- Recognising And Respecting Cultural Diversity In The Constitution

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1:0 Introduction
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One of the most fundamental characteristic of the increasingly widened
political space in Kenya is not so much the plurality but the polarity of
ideas by the many and varied contending social forces. This polarity
corresponds quite naturally to the socio-cultural diversity that is the
Kenyan nation-state. Polarity need not necessarily be a negative development
in the socio-political process. However, to derive a useful value from this
development, there need to be a conscious effort at creating institutional
mechanisms that not only acknowledge its existence but also emphasise the
underlying consensual values and principles as the basis of the state. Such
an opportunity, potentially exists in the ongoing constitution-making
process.

This paper addresses the broad problematic area of cultural and ethnic
diversity and how they can be given a positive role in the institutional
structures likely to emerge from the current constitutional review process.
In this regard, it is to be noted from the onset that cultural and ethnic
diversity face different constraints and opportunities in different
institutional contexts. These differences are however, not absolute and can
be positively mediated by conscious constitutional engineering. A task which
the CRP should endeavour to attain. The section below provides some direction
on definitional and conceptual issues.

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2:0 Definitional and Conceptual Issues
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Culture refers to the customs, civilisations and achievements of a particular people. The multicultural nature of African states including Kenya, has been attributed to the arbitrary process of creating nation-

states in Africa by Europeans in late 19th century. Some scholars have argued that because colonial overlords did not pay due attention to cultural uniformity in creating the nation, states in Africa, they laid the basis of political instability that continues to bedevil the continent. But whether or not cultural uniformity is a safe guarantee of political stability remains a matter of great contention. In any event, the great pre-

colonial kingdoms of Africa such as the Zulu and Mali were essentially multicultural and yet were able to consolidate political stability quite considerably. More recently, the cultural uniformity of Somalia did not stop the nation-state from unravelling with ferocious intensity. What is in little doubt however, is that ethnicity in a culturally diverse state often leads to great political instability.

Ethnicity has been defined as the conscious mobilisation of ethnic identity and interest by elites to make political and economic demands on the state in order to secure their constitutive interests in competition with members of other ethnic groups. It is thus a political process whereby people form groups in order to differentiate themselves from other groups by appealing to the idea of ineluctable cultural differences.

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

But ethnic identity, the supposed basis of ethnicity, is itself largely a social construct. Many scholars have observed that ethnic identity and behaviour are only partly determined by genetics, they are also shaped by context and choice. Language, a myth of common ancestry and history may be important ascriptive raison de'tre of ethnic identity but so are religion, rituals, values etc. Ethnic groups have thus been characterised by some scholars as imagined communities.

Because of the nature of the ethnic group as a social identity, ethnic boundaries although fairly stable, change over the course of time. Horowitz has however, correctly observed that the artificial nature of the ethnic group does not in any way vitiate its significant political role. Ethnic conflicts continue to afflict various parts of the world with devastating negative consequences. Ethnicity itself shows no sign of receding in political discourse and interactions.

Max Weber in an earlier study, suggested that " ethnic membership does not constitute a group; it only facilitates group formation of any kind, particularly in the political sphere. On the other hand, it is primarily the political community (no matter how artificially organized), that inspires the

belief in common ethnicity" People do not form groups for simple reasons of shared ancestry or common language, but should they want a political community, then the question of a cultural difference from other groups will become expedient and if such differences do not exist, they will be invented.

In Kenya, ethnic social engineering for political objectives has been a significant feature of politics. For example, the movement for political independence from British colonialism was played out with fairly explicit ethnic manoeuvrings. As political independence got close, a clear schism developed in the African leadership between groups representing the so-

called 'minority' interests and the 'majority' groups. The majority groups were identified as the Kikuyu and the Luo. These two communities, for historical reasons were the most predominant African groups in the colonial economy. They thus constituted the most politically active and articulate groups in the nationalist movement. This also translated into what seemed a disproportionate representation of the two groups in the emerging African political class.

The other groups such as the Bukusu and the Kalenjin-speaking communities in the Rift Valley, the Maasai and Coastal peoples, had just been incorporated in the political economy of the colony. They therefore lacked not only the material infrastructure but also the level of political sophistication necessary to compete effectively vis-?-vis the Kikuyu and the Luo. Perhaps in appreciation of this context, there developed a view among the political leadership of the latter group that the Kikuyu and Luo were likely to be the greater beneficiaries of the 'fruits' of independence. Moreover, it was argued that the benefits accruing to the dominant groups would concomitantly curtail those of the 'minority' groups.

These fears conformed to extant widely held apprehensions that the Kikuyu, especially, known to be quite land-starved, would use their dominant political position to acquire land in the former white Highlands in the Rift Valley This was to be at the expense of the Maasai and the Kalenjin groups who believed they were the original owners of the Highlands, and therefore had a more legitimate claim to the land after the white settlers left

In order to counterbalance this presumed 'hegemonic project' of the Kikuyu and the Luo, the leading political players from non Kikuyu-Luo groups, notably, Masinde Muliro, Ronald Ngala and Daniel Moi resorted to the expedience of ethnic mobilisation. In the late 1940s and 1950s, Daniel Moi was able to galvanise disparate communities occupying the Rift valley province of Kenya into a new ethnic group called the Kalenjin. Similarly, Masinde Muliro, appealing to some shared ancestry among an assorted Bantu-

speaking groups in the western province of Kenya rallied a Luhya community, hitherto nonexistent. These groups merged to found a political party, the Kenya African Democratic Union (KADU) in 1960. Although the party never won the 1961 and 1963 pre-independence elections, it was an effective surrogate trade union for pushing the economic and political demands of its constituency. After some time, changing political exigencies in the post-

colony made it possible for the leading representatives of the 'minority' groups to be incorporated into the mainstream of the ruling elite.

Moi, Muliro and Ngala became cabinet ministers in the Kenyatta government after the dissolution of KADU in 1964 and the creation of a de facto one party system controlled by the Kenya African National Union (KANU). Moi's career and political future grew to dizzying heights when in 1967 he rose to the position of Vice President, and in 1978 he succeeded Kenyatta as the president of Kenya. Since the political contest in the post colonial Kenya has not necessarily assumed a framework of a dichotomy of interests definable in terms of Kikuyu-Luo versus the 'minority' groups, 'ethnic balancing' remains an enduring element of the country's politics.

What underlies ethnicity are competitions for scarce resources and social goods and the struggle to control the state apparatus seen as critical to the authoritative allocation of such resources and social goods. Control of state apparatus often assumes many forms. In its extreme manifestation, it can take the assumed ethnic group in the direction of 'self determination'. But sometimes, the cost of achieving this final goal is too costly and as a result sober political calculation counsels other alternatives such as seeking political dominance within the context of a heterogeneous state. Where this latter option is pursued, it matters a great deal what kind of political structures are in place. For example, when authoritarian political structures are captured by a politicised ethnic elite, they are often more effective in ensuring ethnic dominance than democratic structures. Democracies are however, not immune to ethnic manipulation. Since numbers count in democracies, the success of an ethnic project lies in the ability of the ethnic elite to mobilise the mass of the people (the ethnic group) who have been made sufficiently dissatisfied with the status quo." The success of exclusive ethnic politics in a democratic framework will additionally be contingent on historical and structural factors which vary a great deal across democratic political systems. It should be noted too, that whereas a democratic system hypothetically opens avenues of political interactions, it is equally capable of igniting fragmented and particularistic politics.

The empirical and historical origins of ethnicity, its constituent elements as well as the relationships among these elements has been a subject of much polemical contestation. The 'ethnicity discourse' itself is quite varied, but essentially coalesces around two broad intellectual traditions: the 'primordial' and the Marxist and/or critical schools. The earliest view of ethnic groups and ethnicity can be found in the so-called 'tribal paradigm'. This perspective, first popularised by missionaries and colonial anthropologists propagated the view that Africa and other 'backward' societies consisted of groups defined as 'tribes'. The 'tribes' referred to a number of discrete cultural-linguistic groups which were seen to have remained unchanged into the present times. These groups were 'backward' and 'primordial' in their social organization and behaviour. They thus represented an earlier stage in human social evolution.

The notion 'tribe' was used as a social category not just to refer to the people who lived in the 'backward' societies, but also to differentiate two societies; those who were 'tribal' as were found in Africa and other Third World societies, as opposed to the 'modern' societies predominantly based in Western Europe and North America. The social and political significance of this category was that the former were seen as primitive and barbarous while the latter were modern and progressive. This perception viewed such societies as doomed to extinction by ethnocide, the primary focus being the evocation of the savage as distinct from western civilization.

More serious research however, reveals that early African population though not culturally and linguistically homogenous, was nonetheless marked by rapid change and incorporation rather than static and bounded units.Thus the notion of a permanent, immutable tribe did not represent any empirical reality and was therefore of a limited

Additionally, the term tribe or tribalism is quite commonly used by Kenya's political commentariat to mean ethnic groups. This however, is a misnomer since tribe strictly speaking, refers to pre-institutionalised social groups conceptual and analytic value. Marxist and Neo-Marxist scholars have similarly disputed this approach arguing that the notion of 'tribe' and 'tribalism' is not only an anachronistic misnomer which impedes cross-

cultural analysis by drawing invidious and highly suspect distinction between Africans and other peoples of the world, but that it also oversimplifies, mystifies and obscures the real nature of economic and power relations among Africans themselves and between them and others.

Two contending tendencies need to be noted in the primordialist approach. First, there were those like the colonial anthropologists and missionaries who though subscribing to the 'primitive' culture view, placed considerable hopes on Christianity, western education and urbanization to transform the village man into a modern man. This view, underpinned the theory, widely held in Africa in the 1960s and 1970s that the 'nation-building' project would eventually create a cosmopolitan citizen, removed from parochial tendencies such as 'tribalism'. Conceptually therefore, whereas this approach highlighted the 'backward' nature of Africans and their societies, it was also optimistic and modernist.

The second tendency within the general primordialist school views 'tribe' and 'tribalism' as a historical given, a static identity rooted in a historical past. It emphasises cultural and psychological aspects of group identity seeing them as natural, rather than as acquired from social interaction. If ethnicity is seen in this context, then institutions can do little beyond reflecting differences.

The primordialist perspectives can be useful in alerting us to the persistence of ethnicity. However, its second variety especially underemphasizes the significance of common institutions and cross-cutting relationships which develop in the contact between sections.

Moreover, as cultural pluralists point out, ethnic diversity and interests are likely to be permanent features of the modern political system. In their view however, the stability of heterogeneous societies is threatened not by communalism per se, but by the failure of national institutions to recognize and accommodate existing ethnic divisions and interests. Consequently, cultural pluralists recommend instead, political arrangements which accord all communal groups a meaningful role in national life and which are able to keep communal conflicts within manageable bounds. The significant implication of this view is that if ethnic ties are not easily transformable, the negative aspects of ethnicity can nonetheless, be mitigated by carefully crafted institutions.

Additional dilemma to the first conception of the primordial school include research findings which demonstrate that ethnicity is neither irrational nor

ephemeral. From the perspective of the ordinary people, ethnicity appears no less sensible a basis for political mobilisation than other social cleavages (race, religion, class, gender etc). Secondly, ethnicity is not as originally assumed transitory. It is a modern and not an atavistic phenomenon. Indeed ethnicity has grown since the turn of the twentieth century along with uneven development and individual competition for increasingly scarce resources. There is no sign that it is on the wane. On the contrary, in many parts of the world, ethnic conflict is actually on the rise.

Cultural pluralists, as already noted, have been the other critical participants in the 'ethnicity discourse. Van de Berghe, for example, has summed up theories of cultural pluralism as referring to a property or a set of properties of societies wherein several distinct social and or cultural groups coexist within the boundaries of a single polity and share a common economic system that makes them interdependent, yet maintain a greater or lesser degree of autonomy and a set of discreet institutional structures in other spheres of social life.

Specific opinions on the requisite form and content of institutional arrangements which would accommodate ethnic diversity, however vary in the cultural pluralists school. At abroad level consensus seems to revolve around spatial and corporate devolution mechanisms within a democratic framework in the form of consociationalism of one type or another depending on the particular circumstance of the polity.

The position of the cultural pluralists is strongly reinforced by a strong current of consensus among Africa's political and economic commentariat that the democratisation transition in Africa must avoid the politics of exclusion. All relevant political players should be allowed a share of executive power in order to increase collective stake in the transition. However, some critics of the culturalist pluralist school point to the failure of the institutional accomodationist measures to ameliorate ethnic conflict in Africa. Okwudiba Nnoli for example, has cited the failure of the federalist structure in Nigeria, ethno-regional balance in Burundi, Kenya and Uganda at specific periods, and the failure of the proportionality principle in Ghana under Jerry Rawlings.

Needless to say, Nnoli's apprehensions betray an inability to differentiate form from content. In all the cases he cites, the regimes embraced symbolic accomodationist measures while at the same time subverting and diluting their content.

Marxist and Neo-Marxist scholars criticize cultural pluralists on the premise that the approach tends to see cultural cleavages as permanent within the society and the mere existence of plurality seems to account for conflict. The pluralists in their opinion, thus downplay the economic and political aspects of ethnicity. Other schools have pointed out that cultural pluralists allow ethnicity and ethnic conflicts to play themselves out in a social vacuum. Ethnic identity is thus given primacy over all other forms of identification.

The Marxist approach itself links the emergence of ethnicity to a stage of economic development, namely; the rise of modern industrial or capitalist state. The argument is that social and political behaviour can be reduced to economic interests particularly those of classes, sections and groups.

Ethnicity in this context is seen as "a disguised economic interest or 'false consciousness' which stops people from pursuing their class interests." Priority research focus is therefore mainly directed on the types of ethno-class linkages developed at various stages in the evolutionary process. Scholars in this orientation note that in Africa, the political class uses ethnicity for purposes of consolidating power by diverting from class questions to ethnic questions. Intra-class, rather than inter-class relations are dominated by ethnic questions arising from social relations of production.

On political competition, the argument is that the political class engages in inter-ethnic competition for political power through the strategy of intensive and extensive mobilisation of ethnic support for ethnic political parties for both electoral and non-electoral purposes. Furthermore, such power is used to weaken the influence of 'real' and 'substantive' issues in political competition. This activity obscures horizontal stratification through ethnic populism in order to advance class interests of the elite. Thus, according to Marxists and NeoMarxists, ethnicity is an ideological weapon at the service of the elite in economic and political competition. Nnoli emphasizes this position by asserting that" we cannot fully comprehend the ethnic phenomenon in Africa without an adequate understanding of its historical origin and class character. Ethnicity in this conceptualisation does not exist outside class.

Critics of the Marxist approach point to its inadequacy in understanding the nature of the social configuration of African societies and the social relations of production and therefore its inability to explain the relationship between ethnicity and class in political mobilisation.

African societies were until recently overwhelmingly peasant not capitalist, even though the rate of urbanization has been very high, social stratification has not yet crystallised sharp class contradictions. Although there is a small sector of capitalist production mainly in the cities, however, the modern capitalist classes envisaged in Marxism; the bourgeoisie and the proletariat, are only in nascent formation.

A number of factors make the reproduction of classes extremely difficult; First, sharp class contradictions are sublimated by the indirect, and impersonal mechanisms through which economic surplus is extracted from the peasantry and urban workers. Second, glaring inequalities in landholdings, historically important in the awakening of the masses, are few. The landed class is invariably tiny and geographically concentrated. Third, and perhaps more importantly, kinship ties serve to ameliorate contradictions in the social relations of production whenever they exist. The rich often assist their poor relations which in turn makes the status quo if only a little tolerable.

4.0: Culture and Ethnicity in Context: Understanding the Impasse

Developments in the post-colonial Kenyan state largely vindicates critics of the Marxist analysis. In the 1960s and 1970s for example,there was optimistic speculation that there was indeed a chance that classes could emerge in Kenya. Colin Leys for example, argued that when favourable conditions such as control of political power would permit, an indigenous African bourgeoisie in concert with foreign capital would be at the helm of capitalist

development.Similarly, Nicola Swainson envisaged an African merchant class in Kenya, "poised for a move into large-scale capitalist production."

But whereas it is true that in the 1960s and 1970s, a political elite which was in control of state power rapidly accumulated capital, it had a very fragile base of mere appendage of state structures. Thus the fortunes of this 'indigenous bourgeoisie' changed dramatically once the state withdrew support.

The local 'indigenous bourgeoisie' that gave much hope to Leys and Swainson was an ethnic-based bourgeoisie. It consisted mainly of Kikuyu politicians and businessmen who used their proximity to the President and fellow Kikuyus, to acquire state loans and assistance to further their economic aspirations mainly in real estate and manufacturing. Richard Sandbrook has indeed pointed out the incongruence of this indigenous bourgeoisie since political power allowed it to build economic power and not the other way round. Class relations in this context were determined by relations of power rather than relations of production. A relation of power which was in any case circumscribed not only by its recent origin but also by a very narrow social base.

Predictably then, when Daniel Moi, a non-Kikuyu assumed power in 1978, he built new alliances around the so-called 'minority' ethnic groups and excluded the Kikuyu from the levers of power. This effectively removed the patronage upon which the 'bourgeoisie' was based and it easily toppled. The Kikuyu bourgeoisie and indeed the typical Kenyan bourgeoisie thus simply designates a dominant class which aspires to become a bourgeoisie. But the aspiration means little more than using the privileges of unfettered political power and not the development of the entrepreneurial behaviour normally associated with the bourgeoisie.

If the bourgeoisie is at best embryonic in Kenya, the growth of the proletariat is equally problematic. What can be called the working class is small and only partially proletarianised. They are not wholly dependent on their jobs for survival. Many people retain rights to land, even if they work in the urban areas until their retirement. The implication of this 'straddling' is that the workers' attention is equally divided between rural emotional ties and the normal urban concerns. Moreover, the fact that in many cases workers still get food provisions sent to them by their relations in the rural areas serves to seriously undercut the development of a proletarian ethos. Tom Lodge has observed that in case of both South Africa and Kenya, labour industrial action is problematic because worker class consciousness is tempered by rural connections. The quintessential 'working class' strike for example, is thus marked by ecclectic influences and generally inchoate socio-political grievances.

The peasantry is itself clearly not homogenous. Within the peasantry there are considerable disparities in terms of landownership, capitalisation and technology. Moreover, the 'straddling' observed in the case of the working class replicates itself in the case of the peasantry. An individual can be simultaneously a salaried worker and an independent producer depending on the farming calendar or the time of the week. Some scholars have even suggested that, 'peasantisation'; a peasantry in the process of creating itself, is perhaps a more appropriate term.

In the context of the foregoing, a simplistic transposition of the Marxist class analysis into the African situation more generally, and in the particular case of Kenya might not be illuminating. For example, because of the shadowy lines of class cleavages in Kenya, there is a vast area of shared experience. Other scholars have noted that ethnicity and class function on different levels. Gerhard Mare for example, notes that class is to be situated and indeed has a structural location in the social relations of production. It has to do with the differentiated control over the means of production. The logic of the capitalist mode of production he argues, is that those who control the means of production, extend such control to the instruments of production which gives them enormous leverage over those who only own their labour. This is the basis of class formation and it is also what determines the antithetical interests that classes come to assume. However, this fact does not mean specific classes will in all their relations assume a single class identity.

Because ethnic groups do not exist outside social identity, there is no structured position in society that determines an individual membership to an ethnic group in the way that class membership does. Many scholars have thus noted that, while everyone belongs to a class, the lived relationships of everyday life are not in themselves class relationships. The crucial point then is that while everyday life is indeed moulded by and delimited by social structure, it does not in itself simply express this social structure. Beyond the various contestations and scholarly debate on ethnicity and the ethnic group, there seems an emerging consensus that ethnicity, being in part a social construct, is a situational variable that acquires political salience in the competition for political and economic goods in the state. Ethnicity is thus shaped by the environment, and the threats and opportunities it affords. Constitutional engineering has to address this issue.

Ethnicity is determined by institutional context. It is the overarching structures organized within the state that confer constraints and privileges to ethnicity. These state institutions include not only the formal institutional structures such as the structure of the government and that of the economy, but also the nation's normative order and associational life. But most available theories that touch directly or indirectly on the issue of the relationship between ethnic groups and the state have missed a proper appreciation of the role of the state in relation to internal struggles of control in ethnic communities and in relation to competition between ethnic groups. One recurring problem, as Paul Brass has pointed out, concerns the treatment of the state. That is, whether it is to be seen as an instrument of a class or of ethnic group? As a relatively autonomous force? ,A distributor of privileges? A promoter of justice and equality among groups?. An impartial arena for conflict resolution or a partial intervener in societal conflicts?.

Brass has further observed that the state is a great price and resource [commodification of the state], over which groups engage in a continuing struggle especially in societies that have not developed stable relationships among the main institutions and centrally organised social forces. It is also a distributor of resources, which is nearly always done differentially. The state in such a case can be captured by particular groups or segments for periods of time to serve their own interests. By definition, the state then comprises a complex set of persisting institutions over which social groups are engaged in a struggle for control.

Seen in the context of Africa, it has been argued that the colonial state invested an antidemocratic ethos that continues to pervade politics to the present day. Crawford Young has argued that the post-colonial state in Africa inherited " structures, its quotidian routines and practices, and its more hidden normative theories of governance" from its colonial predecessor. The colonial state in Africa had a pervasive impact on patterns of subsequent cultural identity and conflict through the unequal development of its territorial space. The role of differential access to modernisation is well studied; the locus of major urban centres, the routes chosen for major axes of communication, road and rail, the siting of major centres of cash employment, the distribution of post-primary education facilities, the production zones for the export crops encouraged or imposed by the colonial administration: all these factors facilitated ascension into higher social roles of relatively large numbers of some ethnic communities while marginalizing others.

Closely related to the group differentials in access to social mobility through uneven spread of colonial agencies was another form of categorisation: this time a consequence of stereotypical qualities imputed to entire ethnic groups. Ethnic categories were perceived as receptive or refractory towards the colonial presence. Relationships with the former were cultivated, while the latter, in the formative colonial years, had to be neutralised. Many authors have pointed out that important policy consequences flowed from these group images. Missions, with very limited resources in the early years, were anxious to sow their seeds in fertile soil; the groups viewed by the Europeans as "open to civilisation" were favoured targets. The mission in turn brought the schoolhouse, and "receptivity" became a self-fulfilling prophecy. Labour recruiters concentrated their efforts amongst groups believed to be "industrious", and amenable to industrial discipline. A generation later, this meant relatively strong urban representation, and thus favoured access to the more abundant agencies of mobility concentrated in towns.

Mahmood Mamdani recently observed that the stratified nature of the colonial state was to be discerned more in the mode of rule which resulted in the creation of a 'bifurcated' state: divided between a customary law-

run native authorities and civil law-run central state. The former corresponded to ethnic groups, however arbitrarily defined, and was characterised by coercive power at the service of colonial economic objectives. The latter emphasised civil rights and associated regime of rights which applied to the colonial citizenry as opposed to the native subjects in a racially defined polity. In his view, the failure of democratisation to rise above particularistic tendencies in Africa is a function of the failure of the post-colonial state to fundamentally restructure the 'bifurcated' state.

It would do well however, to appreciate with Crawford Young that the interaction between the state and ethnicity in Africa, is multidimensional and varied. To begin with, the enormous scope of state action characteristic of the modern post-World War II polity places high stakes on control of the state by elites. The interventionist, regulatory, and statist policies which were the norm in much of this period, reoriented the state very much as the authoritative site for the distribution of societal resources, itself a process of high visibility and prone to careful and continuous calculation of cultural as well as other group benefits. Further, the imperative of

modernisation undergirded in theory and practice the expanding edifice of the state. If the state is seen as the midwife of progress, then its enhancement in the face of multi-cultural reality becomes a pre-eminent objective of the ruling elites.

The general institutional hallmark of the Kenyan state and perhaps in tandem with the continental pattern has been one in which rational-legal institutions have always cohabited with 'big man' politics. Political rule is highly personalised, despite the official existence of a written constitution. In the one party system under which the country was ruled for almost three decades of its post-independent life, the President ruled with minimum legal encumbrances. His personal wishes were equated with official policy, with the consequent result that his whimsical proclamations became the basis upon which the lives of the citizenry was ordered. He alone exercised such prerogatives as the appointment of individuals to important public positions, a discretion which he was not averse to use to shore up political support.

Public sector jobs were used solely as sinecures for prebends and economic rents for favoured sections of the political elite, which invariably included those related to him by blood and members from his ethnic group. Incipient primitive and unproductive accumulation on the part of an elite, ever so insecure, soon ensured a pattern of use of private office for private accumulation. Indeed under the one party system, politics in Kenya was a cottage industry of private expropriation. Politicians who supported the regime were able to make ill-gotten wealth in short spans of time. Inevitably, this process led to a pervasive atrophy of state institutions and an elaborated general state of poverty for the average citizen.

But if this kind of politics led to a fairly predictable economic decline, it equally entrenched intangible but enduring institutional values. Perhaps the most important of which is that as the state squandered its vertical and horizontal legitimacy, the citizenry withdrew into smaller but reliable social networks of clans and ethnic groups. These alongside other structural factors were to prove a major impediment to the subsequent democratisation process the country engaged in from the early 1990s.

On cursory appearance though, the process of democratisation in Kenya has made a significant effect on the-socio-political configuration. Since late 1991, a multi-party political system has been put in place and many political parties now exist in competition with the ruling party and theoretically offer alternative governments. Political life itself is relatively more relaxed, civil liberties generally guaranteed and associational life has witnessed a phenomenal vibrancy marked with a buoyant civil society that is ever keen to point out the mistakes of the ruling elite. Moreover, the country has undergone two multi-party general elections in 1992 and 1997, and will soon have a third multi-party general elections this year.

But a more nuanced view of the process of change in the country would reveal that democratisation in Kenya has not fundamentally changed the contours of Kenya's politics. To begin with, political liberalisation in the country was forced down upon a recalcitrant ruling elite determined to hang on to power by all means. Internal protest against the authoritarian government of Daniel Moi had a long history, but basically peaked in the 1980s after receiving considerable boost from the prevailing international trend towards a generalised collapse of single-party systems. It is significant though, that

even against the evidence of a 'Third Wave' the Moi regime had expected to hold out. It was therefore, not until western countries withheld aid to the regime, that Moi relented to the demands for a multi-party system, but continued to profess his antipathy to the system.

Politicised ethnicity, a prominent characteristic of the one-party state in Kenya, easily fed into the democratisation in a number of ways. For example, for the Kalenjin, Moi's ethnic group and the favoured community, institutional transformation as entailed in democratisation represented a great threat to extant political and economic privileges. They were thus least predisposed to support reform measures. On the other hand, ethnic outgroups embraced democratisation mainly as an opportunity to overturn a system, widely perceived as antithetical to their political and economic aspirations.

Quite predictably then, the Kalenjin supported the ruling party, KANU, while the new opposition parties were enthusiastically embraced by the ethnic outgroups, but especially by the numerically significant Kikuyu, Luo and Luhya. Within the opposition itself, ethnic fracturing was not long in coming. The main opposition movement, the Forum for the Restoration of Democracy (FORD), which had been the vanguard in the fight for democracy collapsed under the weight of ethnic divisions as the outgroups repositioned themselves into various ethnic factions since electoral victory seemed near and predictable.

In the context of a fairly polarised political environment, the Moi regime which still enjoyed such advantages of incumbency as control of the instruments of force and other resources of the state, managed stay in power. The two multi-party general elections referred to above, had fairly questionable but predictable outcomes in which the Moi government, is widely believed to have extensively bribed voters to rig the elections. In the 1992 general elections, the regime printed huge amounts of money, for electoral bribery, which later caused massive inflation in the country. The regime was also implicated in ethnic murders of people it believed supported the opposition. But of perhaps even greater significance is the fact that the institutional expression of multiparty politics in Kenya whether in terms of political party formation or informal political alliance and lobbying, expresses itself purely on ethnic lines. Political parties invariably represent specific ethnic groups.

Typically, a party is headed by an ethnic patron who engages with the electorate chiefly through the recruitment of clients. The parties themselves have very limited social appeal as they are generally characterised by shallow social roots, authoritarian leadership and inarticulate political programmes and policies.

Voting patterns in both the 1992 and 1997 elections confirm that ethnicity is the primary form of political organisation and that presidential candidates and political parties get support predominantly from their ethnic regions

Table 1:1992 Presidential Election Results by Province and Candidate.

Nairobi

Moi KANU: 62,402 (16.6%)

Matiba FORD-A: 165,533 (44.1%)

Kibaki DP: 69,715 (18.6%)

0. Odinga FORD-K: 75,898 (20.2%) :

Total Votes: 375,574

Central

Moi KANU: 21,882 (2.1%)

Matiba FORD-A: 621,368 (60.1%)

Kibaki DP: 372,937 (36.1%)

0. Odinga FORD-K: 10,765 (1.0%)

Total Votes: 1,034,016

Eastern

Moi KANU: 290,494 (36.8%)

Matiba FORD-A: 80,515 (10.2%)

Kibaki DP: 398,727 (50.5%)

0. Odinga FORD-K: 13,064 (1.7%)

Total Votes: 789,232

North East

Moi KANU: 57,400 (78.1%)

Matiba FORD-A: 7,440(10.1)

Kibaki DP: 3,297 (4.5%)

0. Odinga FORD-K: 5,237(7.1%)

Total Votes: 73,460

Coast

Moi KANU: 200,596 (64.1%)

Matiba FORD-A: 35,598 (11.4%)

Kibaki DP: 23,766 (7.6%)

0. Odinga FORD-K: 50,516 (16.1%)

Total Votes: 312,993

Rift Valley

Moi KANU: 994,844 (67.8%)

Matiba FORD-A: 274,011 (18.7%)

Kibaki DP: 111,098 (7.6%)

0. Odinga FORD-K: 83,945 (5.7%)

Total Votes: 1,467,503

Western

Moi KANU: 217,375 (40.9%)

Matiba FORD-A: 192,859 (36.3%)

Kibaki DP: 19,115 (3.6%)

0. Odinga FORD-K: 94,851 (17.9%)

Total Votes: 531,159

Nyanza

Moi KANU: 111,873 (14.4%)

Matiba FORD-A: 26,922 (3.3%)

Kibaki DP: 51,962 (6.4%) •

0. Odinga FORD-K: 609,921 (74.7%)

Total Votes: 816,387

Total

Moi KANU: 1,962,866

Matiba FORD-A: 1,404,266

Kibaki DP: 1,050,617

0. Odinga FORD-K: 944,197

Total Votes: 5,400,324

Source: Daily Nation, 5 January 1993, p. 1

Table 1:2: Distribution of Parliamentary Seats by Province in the 1992 Elections.

Province	KANU	FORD K	FORD A	DP	KNC	KSC	PICK	TOTAL
Nairobi	1	1	6	0	0	0	0	8
Central	0	1	14					

10

0

0

0

.25

Eastern

21

1

0

9

1

0

0

32

North Eastern

8

1

0

0

0

0

1

10

Coast

17

2

0

1

0

0

0

20

Rift Valley

36

2

4

2

0

0

0

44

Western

10

3

7

0

0

0

0

20

Nyanza

7

20

0

1

0

1

0

29

Total

100

31

31

23

1

1

1

188

Source: Throup, D. and Charles Hornsby, Multi-Party Politics in Kenya. London: James

Currey, 1998 p.443

Table 1:3: Results of 1997 Presidential Election in Kenya

Province

Moi (KANU)

Kibaki (DP)

R. Odinga (NDP)

Wamalwa (FORD K)

C. Ngilu (SDP)

Nairobi

20.56%

44%

16.23%

6.82%

10.85%

Coast

61.05%

13.4%

6.07%

2.97%

10.85%

N/Eastem

73.08%

18.60%

0.33%

7%

0.58%

Eastern

35.87%

28.81%

0.75%

0.68%

32.35%

Central

5.5%

88.73%

0.68%

0.31%

2.95%

Rift Valley

69%

20.9%

2.19%

6.22%

0.69%

Western

44.67%

1.38%

1.19%

48%

— Nyanza

23.52%

15.05%

56.55%

1.59%

1.57%

Source: Ajulu, R. 'Kenya's democracy experiment: the 1997 elections in Review of African Political Economy Vol. 25 Iss: 76 1998 p 283

Table 1:4: Distribution of Parliamentary seats by Party and Province in the 1997 elections

Province

KANU

DP

NDP

FORDK

SDP

Nairobi

1

5

1

0

1

Coast

18

2

0

0

0

N/Eastem

9

0

0

0

0

Eastern

14

8

0

1

10

Central

0

17

1

0

5

Rift Valley

39

7

0

3

0

Western

15

0

0

9

0

Nyanza

8

0

19

4

0

Total

104

39

21

17

16

Source: Ajulu, R. 'Kenya's democracy experiment: the 1997 elections in Review of African Political Economy Vol. 25 Iss.76 1998 p283

The tables above disaggregate the 1992 and 1997 Presidential and Parliamentary election results by the leading candidates and also by Provinces. The political parties headed by these candidates are included next to their names. To understand the ethnic accent of these results however, one needs to have some basic information on not just ethnic groups in the country but also on ethnic coalition patterns. Moi, the KANU candidate who won both presidential elections in 1992 and 1997, is from the Kalenjin community, who occupy most parts of the Rift Valley province but are also to be found in parts of the Western Province. His 'homeboy' status thus largely accounts for the massive support he received mainly in the Rift Valley and in Western province. The second candidate in the 1992 elections, Matiba, a Kikuyu, also drew huge support from the heavily Kikuyu populated provinces of Central and Nairobi. A large number of Kikuyu diaspora is also to be found in the Rift Valley which accounts for Matiba's equally impressive support from the province. In the case of Western province, Matiba's good performance was as a result of choosing Martin Shikuku, a native of the region, as his running mate. To some extent, the same argument explains Kibaki's, another Kikuyu presidential candidate's, varied fortunes in the provinces; Similarly, Oginga Odinga, a Luo, received majority support from the Luo-dominated Nyanza province.

In the 1997 presidential elections, the ethnic votting pattern was repeated with little changes if any. Two presidential candidates in 1992, Oginga Odinga and Matiba, were absent for reasons of death and voluntary withdrawal respectively, thus Kibaki, the only Kikuyu candidate came second to Moi, but took majority votes in the traditional Kikuyu provinces. The new entrants Kijana Wamalwa and Charity Ngilu of Luhyia and Akamba ethnic group respectively, received wide support from their home provinces. And with the demise of Oginga Odinga, his position was taken by his son, Raila Odinga, who the most widely supported presidential candidate in the Luo province of Nyanza. Moi's votes largely came from the same sources explained for 1992 presidential results.

An important variable from ethnicity but not entirely unconnected to it, is the fact that the 'home' provinces of Moi and KANU, inordinately enjoy a large portion of parliamentary seats. For example in 1992, Rift Valley had 44 parliamentary seats which were increased to 49 by 1997 and in both cases, KANU, got most of them. This obviously tremendously increased the party's total tally and eventual parliamentary strength vis-?-vis other parties. This

state of affairs is mainly a result of constituency gerrymandering by KANU, in which its traditional constituencies were allotted more parliamentary seats. Additionally, Moi's apparent popularity in the Eastern, North-Eastern and Coast provinces in both elections is explained by a not too subtle use of a combination of carrot and stick in those provinces - indeed an expected advantage of incumbency on both occasions.

In the context of the above analysis, it would appear that ethnicity and ethnic voting is firmly rooted in the politics of the country. This being the case, it would be an expensive oversight to fail to seek to accommodate Kenya's ethnic diversity in a more positive manner in the new widely anticipated political dispensation.

5:0 Towards A Praxis: Managing Culture and Ethnicity in the Constitution

The view proposed in this paper is that to the extent that the broad contours of political and economic relations in a democratic state are determined by a pluralistic constitutional process, social formations, whether defined as ethnic groups or other categories, have a leverage in the kind of state the constitution creates and patterns. Thus, though the role of the constitution ought not be overemphasised, it is not merely a policy-outlining process, balancing different notions of equality against each other; nor an instrument for class domination but a relatively autonomous process that potentially can act to arbitrate conflicts arising from divergent interests of extant social forces.

The constitution creates and structures the various institutions that finally determine the form and content of political and economic relations in a polity. Institutions hereby referring to " sets of constraints on behaviour in the form of rules and organisations; a set of procedures to detect deviations from rules and regulations, and a set of moral, ethical behavioural norms which define the contours that constrain the way in which the rules and regulations are specified and enforcement carried out."

The institution-creating role of the constitution thus assigns a mediating role to the constitution in political change in the way that it structures relations of power among contending groups. Given the dialectical and conflict-based trajectory of state evolution, the state is in nearly all cases characterised by tenacious partisan contention. It is the underlying role of the constitution to constantly configure and reconfigure the state.

In the context of our preceding analysis of the continuing problematic engagement of ethnicity in Kenya's politics, a critical area of investigation should be on how to positively manage and reorient cultural and ethnic diversity in the new constitution for common good.

Marina Ottaway has observed with other scholars that one of the critical challenges to democratisation in Africa is how to create institutional mechanism to give positive meaning to ethnic diversity in the various polities in the continent. She has opined that African countries remain generally reluctant to accept that at least some of the demands by ethnic groups are legitimate and that in any case, efforts to outlaw ethnicity are futile. In a large sense, democratisation in multi-ethnic societies requires not the suppression of ethnic identities, but their accommodation.

In agreement with this latter argument, which in any case, is the predominant view among many other democracy scholars, watchers and practitioners, the last part of this paper attempts a cursory overview of some of the trodden paths in recognising ethnic diversity in democratic dispensations. This is in appreciation of the fact that while there definitely obtains unique and particular circumstances in many a democratising polity, the general principles underlying positive management of ethnic diversity is now well established and there might be no need to reinvent the wheel.

5.1 Citizenship Rights: Jus Soli or Jus Sanguinis

Citizenship rules in Africa are especially important as boundary mechanisms; they determine who is and who is not a citizen and therefore attempt to give meaning at the level of the individual and the community to the cadastral boundary lines originally created by Europeans.

Jeffrey Herbst has observed that nationality laws are critical in defining the shape of the nation, since the institutions of the state anchor the nation in historical continuity. And since the purely emotive ties between populations and African states are not obviously strong in most cases, the nationality laws themselves can be understood as reflecting critical aspects of the citizenship ideal in Africa.

Citizenship laws can be put in two general categories; jus soli and jus sanguinis. Jus soli ascribes and assigns citizenship to all those born in the territory, irrespective of the nationality of the parents. Jus sanguinis on the other hand, emphasises citizenship through descent irrespective of the location of birth.

Jus sanguinis are attractive to those who want to promote a heightened sense of nationality. Citizenship laws based on jus sanguinis are often designed to retain at both a factual and a symbolic level, to keep a people together and to prevent certain groups from becoming citizens even if they were born within the national territory. Critics have pointed at that inevitable cost of allocating citizenship based on criteria more complicated than location of birth is to exclude individuals and whole groups who are physically located in a state but who cannot claim descent from ancestors who were nationals. Such citizenship regulations may generate more intense levels of identity because states are able to screen potential citizens to see if they meet whatever set of desired characteristics leaders believe are central to national identity. The result will almost always be some number of people who are in the polity but not of the polity because the location of their birth was not enough to qualify them for citizenship. Potentially this can have far reaching destabilising consequences for the polity. Moreover, the costs of exclusion are likely to be very high in ethnically heterogeneous polities.

In general, citizenship laws in Africa bear a close, but not absolute, connection to the practices of their colonisers at independence. For example, all the francophone countries follow the French practice of relying principally on citizenship by descent but they have also been influenced by the British practice of granting citizenship to anyone born in the territory. Given the noted dangers and pitfalls of jus sanguinis citizenship regulations, Kenya would be well advised to maintain its jus soli status quo in the new constitution

5.2 Group and Minority Rights

The defence of individual rights, which is an indispensable aspect of a democratic system is not by itself a guarantee of minority rights. In highly differentiated societies there is therefore a strong case for protection of group rights, if just to defuse ethnic tensions. The protection of minority rights cover a wide terrain and may take various forms, some of the forms might be necessary to entrench in the constitution while others can be policy derived. The exact content of these rights will in most cases be determined by the exigencies of existing situations but must be supported by a large constituency of the polity.

Kenya's experience shows that demands for protection of minority rights emanate from two broad categories of social formations: ethnic constituencies and an array of groups that transcend specific ethnicities. The former group composes those groups who consider themselves historically less privileged in terms of access to opportunities and resources within the state. The latter group includes a disparate array of groups such as women, children, the aged, and the disabled among others. The position of the marginalized groups is a function of institutional inequity reproduced in the state starting from the colonial and into the post-colonial times. Attendant issues to these demands have been discussed in a generalized way in an earlier part of this paper.

It should not be assumed however, that demands for minority or group protection enjoys unanimous support in the country. Some social critics have argued that just any group can justifiably claim a "marginalized" status if sufficiently mobilised. The definition of marginalisation they aver, is nebulous as to include just any group. More fundamentally, it has been pointed out that protection of collective rights often conflicts with individual rights which is a critical basis of a democratic dispensation.

Establishing a balance between group rights and individual rights thus requires a delicate compromise by the major parties to the conflict. Ottaway has suggested that a workable solution, however can be greatly assisted by the development of principles and a set of institutional models that seek and enjoy support from the broad array of forces from both sides of the divide.

But even before this is attempted, there does exist in Kenya today a general acknowledgement across the board of political players that the rights of such groups as the women, children and the disabled require special legislative attention that will seek to equalise the playing ground for them in the politics and economics of the country. Thus, though there is contention on specific measures and mechanisms to achieve this goal, a body of opinion seems to be converging on affirmative action regime of laws. Public opinion in the country will however, still have to be educated that affirmative measures are by definition short gap interventions to ameliorate extant inequities and therefore need not be seen as permanent. Perhaps such an education will help salve considerable agitation from assorted apprehensive groups.

The issue of protection of ethnic constituencies or groups is even more vexed and problematic. There is a strong case however, for greater local autonomy as a away of giving groups control over their affairs Such initiatives will perhaps counsel greater devolution of political and economic powers than already exists in the current constitution.

5.3 Federalism as a Mechanism of Group Protection

There is an ongoing debate on the federal option in Kenya as a way of protecting group interests. By and large, the debate has been useful even though very unstructured and convoluted. By way of providing an 'objective' trajectory to the arguments and considering its general usefulness to the whole question of group protection, we hereby attempt a quick summation of the pros and cons of federalism As a constitutional form of government, federalism is the system in the middle-conceptually sandwiched between a more decentralised confederate system and a more centralised unitary system. In a federal system both national and sub-national governments have constitutionally defined powers. Both typically have the power to regulate individual behaviour and to make laws. Each level of government has a complete set of legislative, executive and judicial institutions. An alteration in the constitutional powers of either level of government typically requires the approval of both levels through the constitutional amendment process.

5.3.1: The Advantages of a Federal System

1. Federalism presumably brings government closer to the people by creating constitutionally defined state governments which cannot be arbitrarily abolished or rendered powerless by a capricious national government. State governments cover a smaller geographic territory than does the broader and bigger central government. The small size of the state governments make state officials more easily accessible to the average citizen than national officials. Additionally, where state governments correspond to homogeneous ethnic groups it is often assumed that they would be more attuned to the interests of the people

2. Federalism provides multiple points of access to citizens since they have many avenues of entry Two levels of government have more access points than does a single central government. Additionally, each level has a complete set of government institutions. And Citizens who fail to achieve satisfactory resolution of an issue or problem in one branch of state government may turn either to other branches of the same government or to institutions at the federal level.

3. A federalist structure of government invariably has more checks and balances than a unitary system of government. For example, multiple governments reduce the probability that one political party or faction can capture the entire governmental machinery and act arbitrarily and whimsically. A federal system more than a centralised one, provides the opportunity for electoral success for opposition parties and therefore reduce the chance of single party hegemony.

4. Sub-national governments provide an opportunity to experiment with unproven policies before adopting the policies at the national level

5. Not only does a federal structure allow different policies to be adopted in various parts of the country, but federalism also confers policy diversity which is desirable and even necessary to meet differing local needs. Since the country is not uniform, it is only natural that government policies reflect that diversity. Moreover, the application of rigid national standards obfuscates local cultures which is not necessarily a good thing.

5.3.2: The Disadvantages of a Federal System

1. Diversity in state laws creates chaos, unfairness and inequities.

2. Federalism may result in excessive decentralisation and duplication of service provided by the various levels of government. Both federal and state governments are involved in and sometimes overlap in the areas of education, transportation, health etc. Critics charge that much of the service duplication in federalism is needless and wasteful

3. Even when federal and state governments coordinate to provide a common service rather than duplicate efforts, filtering services through multiple layers diminish accountability and cause slow and wasteful delivery.

4. Wealthier regions of the state have greater resources to deliver higher levels of services more effectively. By decentralizing financing of government services to the regional and local level, federalism fails to correct these inequalities in resources and wealth.

5. Federalism also fails to correct inequities among the service levels provided by regions, thereby making national standards difficult to develop and administer.

6. Because federalism provides two levels of government, it by definition entails a double taxation to the citizenry, which makes it more expensive than a unitary centralised system of government.

7. Further, it should be noted that there are no one type federal systems. Some federal systems confer greater overriding and veto powers to the national government as in the case in the United States of America while others vest disproportionately more powers in the region as in the example of Canada. With specific regard to a federal system orientated to providing ethnic or group protections, it should be noted that it is only viable in places where ethnic groups occupy proximate spatial returns in the country.

6.0 Concluding Remarks

The thrust of the argument in this paper has been that the multi ethnic character of the Kenyan nation-state is a fundamental fact which cannot just be wished away. In designing a durable constitutional dispensation, there is not only a need to acknowledge this fact, but also a conscious effort should be made towards tapping the positive values of this diversity. One way of doing this would be to entrench certain rights within the new constitution which can act to deepen a healthy cohabitation of the various groups.

For the reason that the general debate on the subject is only in the formative stages, this paper has been indeed duly reticent in providing explicit directions. This also is in cognisance of the fact that the final decisions on these weighty matters must of necessity emerge from a democratic process involving very pluralistic and varied participation. This paper would thus have achieved its objective if the ruminations included herein, are considered more as 'roadmaps' meant to generate more structured debates rather strict stipulations.