Luo for their failure to vote for Moi. Even the Luo and Kikuyu ministers appointed to cabinet were nominated to parliament by KANU to uphold a modicum of ethno-regional balance. Moi then appointed five new ministers from communities which had not had ministerial slots since Independence.

3.4 The Kibaki Regime: Let Ethnic Politics Continue (2002 – 2013)

The Kibaki cabinets were unique and reflected the circumstances under which they were formed. His 2002 election victory was spearheaded by a multi-ethnic coalition and thus the cabinet formed after the elections had to reflect pre-election agreements. His 2007 cabinet, formed against the backdrop of a bungled election that occasioned election-related violence, forced him to form a coalition government. It is reasonable therefore to expect, at least in theory, that his hands were always somehow 'tied' when distributing public jobs and resources. It is further expected that a lack of independence and the need to fulfil the pre-election coalition agreements directed president Kibaki to create an ethnically balanced cabinet. Figure 2 shows Kibaki's 2003 cabinet and the proportion of each of the selected major ethnic groups in the national population.
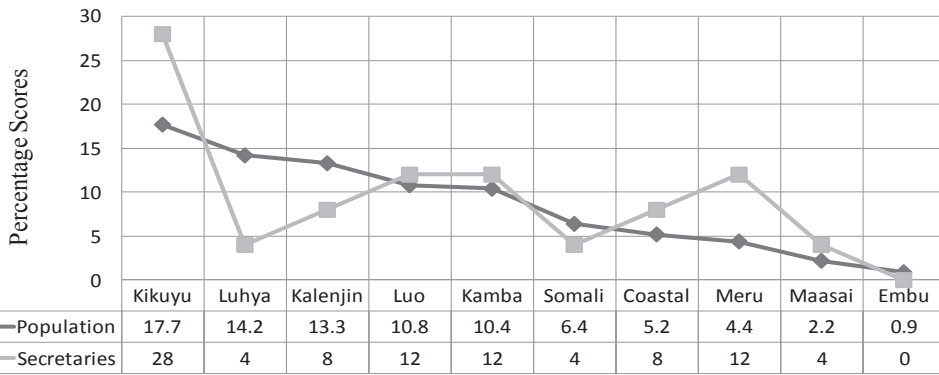
Fig. 2 Population and Cabinet slots under Kibaki

	Kikuyu	Luhya	Kalenjin	Luo	Kamba	Somali	Coastal	Meru	Maasai	Embu
Population	17.7	14.2	13.3	10.8	10.4	6.4	5.2	4.4	2.2	0.9
Cabinet seats	19.2	19.2	7.7	15.4	7.7	3.8	7.7	7.7	7.7	3.3

Data Source: Author's reconfiguration of data from National Cohesion and Integration Commission (2016) and PanaPress online: http://www.panapress.com/Kenya-s-full-cabinet-list-announced-by-president-Kibaki--13-471081-17-lang1-index.html (Accessed September 29, 2017)

The overall picture emerging from figure 2 is that Kibaki's first cabinet was fairly well balanced to the extent that there is a strong correlation between the demographic strength of each ethnic group and the cabinet positions allocated to it ($r=0.779$; rho $=0.755$). This means that the larger the demographic size of an ethnic group, the more cabinet slots it received. Only three out of the ten communities (Kalenjin, Kamba and Somali) were underrepresented in the cabinet, while the others were overrepresented. Nonetheless, the degree of variance in either case is very small.

True to the trends regarding the distribution of cabinet positions in Kenya, the Kikuyu and the Luhya, the ethnic groups of the president and the vice-president respectively, received the highest share of cabinet slots. However, ethnic minorities were also fairly well represented in the cabinet, with 30.8% of the slots taken by the Meru, Maasai, Somali and coastal communities. There were no systematic attempts to reserve certain cabinet posts to members of the president's ethnic group as had been the case during the Kenyatta era. Even politicians from minority ethnic groups were appointed to ministries such as Local Government and Labor. Figure 3 shows the 2003 Permanent Secretaries and the demographic size of each ethnic group.

Fig. 3 Population and Permanent Secretary Slots under Kibaki

	Kikuyu	Luhya	Kalenjin	Luo	Kamba	Somali	Coastal	Meru	Maasai	Embu
Population	17.7	14.2	13.3	10.8	10.4	6.4	5.2	4.4	2.2	0.9
Secretaries	28	4	8	12	12	4	8	12	4	0

Data Source: Author's reconfiguration of data from National Cohesion and Integration Commission (2016) and PanaPress online: http://www.panapress.com/Kenya-s-full-cabinet-list-announced-by-president-Kibaki--13-471081-17-lang1-index.html (Accessed September 29, 2017)
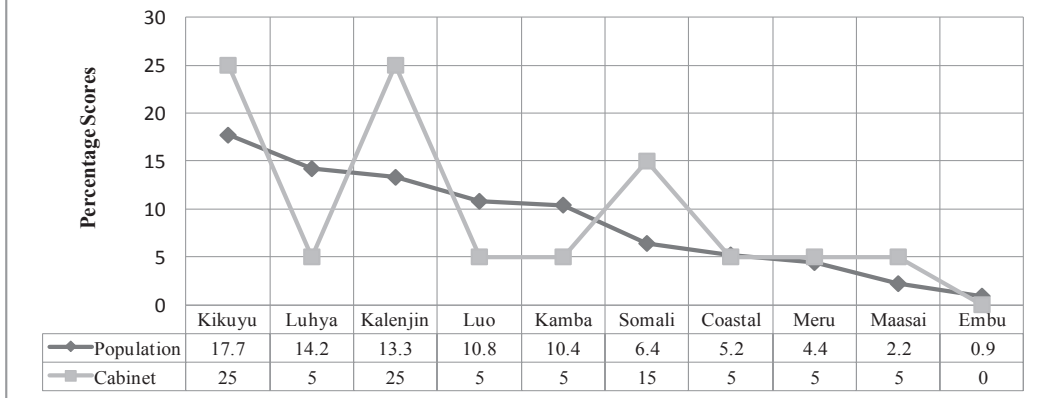
While the correlation is not as strong as that of appointments to cabinet, Kibaki's appointment of Permanent Secretaries correlates fairly well with national ethnic configuration (r=0.610; rho=0.432). The Kikuyu and Meru, two of Kibaki's political strongholds, appear to be unduly overrepresented in terms of PS slots. On the other hand, the Luhya and to a lesser extent the Somali, are underrepresented among the ranks of Permanent Secretaries. This is surprising since the Vice President did not seem to have the expected influence in the selection of PSs as patronage rewards to his supporters. The low representation of Luhyas among Permanent Secretaries may have been informed by the community's high representation among Ministers and the need to provide representation to members from other communities.

3.5 Uhuru Era: The Silver Jubilee of Ethnic Politics (2013 – 2017)

3.5.1 Composition of Cabinet

Uhuru Kenyatta was the son of Kenya's first president, Jomo Kenyatta, and political 'son' of the second president, Daniel Arap Moi. It was therefore expected that the uneven nature of cabinet appointments that characterized the two presidencies would be resurrected through him. Figure 4 shows the cabinet distribution by Uhuru in 2013 and the demographic size of each ethnic group.

Fig. 4 Population and Cabinet Slots Under Uhuru

	Kikuyu	Luhya	Kalenjin	Luo	Kamba	Somali	Coastal	Meru	Maasai	Embu
Population	17.7	14.2	13.3	10.8	10.4	6.4	5.2	4.4	2.2	0.9
Cabinet	25	5	25	5	5	15	5	5	5	0

Data Source: Author's reconfiguration of data from National Cohesion and Integration Commission (2016) and Jamhuri Magazine online: http://jamhurimagazine.com/index.php/kenya -president/4149-president-uhuru-kenyatta-18-ministries-18-cabinet-secretaries-26-principal- secretaries.html (Accessed September 29, 2017)

Uhuru's 2013 cabinet was the least balanced since independence, with weak correlation between each ethnic group's cabinet slots and their demographic size ($r = 0.440$; rho $= 0.305$). Kikuyus Kalenjins, which are the president and deputy president's ethnic groups, were disproportionately overrepresented, together with Somalis. Yet, the Luo, Kamba, and Luhya whose members voted largely for the opposition were grossly underrepresented. This suggests that Uhuru used appointments to cabinet to reward "communities" that supported him in 2013 elections. It is evident for instance, that half of the cabinet slots were evenly distributed between his own ethnic group and that of his deputy, while ethnic groups from the rest of the country shared the other half. However, Kenyatta significantly empowered minority communities through his cabinet appointments, both in terms of numbers and the weight of their cabinet portfolios. For the first time, Somalis who had not been represented in Jomo Kenyatta's Cabinet and had only 1 cabinet representative during Moi's tenure represented by 3 Cabinet Secretaries. In fact, apart from the president and deputy president's ethnic groups, the Somali were third most hired ethnic community in the cabinet.

3.5.2 Composition of Constitutional Commissions

The 2010 constitution created 15 constitutional commissions. The Kikuyu have the highest number of employees in 13 of these commissions, while the Luo dominate the other two. At the same time, only 19.3% of all the commission employees are from minority communities. Only 30 out of the over 40 ethnic groups in Kenya have at least one employee in a commission, and

out of 30 communities, 15 (50%) are overrepresented, 11 (36.7%) are underrepresented and four (13.3%) are well represented in the commissions. In a nutshell, no single commission has employees from more than 30 ethnic groups. In fact, the highest number of ethnic groups in a commission – the Parliamentary Service Commission – is 29. Figure 5 shows the 5 most overrepresented and 5 most underrepresented ethnic groups. It shows the variance between each ethnic group's share in the commissions and what each community would be 'allotted' if employment in the commissions conformed to population size. Ethnic groups with positive scores are overrepresented, while those with negative scores are underrepresented.
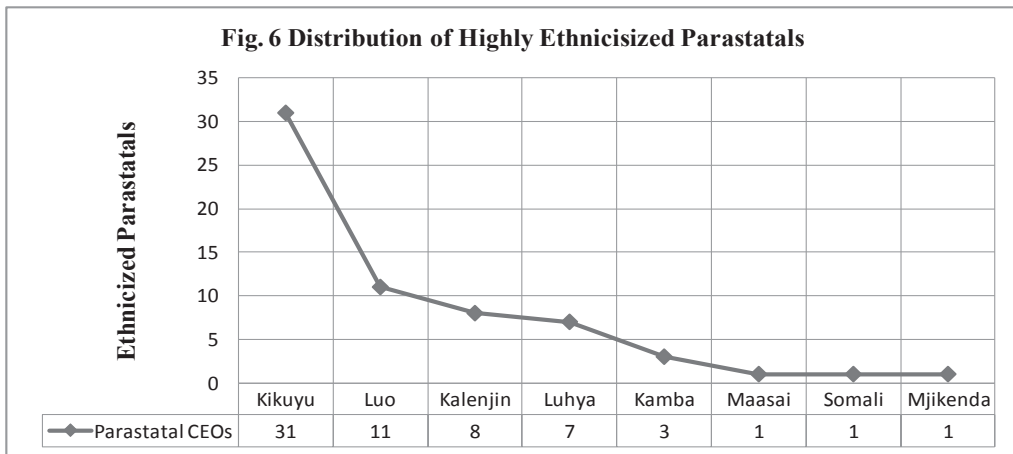

Fig 5 Representation of Ethnic Groups in National Commissions
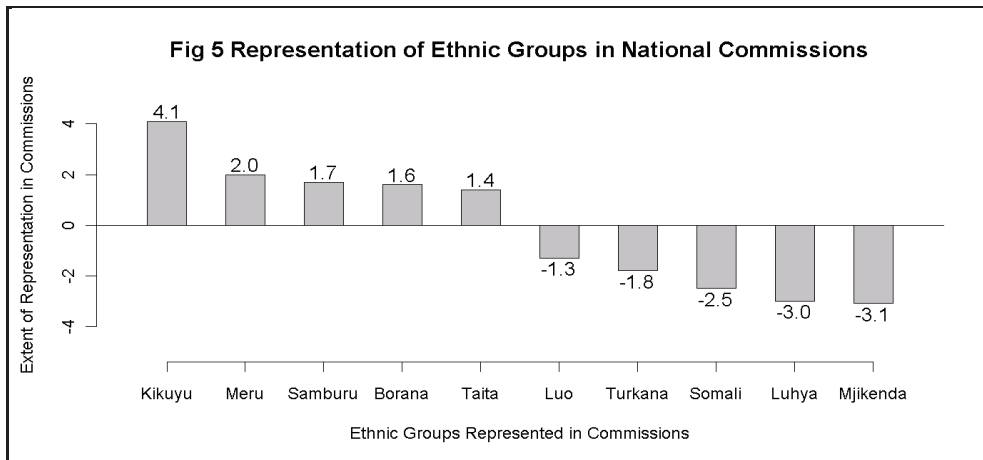
Source: Author's Calculations based on data from NCIC, 2016b.

Kikuyu are the most overrepresented ethnic group, while the Mijikenda are the most underrepresented in constitutional commissions. The other seriously overrepresented ethnic groups are – the Meru, Samburu, Borana, and Taita – are, in fact, numerical minorities. Although overrepresentation of these minorities may be indicative of affirmative action efforts aimed at including marginalized communities in decision-making forums, it is also apparent that apart from the Taita, members of the other 4 most overrepresented ethnic groups had voted in favour of Uhuru Kenyatta's Jubilee Alliance in the 2013 elections. In contrast, members of the communities which are underrepresented are those that voted largely in favour of the opposition CORD Coalition (Luo, Luhya, Mijikenda and Turkana). This pattern suggests that appointments to the commissions favoured those from the ethnic groups that voted for Jubilee in the 2013 elections.

3.5.3 Composition of State Parastatals

The Kikuyu have the largest representations of parastatal Chief Executive Officers (CEOs) (22.2%), followed by Kalenjins and Luos at a cumulative 16.2%. In other words, nearly 40% of all parastatal CEOs are from the president and deputy president's ethnic groups. The problem is further exacerbated by the fact that a parastatal CEO tends to oversee institutional practices that led to the hiring of more employees in that parastatal than other ethnic groups. Based on data provided by the National Cohesion and Integration Commission, the majority of employees of 34% of parastatals hailed from the same ethnic groups as their CEOs. Figure 6 shows the number of highly ethnicized parastatals where majority employees share ethnicity with the parastatal CEO.

Fig. 6 Distribution of Highly Ethnicisized Parastatals

	Kikuyu	Luo	Kalenjin	Luhya	Kamba	Maasai	Somali	Mjikenda
Parastatal CEOs	31	11	8	7	3	1	1	1

Data Source: NCIC, 2016c.

Figure 7 shows 10 selected ethnic groups which are either overrepresented or underrepresented in the parastatals in terms of the variance between the parastatal employees from each ethnic group and the group's entitlement based on their population size. Ethnic groups with positive scores are overrepresented, while those with negative scores are underrepresented in parastatals.

Fig 7 Representation of Ethnic Groups in Parastatals
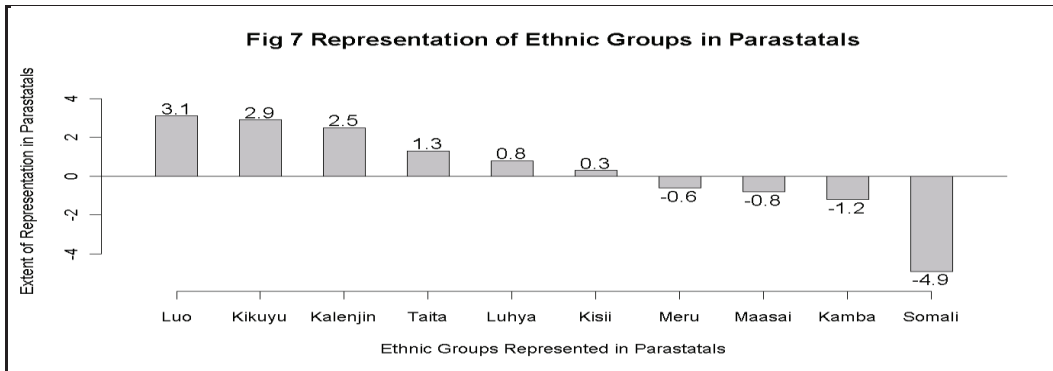
Source: Author's Calculations based on data from NCIC, 2016c.

It is evident from Figure 7 that the Luo, Kikuyu, and Kalenjin are the most overrepresented ethnic groups in parastatals. This is hardly surprising since these are also the same communities that have the largest representation of parastatal CEOs.

4   Remedies for Ethnic Politics and their Applicability in Kenya

4.1 General Overview

Serious remedies to ethnic politics in Kenya must appreciate the long-standing contention among political scientists that democracy cannot work easily in divided societies. Indeed, 'scholars have long argued that democracy is conflict-prone and unstable where ethnic identity becomes the primary basis for political organization' (Arriolla, 2013:10). They recognize that 'the dominant characteristic of divided societies is the ethnic political party, with individuals casting votes for parties of their own ethnicity' (Choudhry, 2008:23). Moreover, 'the literature suggests that competition among ethnic-based parties is perceived as a zero-sum contest in which gains by one group's politicians are interpreted as losses for all others' (Arriolla, 2013:11). Failure to secure interests, coupled with their diminished prospects for assuming power democratically, provides ethnic minorities with an incentive to resort to extra-constitutional means to tilt the balance of power in their favour (Rabushka and Shepsle, 2009). The conflict is exacerbated by the fact that public demands force governments into lopsided expenditures that benefit some communities at the expense of others (Furnivall, 1939). Consequently, ethnic minorities in divided societies often tend to display relatively less attachment to the state than ethnic majorities (Elkins and Sides, 2005). Thus, political scientists have suggested three institutional remedies for democracy in divided societies – *consociationalism*; *power-dividing strategy;* and *centripetalism*.

4.2 Consociationalism

4.2.1 Theory and Practice of Consociationalism

Theorizing about consociational democracy traces its roots in the work of Arendt Lijphart whose study sought to explain why democracy remained stable in deeply divided societies like Austria, Switzerland, Belgium, and the Netherlands. It emerged that consociational democracy also existed in Colombia, Lebanon, Czechoslovakia, and India (Andeweg and Irwin, 2002). Today, 'there is little doubt that among scholars, consociationalism represents the dominant model of democracy for divided societies' (Reilly, 2006:28). They suggest that 'consociationalism is to political systems what walls are to territory; it is away to divide up the goods to keep everyone happy – for a time. Like walls, consociationalism ensures that each interest has space in which it can flourish' (Daly and Sarkin, 2007:225). Some of them conclude that, 'in divided societies, the choice is either "consociational democracy" or "no democracy at all' (McCulloch, 2014: 10).

In developing the theory of *consociational democracy,* Arendt Lijphart argued that democracy is only possible in divided societies if such societies adopt institutions that allow representatives of all key sections of the society to share in decision-making on matters of common concern, while granting sufficient autonomy to each segment to make decisions on matters unique to it. In its pure form, consociational democracy involves 'mutual recognition and autonomy for, and power sharing between, the different segments of a plural society' (Daly and Sarkan, 2007: 224). That is, 'when the threat to stability by social division is offset by politics of accommodation at the elite level, we have consociational democracy' (Andeweg and Irwin 2002:28).

There are 4 key features of consociational democracy. First, it acknowledges the existence of cleavages and seeks to accommodate them by letting the political elites of various ethnic groups come together in a coalition government. Hence, it involves power-sharing through grand coalition government that bring together political leaders of all key segments of the society. This promotes elite-level bargains among representatives of organized cleavages in the society, while ensuring that power is dispersed and checked through executive power-sharing in broad coalition cabinets (Lijphart, 1999). In this regard, 'power sharing means the participation of representatives of all significant groups in political decision-making, especially at the executive level' (Reynolds, 2002:39). Better still, 'power sharing is a type of role sharing in which there is an agreement that the power is shared even though the tittles may differ' (Alvarez and Zvejenova, 2005: 100).

Secondly, consociationalism provides for proportionality in political representation, civil service appointments, and the allocation of public funds. In Kenya, the distribution of appointments to the public service favours the ethnic groups of successive presidents. It must be appreciated however, that with over 40 ethnic groups, it is practically impossible to accommodate each ethnic group in every facet of high-level public service. The perception that senior civil servants 'represent' members of their ethnic community or that every ethnic community needs

representation in the upper-most levels of the government in order to have their interests fulfilled is the effect of decades of patrimonialism and personalization of public power in Kenya. For instance, under Kenyan one would have to create over forty cabinet posts and assign a Cabinet Secretary "representative" to each ethnic group for cabinet to be considered truly inclusive.

Thirdly, consociationalism calls for mutual veto to protect interests of minority groups. Most scholars agree that a bicameral legislative system is the best system for enhancing legislative veto, especially for ethnically divided societies (Newton and Van Deth, 2005) in which power and political representation is shared within the legislative arm of government (Uhr, 2006). It is estimated that at least one third of all the countries of the world, and about two thirds of advanced democracies have bicameral legislatures (*ibid*). There are two major forms of bicameralism: s*trong bicameralism where* both houses have almost equal power, and *weak bicameralism* where one chamber of the legislature is stronger than the other. Strong bicameralism, such as in Italy, is rare since such systems are prone to the same conflicts that consociationalism seeks to avert.

Generally, bicameralism promotes serene co-existence in ethnically divided societies which are conflict-prone. One reason why a bicameral legislature was adopted in the post-conflict Rwanda, for instance, was to forestall future genocides and uphold ethnic co-existence (Nakamura, 2008). Thus, the prime role of the Rwandan second chamber was not general legislation, but regulation of party and political activities. Bicameralism also mediates against tyranny of majority, thereby enhancing democracy by protecting the majority and minority from each other, preventing majority or minority rule, and fostering cooperation among majority and minorities to be able to rule (Cooter, 2000). Furthermore, bicameralism facilitates informed policy and legislative decision-making, especially where the two houses share legislative and policy making responsibilities (Cutrone and McCarty, 2006).

Assigning the upper house with veto powers over legislation serves as an incentive for closer scrutiny of legislation and policy proposals before enactment (Heller, 2007). Since bicameralism has more veto points, and more veto players than a single chamber, it facilitates greater policy stability (Riker, 1964), especially if the second chamber is strong enough to promote dialogue and nurture a spirit of bargaining between the executive and legislature (Tsebelis and Money, 1997). The representativeness of bicameralism is also reflected in the fact that it offers additional seats to groups and interests which may be inadequately represented in the Lower House (Heller, 2007). A study done from 1996-2004 in thirty five democracies found that bicameralism also improves accountability of legislators to the electorate, particularly where there is high party polarization and both chambers are dominated by the same political party (Testa, 2010).

Finally, consociationalism grants regional autonomy to various ethnic groups through federalism (Lijphart, 1977) and to some extent devolution. Federalism is a form of government where power

is shared between a national government and regional governments in a way that each tier of government has final decision over some activities (Riker, 1964). Like federalism, devolution involves the transfer of authority and responsibility over certain governmental functions from the central government to some local-level semi-autonomous units which are considered to be both geographically and operationally closer to the public (Turner & Hulme, 1997). In the Kenyan context, these devolved units have been christened *Counties*. Devolution has been noted for maximizing the ability of governments to address the preferences of its citizens (Feeley and Rubin 2008).

Devolution provides a trade-off between economies of scale and heterogeneity of preferences. In this regard, the Kenyan county governments should be empowered to provide goods and services for which there is greater heterogeneity of preferences and lower demands for economy of scale (Alesina and Spolaore, 2003). If properly designed, devolution has the potential to reduce ethnic conflict by creating multiple centres of power at the local level and making national leadership less attractive, thereby divesting attention from national power. This is vital since ethnic politics in Kenya is largely manifested in the contest for national power and influence (Schneir, 2006).

Regrettably, Kenyan political elites at the national level have not helped matters by continuously denigrating county governments and making the position of Governors look less glamorous. By denying them the harmless but seemingly revered title of "His/Her Excellency', insisting that they should not fly flags on their official cars, unnecessarily denying or withholding county funds, and incessantly engaging county leadership in political supremacy battles, these elites depreciate the value and powers of Governors. These trends need to be reversed to make local leadership more attractive and powerful yet transparent and accountable than is currently the case.

4.2.2 Application of Consociationalism to Kenya

Kenya has experimented with various aspect of consociationalism in one form or another over the years. It is noteworthy that solutions to persistent conflicts that revolve around ethnic fault-lines require weighing the viability of co-existence. Where co-existence is viable, the choice has often been to resuscitate it through power sharing arrangements. However, when it proves unviable, the option is 'political divorce.' In this regard, 'the principal decision that the international community has had to face is whether separation or power-sharing is the most achievable, sustainable, and just outcome… power sharing as a peace-building option has often won the day' (Sihanya and Okello, 2007: 698). In this case, the African continent is replete with cases of post-conflict power-sharing such as Burundi (2001), Liberia (2003), Democratic Republic of Congo (2003), Sudan (2005), Zimbabwe (2008), and Kenya (2008).

The 2008 power-sharing arrangement in Kenya brought together political leaders of key segments of the society after the disputed 2007 elections. The 2007/2008 election violence ended with an internationally mediated peace accord, which provided for the formation of a grand coalition between the incumbent Party of National Unity (PNU) led by President Mwai Kibaki and the Orange Democratic Movement (ODM) led by Raila Odinga. There is little doubt that 'the mediation was based more on aspects of consociational democracy... [For instance], the mediation was based on the principle of inclusion, which resonates with some key prepositions of consociational democracy' (Sihanya and Okello, 2007: 659 - 660).

Earlier in 2002, the incumbent Kenya African National Union (KANU) lost elections for the first time since independence in 1963 to the National Rainbow Coalition (NARC). NARC became the first opposition coalition to win elections and form government in Kenya. The coalition brought together Raila's Liberal Democratic Party (LDP) and Kibaki's National Alliance Party of Kenya (NAK). Since the law did not recognize coalitions, NARC was registered as a political party for the sake of elections. Notably, 'the LDP and NAK partnership was fashioned on a Memorandum of Understanding (MoU), a power sharing agreement that stipulated an equal share of cabinet and government positions between the two political parties' (Sihanya and Okello, 2007:663).

The 2010 Constitution introduced devolution and re-designed Kenya into 47 Counties. Article 174 of the Constitution restates the objectives of devolution in Kenya: to foster national unity by recognizing diversity; protect and promote the interests and rights of minorities and marginalized communities; and to ensure equitable sharing of national and local resources. These values are amplified in various parts of the Constitution such as Article 56(a) which requires the participation and representation of minorities and marginalized groups in governance and other spheres of life. Section 65 (1)(e) of the County Government Act (2012) require at least 30% of recruitments to the county public service to be reserved for candidates who are not from the most dominant ethnic groups in that county. The quest for devolution was largely driven by the need to empower local communities by locating decision-making, resource allocation, and service delivery centres closer to them, thus easing service provision burdens of the central government which is geographically and operationally far from local communities, and thus unable to accurately determine and promptly respond to their felt needs (Asingo, 2008).

An analysis of data collected by National Cohesion and Integration Commission (NCIC) from November 2014 to August 2015 reveals that minority communities within counties still continue to be marginalized just as minorities at the national level get marginalized. In other words, those who are marginalized at the national level get voice at the county level, where they marginalize others as well. For instance, Marsabit County, the largest county in Kenya, is inhabited by thirteen ethnic groups – Gabra, Borana, Burji, Rendile, Somali, Samburu, Turkana, Konso, Sakuye, Dassenach, Garee, Waata, and El-Molo. Whereas the Gabra, Borana and Rendile are minority ethnic groups at the national level, they are dominant in Marsabit country, where they

also marginalize smaller local communities. The El Molo, which is the smallest ethnic group in Marsabit County and in Kenya, lacks representation in both the County Public Service Board (CPSB) and the County Executive Committee (CEC). Likewise, new appointments in Baringo County, seem to follow the ethnic trend, whereby the larger the representation of a community in the CPSB, the more recruits it got. In this case, 78% of the new recruits were Kalenjins as compared to 12% Pokots and 8% Njemps. Similarly, 81% of the County Assembly staff and 70% of all the CECs were Kalenjins. In both cases, Pokots and the Njemps were a distant second and third respectively (NCIC, 2016a). In short, devolution has only partly addressed the problem of ethnic discrimination in Kenya.

4.3 The Power-Dividing Strategy (PDS)

In brief, 'PDS seeks to remove the most divisive issues from the jurisdiction of the government and to reserve these decision-making powers to individuals and civil society' (Roeder, 2012: 66). The prime goal in this case is to uphold civil liberties and reduce the stakes involved in politics. PDS proposes vertical and horizontal redistribution of governmental decision-making powers to multiple functionally-specific agencies. Thus, 'the logic of Power Dividing requires identifying in each particular society alternative, cross-cutting divisions that do not replicate its cultural divide and are less likely to be trumped by cultural differences' (Roeder, 2012:69).

Similarly, 'in designing jurisdictions at the sub-national level, PDS devolves decision-making to multiple cross-cutting jurisdictions, so that all devolved powers do not concentrate in the same political jurisdictions. School districts should not [extend over the same jurisdictions as] water basin districts, which in turn should not [extend over the same area as] police districts, and so forth' (Roeder, 2012: 67). This creates new multiple cross-cutting cleavages based on the delivery of different public services. Thus, 'cleavages that cut across many different groups tend to promote political stability; while mutually reinforcing cleavages tend to promote political instability' (Asingo, 2014: 9). However, 'the existence of more than two groups tends to militate against polarization that is commonly a feature of deeply divided societies' (Guelke, 2012: 13).

In formulating PDS, Rothschild and Roeder cite the case of Switzerland, where decision-making at each governmental level are reserved for self-administering agencies. In summary, 'the Swiss have not created a simple ethnic or religious power-sharing constitutional order; they have empowered civil society and multiple majorities in government, so that winners and losers do not accumulate along cultural lines' (Roeder, 2012: 69). Key cleavages in Switzerland like ethnicity, religion, and rural-urban residence cross-cut with each other in a way that undercut ethnicity.

In Kenya, many counties are dominated by single ethnic groups and hence, separate service delivery units for each county only strengthens ethnic divides, and promotes ethnocentrism. PDS suggests the restructuring of administrative and service delivery boundaries to create multi-

ethnic and cross-cutting service delivery units. This creates a situation where segments of different ethnic groups are lumped together under single service delivery units in varied permutations. For instance, some Kisiis in Kisii County and some Kalenjins in Bomet County could be under one Education Board. Another board on agriculture could bring together some Kisiis and their Luo neighbours in Homa Bay. Nationally, Kisiis are numerically inferior to Kalenjins and Luos, but the creation of cross-cutting units neutralizes these ethnic numbers.

4.4. Centripetalism

Centripetalism was developed by Donald Horowitz (1985). It is anchored on the premise that the ethnic divisions in the society cannot be resolved by reproducing the same ethnic divisions in the legislature through consociational accommodations. Instead, the solution to ethnic divisions is to design an electoral system that encourages co-operation among different ethnic groups, thereby diminishing the prominence of ethnicity (Reilly, 2006). This would also eliminate the possibility of creating decision-making bodies whose members essentially represent ethnic interests. Its main departure from consociationalism is that social cleavages cannot be used as a basis for building foundations of a stable society. Instead, a stable society is one built on institutions which neutralize rather than magnify and even glorify social cleavages like ethnicity.

One mechanism for attaining this is the promotion of political parties that have broad based cross-cleavage support. The second institutional mechanism is by adopting an electoral system that redistributes votes more proportionally. Indeed, 'one core strategy, advocated by Donald Horowitz, is to design electoral rules that promote reciprocal vote-pooling, bargaining, and accommodation across group lines' (Reilly, 2006: 28). An electoral system in this case is defined as 'the set of laws which regulate the transformation of preferences into votes and of the votes into seats' (Baldini and Pappalardo, 2009:17). Moreover, 'electoral systems determine the means by which votes are translated into seats in the process of electing politicians into office' (Farrell, 2011:4). It is also a mechanism through which the electorate holds their leaders accountable and structures the boundaries of acceptable political discourse (Reynolds (1999). Thus, 'the electoral system is by far the most powerful lever of constitutional engineering for accommodation and harmony in severely divided societies…' (Horowitz, 1991:163). In short, 'electoral systems are the cogs that keep the wheels of democracy properly functioning' (*Ibid*: 2).

Centripetalism advocates for the adoption of electoral systems based on principles of preferential voting. Such electoral systems allow voters to vote for more than one candidate by indicating their order of preference for the candidates, rather than voting for just one preferred candidate. Not only are there different versions of preferential voting, but generally, 'there are almost as many voting systems as there are democratic countries' (Parpworth, 2016: 116). One of the preferential electoral systems is the Alternative Voting system (AV). Under AV, candidates for

the same seat are listed on the same ballot paper. Instead of voting for one candidate, each voter casts his votes for all the candidates by ranking the candidates in order of preference.

The number-one choices for each voter are then counted to determine if any candidate has reached the threshold, which may be set at 50%+1 or higher. Such a candidate is then declared the winner. If no candidate meets the threshold then the last candidate is dropped and the second choice preferences of those who voted for him are redistributed to the remaining candidates. The process is repeated until a winner emerges (Parpworth, 2016). AV encourages candidates to appeal to minority groups to maximize second-place votes. It raises chances of minority groups being elected through second-place votes and encourages less negative campaigns. In fact, 'many proponents claim that choice voting [like AV], discourages the kind of negative campaigning and mudslinging that have become common in single-member district contests' (Amy 2000:102).

Reilly (2001) presents evidence of successful application of centripetalism in deeply divided societies like Papua New Guinea, Fiji, Sri-Lanka, Malaysia, Estonia, and Northern Ireland. These countries have used centripetalism to facilitate peaceful co-existence of different ethnic groups, and adopted variants of the preferential voting system. Papua New Guinea had a population of just about 4 million and nearly 840 language groups by 2001. In fact, he estimates that this is about a quarter of all language groups on earth. Moreover, there is no significantly large ethnic group in Papua New Guinea, with some of them numbering just about 400 people, making the country the most ethnically fragmented country in the world. The use of preferential voting in Papua New Guinea encouraged vote pooling in three major ways. First, candidates with limited home support have to solicit for second-choice votes away from home, sometimes in what are considered hostile territories. Secondly, candidates with substantial home support reach out to allies from other areas to help them secure the second-choice votes. Thirdly, candidates form alliances and support each other in their territories. These efforts neutralize the effect of ethnicity in the electoral process. Thus the number of first choice candidates who failed to win seats increased from 9% in 1964 to 14% in 1968 to 16% in 1972 (Reilly, 2001).

5   Conclusion

It is evident that neither devolution, as currently designed, nor power sharing as crafted in 2008 has effectively addressed problems of ethnic exclusion in Kenya. In fact, political coalitions have largely been informed by ethnic calculations and hence based on promises of ethnic rewards. The bigger an ethnic group, the more attractive it is as a coalition partner. Minority communities are thus left out from the political and decision-making process. Devolution too has been designed and executed in a way that replicates the ethnically-biased resource and opportunity distribution stratagem at the centre. Both coalition-building and devolution experiments done in Kenya so far stand guilty of embracing and glorifying ethnicity as a basis for local and national politics.

What needs to be done against this backdrop is to undertake radical institutional reengineering to make ethnicity less attractive as a basis for organizing or practicing politics. Yet institutional changes, by their nature, attract resistance. In fact, historical institutionalism regard institutions as inimical to change until some perturbations toss them off equilibrium. This is why for instance, on average, states change their constitutions after 16 years and states with greater ethnic fragmentation are twice as likely as those with relatively homogenous populations to change their constitutions (Elkins and Sides (2007).

It is therefore insufficient to reject institutional change merely on account of the fact that it failed elsewhere. The failure of an institution does not necessarily mean that the institution in question is unworkable. Institutional failures may result from the behaviour of political actors, the unique environment in which it is operating, or inadequacies inherent in an institutional design perhaps due to deficient empirical content. It is argued for instance that consociationalism emphasizes bargains among representatives of organized cleavages in the society who are mainly elite and hence it is impractical if the masses in each cleavage do not fully empower their elites to bargain on their behalf or where ethnic lines are fluid and rivalries characterize the relationships among various cleavage leaders. In fact, 'the failed transition from communist rule to consociationalism in Bosnia in 1990 was due to lack of co-operation among the elites' (Belloni, 2007:50).

Furthermore, the consociationalist proposal for segmental autonomy can amplify some sense of independence which can be negatively exploited to undermine the national unity it seeks to preserve. This is more so after 2017 Kenyan elections evoked a deep sense of umbrage that has ignited calls for secession. It has also therefore been suggested that segmental autonomy as prescribed by consociationalism should be expunged from its definition since it is more about 'power sharing' while segmental autonomy is about vertical 'division of power' (Coakley, 2009).

Implementing centripetalism in Kenya on the other hand, would require a referendum to change the electoral system from the current First-Past-the-Post system (F-P-T-P) or the winner takes all to Alternative Voting system. The trepidation of amending the constitution should not obliterate the prime objective of centripetalism which is to manage ethnic diversity through cross-cutting political institutions which give the minority realistic opportunity to access power, or better still, promoting and nurturing 'accommodation-inducing structures' (Reilley, 2001:22). It is extremely preposterous to use fear of referendum to cast aspersions on such a theoretical novelty. In any case, 'as so many democratic theorists from Dahl to Lijphart have argued, democracy in a plural society can be maintained only through highly consensual arrangements, recognition of cultural differences, a high level of toleration, and mutual guarantees' (Ozbudan, 2012:88).

Interestingly, electoral reform discourse in Kenya focus on nearly all the aspects of the electoral process except what is more critical – the electoral system. The current push for electoral reforms by the opposition opens a critical window through which the scope of electoral reform agenda in

Kenya should be expanded to incorporate the electoral system, and specifically to shift Kenya's electoral system from F-P-T-P to AV system. Critics may argue that the system is too complex for a largely illiterate Kenyan population. However, the reality is that the complex elements of the system have little to do with the ordinary voters and more to do with the electoral agency.

Despite its challenges, centripetalism is capable of reducing the influence of ethnicity in politics and promoting national unity. Therefore, the strategic institutional choice facing Kenya like other divided societies is not between 'consociational democracy' and 'no democracy' as Lijpart would argue, but between consociationalism which recognizes ethnic cleavages as legitimate political constituencies of their respective political elites on the one hand, and centripetalism which facilitates cross-ethnic political dialogue on the other hand.

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Back cover summary

This book seeks to provide a definitive accounting of the mobilization of ethnicity in political processes in Kenya, what we refer to as the "politicization of ethnicity." Specifically, we seek to answer two questions: *Why is ethnicity such a major facet in the way Kenyans conduct their social and political affairs? How can we create a political system that serves the interests of all Kenyans: what historical and analytical tools do we need when discussing the remaking of Kenyan politics?*

The *National Study* is composed of four papers that discuss four distinct topics: i) Politicization of Ethnic Identity in Kenya: Historical Evolution, Major Manifestations, and the Enduring Implications; ii) Negotiated Democracy and its Place in Kenya's Devolved System of Government; iii) Who belongs in the Civil Service? Ethnicity and discrimination in Kenya's civil service; and iv) Ethnicity and Political Inclusivity in Kenya: Retrospective Analysis and Prospective Solutions.

By making use of a multidisciplinary approach that traverses post-colonial studies, constitutional law, historical analysis, policy analysis, and political science, this volume's accounting of ethnicity and politicization in Kenya promises to be the definitive guide for scholars, students, activists, and policymakers who wish to study ethnicity as it pertains present-day Kenyan society.

Published in the aftermath of a bitterly contested and highly divisive 2017 election cycle, KHRC's National Study seeks to map the terrain of ethnicity and the political process in Kenya. Not unlike 2010, when Kenyans came together to establish a new constitutional dispensation, we are once again at a crossroads whose decision on the way forward could make or break our social fabric.

The papers that make up this study discuss a wide range of issues from the elite discourses that shaped ethnicity as "the single most important variable in the Kenyan political arena," to an analysis of the contours of "negotiated democracy" in the country under the devolved system of government, to the fluid notion of ethnicity as well as the problems of determining the moral claims to "ethnic balance" in the public service, to, lastly, a bold proposal for the infusion of new ideas of representation that transcend ethnic identity by positing cross-ethnic cooperation as opposed to ethnic competition.

Our current political moment compels us to think innovatively and radically about how to live in an ethnically diverse society that works for all of us. We hope this Volume will contribute to current discussions as to how Kenya can best move forward in a way that pays respect to and learns from the past but that also looks refreshingly to the future. It is for this reason that we have intended for this Volume to have a wide readership including students, scholars, and policy-makers.