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Proportional Representation electoral system and conflict management in divided societies. The case of Rwanda and Kenya

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DECLARATION

I, KAWERA Marie Sylvie, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has neither previously been submitted nor currently being submitted to any other university for a degree or diploma. Where someone else's work has been used, due acknowledgment has been given and reference made accordingly.

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DEDICATION

In memory of my late Dad, you will always remain the source of inspiration in all spheres of my life

Maman, your constant motivation, encouragement and love will forever occupy a special part in my heart

Mon cheri, Edmond, words cannot express your value in my life, I shall forever remain the pride of your life

Desmond, mon fils, may you grow up to make the footprints in the sands of your time

ACKNOWLEDGEMENTS

LIST OF ABBREVIATIONS

ANC	African National Congress
AV	Alternative Vote
CMD	Centre for Multy party Democracy
EISA	Electoral Institute of Southern Africa
FPTP	First Past The Post
FORD	Forum for the Restoration of Democracy
GEMA	Gikuyu, Embu and Meru communities
ICTR	International Criminal tribunal for Rwanda
IDEA	International Institute for Democracy and Electoral Assistance
IFES	International Foundation for Electoral Systems
KADU	Kenya African Democratic Union
KANU	Kenyan African National Union
KPU	Kenya People's Union
MDR	*Mouvement Démocratique Républicain*
MMP	Mixed Member Proportional
MPs	Members of Parliament
MRND	*Mouvement Révolutionnaire National pour le Développement*
NARC	National Alliance Rainbow Coalition
OSIEA	Open Society Institute, East Africa Initiative
PL	*Parti Libéral*
PR	Proportional Representation
PSD	*Parti social Démocrate*
RPF	Rwandese Patriotic Front
SMD	Single Member District
STV	Single Transferable Vote
TRS	Two-Round System
UK	United Kingdom
UN	United Nations

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CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

Many African states, especially those in Sub-Sahara Africa have not been spared from the wave of democratisation that swept globally since the end of the Cold War. The pattern of such reforms remained the same as evidenced in political protests, liberalisation reforms often culminating into competitive elections and the installation of new regimes.[1] As a result, there has been the development of 'structural' and 'belief or values' institutional frameworks that provide the basic decision rules and incentive systems that concern Government formation, conditions under which they continue to rule and conditions by which they can be terminated democratically.[2] Such conditions include constitutional and electoral reforms as well as multi-partysm and power-sharing.

Nevertheless, many of the Sub Sahara Africa countries still have a long way to go to have their democracies consolidated so much so that one may refer to them as 'pseudo-democracies'.[3] In Rwanda, the timing, nature of transitions from authoritarian rule to the current political landscape may be analysed from independence in 1962. In 1973, after seizing power through a *coup d'Etat*, Major General Juvenal Habyarimana established a one-party state governed by the MRND[4], and dissolved all other existing political parties. It was not until 1991 that multipartysm would resurface under pressure of Western donors. As the war was shaking all areas of political life in Rwanda, the formal constitutional recognition of multi-party rule[5] did not mean direct organization of multi-party elections. The regime of Habyarimana was characterized by endless conflicts, regionalism and sectarianism, and ethnic division between Tutsi minority and Hutu majority. The Tutsi were excluded from political life and were persecuted by the government of extremist Hutu which finally carried out genocide against Tutsis in 1994. However, following this genocide, Rwandans have struggled to rebuild their country. The referendum and the Presidential and Parliamentary elections of 2003 were the first democratic elections since the country's independence in 1962. Like many divided societies, the country has developed Constitutional Frameworks

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[1]   M Halperin et al *The Democracy Advantage* (2005).
[2]   A Stepan & C Skatch *Constitutional Frameworks for Democratic Consolidation: Parliamentarism versus Presidentialism* (1993).
[3]   R Mattes & R Manning *The Impact of HIV/AIDS on Democracy in Southern Africa* (2004).
[4]   *MRND: National Revolutionary Movement for Development*.
[5]   The Rwandan Constitution of 10 June, 1991.

that have been largely designed to accommodate diversity and power sharing. It is against this history of exclusion that the country has institutionalised a system of Party-List of Proportional Representation in order to include all groups in decision making. [6]

Similarly, ethnicity has been a major feature of the Kenyan political landscape just as in Rwanda. The history of ethnicity impacting on the Kenyan political process can be traced back to colonial days when the colonial government divided the country into provinces which were essentially created along ethnic lines.[7] For instance, ethnicity in Kenya is manifest in the formation of political parties. Towards independence, in May 1963, a multi-party election involved the Kenya African National Union (KANU) and Kenya African Democratic Union (KADU), in which KANU won a majority of votes. The two parties formed in 1960 in anticipation of independence represented ethnic affiliations and divisions. While KANU represented the two large tribes of Kikuyu and Luo, KADU represented the smaller tribes of Kalenjin, Luhya and Giriama who feared domination by the bigger tribes. [8]

Kenya became independent on 12 December, 1963. However, within one year of independence, KADU dissolved itself and joined KANU making the country a *de facto* one party state.[9] Jomo Kenyatta became the first President and consolidated his authority through patronage to his clan and the offering of elite positions to members of his Kikuyu tribe to the exclusion of other ethnic groups.[10] This led to the formation of an opposition party in 1966, the Kenya Peoples' Union (KPU), a Luo based party which was banned three years later and its leaders detained.[11]

Kenya was to remain a *de facto* one party state until 1982 when this situation was given legal basis through a constitutional amendment. Therefore, between 1969-1991, five general elections were conducted in the context of the one-party system run by KANU, whose legal and political infrastructure was a hindrance to free and fair election competition.[12] The multi-party system was finally restored in 1991, and the first and second multiparty elections were

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[6]   Article 2, 3° of the Organic Law 05 of 2007 governing Presidential and Parliamentary elections states that each political organization or a coalition of political organisations shall submit a closed list of candidates.

[7]   D Kadima & F Owuor,'The National Rainbow Coalition: Achievements and Challenges of Building and sustaining a broad-based political party coalition in Kenya' in D Kadima(eds) *The politics of party coalitions in Africa*(2006)190.

[8]   As above.

[9]   J Biegon 'Electoral violence and fragility in Africa: drawing lessons from Kenya's experience in the 2007/2008 post election violence', paper for presentation at the poster session of the conference on 'Financial Markets, Adverse Shocks and Coping Strategies in Fragile Countries', Accra, Ghana, 21-23 May 2009.

[10]   GM Musila 'Federalism and the ethnicity question in Kenya: Limits, fears and prospects' in J Carter (eds) *Ethnicity, Human Rights and Constitutionalism in Africa* (2008)62.

[11]   OSIEA, IFES Final Report 'The Electoral Process in Kenya:A Review of past experience and Recommendations for Reform'(2008)6.

[12]   WO Oyugi *Ethnicity in the Electoral Process: The 1992 General Elections In Kenya* (1997) 2 *African Association of Political Science* 41-69.

held in 1992 and 1997 respectively. However, Daniel Arap Moi the new elected President proceeded to divide his Kikuyu allies and consolidate power under a coalition of Kalenjin and other minority tribes.[13] In 2002, power was transferred from Daniel Arap Moi to Mwai Kibaki. While Kenya has remained fairly stable and peaceful during five years of rule under Mwai Kibaki (from 2002 to 2007), ethnic tensions have become increasingly apparent. Upon the announcement of the 2007 presidential election results on 30th, the country quickly underwent periods of political turmoil following the allegations as to the questionable victory for the incumbent Mwai Kibaki over his rival Raila Odinga.[14] In short, Kenya's political history has been marred by both economic and political exclusion of significant part of the population, and the violence was a reaction to historical grievances that have remained unresolved for years. The role played by the applicable electoral system cannot be over-emphasised. Thus, a shift towards more inclusive politics can have significant conciliatory effects in Kenya.

This dissertation focuses on the role of electoral systems in efforts to simultaneously advance both democratization and conflict management in divided societies such as Kenya and Rwanda. It is generally argued that an electoral system should not be viewed in isolation from its political consequences. It is clear that different electoral systems can aggravate or moderate tension and conflict in a society. At one level, a tension exists between systems which put a premium on representation of minority groups and those which encourage strong single-party government. At another level, if an electoral system is not considered fair and the political framework does not allow the opposition to feel that they have the chance to win next time around, losers may feel compelled to seek power through illegal means, using non-democratic, confrontationalist and even violent tactics.[15]

Against this backdrop, it is hoped that this dissertation will be a critical complement on the existing literature on the role of electoral systems in the democratisation process and conflict management in divided societies with emphasis to concrete situation lived in Kenya and in Rwanda

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[13] S McGee *Ethnic Divisions and Electoral System Design: Prospects for Reform in Kenya* (2008)23, available at http://www.ifes.org/publication/7a9bc798b445538b39c4bcf232605215/ShaneComments_Hybl_Paper_Electoral_System_Kenya.pdf (accessed 25 August 2009); M Mwagiru, 'Elections and the Constitutional and Legal Regime in Kenya' in Ludeki Chweya (ed) *Electoral Politics in Kenya* (2002)28.

[14] N Cheeseman 'The Kenyan elections of 2007: an introduction' (2008)2 *Journal of Eastern African Studies* 166 168.

[15] B Reilly 'Political Engineering and Party Politics in Conflict-Prone Societies' (2006) 5 *Democratization*, V 13, 811–827, available at http://www.sciencedirect.com/science? (accessed 25 May 2009).

1.2. Literature review

The argument that electoral system contribute to the mitigation of ethnic conflicts has been discussed by a number of scholars both within and outside Africa. However, there is much disagreement about the most appropriate electoral system for divided societies.

The book by Lijphart[16] presents a rich research in this field. Lijphart made a comparison between two basic models of democracy: majoritarian (or Westminster) and consociational. He argues that the only realistic type of settlement capable of attracting agreement among all factions in post-conflict societies are power-sharing regimes which avoid the dangers of winner-take-all outcomes. Thus, he clearly expresses a preference for using party list forms of PR rather than majority system in a deeply divided society because it facilitates the inclusion by bringing minorities in the election process and fairly representing all significant groups in the parliament. Andrew Reynolds[17] proposes an integrative consensualism which requires the use of the single transferable vote in order to encourage cross-cutting ethnic cleavages, while at the same time ensuring the fair representation and inclusion of minorities in decision making.

Horowitz, on his part criticizes PR and coalition governments as insufficient means to bring about moderation. He pleads for reducing ethnic conflict in divided societies by using an alternative vote which encourages political representatives to find support outside of their own ethnic communities and thus promotes cooperation between the different groups in a society.[18] Vernon Bogdanor[19] categorizes and analyses the main types of system actually employed in democracies and demonstrates how the electoral system which a country adopts depends more upon its political tradition than upon abstract considerations electoral justice or good government. However, the majority of work on electoral systems to date has focused their study on the experiences of established democracies in the West.

Concerning the applicability of electoral systems in Africa, Alexander Stroh,[20] demonstrates that historical and procedural conditions in the respective national cases broadly influenced

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[16] A Lijphart 'Consociational democracy' *Thinking about democracy: power sharing and majority rule in theory and practice* (2008).

[17] B Reilly & A Reynolds *Electoral Systems and Conflict in Divided Societies*' (1999)29, available at http://www.nap.edu/catalog/9434.html (accessed 30 July 2009).

[18] M Bogaards 'Electoral choices for divided societies: Moderation through pooling and vote pooling', paper prepared for the 29th Joint Sessions of Workshops 6-11 April, 2001, Grenoble, France, available at http://www.essex.ack.uk/ECPR/events/jointsessions/paperarchive/grenoble/ws13/bogaards.pdf (accessed 25 September 2009).

[19] V Bogdanor & D Butler 'Democracy and elections: Electoral systems and their political consequences' (1983).

[20] A Stroh 'Crafting Political Institutions in Africa: Electoral Systems and Systems of Government in Rwanda and Zambia Compared' *(*March 2007) *GIGA working paper 43*.

the interest-led decisions of political actors crafting new institutions. Timothy D. Sisk and Andrew Reynolds emphasizes the importance of choosing an appropriate electoral system to promote inclusivity and power sharing. They address an important debate over electoral system choice, whether a plurality or a proportional representation is best for Africa[21]. Reynolds argues that majoritarian electoral systems induce more competitive, confrontational, exclusionary politics, whereas proportional systems are often argued to produce inclusive, consensual governments.

In contrast, Barkan[22] claims that majoritarian system or first-the-post, arrangements are best suited to African society because they offer a direct link between representative and her electorate, and thus these systems can promote integrative, moderating effects across ethnic group lines.

From the foregoing, this dissertation makes the following deductions. There has been no specific study which comparatively analyses electoral system in two countries in which ethnicity has marked politics for a long time. The work reviewed deal with general theories and does not focus on their actual application within individual countries. In addition, no study has analysed the benefits of shifting from one electoral system to another as has been the case in Rwanda. Thus, this study will contribute to the understanding of how proportional representation can help in conflict resolution after 2007 election violence in Kenya and how the Proportional Representation adopted by Rwanda in the aftermath of genocide has contributed in the inclusion of all groups in decision making. It is expected that this dissertation may initiate a rethink on the current electoral system in Kenya and cause a shift to be made in order to manage ethnic conflict as has been the case in Rwanda.

1.3.   Research question

As this indicated above, Rwanda and Kenya are two societies with histories of inter-ethnic conflict. Therefore, this dissertation seeks to address the following question:
Can Proportional Representation help manage ethnic conflict and consolidate democracy in countries divided along ethnic lines as Rwanda and Kenya?

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[21] TD Sisk & A Reynolds *Elections and Conflict Management in Africa* (1999)5.
[22] JD Barkan 'Rethinking the applicability of proportional representation for Africa' in TD Sisk & A Reynolds (eds) *Elections and Conflict Management in Africa* (1999)58.

1.4. Hypothesis

This dissertation takes the preliminary position that Proportional Representation system is the most appropriate electoral system to ensure the consolidation of democracy and political stability in countries divided on ethnic lines as Rwanda and Kenya.

1.5. Objectives of the study

The objectives of this dissertation are the following:

1. to examine the role of electoral systems in securing sustainable peace and consolidation of democracy in post conflict societies.
2. to analyse the power sharing arrangement institutionalized in Rwanda in the aftermath of the genocide in order to demonstrate the potential to mitigate issues of ethnic and minority representation
3. to explore the anomalous results caused by the current electoral system in Kenya (*First Past The Post)* in its process of democratization and then find out which is the most suitable electoral system which encourage co-operation and inclusiveness and discourage conflict and exclusiveness.

1.6. Significance of the study

The significance of this dissertation is of critical importance to the process of democratisation on one hand and to the management of conflicts on the other hand. By its focus on concrete examples where electoral systems may be used to serve different interests of ethnic groups, it is expected that the reach of this work may go beyond the two countries as case study and impel changes in electoral systems across Africa.

1.7. Research methodology

This dissertation will generally rely on library and internet research. The purpose of this research is therefore to analyse existing literature regarding the role of electoral systems in the democratization and conflict resolution in divided countries. This dissertation will analyse in a comparative perspective the electoral process in Kenya and Rwanda, especially existing law regarding or influencing elections in those countries and the political history of the two countries in order to find out if electoral systems chosen ensure a representative democracy.

This dissertation will summarize the arguments made by proponents and critics of the two electoral systems refer to a number of case studies and identify the main characteristics of a suitable electoral system for Kenya and Rwanda taking into account their political history, electoral and democratic experience and political culture prevalent in each country.

1.8.   Limitation of the study

This dissertation will be limited to Rwanda and Kenya as countries that have suffered ethnicity conflicts and an analysis shall be made of the two countries, with the view of ascertaining which is the best electoral system that could help accommodate the diversity and guarantee a fair representation of all groups in parliament.

Taking into account the political history of the two countries from their independence, this dissertation will seek to see how electoral systems have been shaping the democratisation process and the right of all people to participate in politics of their countries. In a nutshell this dissertation is limited both in space and time. I would not propose to examine all questions pertaining to the whole electoral systems in both countries. This may require a thorough analysis of all electoral laws and regulations. The bottom line aspect of this dissertation is analysing of the current electoral systems and the extent to which the PR may help manage ethnic conflict and engineer a successful democratisation process.

1.9.   Overview of chapters

This work is divided into five chapters. Chapter one is its introduction: providing the background, research question and objectives of the research. Chapter two explores the theoretical framework of various electoral systems with much focus on Proportional Representation and the First Past the Post. It analyses the advantages and disadvantages of each electoral system. Chapter three addresses the impact of ethnicity in electoral politics of Kenya and Rwanda. It proceeds with the analysis of the implementation of proportional representation in Rwanda and criticism of the First Past the Post in Kenya. Chapter four is an assessment of the success of proportional representation in the post genocide Rwanda and the analysis of Mixed Member Proportional system in the prospect for electoral reform in Kenya. Finally, Chapter five provides general conclusions and recommendations.

CHAPTER TWO

THEORETICAL FRAMEWORK OF ELECTORAL SYSTEMS

It is an essential part of democracy that minorities should be adequately represented. No real democracy, nothing but a false show of democracy, is possible without it.'[23]

2.1.   Introduction

This chapter begins with a discussion of what electoral systems actually are, and provides a primer on various electoral systems. Having set up this framework, it then explores possible consequences of different electoral systems in Africa. The advantages and disadvantages of each system are drawn from historical experience of some countries and the writings of scholars in the field.

2.2.   Defining the concept of 'electoral system'

It is important to distinguish between electoral laws and electoral systems. Electoral laws are the family of rules governing the process of elections; from the calling of the election, through the stages of candidate nomination, party campaigning and voting, and right up to the stage of counting votes and determining the actual election result.[24] The electoral system is the mechanism of determining the means by which votes cast by electors are translated into seats in the process of electing politicians and parties in a legislature.[25]

There is a broad agreement among electoral system experts that the three most important dimensions of any electoral system, are the ballot structure (whether the voter votes for a candidate or a party and whether the voter makes a single choice or expresses a series of preferences); the district magnitude (not how many voters live in a district, but how many representatives to the legislature that district elects); and the electoral formula (whether a plurality or majority, proportional, mixed or other system is used, and what mathematical formula is used to calculate the seat allocation).[26]

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[23]   JS Mill, 'Representative Government' (1861) cited in Arend Lijphart *Plural societies and Democratic regimes* (1977).
[24]   DM Farrel *Comparing electoral systems* (1997)3.
[25]   N Steytler et al. *Free and Fair elections* (1994)2.
[26]   A Reynolds , B Reilly & A Ellis (eds) *Electoral System Design: The New International IDEA Handbook* (2005); A Lijphart *Electoral Systems and Party Systems* (1994)10.

2.3.   Types of electoral systems

The most common way to look at electoral systems is to group them according to how closely they translate national votes won into legislative seats won, that is, how proportional they are. Three main types of electoral formulas and a large number of subtypes within each of these are usually distinguished. Majoritarian or plurality formulas (First Past The Post, Alternative Vote, and the Two-Round System as the main subtypes); proportional representation (party-list systems and the single transferable vote) and mixed systems.[27]

2.3.1.   The Plurality or Majority Systems

The Plurality electoral system is also known as the single member district (SMD), winner-takes-all and First Past The Post (FPTP). Under this system all a candidate needs is to win a seat with more votes than any of the other candidates, but not necessarily an overall majority of all the votes cast in the constituency.[28] This can lead to a situation where a candidate is elected to represent all the people in a constituency even though more people voted against him (but for other candidates).[29] Thus, the candidate supported by the largest number of voters wins, and other voters remain unrepresented.[30] However, the way this is achieved in practice varies widely. Three varieties of plurality or majority systems can be identified: First Past The Post (FPTP), Alternative Vote (AV), and the Two-Round System (TRS).[31]

2.3.1.1.   First Past The Post (FPTP)

First Past The Post is the simplest form and the most common type of plurality or majority electoral system. The winning candidate is the one who gains more votes than any other candidate, even if this is not an absolute majority (50 percent plus one) of valid votes. The system uses single-member districts and the voters vote for candidate rather than political parties.[32] To date, pure FPTP systems are primary in the UK and those countries historically

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[27]   A Ware *Electoral Systems, International Encyclopedia of the Social & Behavioral Sciences* (2004)4378-4382. available at http://www.sciencedirect.com/science (accessed 26 April 2009).
[28]   Farrel (n 24 above)12.
[29]   B de Villiers 'An Electoral System for the new South Africa', paper presented at the conference on" South Africa's Choice for the 1990", Leicester, United Kingdom, 20-22 March 1991, 4.
[30]   A Lijphart *Democracies: Patterns of Majoritarian and Consensus Government in Tuenty-One Countries* (1984) 150.
[31]   Reynolds *et al* (n 26 above)35.
[32]   As above.

influenced by Britain. In Africa 15 countries, mostly former British colonies including Kenya use FPTP systems in parliamentary elections.[33]

2.3.1.2.   The Alternative Vote (AV)

The Alternative Vote is a preferential plurality or majority system used in single-member electoral districts which requires successful candidates to gain not just a plurality but an absolute majority of votes (50 percent plus 1). Voters use numbers to mark their preferences on the ballot paper. If no candidate has an absolute majority of first-preferences, the candidate with the lowest number of first preference votes is eliminated from the count, and his or her ballots are examined for their second preferences. Each ballot is then transferred to whichever remaining candidate has the highest preference in the order as marked on the ballot paper. This process is repeated until one candidate has an absolute majority, and is declared duly elected. Voters vote for candidates rather than political parties. AV is thus a majoritarian system. AV is used in Australia, Fiji and Papua New Guinea.[34]

2.3.1.3.   The Two-Round System (TRS)

The Two-Round System is a plurality/ majority system in which a second election is held if no candidate or party achieves a given level of votes, most commonly an absolute majority, in the first election round. A Two-Round System may take a majority-plurality form (more than two candidates contest the second round and the one who wins the highest number of votes in the second round is elected, regardless of whether they have won an absolute majority) or a majority run-off form (only the top two candidates in the first round contest the second round).[35] TRS is used in numerous presidential elections, including that of Kenya. For instance in Kenya, under the constitution, a presidential candidate who is elected is the one who receives greater number of valid votes cast in the presidential election than any other candidate and who, in addition, receives a minimum of tuenty five percent of the valid votes cast in at least five of the eight provinces.[36] If no candidate reaches this quota, the two candidates who won the highest numbers of votes contest for the position in a second round of voting.

[33] As above.
[34] B Reilly *Electoral systems and conflict management: comparing STV and AV systems,* available at http://aceproject.org/ero-en/topics/elections security/Reilly_Electoral_Systems_and_conflict_management.pdf/download (accessed 21 May 2009).
[35] Reynolds *et al* (n 26 above)52.
[36] Section 5(f) of the Kenyan Constitution.

2.3.2. Proportional Representation Systems

An electoral system based on proportional representation means that political parties compete for support in multimember constituencies and that the division of seats is determined by the actual support that a party receive. The rationale underpinning all PR systems is the conscious translation of a party's share of the votes into a corresponding proportion of seats in the legislature.[37]

While the plurality or majority electoral system involves one-seat member constituencies or district, PR requires the use of electoral districts with more than one member. PR systems are thus not employed in single-member districts or presidential elections because of the inherent impossibility of dividing a single seat elected on a single occasion proportionally. In some countries, such as Israel, Netherlands and Rwanda, the entire country forms one multi-member district. There are two major types of PR system: the Party list systems (List PR) and the Single Transferable Vote (STV).

2.3.2.1. Party list systems of Proportional Representation

Under a List Proportional Representation system each party or grouping presents a list of candidates to the electorate in each multi-member electoral district. Voters vote for a party, and parties receive seats in proportion to their overall share of the vote. In some (closed list) systems the winning candidates are taken from the lists in order of their position on the lists. If the lists are 'open' or 'free' the voters can influence the order of the candidates by marking individual preferences.[38]

The choice of List PR does not in itself completely specify the electoral system, more details must be determined. A formal threshold may be required for representation in the legislature. Moreover, if the threshold is higher small groups can easily be excluded from any participation in the legislature. A high threshold[39] (for example 10 per cent, as used by Turkey) is likely to exclude smaller parties, while a low threshold (for example 1.5 per cent, as used by Israel) may promote their representation.[40] However, in the case of Rwanda, the formal threshold required for gaining a seat in parliament is 5 percent which is also high.

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[37] Reynolds *et al* (n 26 above)57.
[38] Reilly & Reynolds (n 17 above)60.
[39] 'Threshold' refers to the minimum number of votes a party has to obtain in order to gain a seat in the legislature, cited in Steytler (n 25 above)11.
[40] Reynolds *et al* (n 26 above)60.

2.3.2.2. Single transferable vote (STV)

The Single Transferable Vote is a preferential system in which the voter ranks the candidates in a multi-member district and the candidates that surpass a specified quota of first-preference votes are immediately elected. In successive counts, votes are redistributed from least successful candidates, who are eliminated, and votes surplus to the quota are redistributed from successful candidates, until sufficient candidates are declared elected.[41] As opposed to the party list which uses a national electoral college, STV can apply at the constituency level. Unlike List PR, STV empowers voters to choose between parties and between candidates within parties. It also ensures a close relationship between voter and representative in the fact that in most actual examples of STV the multi-member districts are relatively small. However STV is very complex for voters to understand.[42]

2.3.3. Mixed systems

Given the inherent drawbacks of both plurality or majority and PR systems, Mixed system have been proposed. These are Mixed Member Proportion System (MMP) and Parallel system, as discussed in detail below.

2.3.3.1. A Mixed Member Proportional System

Under MMP, a half or some proportion of the seats in the parliament is elected by plurality or majority methods, usually from single-member districts, while the remainder is constituted by PR lists. The PR seats are used to compensate for any disproportionality produced by the district seat results. For example, if one party wins 10 per cent of the vote nationally but no district seats, then it will be awarded enough seats from the PR lists to bring its representation up to 10 per cent of the seats in the legislature. [43] Proponents claim that MMP voting provides the best of both worlds. Mainwaring and Shugart, for instance, argue that the underlying rationale of MMP is to design an electoral system which combines the virtues of majority rule and PR.[44] While MMP retains the proportionality benefits of PR systems, it also ensures that elected representatives are linked to geographical districts.[45]

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[41] B Reilly & A Reynolds *Electoral Systems and Conflict in Divided Societies* (1999)21.
[42] As above.
[43] Reynolds *et al* (n 26 above)91.
[44] S Mainwaring & M Shugart (eds) *Mixed member electoral systems: The best of both worlds* (2001).
[45] Reynolds *et al* (n 26 above)95.

2.3.3.2. A Parallel System

Parallel system use both PR lists and single-member districts running side by side, but unlike MMP systems the PR component of the system does not compensate for any disproportionality within the plurality-majority system.[46]

2.4. Political consequences of electoral systems in divided societies

This section addresses an important debate over electoral system choice, whether plurality-majority or proportional representation has the greatest potential to foster legitimate democratization in divided societies. For ethnically divided societies, the prevailing academic wind clearly blows in favour of proportional representation and against plurality. In such instances, I will describe the arguments and evidence offered by both the critics and the defenders of a particular system, and analyse them in the context of divided societies.

2.4.1. Advantages and disadvantages of plurality or majority systems

2.4.1.1. Advantages of FPTP

The most often cited advantages of FPTP are stability, simplicity and constituency representation. First, the argument is usually made that FPTP offers the electorate a clear-cut choice for voters between two broadly based competing parties, and the national vote clearly translates into winning and losing parties. This clear-cut choice inherent in plurality SMD produces stable and effective single-party executive. Plurality SMD is also praised for facilitating strong parliamentary oppositions, which provide a checking role on the government.[47]

Second, FPTP is defended most on the grounds that it promotes a link between constituents and their representatives. If members of parliament (MPs) have a defined geographical area for which they, and they alone, are responsible, then they will have a closer affinity with their district, be more combative on its behalf, and be responsive to its needs.[48] Thus, voters can assess the performance of individual candidates rather than just having to accept a list of

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[46] Reynolds *et al* (n 26 above)29.
[47] Sisk & A Reynolds (n 21 above)23.
[48] Sisk & A Reynolds (n 21 above)67.

candidates presented by a party, as can happen under some List PR electoral systems.[49] This constituency representation is a central feature of Kenyan political life where each MP represents a constituency. However, this is in stark contrast to the situation in Rwanda, where the entire country is one large constituency, where there may be a concentration of MPs from certain parts of the country, and where there is no single recognisable MP serving a certain area.

Finally, FPTP systems are particularly praised for being simple to use and understand. A valid vote requires only one mark beside the name or symbol of one candidate.[50] This point about simplicity is particularly apt when, comparisons are drown with the ballot used in STV.

2.4.1.2.   The disadvantages of FPTP

In response, critics of plurality argue that its exclusionary tendency on a number of levels can be fatal in divided societies where there is no real consensus on institutionalized competition for control of the state. These critics are as follows:

First, Plurality excludes minority parties or ethnic groups from participation in political representation. In countries like Kenya where major political parties are associated with ethnic tribes, citizens' choices tend to be limited to their ethnic groups, which can easily lead to the exclusion of the minority group member from parliamentary representation.

Second, FPTP exclude women from the legislature. Research and statistics have shown that countries applying proportional representation systems have a higher proportion of women in their parliaments than those with majority or plurality systems. According to the International IDEA, in 2004, the number of women representatives in legislatures elected by List PR systems was 4.3 percentage points higher than the average of 15.2 percent for all legislatures, while that for legislatures elected by FPTP was 4.1 percentage points lower.[51]

Third, plurality has also been criticized on the basis that it encourages the development of political parties based on clan, ethnicity or region, which may base their campaigns and policy platforms on conceptions that are attractive to the majority of people in their district or region but exclude or are hostile to others.[52] This has been an ongoing problem in Kenya,

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[49] Reynolds *et al* (n 26 above)29.
[50] As above.
[51] Reynolds *et al*, (n 26 above) 61.
[52] Reynolds *et al* (n 26 above)42.

where ethnic groups tend to be regionally concentrated. The country is thus divided into geographically separate party strongholds, with little incentive for parties to make appeals outside their home region and cultural–political base. The decision by voters on where to cast their vote is mainly informed by which region they come from and consequently, whose stronghold that region belongs to.

Four, another major criticism of plurality-majoritarian system is that it is essentially unfair as far as 'genuine' representation is concerned. It tends to create "regional fielfdoms" in which one party, through winning a majority of votes in the region, wins all, or nearly all, of the parliamentary seats, excluding minorities from access to representation.[53] For example, in the 1997 Kenyan election, the ruling party KANU received 51 percent of the seats but only 38 percent of the parliamentary vote.[54] Additionally, the system yields a great number of wasted votes and thus creates potentially dangerous feelings of alienation by minority parties or ethnic groups and the likelihood that extremist will be able to mobilize anti-system movements. Reynolds argues that, in Africa, approximately one-fifth of votes are wasted under plurality SMD systems, while only 2 to 5 percent are wasted under PR systems.[55]

Finally, under Single member district systems, ruling parties can manipulate the boundaries of constituencies to their own advantage, a process known as gerrymandering[56]. This SMD manipulation helped return Daniel Arap-Moi to office in Kenya in 1993.[57]

2.4.2. Advantages and disadvantages of proportional representation

2.4.2.1. Advantages of PR

Many advocates of PR claim that it is the most appropriate electoral formula for post-conflict societies where reconciliation among ethnic groups is vital. Their arguments are based on the rationale that PR is inclusive in nature because it ensures that all significant segments of the population are fairly represented in the legislature, which can be crucial to stability in divided societies.[58]

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[53] Sisk & Reynolds (n 21 above)24.
[54] De Villiers (n 29 above)5.
[55] Reynolds *Electoral Systems and Democratisation in Southern Africa* (1999)97.
[56] M Harrop & WL Miller *Elections and Voters, A comparative introduction* (1987)63.
[57] Reynolds (n 55 above)97.
[58] A Reynolds,'The Case for Proportionality' *Journal of Democracy* (1995)117-124.
[58] Reynolds *et al* (n 26 above)57.

Another strong argument for PR systems is that they are fair and provide clear correlation between the number of votes cast in the election and seat won in parliament. [59] In addition to that, Benjamin Reilly says that PR facilitates arrangements of grand coalitions governments, which are a fundamental feature of the power sharing approach on which consociationalism is based.[60] Lijphart maintains that power-sharing is the only viable option for societies with deep ethnic cleavages. Thus, he argues that a deeply divided society, or a postconflict society with high levels of distrust and suspicion between the parties, and extensive security challenges, can reach a stable peace if its political institutions are shaped as in the consociational democracy.[61] Those coalitions governments are more reflective of the realities of African states. This was the solution to fostering stability in Kenya following the 2007 post election violence, where the coalition have been formed between the president and prime minister from two opposition parties.

Furthermore, proportional systems are more likely to produce a parliament which reflects the composition of the society than is the case for those parliaments elected under FPTP. Particularly, List PR encourages parties to present inclusive and socially diverse lists of candidates. In essence, parties are able to use the lists to promote the advancement of women politicians and allow voters the space to elect women candidates.[62] In sum, PR is thought to breed peaceful conflict resolution and consensus making in politics, which should be an asset in the context of a nascent unstable political democracy.

2.4.2.2.   Disadvantages of PR

While many authors agree that proportional representation is the most suitable system for divided societies, a number of critics have challenged its effectiveness in divided societies.The arguments most often cited against PR are that it gives rise to coalition governments, with disadvantages such as party system fragmentation and government instability; and that PR produces a weak linkage between a representative and her or his geographical electorate.[63]

The persuasive argument against using PR for divided societies and new democracies is that it gives rise to coalition governments, which in turn lead to legislative gridlock and

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[59] B Reilly *Elections, democratization and human rights* (2003), available at http://www.unu.edu/hq/Japanese/gs-j/gs2002j/okinawa4/reilly-full-e.pdf (accessed 25 May 2009).
[60] As above.
[61] A Lijphart *Democracy in Plural societies: A comparative exploration* (1977)25.
[62] Reynolds *et al* (n 26 above) 57.
[63] Reilly & Reynolds (n 17 above)22.

consequent inability to carry out coherent policies. Reynolds argues that there are particularly high risks during an immediate post-conflict transition period, when popular expectations of new governments are high. Quick and coherent decision making can be impeded by coalition cabinets and governments of national unity which are split by factions.[64] Moreover, PR systems lead to the inability of the voter to enforce accountability by throwing a party out of power when governments are usually coalitions.[65]

PR systems are also criticized on the ground that they ensure the easy entry of small and extremist parties into parliament, threatening the stability of the government.[66] However, measures to counter the entry of extremist parties in parliament can be put in place. One way is to define a reasonable threshold below which a party will not be represented in parliament. The second method is to pass a law that prohibits certain categories of parties, as adopted in Rwanda to prevent the rise parties based on ethnicity or region, or any other discrimination.

In addition to critics of PR in general, List PR especially close lists system are criticized for leaving too much power in the hands of senior party leaderships who may determine the manner in which party lists are prepared, who decide who to include or exclude on the list and the order in which the candidates will be listed. Consequently, a candidate's position on the party list, and therefore his or her likelihood of success, is dependent on currying favour with party bosses, whose relationship with the electorate is of secondary importance.[67]

Moreover, when List PR use the single national district, as in Namibia, Israel or Rwanda, MPs are not responsible for addressing the needs of specific localities and cannot be held accountable to the voters. Thus, voters have no opportunity to determine the identity of the persons who will represent them, their town, district or village, nor can they easily reject an individual representative if they feel that he or she has performed poorly in office or is not the kind of person they would want representing them.[68]

Hence, in order to address the need for close contact between voters and representative, the mixed-member proportional system can be considered, whereby a number of MPs are elected on a Single Member geographical (SMD) basis while the remaining seats are filled by

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[64] Reynolds (n 55 above)98.
[65] A Jarstad 'Power Sharing for Peace and Democracy?' paper prepared for presentation at the 47th annual meeting of the International Studies Association, San Diego, USA, 22-25 March 2006, and at the Vail Symposium 27-29 March 2006.
[66] Farrel (n 24 above)154.
[67] Reynolds *et al* (n 26 above)71.
[68] Barkan (n 22 above) 59.

means of list of proportional representation.[69] This would provide a remedy to PR in that, overall, the National Assembly would reflect near proportionality between votes cast and seats won, but a single person would represent each district.[70]

2.5.   Conclusion

In light of the above discussion, two conclusions can be drawn.

First, the debate reveals that while proportional representation systems are by no means a perfect solution for plural societies, they are more representative than FPTP systems. The inclusion of both minority and majority interests, and therefore some degree of electoral proportionality, is a normative good in fledging democracies that are divided along ethnic or regional lines. This ethos of the political inclusion of both minorities and majorities in decision-making structures inherent in PR, improves the prospects for peace and stability in those countries. In contrast, FPTP have many disadvantages that raise doubts about its effectiveness in divided societies. FPTP produces disproportional results; small parties are underrepresented, and supporters of smaller parties waste their votes.

Second, in Africa and especially in divided societies PR can be made to provide solid link between representatives and constituencies, hence promoting an accountable legislative. Thus, a shift towards a Multi-member proportional system would increase geographical representativeness and accountability, at the same time maintaining the overall benefits that PR offers to diverse societies.

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[69]   A Reynolds, 'Elections in Southern Africa: The case for Proportionality, a Rebuttal' in TD Sisk and Andrew Reynolds(eds) *Elections and Conflict Management in Africa* (1999)79.
[70]   Reynolds (n 55 above)100.

CHAPTER THREE

THE ISSUE OF ETHNICITY AND ELECTORAL SYSTEMS IN RWANDA AND KENYA

3.1.   Introduction

The previous chapter has presented the theoretical framework of electoral systems in general. The present chapter gives a brief history of electoral process in Rwanda and Kenya and looks at how ethnicity impacts on their democratization process. It furthermore proceeds with the analysis of the implementation of proportional representation in the post-conflict period in Rwanda. Finally, it criticizes the Kenya's current FPTP electoral system for its exclusionary tendency and contends that a shift towards proportional systems will engender more legitimate and representative political institutions and thus consolidating democracy.

3.2.   Proportional Representation in Rwanda

This section seeks to demonstrate how the Proportional system has played a critical role in ensuring power sharing, and conflict management in the post-genocide Rwanda. It gives a brief historical background on elections in Rwanda. Thus, it shows the dynamics that have lead to the institutionalisation of the PR system in Rwanda. It is expected that this section will help understand how the PR is likely to help address issues of political exclusion and ethnic conflict in divided societies.

3.2.1.   The impact of ethnicity in Rwandan politics: Historical perspective

Tracing back the history of elections in Rwanda may not be the ambition of this paper. But some knowledge on the Rwandan political history may help understand the long way that lead to the institutionalisation of the PR system. Traditionally, Rwanda is a plural society[71] which was divided into three ethnic groups. *Hutu* constituting the majority, T*utsi* minority, and *Twa* representing the minority of the population. While sharing the same culture and the same language, European colonizers reinforced conflict between Hutu and Tutsi, that reached its climax in the revolution of 1959-1962.[72] This lead to the instauration of a Republic

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[71] Lijphart (n 62 above)3.
[72] R Lemarchand 'The Rwanda Genocide' in Samuel Totten, *Teaching about Genocide: Issues, Approaches , and Resources* (2004)205.

under Hutu control, and Tutsi were forced to flee their homeland and seek refuge in neighboring states.[73] Rwandan independence was declared on July 1, 1962, the MDR (*Mouvement Démocratique Rwandais*) became the single governing party under the regime of Grégoire Kayibanda.[74] On July 5, 1973 General Juvenal Habyarimana achieved power by armed force.[75] He dissolved the first Republic and established the second Republic, consolidating his powers in the hands of northern politicians to the exclusion of Tutsi. In 1975, Habyarimana instituted a one party state under his regime: the National Revolutionary Movement for   Development (MRND).[76] The political pluralism would have to wait until 1991 when the Constitution recognised the multi-party system putting an end to a 15 year old one party regime.[77] In August 1993, the RPF and the government of Rwanda signed the Arusha Peace Accords, which included forming a power sharing among parties and the installation of a broadly-based transitional government. However, early after the death of the president Juvenal Habyarimana in 1994 genocide, a government of extremist Hutus savagely killed Tutsi. This led the country into a transitional period that ended with a new constitution and elections in 2003.[78]

Against this backdrop, it is worth mentioning that the electoral system had been the majoritarian system for quite a long time. The only ruling party had been enjoying the possession of all 70 seats making up hundred per cent of the then one chamber parliament.[79] This had resulted in political exclusion of minority ethnic groups, nourishing political frustration and social tensions. Such a situation translates into a clear example of how the majority rule may be used as smoke screen favouring undemocratic regimes. The majority system prevents the minority from having a fair voice in national politics.[80]

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[73]   As above.
[74]   ICTR judgement *The Prosecutor v Jean-Paul Akayesu*, Case No ICTR 96-4-T, para 88-89 ICTR 96-4-T P 82-84 available   at: http://www1.umn.edu/humanrts/instree/ICTR/AKAYESU_ICTR-96-4/AKAYESU_ICTR-96-4_Index.html (accessed 3 October 2009).
[75]   As above.
[76]   *Akayesu* Case (n 78 above)92 *MRND* in french means '*Mouvement Révolutionnaire National pour le Developpement'*.
[77]   Commission Juridique et Constitutionnelle du Rwanda *Module de sensibilisation et de Formation en matière constitutionnelle* available at http://www.cjcr.gov.rw/modulepartie2.htm (accessed October 2009).
[78]   A Stroh 'The Effects of Electoral Institutions in Rwanda: Why Proportional Representation Supports Authoritarian Regime' 105 *GIGA Research Programme: Legitimacy and Efficiency of Political Institutions (*2009).
[79]   Data on the 26th December 1983 parliamentary elections. available at http://www.ipu.org/parline-f/reports/arc/RWANDA_1983_F_1.PDF (accessed 3 October 2009).
[80]   Sisk & Reynolds (n 21 above).

3.2.2. Constitutional and Legal framework of proportional representation in Rwanda

The lessons learned from the genocide and history of exclusion in Rwanda were enough to make Rwandan leadership think of the way elections should be conducted in order to ensure fair representation of all societal groups. For decades, the question of how to design institutions for ethnic- conflict prone societies has been discussed by political scientists.[81] One of the questions that is dealt with repeatedly is the issue of electoral system. This is the concern of what is called constitutional or institutional engineering and electoral engineering. The electoral system of proportional representation is enshrined in the Constitution of the Republic of Rwanda of 04 June 2003 as amended today. In this vein article 77 of the Constitutions reads as follows:

> Without prejudice to the provisions of Article 76[82] of this Constitution, the members of the Chamber of Deputies shall be elected for a five-year (5) term by direct universal suffrage through a secret ballot using a system of proportional representation.
>
> The seats which remain after allocation of seats by dividing votes received by the electoral quotient shall be distributed to political organizations according to the system of the highest surplus.
>
> The list shall be compiled in full respect of the principle of national unity as stipulated in Articles 9[83] and 54[84] of this Constitution and the principle of gender equality in matters relating to elective offices as stipulated in article 54 of the Constitution.
> Candidates may be presented by a political organization or may stand independently.
>
> A political organization or list of independent candidates which fails to attain at least five per cent (5 %) of the votes cast at the national level during legislative elections can not be represented in the Chamber of Deputies or benefit from grants given to political organizations by the State.

The constitutional recognition of this electoral system is not a result of a mere up hazard. In 2003 when the Constitution was approved Rwanda had already marked its 9th Anniversary of the Genocide against the Tutsi, which genocide was the climax of a long history of ethnicised politics, political exclusions and mistrust. Hence, following the political instability caused by the genocide, it was necessary to implement political reforms aimed at solving the post-genocide problems. Besides, it was also necessary to develop mechanisms to dismantle the divisive ideology, and to craft new institutions that will promote accommodation and inclusion

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[81] B Scholdan 'Democracy and Electoral Engineering in post-ethnic conflict societies' paper prepared for a conference of the International Political Science Association: Human Rights Research Committee: *Human Rights and Democratic Transitions*, Ljubljana, August 26 - 28, 1999.

[82] Article 76 of Rwandan constitution.

[83] Article 9 stipulates that the State of Rwanda commits itself to promote and enforce the respect of eradication of ethnic and regional divisions and promotion of national unity and equality of all Rwandans...

[84] Article 54 prohibits political parties from basing themselves on ethnic groups,regions.. and require them to reflect the unity of Rwandans and gender equality in all their activities.

of all ethnics groups in the political life in order to build national unity. The proportional representation is equally recognised in the organic law governing presidential and parliamentary elections.[85]

As discussed above, many scholars have argued that PR is better off than the majoritarian electoral system. This is analysed below *vis-à-vis* the post-genocide Rwandan society with regards to power sharing, democratisation process, and conflict management.

3.2.3. Proportional Representation, power sharing, and the democratisation process in Rwanda

There have been many critiques on the electoral system in Rwanda thus far. For some the current electoral system indicates the country's status as an electoral autocracy whereby electoral institutions have had to be designed, possibly with the primary aim of maintaining autocratic rule instead of opening the system up to liberal democracy.[86]

Nevertheless, the role played by the PR system in increasing small political parties into the political landscape of Rwanda cannot be ignored. Several small political parties could not have got by their own standing the required five per cent threshold to get some seats in the parliament.[87] An assessment of this process by Lionel Cliffe *et al,* demonstrates how PR system was particularly advantageous to small political parties, which would have been excluded from assemblies elected under most other arrangements.[88] The principle of proportionality in elections is designated to protect ethnic minorities, by giving each party the incentives to be responsive to each ethnic group.[89] While in Rwanda there is no political party that is ethnic based, the PR has helped all ethnic groups which are members of political parties to get and enjoy the opportunity of political participation which would otherwise have been denied or become more difficult to them. The system is laudable in that it makes for maximum proportionality, a factor that strengthens the democratisation process.[90] The merits of PR in Rwanda may include fairness, suppression of regionalism and even more chances

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[85] Article 83 of organic law 17 of 2003 governing presidential and parliamentary elections.
[86] Stroh (n 82 above).
[87] Article 77 of the Constitution of Rwanda as amended todate.
[88] L Cliffe et al *The Transition to Independence in Namibia* (1994).
[89] D Charpman 'The Role of Electoral Systems in the Resolution of Ethnic Conflicts' paper presented to the third International Conference on the Ethnic Studies Network at the University of Ulster, Londonderry, Northern Ireland, 26-29 June 1997.
[90] EISA 'South Africa: Proportional Representation' available at http://www.eisa.org.za/WEP/sou3.htm (accessed 3 October 2009).

for women.[91] Furthermore, PR has facilitated the inclusion of all sections of the society in parliament such as disabled and youth.

In fact the PR has helped end the majority rule whose horrors were lived by many Rwandans. And as Lijphart contends, for divided societies, majority rule is not only undemocratic but also dangerous. Although majoritarian rule is often a result of a democratic process, the resulting majoritarian institutions can lead to minorities being continually excluded from power and discriminated against.[92] This had been a reality to the minority groups in Rwanda and the PR has helped in learning from the lessons of the past.

3.2.4. PR and conflict management in the post genocide Rwanda

Equally important is that argument that PR system has helped in conflict management in the post genocide Rwanda. In fact, the conflicts in Rwanda have been a result of long political dissensions that could be traced along with the then existing political parties that were generally formed basing on ethnic ideologies.[93] The effect of the majoritarian electoral system argued above is indicative of electoral system and engineering of conflict. By affecting the outcome of a given election, electoral systems are the arbitrators of whether or not the resulting legislature and government represent the political will of human polities.[94]

The role of electoral system and conflict management has been recognised by a number of authors. As argued by Timothy Murithi, electoral system need to be a central concern of the conflict management process rather than being viewed merely as details which do not merit much attention.[95] Not questioning the adoption of the majoritarian systems can end up subverting the whole peace-making initiatives particularly when politicised ethnicity is a factor. The only realistic solution for settling the problems of the war-torn in divided societies is the institution of inclusive constitutional arrangements.[96] This undisputable fact has been recognized in Rwanda with the institutionalization of the proportional representation system.

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[91] A Montague 'Merits of Proportional Representation' available at http://accuratedemocracy.com/d_intro.htm (accessed 3 October 2009).
[92] A Lijphart *Patterns of Democracy* (1999) 32-33.
[93] Example of such political parties may include the MDR –ParmeHutu.
[94] D Rae *The Political Consequences of Electoral Laws* (1967); A Lijphart & B. Grofman *Choosing an Electoral System: Issues and Alternatives* (1984).
[95] T Murithi '*Electoral Systems and Management of Ethnic Conflict in Africa'* available at *http://docs.google.com/gview?a=v&q=cache%3ArsWxiBuvyUAJ%3Aaceproject.org%2Fero* (accessed 2 October 2009).
[96] Reynolds (n 55 above) 275.

The principle of broad proportionality seeks to reduce the sense of marginalisation and political exclusion which smaller ethnic groups are subjected to. Some critic may consider it as a way of muzzling an open political competition between parties especially when the small political parties have no other way of getting some seats in the parliament. Still one has to acknowledge that this system has at least helped avoid open and sharp party conflicts the effects of which extrapolate to the entire community.

It results from the above discussion that Rwanda has undergone different stages to reach where it stands now. From the majoritarian electoral system to the current proportional representation system, much has been achieved in regard to a more inclusive approach to small parties and all groups in the society, inclusive women, youth and people living with disabilities. One may not agree that there is no such a thing as perfect democracy; but the approach adopted by Rwanda has helped manage different forces (political parties and opportunistic politicians) that formerly used to fuel political and social dissension within the Rwandan society, having their ambitions favoured by the then applicable majoritarian system.

3.3.   Prospects of First Past The Post in Kenya

This section begins with a summary of Kenya's electoral history and the lessons learned from it and proceeds to a history of failures of the current electoral system. It then analyses how proportional representation system can serve better for Kenya. It argues that the current electoral system has played a paramount role in the conflicts that marked the recent Kenya political landscape. It further argues that there is a need for Kenya to shift from the current electoral system in order to ensure a more inclusive and peaceful political climate.

3.3.1. History of exclusion in Kenyan electoral process

Understanding the failures of the current electoral system to manage election violence and the role of ethnicity in politics of Kenya requires a review of the country's recent history.

Kenya achieved independence on December 12, 1963. Like Rwanda, Kenya has a history of oppressive rule along with frequent ethnic conflicts and violence.[97] One year after independence, Kenya was declared a Republic and Jomo Kenyatta, a Kikuyu became

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[97] WO Oyugi 'Ethnicity in the electoral process: The 1992 General Elections In Kenya' in *African Association of Political Science* (1997).

president. One month before, KADU had voluntarily dissolved itself as the official opposition, and its members crossed the floor to join KANU. Thus, Kenya became a *de facto* one party state for the duration of Kenyatta's regime which lasted until 1978. During his regime, Kenyatta resorted to ethnicity and nepotism as the main criteria for providing job in the public service and appointing those who were to fill other key positions. Hence, the majority of those appointed into key positions were drawn mainly from the president's own community, the Kikuyu.[98] This led to the resignation of Oginga as the vice-president in 1966. Following his removal from KANU, Oginga Odinga established the Kenya Peoples Union (KPU), a Luo based party, returning the country to a multi-party competitive politics. Three years later, KPU was banned by ruling party and its leaders and sympathizers were detained. Kenya once again became a *de facto* one-party autocratic state.[99] From 1969, the regime was marked by the consolidation of power among the Gikuyu, Embu and Meru(GEMA) communities excluding the majority not only from the political, but also the social and economic sphere of the state. While the Kenyatta cabinet and government was mainly dominated by his Kikuyu people, concomitantly, the regime was marked by the use of state power for purposes of personal accumulation and politicization in the allocation of public resources.[100] It is this type of regime that President Daniel Arap Moi inherited upon Kenyatta's death in August 1978 and superintended for twenty-four years, until December 30, 2002.[101]

President Arap Moi, a Kalenjini, proceeded by dismantling Kikuyu Hegemony and consolidating power under a coalition of Kalenjini and other minority tribes. As is argued by Muigai, Arap Moi' broader strategy of creating a Kalenjini hegemony was disguised as one of creating opportunities for the minority tribes who had been unfairly excluded by both the colonial and the Kenyatta administrations.[102] Although the country had reverted to a multi-party system in December 1991 and the subsequent expansion of the political space, Arap Moi continued to govern the country like a *de-facto* autocrat.[103] In December 1992, general multiparty elections were held in the county for the first time from the independence. However, the elections results revealed that each important party drew most of its support from the tribal affiliation of its leader. Therefore, this demonstrate that ethnicity continues to be basic and a focal point that the political elite uses for political mobilization in order to fight

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[98]   J Biegon, 'Electoral violence and fragility in Africa: drawing lessons from Kenya's experience in the 2007/2008 post election violence' (2009).

[99]   G Muigai, 'Ethnicity and the Renewal of competitive politics in Kenya' in Harvey Glickman (eds) *Ethnic conflict and Democratisatioon* (1995)167.

[100] R Ajulu 'Thinking through the Crisis of Democratisation in Kenya : A Response to Adar and Murunga (2000).

[101] CO Mbai 'The rise and fall of the autocratic state in Kenya' in WO Oyugi, P Wanyande & CO Mbai (eds)*The Politics of transition in Kenya: From KANU to NARC* (2003).

[102] Muigai (n 103 above)177.

[103] Mbai (n 101 above)53.

the intra-elite war that characterizes its national politics. [104] Second multi-party elections were held in 1997. Furthermore, these 1992 and 1997 multi-party elections were marred with ethnic violence in the Rift Valley and Coast province. Politically motivated ethnic clashes were used to disrupt and displace Kikuyus, who the Kalenjini felt were wrongfully occupying traditional Kalenjini land, and as opposition to the Moi administration, posed a political threat as the Rift Valley province contains the largest number of seats in Parliament.[105]

In December 2002, Kenya held elections that marked an important turning point in the country's democratic evolution as power was transferred peacefully from KANU, the ruling party since independence, to the National Rainbow Coalition (NARC), a coalition of multiple political parties. Mwai Kibaki was elected President.[106] At first glance, the election appeared to mark a shift from ethnic voting in that Kibaki was able to rally citizens of various ethnicities around a platform of change and economic revitalization. However, the coalition party had been formed on the premise that the Constitution would be reviewed which would essentially provide a power sharing structure between the member parties, meanwhile, the entire party had never actually met to consolidate a thorough platform.[107] Moreover, Mwai Kibaki failed to honour NARC's Memorandum of understanding, and when his proposed draft was presented for the 2005 Referendum, it was overwhelmingly rejected. Consequently, the 2007 election campaigns revolved around an anti-Kikuyu cause based on the rationale that there was inequitable distribution of state resources among ethnic groups.[108] As a result, the 2007 general election turned out to be a contest between the 'included' and the 'excluded'. Mwai Kibaki represented the included while Raila Odinga represented the excluded.[109] Thus, those elections were followed by violent ethnic conflict that resulted in the death of over 1500 people and the displacement of about 300,000 thousand people.[110]

It results from the above discussion that the political history of Kenya is characterized by instances of exclusion and that the 2007 post elections violence was a reaction to old grievances that remained unresolved for years. In this light, the challenge for Kenya is to build national cohesion by ensuring that all groups within the country are meaningfully

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[104] As above.

[105] Human Rights Watch 'Divide and rule: state sponsored ethnic violence in *Kenya'* (1993); C Murphy 'Ethnic tension in Kenya' available at http://www.du.edu/korbel/sfa/violenceinkenya.doc. (accessed 15 August 2009).

[106] IFES Final Report (n 11 above).

[107] A Kenney 'Multi-Ethnicity and Democracy in Kenya: Ethnicity as a Foundation for Democratic Institutionalization'(2006) at http://humanrightshouse.org/noop/file.php?id=9158 (accessed 8 August 2009).

[108] S Kinyaju & G Maina 'Ethnic Conflict in Kenya: An Analysis of the politization of ethnicity and the impact of free markets on ethnic relations in J Carter (ed) *Ethnicity, Human Rights and Constitutionalism in Africa* (2008).

[109] J Biegon, 'Electoral violence and fragility in Africa: drawing lessons from Kenya's experience in the 2007/2008 postelection violence' (2009).

[110] IFES Final report (n 11 above).

included in the national political, economic and social life. The failures to have a more inclusive political landscape may be analysed against the First Past the Post electoral system as discussed below.

3.3.2. Failures of the First Past the Post electoral system in Kenya

3.3.2.1. Disproportionality

Kenya has since independence used the plurality-majority or *First Past the Post* Electoral System in all its elections.[111] However, the failure of First Past The Post system, to yield fair representation in Africa, and *Kenya in particular* has been well-documented. Norris argues that the First Past the Post System manufactures a majority and exaggerates the share of seats for the leading party in order to produce an effective parliamentary majority, whilst it penalizes smaller parties. [112] In the *Case for Proportionality*, Reynolds goes further arguing that high disproportionality that is characteristic of countries who use SMD Plurality electoral systems shows that:[113]

> (1) minority parties are receiving little or no representation; (2) larger parties are gaining "seat bonuses" over and above their share of the popular vote; (3) governments with 100 percent of the executive power are being catapulted into office with less than 50 percent of the popular vote; and (4) governments based on a simple majority of the popular vote are being awarded supermajority powers.[114]

Kenya's 1992 and 1997 elections results are good examples of discrepancies between popular vote and allocation of seats that have been institutionalized by the simple majority or FPTP model. In Kenya's 1992 parliamentary elections, despite winning only 30 percent of the national vote, Moi's ruling KANU party received 53 percent of the legislative seats. Hence, though KANU had fewer votes than the combined opposition (less than one third of the country)[115], it nonetheless received 100 parliamentary seats. This overrepresentation of KANU strongholds and underrepresentation of opposition territories undermined the credibility of the elections and violated the principle of one man-on vote.

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[111] Section 32 of the current Constitution in Kenya provides: 'Kenya shall be divided into constituencies in accordance with section 42 and each constituency shall elect on elected member to the National Assembly in such manner as, subject to this Constitution, may be prescribed by or under any law.'

[112] P Norris 'Do power-sharing institutions work? Stable democracy and good governance in divided societies'(2005) available at http://www.qog.pol.gu.se/conferences/november2005/papers/Norris.pdf (accessed 25 May 2009).

[113] Reynolds (n 73 above)74.

[114] Reynolds & Sisk (n 21 above)72.

[115] KANU received 30% of votes and 53 seats; , FORD-Asili received 24% of votes and 17 seats; FORD-Kenya received 22% of votes and 17% of seats, cited in Sisk & Reynolds (n 21 above)67.

The results of 1997 elections in Kenya likewise revealed a high level of disproportionality, where KANU received 51 percent of the seats with only 38 percent of the parliamentary vote. However, it is submitted that the creation of districts or constituencies with equal number of voters would reduce the level of disproportionality in Kenya.[116]

3.3.2.2. The question of Gerrymandering

Systems based on single-member district majority, as is the case in Kenya, are particularly open to manipulation by ruling parties, who can gerrymander boundaries to their own advantage and disadvantage the minority parties. This is a common electoral practice in plurality SMD which is not possible under a PR electoral system.[117] Electoral abuses such as mal-apportioned constituencies (electoral districts that vary substantially in population) and electoral districts that have been "gerrymandered" (constituency boundaries intentionally drawn to advantage one political group at the expense of others) can have profound effects on the outcome of an election and the composition of a parliament.[118] Thus, this section seeks to address the following questions in the context of Kenya. Are the boundaries seen as fair and reasonable? Or are the boundaries determined in such a way as to give a particular ethnic or social group an unfair proportion of seats? Do political actors regularly manipulate constituency boundaries (gerrymandering) in order to gain such unfair election advantages?

Section 42(1) of the Kenyan Constitution gives the Electoral Commission the mandate of prescribing the boundaries of electoral constituencies in the country, but must do so according to strict principles set down in the constitution. Among these is the principle of equality of voting strength. Though section 42 (3)[119] of the Kenya's constitution prescribes that 'all constituencies shall contain as nearly equal numbers of inhabitants', it also stipulates exceptions to the rule that are often in conflict with each other. If the principle of one person one vote is respected and constituencies are established with equal or nearly equal populations, the principle of establishing constituencies that reflect communities of interest or "sparsely populated areas" will be violated, and vice versa.[120]

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[116] McGee (n 13 above)24.

[117] Reynolds (n 55 above)97.

[118] L Handley 'Boundary Delimitation' in IFES, *Challenging the Norms and Standards of Election Administration* (2007) 59-74, available at http://www.ifes.org/publication/505d087c7a033c8563e67b9fdd45cd78/4%20IFES%20Challenging%20Election%20Norms%20and%20Standards%20WP%20BNDEL.pdf. (accessed on 1st October 2009).

[119] Section 42(3) of the Constitution of Kenya.

[120] JD Barkan, P Densham & G Rushton 'Designing Better Electoral Systems for Emerging Democracies'(2001) available at http://edcsnw4.cr.usgs.gov/adds/c1/r2/ke/doc/admn/keadmn5.html#Spatial Reference Information (accessed on 25 May 2009).

Moreover, constituency boundaries have been the object of stronger controversy in Kenya, and allegations have been made of political interference and gerrymandering.[121]The constituencies as currently drawn are wildly disproportional which tends to favour dominant ruling parties and undermine the democratic principle of equal representation, or "one person, one vote" principle.[122] For instance, according to IFES Final Report on *The Electoral Process in Kenya : A Review of past experience and recommendations for Reform[123]*, 'in 2007, Lamu East Constituency had 12,866 registered voters while the largest constituency, Embakasi, had nearly 250,000 voters. Thus, one vote cast by a Lamu East resident is worth approximately 19 Embakasi votes.' The reasons for the present situation are related to the malapportionment of constituencies by the ruling party (KANU) during the introduction of multipartysm in 1992. Hence, in safe KANU districts such as in the Rift Valley and North Eastern provinces, the KANU government created small, largely mono-ethnic electoral districts, which assured it of easy wins. Where the opposition was likely to win more votes, the incumbent KANU government devised larger constituencies thus ensuring that the opposition parties won these seats at great cost in 'wasted' votes.**[124]**

As consequence, in the 1992 parliamentary elections, the Kenya African National Union (KANU) party gained a majority of 100 parliamentary seats (53.2%) on the strength of less than a third of the popular vote (31%). Furthermore, the plurality electoral system produced a similar outcome in favor of the former single-party in the 1997 elections where KANU won a narrow majority of 107 (51%) of the 210 seats in the National Assembly with only 43% of the vote, in large part because the enormous disparity in constituency populations worked to favor the party.[125]

3.3.2.3.   The phenomenon of "wasted votes"

As highlighted above, First Past The Post system may have the result that a party without an absolute majority of the votes, gets a majority of seats and lock out other parties from parliamentary representation. The votes of the losers, who may constitute a majority in a constituency, are altogether wasted in the sense that these voters are not able to affect the

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[121]   IFES Final Report (n 11 above)36.
[122]   McGee (n 13 above)23.
[123]   IFES Final Report (n 11 above)35.
[124]   SN Ndegwa 'The Relevance of the Electoral System: A Simulation of the 1992 Kenyan Election' (1997)1 *African Association of Political Science* 4.
[125]   Handley (n 122 above); N Kabeberi ED (CMD) 'The Electoral System and Multi-Partyism in Kenya' in Hanns Seidel Foundation, *The electoral system and multi-partyism in Kenya* (2007) at **http://www.hss.or.ke/pdf/electoralsystemandmultipartyisminkenya.pdf** (accessed   on 30 september 2009).

result of the election.[126] This may lead to a situation of permanent inclusion and exclusion which is dangerous in divided society as Kenya.[127]

The 1992 and 1997 general elections in Kenya witnessed the phenomenon of wasted votes. In many constituencies, MPs were elected with less than 50% of the total valid vote in their constituencies. As a result, these elections were unrepresentative in that votes for losers who were majorities were not taken into consideration in allocating seats in parliament.[128]

In light of the above discussion, two conclusions can be drawn. First, Ethnicity continues to be the major basis of political mobilization in Kenya. The Kenya's current electoral system (First-Past-The-Post) reinforces this because it is based on constituencies whose boundaries are congruent with the boundaries of tribal areas. Second, FPTP's overwhelming tendency to exclude minority parties from credible representation in the political process increases potentially dangerous feelings of alienation by minority parties or ethnic groups. The violence that erupted in the aftermath of 2007 in Kenya was therefore a mean of expressing historical marginalisation and exclusion. As Harvey Glickman claims:

> If victory in electoral politics literally means winner take all, and there is nothing for political losers and nothing outside of government, then ethnic party competition will polarize into ethnic conflict accompanied by violence and probably slide back into authoritarian rule and military dictatorship.[129]

Thus, moving away from FPTP towards systems that better promotes inclusion and incorporate at least some measure of proportional representation is essential for the consolidation of democracy in Kenya.

3.3.3. Prospect of Electoral Reform

It is our contention that FPTP cannot serve well for Kenya' s needs. This section seeks to address the following questions. What kind of electoral systems can help democracy survive in country deeply divided by ethnic cleavages, as Kenya? What is to be done so that ethnic divisions do not necessarily mean ethnic conflict? What kind of system that can address other challenge facing Kenya's *national* politics such as inadequate representation of

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[126] K Asmal & J de Ville 'An electoral system for South Africa' in N Steytler *et al*(eds) *Free and Fair elections,* (1994)22.
[127] As above.
[128] LM Mute (n 71 above).
[129] H Glickman *Ethnic conflict and Democratization* (1995)28.

women, cultural, ethnic minorities, people with disability, youth, and marginalized communities?

In fact, as is demonstrated above, Kenya electoral system has, among other things, provided inadequate structures to tackle ethnic conflicts. At the same time, the system has not facilitated fair and equal representation of all sections of the community in the process of governance in Kenya. For instance, the "winner-take all" system produced highly disproportional results in 1992 and 1997 elections in Kenya. This system enabled KANU (ruling party from 1963-2002) to retain the office with an absolute majority of the seats in the parliament despite winning fewer votes throughout the country as a whole than the combined opposition. In addition to that, FPTP enables gerrymandering to thrive in electoral process in Kenya.[130]

Kenya political history illustrates that ethnicity has become the source of a political mobilization by aspiring politicians at election time. This has been the case in different elections in Kenya, where political parties are organized along ethnic groups and seek their support predominantly from their respective ethnic groups. This can increase the extremist parties which are organized to address the interests of particular ethnic groups.[131] Benjamin Reilly argues that in such circumstances, democratization itself can too easily lead to an increase in ethnic tensions and, in some cases, the outbreak of ethnic conflict[132]. Furthermore, such ethnic conflicts are bound to erupt during elections since electoral campaign between parties are perceived in ethnic terms. Kenyan 2007 general elections and its violent aftermath are a picture of this. In this light, if at the root of electoral violence in Kenya is the failure to address historical grievances, then the solution is to craft political institutions that ensure all groups within the country are meaningfully included in the political, economic and social life of the nation.

The scholarly literature identifies two competing approaches to resolve the problems of exclusion and inequalities and build sustainable democracy and national unity in ethnically-diverse societies which can be analyzed in the context of Kenya. These are consociational democracy and integrative majoritarian system.[133] The first strategy suggested to promote

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[130] IFES Final Report (n 11 above).

[131] Kinyanjui & Maina (n 112)85.

[132] Reilly (n 15 above).

[133] Yusuf Bangura 'Ethnicity, Inequality and the Public Sector: A Comparative study' at http://www.unrisd.org/unrisd/website/projects.nsf/89d2a44e5722c4f480256b560052d8ad/b275b4fdc5ccabf6c1256f2000325e88/$FILE/Bangura.pdf. (accessed on 3rd October 2009).

national cohesion in postconflict societies is consociationalism[134] which intends to recognize explicitly the importance of ethnic divisions of the society and institutionalizes mechanisms to accommodate their interests. Lijphart defines consociational democracy essentially as being built on four basic principles. The first and maybe the most important element is power sharing in government or (1) grand coalition of leaders of all significant segments of the plural society. The other three basic principles of consociational democracy are the (2) veto right for minorities, (3) proportional representation as the principle standard of political representation, civil service and allocation of public funds, and, the last but not least, is (4) group autonomy or community self-government.[135]

Hence, consociational models seeks to guarantee the representation of the different ethnic groups in government and other public offices. Grand coalitions, as already adopted in Kenya, are therefore an instrument of consociationalism.[136] However, a government by grand coalition is meaningful when it is supported by an efficient electoral system which ensure the inclusion of all significant groups in the parliament.

When analyzing the consociational model in terms of electoral systems, the proportional representation system especially party list is thought to be an appropriate system for divided societies. The consociationalist, Arend Lijphart, argue that party-list PR is the best choice for divided societies, as it enables all significant ethnic groups, including minorities, to "define themselves" into ethnically-based parties, and to gain representation in the parliament in proportion to their numbers in the community as a whole.[137] Hence, the list type proportional representation system encourages all key segments to be sharply defined as groups that feel alienated from the political process may form their own parties to gain some representation in parliament, the government and the civil service.

Thus, adopting List proportional system in Kenya would have significant advantages. This would facilitate the entry of minority political groups into parliament in Kenya, as a contrast of the majoritarian system, which in a deeply divided society favours one ethnic group, and in that way excludes others. Reynolds for example, argues that:

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[134] HM Binningsbo 'Consociational Democracy and Postconflict Peace. Will Power-Sharing Institutions Increase the Probability of Lasting Peace after Civil War?' paper prepared for presentation at the 13rd Annual National Political Science Conference, Hurdalsjoen, Norway, 5–7 January, 2005; available at http://www.prio.no/files/file48120_binningsbo_aug2006.pdf (accessed on 24 July 2009).

[135] Lijphart (n 61 above)25.

[136] Kinyanjui & Maina (n above)93.

[137] A Lijphart 'Electoral Systems, Party Systems and Conflict Management in Segmented Societies' in RA Schreirer (ed) *Critical Choices for South Africa: An Agenda for the 1990s*, 10-13.

> PR encourages political parties, both large and small, to create regionally, ethnically, and gender diverse lists, as they need to appeal to a wide spectrum of society to maximize their overall national vote.[138]

However, in order to be successful, when analyzing the strategies to fostering national cohesion, one needs to take into consideration the nature of the society and political history of the country. Kenya is a multicultural and multiethnic society in which the groups are sharply divided from one another, and their boundaries are historically defined along ethnic lines so that their differences are not expected to become a harmony. Besides, Kenyans , to a great extent, still identify themselves with their ethnic group, and this is exemplified by the patent ethnic basis along which Kenyans continue to vote.

It is for this reason that ethnicity cannot be removed, repressed, or ignored. It must be recognized officially in the political and public spheres and national unity should be founded and built on Kenya's diverse ethnic groups. It is necessary to institutionalize ethnicity in politics through crafting electoral systems that allow better representation of ethnic minorities, if we are to consolidate and institutionalize democracy.[139] Thus, it is arguable that proportional representation as a mechanism of consociational democracy would better ensure equal treatment of all ethnic communities in Kenya.

As Francis Deng asserts,

> Africa has cornered itself into rejecting ethnicity as an organizing concept in the process of nation-building. The challenge then is whether it is possible to reverse the mindset, so that ethnic groups which are African realities, could be seen in reverse light as resources or building blocks that can provide a sound foundation for a sustainable political and socio-economic development from within.[140]

The second strategy to managing ethnic conflict in contrast to consociationalism, seeks to move the focus of politics away from ethnicity towards other, less volatile, issues by fostering inter-ethnic cooperation and moderation.[141] Horowitz has been critical of Lijphart's democratic solution for divided societies. He argues that proportional representation does not create compromise or moderate attitudes, it rather strengthens differences. Therefore, he advocate policies which de-emphasize the importance of ethnicity in the political process and

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[138] Reilly & Reynolds (n 17 above).

[139] A Kenney 'Multi-Ethnicity and Democracy in Kenya: Ethnicity as a Foundation of Democratic Institutionalisation'(2006) at http://humanrightshouse.org/noop/file.php?id=9158 (accessed 10 September 2009).

[140] Francis M. Deng, UN Secretary-General's Representative for Internally Displaced Persons, stated in 1992; cited in Kenney, as above.

[141] DL Horowitz *Ethnic groups in conflicts* (1985) 628-651.

undermine the potential for mono-ethnic demands, such as the Alternative Vote or "preference vote" (see chapter two, section 2.3.1 The Plurality/Majority Systems). This system, he argues, would encourage politicians to seek votes outside of their ethnic groups.[142] Horowitz's contention, however, was rebuked by Lijphart who claimed that attempts to stimulate broad-based and moderate representation would prove insufficient for minority groups desiring a more distinctly representative voice in government.[143]

It is useful to review some of the debate about the efficacy of these two policy frameworks for managing conflicts in ethnically segmented societies as Kenya. First, Barkan challenges the effectiveness of PR in divided societies. He criticizes PR for weakening the accountability of parliamentarians to their electorate and strengthen party control over parliamentarians. Because Party List system of proportional representation requires one single constituency or very large electoral districts, individual members of parliament (MPs) elected from list party are not responsible for addressing the needs of specific localities and cannot be held accountable to the residents of a specific geographic constituency.[144] Hence, this List system can exacerbate many problems in the context of Kenya. Kenyan society is mainly rural and voting patterns are largely geographically concentrated. Furthermore, voters focus on the basic needs of their local community which might be sacrificed at the alter of national issues.

Second, though the alternative vote system promotes moderation[145], as a majoritarian system in nature, it may end up excluding some groups from government who may undermine the government, while the consociational system is proportional and opts for inclusiveness.[146]

Thus, a balanced electoral system is arguably the best. While academic advocates of PR such as Lijphart[147] would claim there is no need to deviate from full proportional representation, its practical applicability to Kenya can be questioned. Electoral systems that combine the advantages of single-member constituencies and simple-majority voting with those of PR resulting in links between MPs and their constituents, and fair representation rather than the under-representation of minorities, would be more effective for Kenya society. In shifting to a Mixed Member Proportional system, Kenya would not only harness the benefits of minority representation indicative of its PR component but also maintain levels of geographic representation and accountability inherent in its current FPTP system.

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[142] B Reilly (n 64 above).
[143] McGee (n 13 above).
[144] Barkan (n 22 above).
[145] DL Horowitz *A Democratic South Africa? Constitutional Engineering in a Divided Society* (1991).
[146] Kenney (n 143 above)**.**
[147] A Lijphart Constitutional design for divided societies (2004) 15 *Journal of Democracy*

3.4. Conclusion

This chapter has articulated how proportional representation electoral systems play a role in conflict management in ethnically divided society. First, it has been revealed that PR system has helped in conflict management in the post genocide Rwanda. Second, through an analysis of political history of Kenya, the research has demonstrated that exclusion of some group of the society in political life of the country is one of the factors that led to the post elections violence of 2007. Furthermore, it has been revealed that, the current electoral system in Kenya has failed to provide
a fair and equal representation of all significant groups in politics. Therefore, it is suggested that a shift towards a system that ensure representation of all groups in the society and promotes proportionality and at same time providing local geographic representation, would reduce ethnic conflicts in Kenya.

Finally, this chapter has concluded that Kenya can learn from the experience of Rwanda and South Africa which countries have adopted mechanisms of power sharing in their constitutions after ethnic and racial conflicts. It is imperative for Kenya to craft a new electoral system with wider representation and one that promotes power sharing as this fosters national unity and peace.

CHAPTER FOUR

ASSESSING THE IMPLEMENTATION OF PROPORTIONAL REPRESENTATION IN THE CASE OF RWANDA AND KENYA

4.1.   Introduction

Having analysed proportional representation in Rwanda as well as Kenya's electoral system, in the previous chapter, this section presents an examination of the success of the proportional representation in Rwanda against constitutional provisions on PR and its implementation aspect. The chapter then proceeds to analyse the likely success of the mixed member proportional system (MMP) in the prospect of Electoral Reform in Kenya.

4.2.   Evaluation of power sharing arrangements in Rwanda

In the aftermath of the genocide against Tutsi, Rwanda has adopted a new constitution which incorporates various solutions of power sharing in order to deal with the problem of divisive majoritarian electoral politics. Rwanda opted for proportional representation for its legislative power, particularly in the chamber of deputies. The principle of proportionality is applied in the distribution of 53 seats among MPs elected from closed lists of different political parties. Each political party has been receiving the seats in proportional of votes received in elections. However, independent candidates are also allowed to stand for parliamentary elections.

With respect to national building, PR in Rwanda promotes unity of Rwandans by motivating parties to create cross-ethnic and cross-regional lists in elections, because without this requirement, elections would never be anything more than ethnic census.

Moreover, the introduction of PR in the constitution of Rwanda has promoted the inclusion of all significant players in the political system of the country. The fair translation of votes cast in elections into seats has facilitated the entry of small parties in parliament. Moreover, small parties who cannot reach the threshold of five percent to be represented in parliament, may join the big party to form a coalition which give them the opportunity to gain power in parliament. In addition to that, PR electoral system in Rwanda incorporates positive actions policies such as reserved seats designed to compensate for historically disadvantages

communities. Precisely, the constitution provides for reserved seats for women in the Senate as well as in the chamber of deputies. People living with disabilities and youth have also been represented in the parliament. However, as is argued by some authors, the inclusiveness inherent in proportional representation system has been established as its main drawback because it increases party fragmentation, thus diminishing the opposition between parties.[148] One would argue here that opposition should not be associated with confrontational politics as some may tend to take it.

Proportional representation has also facilitated arrangements of power sharing and enabled most political parties to have a voice in the government. Apart from provisions of proportional representation, the constitution of Rwanda provide for other mechanisms of power sharing which cannot be found in a majoritarian "winner takes all" system like Kenya. One of the constitutional mechanisms seeks to ensure power sharing of political parties in the cabinet by limiting the ruling party in parliament upon the number of ministers representing it in the cabinet. Article 116 of the constitution of Rwanda stipulates that 'the majority party in the Chamber of deputies may not exceed fifty percent of all the members of the cabinet'.[149] Furthermore, the President of the Republic and the Speaker of the Chamber of deputies may not be members of the same political parties.[150] This power sharing arrangement will promote the checks and balances between the legislative and executive, and avoid the accumulation of all power in the hands of one party. However the salient point remains the political affiliation of the President of the Senate. The earlier evidence in Rwanda shows that the President of the Senate and the President of the Republic do not belong to the same political party. But there remains a need to have a clear legal provision in order to avoid the potential excess of power by the ruling party where the President of Republic and the President of the Senate might be members of the same party.

Though PR has facilitated the inclusion of different groups of the society in parliament hence reinforced national unity, it remains a fact that party list of proportional representation system in Rwanda uses one national constituency. This leaves too much power in the hands of national headquarters or leaders of political parties who may determine which candidates to include on the list and the order on which candidates will be ranked. In 2008 prior to parliamentary elections, RPF, PL and PSD held primary elections at regional party congresses before the establishment of the final list, which is established by national committees. The proposal of ranking of candidates on the lists from regional party level were

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[148] Stroh (n 82 above).
[149] Article 116 of the Constitution of Rwanda as amended to date.
[150] Article 58 of the Constitution of Rwanda as amended to date.

transferred to the national parties headquarter, but those recommendations may not be considered as binding by national leaders. In regard to candidates from small parties that may join the big party in order to secure some seats, there seems to be no clear regulations or laws on how they are chosen and ranked on the common list. One may argue that, despite the commendable conduct of regional party elections, the lack of a clear intra party law to determine on which criteria candidates are listed or how the regional elections of candidates are organized can lead to favouritism of some members of parties by the leaders and permanently exclude others from power which may be dangerous in a divided society and thus must be avoided.

Furthermore, it may be argued that party list system of proportional representation in Rwanda weakens the link between the elected MPs and voters. In order to develop a stronger geographical tie between MPs and electors, the parliament in Rwanda should learn a lesson from the ANC in South Africa, which assign their MPs to geographical constituencies. This will result in maintaining the current electoral system and its benefits as has been indicated while addressing the problem of lack of close tie between MPs and the electorate. In addition to that, a five per cent threshold is too high which decreases the chances that both small parties and independent candidates will win seats in parliaments. I would further contend that individual candidates are given the same threshold as political parties which sounds unfair to the former. As has been mentioned, not all Rwandan MPs are members of political parties and they do not go through the same facilities or hardships before being MPs. Thus it would make sense if individual candidates were given a lower threshold than political parties.

When examining the success of the proportional representation in Rwanda, one should mention that the constitutional guarantees are promising for an equal representation of all groups in Rwandan society. However, the legal framework and political systems changes are not sufficient for the success of democracy, the political will and commitment of political players and the whole society to implement those promises is the end goal for transition to democratic rule.

4.3.   The case for Mixed Member Proportional electoral system in Kenya

As presented in the previous chapter, FPTP system has failed to provide for fair representation for all significant groups in Kenya. However, while a consociational government (a proportionally constituted parliament) facilitates the inclusion of minority

parties in parliament, the detachment and lack of accountability of representative elected from party lists, render it ineffective in a divided society as Kenya. Given the inherent drawbacks of both plurality-majority and PR systems, a number of countries have changed electoral systems towards mixed systems. The most common switch has been from a plurality or majority system to a mixed system, and there is not one example of a change in the opposite direction.[151]

Mixed Member Proportional system seems attractive because it combines the virtues of majority rule (accountability of elected representatives) and proportional representation (inclusiveness and proportionality in representation). If implemented in Kenya, MMP will compensate for the disparities inherent in the current FPTP system, such as gerrymandering and wasted votes that have plagued Kenya's single-member district elections. With the incorporation of its PR element, MMP will also allow the inclusion of all sections of the society in parliament such as women, minorities, disabled persons and youth, thus promotes political stability.

Jorgen Elklit corroborates this by citing many advantages that MMP may bring for Kenya:

> (1)Parties which are underrepresented in the constituencies can to some degree be compensated for their underrepresentation. (2) Small, geographically concentrated parties can meaningfully stand for election in a limited number of constituencies. (3) Independent candidates with sufficient local support can compete for constituency seats. (4) Small and geographically dispersed parties, which can never win a constituency seat, can campaign for national (PR) ballots which will subsequently allow them to obtain a corresponding number of compensatory seats. (5) Restrictions on the formation of the (closed) party lists can be used to further the representation of otherwise underrepresented groups, e.g. by requiring that parties submit lists with both male and female candidates, often ordered according to the so-called zipping principle: a woman, a man, a woman, a man, etc. (6) Party leaders, who might risk losing in their constituencies can be given a political life belt, if they are also put on top of the party list.[152]

Here is, however, confusion about how to categorise Kenya's current electoral system. Some seems to believe that it is an MMP because it combines ordinary FPTP with some seats allocated proportionally. Though the constitution of Kenya empowers parliamentary parties to nominate 12 MPs in proportional to the numbers of seats obtained by every party in Single

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[151] Reynolds *et al* (n 26 above)23.
[152] J Elklit, *What Can Kenya Learn from Lesotho? Or: Something about Electoral Systems* (August 2008), at http://www.marsgroupkenya.org/pdfs/2008/09/Annex_2_B.pdf (accessed on 8 September 2009).

Member Districts elections[153], the system of Kenya does not have anything to do with mixed member proportional. The distribution of the 12 nominated seats reflects only the distribution of elected seats in the National Assembly, and is not based on percentage of the national vote. Thus, it cannot in any way provide compensation for underrepresentation in the Single Member District elections to the National Assembly, but the allocation of these seats only enhance the disproportionality already caused by the single member district results.[154]

Furthermore, section 33(1) of the constitution of Kenya prescribes that these nominated members are "to represent special interests" and following section 33(5) the Electoral Commission ensures "observance of the principle of gender equality in the nominations". However, these provisions are not clear on which special group to represent and which formula to use in allocating the seats. [155] Thus, in order to mirror the diversity of Kenyan society in parliament, Kenya should learn a lesson from Rwandan constitution that has enacted reserved seats for women, youth and people with disabilities in order to increase their representation parliament.

It is worth mentioning that Kenya has a history of appeals for the adoption of MMP.The MMP system was discussed in Kenya as part of the previous constitution review process. In 2002, the Constitution of Kenya Review Commission proposed the adoption of the MMP. The Commission proposed an assembly composed of 300 members in which 90 members would be elected on the basis of national list-PR system in addition to Kenya's existing 210 seats which would be filled on the basis of single-member constituency elections.[156] However, this proposal was never adopted by the parliament.[157]

The 2007 post election violence in Kenya has demonstrated that FPTP system distortions are an impediment to democracy in a divided society and can be overcome by an adoption of a system which includes at least some measure of proportionality in translating votes won to seats. Hence, lessons may be learned from Rwanda that proportional representation and power sharing techniques are crucial to create the atmosphere of reconciliation and foster stability in a post ethnic conflict society[158].

However, the case of Rwanda demonstrates that a pure list-PR system while providing for reconciliation and inclusivity may be criticised for generating representatives beholden to a

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[153] Section 33(3) of the constitution of Kenya.
[154] As above.
[155] As above.
[156] Constitution of Kenya Review Commission *The people's choice* (2002).
[157] IFES Final report (n 11).
[158] Barkan (n 22 above)58.

party and not constituents. In Kenya, where the electorate is still keen on a representatives beholden to a certain geographic area which they represent, the most effective solution would be the adoption of a MMP system. This will enable members of parliament to have an independent voice either as non-party constituency MPs or as representatives of a party directly elected by people from a specific geographical area, so that they are not beholden exclusively to their party leaders.[159]

It follows that, it is high time that Kenya began revising the winner-takes-all electoral system, and adopts more inclusive electoral system that take into account the diversity of Kenyan society. Thus, the adoption of a MMP system for its legislature, and together with the coalition government that encourages the cooperation among opposition parties, Kenya would be able to mitigate electoral violence and promote accommodation of all ethnic groups. However, in the absence of a complete transformation of the constitutional framework to ensure that there is adequate ethnic accommodation, sustainability in Kenya remains in doubt.

4.4.   Conclusion

This chapter has demonstrated that PR systems facilitate more inclusive parliaments than majoritarian systems or First Past the Post. In addition, the case study of Rwanda shows that PR and affirmative action strategies have facilitated the election of more minority parties, women and groups historically marginalized. It has further revealed that the threshold in Rwanda is high (5 per cent). This may, therefore reduces the chances of small parties to be much more represented in parliament and is much higher for individual candidates who have to face with the same burden on the same level of organised political parties. This chapter has also shown that the adoption of MMP system in Kenya would lead towards strong coalition government, as well as in a parliament including more women and representatives of ethnic minorities.

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[159] Murithi (n 95 above).

CHAPTER FIVE

GENERAL CONCLUSIONS AND RECOMMENDATIONS

5.1.   Overall conclusion

During our research, it has been understood that in deeply divided societies, exclusion of some groups in the political, social and economic life of the country can lead to ethnic conflicts and violence. With reference to the recent history of Kenya and the history of Rwanda before the 1994 genocide, this dissertation makes the point that majority or plurality electoral systems or 'winner takes all' contribute to the explosion of ethnic conflicts especially in deeply ethnically divided countries. It has been demonstrated that in multi-ethnic societies, when political parties organise themselves along ethnic lines and when the rules of the political game are 'winner- takes- all', the large ethnic group tend to exclude minorities from parliamentary representation. Such a situation engenders the feeling of permanent exclusion on the part of marginalised ethnic groups and lead them in seeking a voice through violent means. In Kenyan context, it was established that 2007 post elections violence was a reaction to history of exclusion that has been the hallmark of Kenyan politics. The Genocide against Tutsi in Rwanda was also a result of the politics of minority exclusion and total dominance of a large ethnic group that has been institutionalised by the majoritarian regime.

The challenge for post conflict societies is to build national cohesion by ensuring that all ethnic groups are meaningfully included in the political, economic and social life of the nation. To meet such a challenge, one may argue that an inclusive electoral system of governance is essential in management of ethnic conflicts and consolidation of democracy. In fact, no respect and protection of human rights can be secured by an exclusive system in a society divided along ethnic lines. Proportional representation and power sharing techniques that encourage cooperation of ethnics groups are more appropriate for such societies as has been demonstrated with reference to Rwanda.

It is against that backdrop that this dissertation has been aimed to see, among different electoral systems, which one can best help prevent and manage ethnic conflicts while contributing to the democratization process of concerned societies. With Rwanda and Kenya as case study, this dissertation addresses the question as to whether proportional representation can help manage ethnic conflict and consolidate democracy in countries divided along ethnic lines.

While the second chapter has dealt with the theoretical framework of electoral systems and their political consequences in divided societies, chapter three presented not only the power sharing mechanisms introduced in post-genocide Rwanda, but it also analysed the failure of the current 'winner take all system' in Kenya, in order to demonstrate in a comparative perspective the consequences of the two systems in two cases. Hence, it has been shown that PR system has greatly helped in more inclusion of small political parties into the political landscape of Rwanda. Furthermore, PR has facilitated the inclusion of all sections of the society in parliament such as women, people with disability and youth thanks to implementation mechanisms that have been associated with it. The distortions of First Past the Post elections results on the other hand have not facilitated fair and equal representation of all sections of the community in the process of governance in Kenya. Moreover, the Kenyan ruling elite has often used ethnicity to manipulate the electoral process in order to further its own political objectives. Political parties in Kenya are ethnic based and they tend to solely represent and protect the interests of their respective ethnic groups especially when elections are close by. It has been also shown that the electoral system in Kenya is based on electoral constituencies that are ethnically delineated which enabled the ruling party to manipulate constituency boundaries in order to retain power.

In chapter four, with close reference to Rwanda, it has been confirmed that, PR system has provided a foundation for peace, stability and fair representation of all significant groups in the multi ethnic societies. In the aftermath of the Genocide against Tutsi in Rwanda, PR has promoted national unity of Rwandans and facilitated reconciliation through guarantees of all group's inclusion in the political life of state. Though broad-based list party system of PR was crucial in the transition, it is not necessarily a panacea, for consolidating democracy. Party list has been criticized for weakening the link between members of parliament and voters in Rwanda.

Just as Rwanda has promoted reconciliation through electoral systems that shape power-sharing governments, Kenya too has the potential to move away from violence towards a government founded on accommodation of group rights. It has been argued in this dissertation that while implementing MMP would promote a proportional and inclusive parliament, it would also maintain solid links between representatives and geographic areas and give a broad range of voter choice, thus leading Kenya towards stable elections and credible democratization.

Finally, it is not easy to draw a straight comparison between Kenya and Rwanda electoral

systems. While comparison is always useful in terms of lessons learnt and identifying good practices, one must also bear in mind the applicable context of each country when attempting to do so. Thus, there is no one single electoral system that works for all divided societies, and optimal choice of electoral system depends upon factors such as the history and socio-political context specific to each country. Having said all the above, the following recommendation can be made *vis-à-vis* Rwanda and Kenya on one hand and *vis-à-vis* international and regional community on the other hand.

5.2. Recommendations

5.2.1. Rwanda

With respect to Rwanda, the following recommendations may be considered. First and foremost, it is recommended that the high threshold of 5 percent is too high so that it should be reduced as this limits the chance for small parties to get seats in parliament without resorting to party coalition during electoral periods. Furthermore, it seems almost impossible for a single candidate to gain more than five percent of the votes. Thus it would make sense if individual candidates were given a lower threshold than political parties. Likewise, I recommend for a reduction of this threshold in order to foster smooth competition for both small parties and individual candidates.

Secondly, though the legal framework on women parliamentary representation in Rwanda is promising, malaise implementation on the part of political parties may be a hindrance to democracy. There is a need to adopt legislation that provides for a 'zipper system' which will allow the alternation of men and women candidates on lists of political parties hence resulting in much more assurance for future women parliamentarians.

Last but not least, it has been suggested that the parliament of Rwanda should assign MPs to specific geographic areas in order to be responsive to the local needs, thus strengthening the prospects for democratic consolidation. Such an arrangement does not necessarily infringe on the constitutional provision that every Member of Parliament represents the whole nation and not just those who elected or nominated him or her or the political organization on whose ticket he or she stood for election, and that any imperative mandate is null and void as long as MPs right of vote remain *ad personam*.

5.2.2.   Kenya

Kenya is in need for electoral reform. Laws and institutions must, therefore, be designed to infuse a culture of inclusion. It is recommended that Kenya should consider the recommendations made by the Constitution of Kenya Review Commission in 2002 which the author conquers with. This includes having constitutional provision that allows the option for MMP system. The Commission further proposed an assembly composed of 300 members in which 90 members would be elected on the basis of national list-PR system in addition to Kenya's existing 210 seats which would be elected in single-member constituencies elections. Furthemore, a low two percent threshold should be adopted to give small minorities parties that are not geographically concentrated a reasonable chance to be represented in the national legislature.

In addition to the choice of electoral system, introducing electoral gender quotas and reserved seats can be considered an appropriate and legitimate measure to increase women's parliamentary representation. The constitution should consider provisions on reserved seats in order to compensate for historically marginalized and vulnerable social groups. In this respect, Kenya should learn a lesson from Rwanda which has adopted reserved seats for women and other marginalized groups in parliament. Like Rwanda, the Kenyan Constitution could provide for thirty percent seats to be filled by women in parliament. It should also consider the provision on representation of youth and disabled persons.

Gender quota can also be adopted by political parties in their internal regulations in order to increase the representation of women. However, this requires a strong law which contains provisions for the ranking order on lists. For instance, the alternation of men and women on parties' lists in order to increase the chances of female candidates to be elected. The duty thus falls on constitutional designers of Kenya's parliamentary election rules to facilitate the formation of a legislature that is reflective of the greater population. As this research has shown, a more representative legislative body has the potential to reduce violence, foster political stability and create a platform for reconciliation.

Furthermore, in order to prevent gerrymandering, it is necessary to have rules to check this malpractise which prevent the gerrymandering of electoral districts, so that electoral boundaries make it impossible for minorities to obtain a fair share of legislative seats. Electoral constituencies must be kept under review in order to take account of population

movement, and reorganisation should not be delayed to favour a government's party base.[160] Thus, there is a need for a set up of new constituencies which are based on equal population and the size of a region in order to ensure that all voters are represented equally and that all vote count.

Finally, albeit the very recent ethnic conflicts in Kenya, the unity still is possible along with ethnic diversity. Therefore, the unity should be founded and built on Kenya's diverse ethnic groups. Kenya should adopt a constitution which has provisions that ensure or promote the representation of all major interests in a political system. Thus, a mandated power-sharing governments which include all significant political parties instead of a government of national unity would work better for Kenyan diversity. In designing the new electoral system for legislative elections, Kenya has to consider the following factors that influence the quality of democracy. First, this should be as inclusive as possible by making it possible for as many divergent interests as possible to be represented. Second, an electoral system should aim at achieving the objectives of proportionality of seats to votes; accountability of MPs to constituents; stable government and conciliation of ethnic groups. Thus, MMP fulfill these aims within the Kenyan context and therefore Kenya has to consider adopting it.

5.2.3.   International and regional cooperation

It is vital for the international community, comprising of states and UN bodies, to co-operate in the response to ethnic conflicts arising out of democratisation process, regardless of where they are likely to occur. As is well argued by Goodwin-Gill 'every state is bound by the principle of international co-operation', so not only is it recommended but it is an international principle which binds states. Indeed, such co-operation may help address the reluctance of some political elites to push for changes that are most deemed to help their individual countries. Particularly, all African states should act as partners in responding to ethnic crisis engineered by policies meant to or likely to exclude a given portion of the population. This co-operation would be in line with the principles of the African Union[161], to which all but one African state belongs, which promote African unity, brotherhood and co-operation. It is high time that the international community stopped waiting for live clashes so that it offers its good offices.

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[160] BC Smith *Good Governance and Development* (2007)25.
[161] Preamble of the Constitutive Act of the African Union (2000/2001).

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