

**A PHILOSOPHICAL JUSTIFICATION OF INDIGENOUS RIGHTS
IN POSTCOLONIAL AFRICA:
A CASE STUDY OF THE REPUBLIC OF KENYA**

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ABSTRACT

A philosophical defense of indigenous rights in postcolonial Kenya is necessary and overdue. The case for indigenous rights is perhaps one of the most significant political questions facing the state of Kenya. Unlike in other postcolonial parts of the globe where the question has gained acceptance and mechanisms are in place to promote indigenous wellbeing, the question in Kenya as in other parts of the African continent has been met with stiff resistance from state governments and even some academics. Despite this resistance, several Kenyan peoples have affixed the word “indigenous” to their names. These are distinct peoples with different burdens originating from colonialism. On the one hand, the question involves whether or not indigeneity is meaningful in contemporary Kenyan politics. On the other hand, the question is if indigeneity qualifies as a legitimate moral basis for the allocation of special rights to specific groups in Kenya.

This thesis takes the position that indigenous rights are philosophically defensible in Kenya. Thus, the main objective of this study is to justify the claim that indigeneity is an identity with legal merit in Kenya as well as analyse key arguments that have been advanced both for and against the thesis that indigenous rights are indefensible in Kenya. To this end, I begin by analysing the concept of indigeneity. I explicate the meaning of indigeneity via its etymology and usage. I argue that it is the specificity of ties to a particular territory which defines indigeneity. On this basis, I conclude that indigeneity is a valid category in Kenya. Next, I examine three approaches to indigenous rights: Will Kymlicka, Dale Turner and James Tully. Their different viewpoints assist to illuminate the different sides of the complex question of indigenous rights and thus inform the discussion of the study. I use insights from these approaches to make a case for the legitimacy of indigenous rights in Kenya. I propose three different arguments for legitimatisation. These three arguments are established on: indigenous nationhood, historic injustices and, constitutionalism.

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CHAPTER ONE

ON THE QUESTION OF INDIGENEITY

“Identities are not primarily the private property of individuals but are social constructions, suppressed and promoted in accordance with the political interests of the dominant social order” *Texts of Identity*, Shotter & Gergen, 1994, p. 94

One of the controversial themes of postcolonial politics is the question of indigenous rights. This, indeed, is a subject on which there are many differences of opinion and emphasis. The question has emerged as a reaction of indigenous peoples to the horrors of colonialism and its monumental impact on contemporary politics. It is founded on the understanding that colonialism embedded in contemporary national institutional and legal structures imposed on indigenous peoples is responsible for their destitute circumstances within their current societies. Therefore, indigenous rights are about the relationship between three subjects: indigenous peoples, non-indigenous peoples and the state. Indigenous peoples see a divide between themselves and the other two as a specific form of institutionalised injustice that has never truly healed. Indigenous peoples see their transition from hitherto a self-governing people to one of marginalised communities today from a victimhood perspective. That transition was a long path through historic injustices that included forcible evictions, land appropriations, forced assimilations, and so on. Indigenous rights, *inter alia*, are intended to redress historic wrongs, stop the continuing victimisation of indigenous peoples from their current state, and secure some degree of autonomy.

The question of indigenous rights has been examined predominantly in non-African contexts in places like Australia, North America and New Zealand. The seriousness and complexity of the indigenous rights question has been immense enough to attract the attention of philosophy. Philosophers in these parts of the globe recognise the way colonialism and politics have interacted to negatively shape the political situation of indigenous peoples. Devoting

particular attention to the problems of the colonial experience as well as contemporary needs, their accounts have advanced new and differing ways to think about the relationship between indigenous peoples, non-indigenous peoples and the state. Indigenous rights have been defended or denied on grounds as diverse as liberalism, first occupancy, treaty rights, cultural relevance, and precolonial indigenous sovereignty. However, in similar postcolonial settings such as Kenya and, in fact, in Africa generally, the notion of indigenous peoples and indigenous rights has received considerably negative attention. What prevails is an effort to deny the entire meaning of indigenous identity and all its legal implications for claimant groups. There exists a clear unfriendliness towards indigenous claimant groups in Kenya and other postcolonial countries of the continent of Africa.

The Republic of Kenya is a semiarid East African country. It has a total landmass of 581,309 km² (224,445 sq mi). Kenya was declared a British Protectorate in 1895, a British colony in 1920 and achieved independence in 1963. According to the January 2017 census, Kenya has a population of approximately 48 million. The country is a picture-perfect representation of Africa's profound ethnic diversity. It is estimated that there is a total of forty-two indigenous nations in Kenya. There are five large ethnic groups. The largest and dominant of the five is the Kikuyu group that makes up about 18% of the population. Other large groups comprise the Luhya, Luo, Kalenjin and Kamba. According to statistics from Kenya's National Commission on Gender and Equality Commission (NGEC, 2014:7) the most marginalised groups are the Maasai, Endorois, Ogiek, Ilchamus, Sengwer, Nubians, Bajuni, Yiaku, El-molo, Boni, Orma, Pokomo, Terik, Dahalo, Suba, Watta, Turkana, and Samburu. These marginalised groups are the ones demanding indigenous rights in today's Kenya. Historian John Lonsdale (2008) records that prior to the British incursion, the territory that became Kenya was a stateless space of disparate indigenous nations. Each had its own territory and lived under their own institutions and customs. But to carry out the

colonial project, the territory had to be remade according to colonial interests. As in other areas of British colonisation, the focal point was on land. Treaties were signed with Kenya's indigenous peoples that dispossessed the original inhabitants of land rights and relocated them into reserves. Many peoples who prior to colonialism were self-governing and lived according to their own customs and institutions were all brought under one colonial state. The end of colonialism and the creation of the Kenyan state raised hopes of a return to indigenous self-rule which never happened.

Confronted by the harsh realities of political alienation and marginalisation, Kenyan indigenous peoples seek in indigenous rights a way of achieving political autonomy that can guarantee their collective wellbeing. Thus, indigenous rights implicate questions of state, property, sovereignty and constitutionalism. In the majority of cases, however, indigenous demands are not demands for a complete secession from their current nation state. As Ivison, Patton and Sanders have rightfully observed in their important work, *Political Theory and the Rights of Indigenous Peoples* (2000), "indigenous claims hardly entail separation or secession but instead a reconstitutionalising of the principles upon which indigenous-state relations are governed" (Ivison et al., 89). For example, in a Memorandum to the Kenyan Parliament dated July 1996, Ogiek indigenous peoples of Kenya pleaded with the Kenyan authorities using the following words: "help us live in our ancestral land and retain both our human and cultural identities as Kenyans of Ogiek origin" (Barume, 37). Their quest for a special relationship with the state has been a call to new patterns of belonging that curtail state sovereignty over them. It is important to underscore that the Kenyan indigenous battle for a recognition of their rights starts as early as the 1900s by the indigenous Maasai. The Maasai were the first to challenge their eviction from their homeland by the British in a colonial court in 1912. Under the pretext of the theory of the state, the court declared itself incompetent in dealing with the claim made by the Maasai that an expulsion from

their ancestral lands was unlawful. Kenyan courts have continued with this tradition of denying indigenous peoples claims to native lands based on collective ownership. Thus, the Kenyan government has continued with the colonial practice of forcible evictions of indigenous peoples from their ancestral lands. For instance, the Ogiek were expelled from the Mau Forest in 1993, the Endorois from the Mochongoi Forest in 1973, amongst others, in violation of their land rights.

Indigenous rights in Kenya are rejected for two main reasons. First, the Kenyan state questions the appropriateness and applicability of the concept of 'indigeneity' in Kenya. Like other African states, it is commonly argued that all African population groups within their current borders may count as indigenous. Accordingly, Kenya is unprepared to allot any analytical usefulness to the concept or accept it as a legal category with entitlements. Secondly, owing, in part, to the adoption of liberalism as a nation-building philosophy at independence, Kenya views such rights as discriminatory. Indigenous group rights contradict the liberal state which is committed to defending individual autonomy and equality of citizenship. A corollary to this last point has to do with the group appeal of indigenous rights. This understanding of indigenous rights as I demonstrate in the course of this chapter is in sharp contrast with the liberal framework of rights. Liberalism is principally committed to the right of individuals rather than collective rights.

In a quest to defend the liberal democratic structures of government imposed on her on the eve of national independence, the Kenyan government has been committed to an interpretation of the state which does not recognise either the genuineness of the precolonial territorial integrity of its different indigenous peoples nor the real problems deriving from colonial injustices to many indigenous groups such as forcible relocations, land appropriations and broken Crown treaties. This approach of governance seems to signify that the creation of the Kenyan state extinguished indigenous land rights and sovereignty. The approach also suggests that colonial historical

injustices have been superseded. The rigid stance against claims of indigeneity is nothing short of a national strategy to deny indigenous claimant groups a recognition that gives them many potential entitlements. By so doing, the government is able to circumvent any national obligations to indigenous peoples. This strategy, however, has proven to be ineffective. Many indigenous groups continue to struggle to regain seized ancestral lands and the right to live according to their distinct cultural style through the Kenyan legal system but with no success. Their helplessness to make their case within their state has led some of Kenya's indigenous peoples to use regional and international courts. The Endorois decision we study in the course of this chapter is a case in point.

The continuous demands for recognition of indigenous status in Kenya coupled with the history of discrimination and marginalisation that indigenous claimant groups continue to experience in Kenya necessitates the need for a philosophical examination of the meaning and justification of indigenous rights within Kenya's postcolonial politics. The relevant questions that need to be answered are many. Is the concept of "indigeneity" normatively significant in contemporary Kenyan politics? Are treaties of colonisation between the Crown and Kenyan indigenous nations normative grounds for territorial integrity and indigenous rights in contemporary Kenyan politics? Does the Kenyan nation-state have a historical responsibility towards Kenyan indigenous peoples who were victims of several forms of injustices under the former British colonial Kenyan state? Should Kenya's constitutional reasoning on indigenous claims be informed by the specific colonial experience of the Kenyan nation and culture? The answers to these questions are of significant importance to answering the fundamental question of this thesis: Is there a philosophical justification for indigenous rights in contemporary Kenya state?

Before beginning to respond to this question, it is important to say a few words about my methodology and the outline of my overall argument in this thesis. On the question of method, it

should be observed that an important problem for the philosophy of indigenous rights is the question of method. The literature shows that the dominant line of reasoning is grounded on liberal notions of rights and justice. Some liberal philosophers like Waldron as we shall see in the course of the thesis do not think that history should dictate the present rights of individuals or groups. But the question at issue is whether liberalism alone can be an adequate interpretive and normative tool for understanding indigenous rights. Given the historical dimensions of the indigenous issues, I do not think so. Therefore, I will approach the question the other way around, that is, from a historical perspective. This approach follows from the assumption that Kenya's history and the circumstances of its birth have in a very significant way contributed to its present state. Put differently, I assume that there are objective causal relations among historical events that determined the foundations of the modern Kenyan state. As in other parts of the continent, Western colonialism is perhaps the most decisive historic event on the Kenyan state. There is a direct relationship between colonialism and the current political marginalisation of Kenya's indigenous peoples. As I will indicate in the next chapter, a nation is understood here as a historical political entity. I see it as a historical product of an agglomeration of human actions throughout history. Consequently, this thesis investigates the question of indigenous rights in the Kenyan state by taking the nation's history seriously. The rationale for my adopting a historical method is predicated upon my assumption that it is not possible to expunge colonialism from Kenyan history. I think this is a better approach than others such as liberal approaches in the sense that this does not begin from assumptions that are divorced from colonial historic injustices. Following Turner's lead as indicated in the coming chapter, this approach seeks to understand Kenya's indigenous peoples within their own frame of meanings and history. I should emphasise that my appeal to history is not an attempt to relegate the entire question to the realm of history rather than

philosophy. Neither does it intend to be an adulation of any grandeur of indigenous precolonial Kenya. I understand history here from a Hegelian sense as a process moving towards the realisation of human freedom. This method, also, is not a purely descriptive exercise. On the contrary, my approach is intended as a logical interpretation of the historical evolution of the Kenyan state. It seeks to understand indigenous rights from the historical angle where it originates. This approach may be criticized as relativist; but it is focused on the truth of historical contextuality. What I recommend is an encounter between historical reality and philosophical reasoning. Accordingly, the hypotheses of my arguments in this thesis will be evaluated not exclusively on the basis of *a priori* reasoning alone as some liberal philosophers have predominantly approached indigenous rights. On the contrary, according to the method proposed here, my hypotheses are weighed on the basis of the concrete historical evidence. Indigenous peoples make claims with regards to territories with which they are historically linked. A historical approach can probe the veracity of such claims by examining the social and political organisation of different groups within history.

In light of this methodology, the argument of my thesis will proceed in the following way. The purpose of this first chapter is to challenge and loosen the hold of “African thinking” about indigenous identity, the position that all Africans are indigenous to Africa. To achieve this objective, this chapter is divided into two sections. The first part has two subsections. To set the discussion, I begin by examining carefully the meaning of the term “indigeneity”. This section shall examine indigenous identity in Kenya as part of the larger question of who is indigenous in Africa. I focus here on the argument that indigeneity is invalidated in Africa because all Africans are indigenous to the continent and the problem caused by essentialist approaches of defining indigeneity. I espouse a view of indigeneity that holds down indigenous identity to a meaning that is tied to both humans and specific ancestral homelands. I argue for the validity of indigenous

identity in Kenya on the basis of first occupancy rather than on fixed essentialist criteria. In the last part of the chapter, I examine indigeneity as the basis for indigenous rights Kenya. On account of the fact that indigenous rights are articulated using Western philosophical terms, the account in this third section decisively begins as an overview of the Western philosophical view of rights. For our purposes, I devote some time in this section on the notion of group and/or collective rights. Indigenous rights are understood here as group rights. In Chapter 2, having shown the meaning and significance of indigeneity for indigenous rights in Kenya, I turn to the task of examining three key philosophical arguments proposed by contemporary philosophers on indigenous rights. Each is exposed followed by a critique. My purpose here is eclectic: while I do not fully endorse any one of them, as I indicate, I find particular aspects from each of the arguments beneficial in developing the arguments in the closing chapter. In Chapter 3, building on ideas from the previous chapter, I offer three arguments in support of indigenous rights in Kenya. I will argue that indigenous rights in Kenya are philosophically justified on three main grounds : (1) On the basis of the territorial integrity and sovereignty of precolonial indigenous nationhood; (2) On the basis of reparation and/or restitution for the consequences of historical injustices to Kenyan indigenous people; (3) On the basis of the Kenyan indigenous people's customary law. These arguments, even though different, revolve around nationhood. The thesis concludes with a federalist constitutional recommendation as a reasonable constitutional model for the contemporary Kenyan nation-state.

1.1 The Meaning of Indigeneity

As in other African countries, indigenous right claims in Kenya are controversial because of indigeneity. This chapter thus has as its *point de départ* the question of indigeneity. It is on the basis of indigenous status that indigenous people claim indigenous rights. Indigeneity is presented as grounds for special status and relationship within a state. Thus, it is needless to say for anyone

interested in indigenous rights, indigeneity is the necessary starting point. But the precise meaning of indigeneity has proven to be more daunting than may be anticipated. A number of reasons have been advanced for the impasse on the meaning of indigeneity, in different contexts. However, it seems accurate to say that one of the main reasons stems from the political implications of the term. Amongst other things, acceptance of indigeneity would imply acknowledgment of historical injustices to indigenous people and the likelihood of curbing state jurisdiction over indigenous affairs, as well as the recognition of special rights for groups that self-identify as indigenous. Thus, the value of understanding the term cannot be overemphasised. But what do we mean by indigeneity or indigenousness? What does it mean to be indigenous? The etymology of the term tells us practically all we want to know about it. Etymologically, the term “indigenous” is from the Latin word “*indigena*”. This itself comprises two words: *indi*, meaning “within” and *gen* or *genere* meaning “root”. Hence, the term “indigenous” is translated severally as “born in”, “something that comes from the country in which it is found”, “native of”, or “aborigine”, in contrast to “foreign” or “brought in” (Annandale, 374; Barume, 24). Consequently, taken literally fully from its roots, the designation is the most appropriate to the original inhabitants of a given territory. The term refers to human groups inhabiting in a given territory from the earliest possible known times. To be indigenous implies one is the first or descended from the earliest inhabitants of the territory prior to colonisation. It is a bifurcated relational identity of peoples towards themselves and land.

The designation “indigenous” has been applied to many groups of people across the world since colonial days. The term has been defined in many ways and in various contexts in a manner that its meaning and uses shows some inconsistency and variability. Nevertheless, the definitions overlap and reveal a common theme. The main theme appears to be an overriding concern with those who are considered to be the “first occupants” to specific territories in relation to new comers

to the same territory. In “Indigeneity: Global and Local” Francesca Merlan submits that “indigeneity is taken to imply first-order connections (usually at small scale) between group and locality. It connotes belonging and originariness and deeply felt processes of attachment and identification, and thus it distinguishes “natives” from others” (Merlan, 304). What is vital to retain from Merlan’s definition is the emphasis on attachment and identification. A conspicuous characteristic of indigenous people’s identity is a strong attachment to their traditional homelands.

Historically, indigenous peoples across the world never identified themselves as “indigenous”. They never understood themselves as one national or global collectivity (Frideres, 320). Instead, these original inhabitants of colonised territories were known by different names at the time of contact. The question then becomes: what is the genealogy of the term “indigenous”? Simply put, it is an identity of the colonised in colonial relationships. It was created by colonialists as a relational category of identity and difference. Jerome Levi and Biorn David Maybury-Lewis have demonstrated how a similar word, “Indian” evolved in the North Americas. They hold that:

It was the European invaders of the Americas who, through a famous confusion, started to refer to the inhabitants of the new world indiscriminately as Indians. The Indians for their part had little sense of possessing common characteristics that distinguished them from the Europeans. Their Indianness was a condition imposed upon them by the invaders (Levi & Maybury-Lewis, 207).

That is, “Indianness” or simply being Indian is an identity assigned by the colonizer. This confirms Chris Weedon’s observation that identities are socially, culturally and institutionally assigned and forms of identity are often internalized by the individual who takes them on (Weedon, 2004). Hence, indigenous is the identity of the “Other”. It is not a people’s own self-identification. It is rather an imposed representation from the colonising culture to distinguish natives from settlers.

However, some have argued that indigenous identity should be understood beyond mere imposition of labels of difference. Indigenous, they argue, suggests a lack in human capacities and civilisation. They contend that the identity is representative of a long tradition of structuring reality in terms of dichotomies and binary oppositions common in Western metaphysics (Iverson et al., 147). One feature to note in binary opposites is that they are rarely equal terms. While the first is often defined positively, the second always carries a negative or pejorative connotation: civil/uncivil, white/black, superior/inferior, to cite but a few. For Chris Weedon, indigeneity was meant to cement “a hierarchization of the races in which the white, Caucasian body was placed at the top of the scale” (Weedon, 16). Indigeneity connotes inferiority and backwardness. Within the colonial setting, indigenous meant all that was different from the modern European. To paraphrase Michael Dodson (1994), the indigenous person was fundamentally a being in possession of all the physiognomies of the prehistoric European: a being lacking a social order and law. In modern political discourse, indigenousness is a form of identity within the state. As David Maybury-Lewis has underscored, “indigenous peoples are defined as much by their relations with the state as by any intrinsic characteristics that they may possess.” (Maybury-Lewis, 54). In “settler societies”—i.e. former European colonies that are now independent states with European descendants forming the greater part of the demographics—indigenous identity is not a debate. In these societies, they are specifically all those of non-European lineage: Aborigines in Australia, First Nations, Inuit and Métis in Canada and Indians in the United States. The Métis Nation are descendants of a mixed ancestry, usually people born of relations between First Nations and Europeans. As a result, the indigenous identity of The Métis Nation remains a matter of debate in Canadian politics. In postcolonial non-settler societies such as Kenya, indigeneity remains a very contentious question.

1.1.1 The Indigeneity Debate in Postcolonial Africa

Like other parts of the world, Africa is also a postcolonial society. Unlike the others, however, with the exception of places like South Africa, most of Africa lacks a large settler population. The absence of a settler population has made the question of indigeneity very problematic. The fundamental question is whether or not an “indigenous identity” is valid in Africa and a corollary question is whether “indigenesness” *per se* should be used as a valid identifier for certain tribal groups with distinctive histories and relationships to given territories as a basis for recognizing special rights. There have been major attempts to settle these questions but the definition and applicability of the term ‘indigenous’ has remained highly contentious in the continent. A popular view against the concept is that all Africans are indigenous to the continent and should have equal rights. If the idea of an “indigenous African” at the simplest terms means the recognition of indigenous rights, then it should come as no surprise that the consequence of denying a valid indigenous identity means also a rejection of indigenous rights. Consequently, indigenous peoples have not regained appropriated indigenous lands seized in the colonial period.

The postcolonial state has also been complicit in denying indigenous rights. As a matter of fact, “formal decolonisation meant that for many indigenous peoples one set of oppressors had been replaced by another” (Keal, 8). In other parts of the globe, indigenous identity claims are rooted in the context of the settler-native relationship of the colonial state. Bonita Lawrence has rightfully observed that indigenous identity is “deeply embedded within systems of colonial power” (Lawrence, 1). Thus, the very term *indigenous* must first be understood as a colonial identity. Mahmood Mamdani’s exploration of Africa’s colonialism evocatively captures the way in which identities were forged in the continent and how indigenous right problems emerged. Mamdani refers to Africa’s identities as colonial constructs and legal inscriptions from the

racialized logic of the African colonial state. For Mamdani, the colonial state was essentially a bifurcated state because it was structured on a series of distinctions. The first distinction was the distinction between ‘races’ and ‘ethnicities’. Each lived and operated in a different legal universe. The races were governed using civil law and its members, the citizens, formed the civil society. On the other hand, the ethnicities were excluded from the civil law and society. The members of ethnicities or the subjects followed their customs. The second distinction was the distinction between two types of persons: indigenous and non-indigenous; i.e. natives and non-natives. Rights belonged to the non-natives, not the natives. Even the civil society was racially constructed between citizens and subjects. The colonial state in Kenya, for example, was split in two: the White Highlands were reserved for Europeans settlers and indigenous people lived in assigned reserves.

From the foregoing, it becomes evident that indigenesness was a colonially assigned identity upon the original inhabitants of a territory. It was a relational identity, an “Other”, the one who is different from the identity of a White settler. In the colonial state, the notion was a comprehensive identity for different groups of Africa’s native people. That to say, the term applied to all non-Western peoples found in colonized territories, irrespective of whether or not they had been born there or were newcomers. This “umbrella” understanding of indigeneity is the basis of the popular view that all Africans are indigenous to the continent and deserve equal rights. Importantly, what is implied in the view is that indigeneity merits legitimacy only in terms of native-settler relations. It means that indigeneity is nothing more than a relation to non-indigeneity.

I do not share the position above. I think that the impression that indigeneity is nothing more than a relation to non-indigeneity is deeply flawed. As the etymology of the word suggests, the validity of indigeneity does not require the existence of another group of people. If indigenesness is an identity associated with first occupancy to a particular territory as we defined

above, then it is fair to assume that one has this identity simply by virtue of birth or genealogical relations. I am, therefore, of the opinion that the popular view is problematic. I will show this from both a semantic and a historical vantage point. Semantically, the first error in the argument is its 'continental sense' of indigeneity. One salient characteristic of all precolonial settings is its cultural nationalism: people belonged to different cultural and autonomous nations. Each nation had its own defined territory where they exercised sovereignty. As Brian Barry has brilliantly submitted in his *Culture and Equality* (2001), cultural nationalism means that people belong to different nations as animals belong to different species. The mistake of the continental understanding of indigenous identity, I think, is that it appeals only to common ancestry while overlooking the specificity of territorial belongingness of different tribes and peoples that originally occupied the land prior to the colonial state system. But it is a truism that before colonialism happened upon the continent, different African peoples understood (as they still do today) that they belonged to different tribes and specified geographical territories. Colonialism distorted the African social order by its forceful movement of peoples and the erection of artificial boundaries between different peoples. As Dwight Newman has rightfully pointed out in his "The Law and Politics of Indigenous Rights in the Postcolonial African State", the problem with the postcolonial African state is that it is "established around rigid borders, essentially those of the colonial grid, that had little regard to prior existing communities and identities and not even any particular regard to material and physical realities" (Newman, 70). This constitutes a big problem.

The question therefore becomes: how then are we to understand indigeneity in the African context? We can respond to this question by looking at indigenous people's perception of themselves and the rationale behind their claims. How do indigenous people perceive themselves? In *Rights and Status of Indigenous Peoples* (1999), Siegfried Wiessner writes that indigenous

peoples are those who self-define, “as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially, and/or economically distinct from the dominant groups in society” (Wiessner, 115). In the words of Taiaike Alfred and Jeff Corntassel, “indigenous” means “indigenous to the lands they inhabit, in contrast to and in contention with the colonial societies and states that have spread out from Europe and other centres of empire” (Alfred & Corntassel, 597). What is critical to note from these definitions is the link between indigenous people and their ancestral homelands. Their ancestral homelands are markers of their identity and crucial for their survival. They claim indigenous status on the basis that they are the original inhabitants of these territories. We should point out that the link between identity and land is not particular to indigenous people. Individuals and communities commonly associate their identity closely with their country of origin: I am a Canadian, I am a German, I am a Canadian of Irish origin. People don’t commonly identify themselves from a continental view: I am a European, I am an African, unless it was necessary to do so. This latter identification, as it can be seen, conveys a certain degree of vagueness not present in the first case.

For instance, Botswana’s Bushmen or the Indigenous San do not claim to be indigenous to the entire African continent, Southern Africa or even Botswana. They claim to be indigenous only to the Central Kalahari Desert. Similarly, the Maasai claims are based exclusively on Maasai traditional lands. Indigenous claims are tied to specific ancestral territories and traditions. Consequently, proponents of the position that all blacks are indigenous to the continent run into a fallacy of division when they disregard territory and focus entirely on colour or blood ancestry. If the reasoning of that argument is pushed a little further, their logic suggests that it would be possible that the present writer of Cameroonian origin can lay a claim of indigeneity in Kenya or anywhere else within the large continent. This is obviously not possible because indigeneity is

not just about identification with ancestral lands. Importantly, it means having territorial rights. It is important to underscore here that the term “territorial rights” is employed here to describe rights of territorial jurisdiction as well as rights of access to natural resources and border control. I am actually of the view that a “territorial right” or simply the right to land is an important precondition for practically all other rights. In his *Metaphysics of Morals*, Kant expresses my view in a much better way. According to Kant, “all human beings are originally (i.e. prior to any act of choice that established a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (apart from their will) has placed them” (Kant, 262).

Another serious problem with the view that all Africans are indigenous to the African continent can be seen from a historical viewpoint. This position does not address the underlying issue of why indigenous peoples are claiming this identity. The view, for instance, does not take into account the many forced displacements of specific groups of peoples in the colonial state. By so doing, this position privileges the present at the expense of the past. As I will argue in the third chapter of this work, to hold such a view is to disregard and bury approximately a century of colonial historic injustices committed against many indigenous peoples who continue to suffer the effects of these historical wrongdoings. Even most importantly, to hold that view would be tantamount to losing sight of the necessary discursive spheres in which indigenous identity is articulated and indigenous claims are to be comprehended. If our starting point is the premise that indigeneity is a relational identity between people and land, then it is reasonable to presume that there are indigenous peoples all over Africa just as they are in different places around the world.

There are a number of possible objections that can be brought against the view of indigeneity founded on first occupancy as defended here. Philosophers like Margaret Moore (1998) are opposed to this view. Moore, for instance, contends that human migration is and has

been extremely common. This makes it hard to determine with certainty “who were here first”. Consequently, she maintains that first occupancy is indeterminate. I admit that there are legitimate reasons for groups to falsely claim indigenous identity. The quest for greater political participation in a state or the desire to obtain some economic benefits that accompany indigenous status are some conceivable reasons. However, my view is that this concern should not be pushed too far in the absence of a rival claimant group over the same territory. Also, indigenous peoples usually have a historic political relationships with their states and other peoples . Hence, it can be agreed that these are real facts that can be effortlessly established and cannot also be easily manipulated.

A weighty objection to invoking first occupancy as the basis of indigenous identity has been offered by the legal and political philosopher Jeremy Waldron. In “Indigeneity? First Peoples and Last Occupancy” (2003) Waldron offers an extensive critique of indigeneity. He essentially asks what is special about “indigeneity” through a series of questions: “What exactly does it mean to describe a people as the ‘indigenous’ inhabitants of a land”, “Why is indigeneity important? “What principles or legal or political ideas does indigeneity invoke, which explains its importance?” (Waldron, 55-59). For Waldron, there is nothing particularly special to be admired in indigeneity. On the contrary, indigeneity, he argues, should be seen as flawed because it creates a problematic bi-cultural reality in contemporary society—“first occupancy” and “prior occupancy”. Indigeneity according to Waldron is divorced from the liberal principles of freedom and equality of people, or the sovereignty of self-governing nations (Waldron, 81). For Waldron, the notion is a “volatile substance” with a dangerous logic used by indigenous peoples to privilege themselves over others in society. We shall return to evaluate Waldron’s argument later in the thesis. Our goal now is to examine another problem for indigeneity in Africa, namely, essentialism.

1.1.2. The Essentialist Problem in Definitional Approaches

The complexities of defining indigenous peoples in Africa has also been constrained in part by the essentialist ideologies of some international instruments. As we have already discussed, the concept of indigenous peoples originally developed in colonial settings. In contemporary times, however, the term has been shaped significantly by United Nations instruments. A common feature of the definitions that have emerged from this area is what I shall call the ‘essentialist problem’. By the essentialist problem, I mean the search for a single and precise definition of “indigenesness” that applies uniformly to all known indigenous groups. “Essentialists” as Sylvain Renée (2014) has underscored, “view a category of persons as having a stable set of traits that are required for inclusion; they therefore think of contemporary members of indigenous groups as linked to their ancestors by those shared traits” (Renée, 252). It is a fact that indigenous peoples have a number of similarities in common. But it is equally important to acknowledge that indigenous peoples come from many nations and varied traditions. As James Frideres points out, indigenous “identity encompasses an enormous diversity of people, groups and interests located within varying socio-political, economic and demographic situation”. They “do not make up a single-minded monolithic entity, speaking with one voice”(Frideres,314). Regrettably, several definitional attempts of indigenous peoples in Africa have followed the essentialist path taken by some legal experts of the United Nations. Merlan labels these kinds of definitions as “criterial”: conditions, that enable identification of the “indigenous” as a global “kind” (Merlan, 305).

The legal scholar Benedict Kingsbury calls these “positivist” approaches to indigeneity. This approach, according to Kingsbury treats ‘indigenous peoples’ as a legal category with precision so that for operational purposes it should be possible to judge whether or not, solely on the basis of the definition, who is having a particular status, can claim a right or assume a particular

responsibility (Kingsbury, 103-105). The intention is to formulate a single, one size fits all definition of indigeneity. A good example of the criterial definitions is provided by the UN Special Rapporteur, José Martínez Cobo (1986). According to Cobo, indigenous people:

Are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. (Cobo, 5, par.379).

This is a general definition based on abstract principles. Here we have varied criteria brought together to achieve some kind of universal applicability. As the definition shows, Cobo's aim is to describe a *certain kind* of people. Similar kinds of definitions are offered by John Bodley (2008), James Anaya (1996), ILO convention no.169, to name but a few. The problem with these types of definitions become immediately visible when one moves from abstract to application. The assumption inherent in this oversimplification is the false idea that indigenous peoples globally have a uniform colonial history and experience. But this is misleading. Indigenous identity is not a stable or uniform entity. They are many and different with each reflecting a given historical and socio-political universe. Thus, there is no single group that can fit into Cobo's formula perfectly.

The pre-invasion and pre-colonial condition, for instance, implies that for Cobo, indigeneity means a necessary link to the phenomenon of Western colonization and invasion. But does this mean that native peoples on territories that were never ceded by treaty cannot claim indigenous status? British Columbia in Canada, for instance, is a unique province whose territory was never ceded through colonial treaties or war by its original inhabitants. Can it be said that there are no native peoples in the province of British Columbia in Canada? Is it possible, for instance,

to deny indigenous status to the Tsilhqot'in Nation for the same reasons? It would be certainly inaccurate. Cobo's definition equally requires a continuous relationship between the people and their ancestral lands. It is also hard to see how many indigenous people can meet this given that most of them have been victims of land dispossession and forced relocations in the course of history. Cobo also suggests that indigenous people are resolute to preserve their culture and identity. This is true but can be a potential problem for groups whose cultures were effaced through forcible assimilationist schemes, conquest and subjugation. With these obstacles, it is evident that Cobo's criteria could inadvertently exclude a number of genuine indigenous groups. African nation states have used these limited standards to deny indigeneity claims to many peoples. Cobo thus instantiates the error in formulaic approaches to indigeneity. Cobo's account shows that the indigenous essence cannot be exhausted in a single definition. As Taiaiake Alfred observes, "demands for precision and certainty disregard the reality of the situation: that group identity varies with time and place" (Alfred, 85). Similarly, Kingsbury argues that the error with positivist approaches is that they run the risk of reducing the "fluidity and dynamism of social life to distorted and rather static formal categories" (Kingsbury, 414-57). He proposes a "constructivist" approach.

Kingsbury's "constructivist" approach begins from the premise of first occupancy. Kingsbury concedes that "indigenous peoples are distinguished from other numeral minorities on grounds of having been lawful occupants of the land before European colonisation, having sustained close cultural ties with particular land over many generations..." (Kingsbury, 446). While this is certainly a fundamental condition, Kingsbury admits that several contingent factors define various indigenous peoples. These contingent factors vary for each group. Therefore, the notion of indigenous people cannot be treated as one strictly defined by universally applicable labels as suggested in positivist definitions. This is in my opinion a better approach because unlike

the positivist, this is not a closed system. That is, it is the specific facts of a people and their relationship to their current states that define whether or not they are eligible for indigenous status with appeal to first occupancy. Kingsbury's "constructivist" approach is evidently anti-essentialist. According to Jerome M. Levi and Biorn Maybury-Lewis (2010), the absence of a universal definition of indigeneity shows that indigenous peoples instantiate what is formally known as a *polythetic* category. This concept draws on the Wittgensteinian idea of family resemblances. According to Kenneth Baily, a polythetic type is one that "has no unique set of defining features. It can be formed from many different combinations of values on the component variables, hence the name polythetic" (Baily, 294). Levi defines the meaning of a polythetic entity using the relationship between national flags and political parties. According to Levi, polythetic is a situation like this : "While the existence of different political parties shows that not everyone agrees about what their country stands for, everyone does agree that their country's flag stands for their country (Levi, 251). For instance, the Pygmies of the Congo Basin Forest in Africa are classified indigenous. They have no relation with the Maasai of Kenya who are also classified under this same category. Nevertheless, the two share a number overlapping family resemblances to each other such as special relationship to ancestral lands, nomadic lifestyle or similar colonial histories.

In light of the foregoing analysis, my view is that it is inaccurate to dismiss indigenous identity claims in Kenya based on essentialist definitions. In our discussion, we have sought to show that indigeneity is an identity based on first occupancy to a land. Indigeneity is tied to specific lands, not the continent. Indigenous identity is related to a specific territory and has a very special relationship to the territory. The Maasai of Kenya, for instance, are properly speaking indigenous only to their traditional Maasailand and not the entire nation called Kenya. Indigenous identity as a relationship to specific territories is the understanding adopted in this essay. Since

colonial days, Kenya has struggled with indigenous rights claims. As a postcolony, Kenya continues to face the same problem. In the following paragraphs, we shall analyse this problem.

1.2 Indigeneity As The Basis For Rights

I want now to turn to the third major aspect of this first chapter, namely, indigenous rights. Until now, we have been engaged with the development of the meaning of ‘indigeneity’. I have refuted the idea that indigeneity is meaningless in Kenya. My argument is that ‘indigenous’ is an identity defined in relation to first occupancy to a specific territory. The whole purpose of that development was geared towards a defence of indigenous rights in Kenya. As the name implies, these are rights of indigenous peoples. These include rights to ancestral lands, rights to resources and other non-material rights. From the foregoing discourse on indigeneity, it should be clear that what indigeneity actually means is that indigenous peoples see themselves as different from others in the mainstream society. Specifically, they comprehend themselves as victims dispossessed of their lawful territorial rights to ancestral lands. Consequently, the collective tenor of indigenous right demands has been demands to forms of political autonomy or right to self-determination.

In seeking to determine what justification, if any, the concept of indigenous rights can and/or should have in postcolonial Kenya, it is first necessary to clarify the meaning of the concept of indigenous rights. On this task the general philosophical understanding of rights is found to be especially helpful. The question then becomes: what is the meaning of a right? Generally, a right is understood as a person’s entitlement to something. The right of an individual involves a corresponding duty of others. In his *The Morality of Freedom* (1986), Joseph Raz expressed this as: “X has a right” if and only if X can have rights and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty (Raz, 166). This definition shows that there is a normative correlation between rights and duties.

Philosophers also distinguish between legal rights and moral rights. A legal right is a right created and recognised by the law of a state. That is to say, X has a legal right if X is a member of a society whose legal system gives X this or that right and correspondingly imposes this or that duty to X. For instance, Cameroonian citizens twenty years of age or older have a legal right to vote. Their voting rights derive from the state and they owe this duty to the state. On the contrary, a moral right is a right one enjoys simply by being a human being and it derives primarily from moral reasons. The right to life is an example. A moral right according to Raymond Frey is:

A right which is not the product of community legislation or social practice, which persists even in the face of contrary legislation or practice, and which prescribes the boundary beyond which neither individuals nor the community may go in pursuit of their overall ends (Frey, 7).

It should be clear from this exposition that moral rights are the more fundamental of the two. They are pre-positive and pre-legal rights. They exist, regardless of their recognition in society. As such, they come before and override other kinds of rights. Therefore, it is not uncommon to see that a moral right is offered as a reason for legal recognition in situations where there are no legal rights.

Indigenous rights follow from the above understanding of rights but differ in the sense that they are “collective” or “group”, not individual. The above framework is premised on the fact that individuals are moral agents capable of moral obligations. Accordingly, rights belong to individuals. But in an indigenous rights framework there is a shift in the concept: rights are held as groups. The individualistic language and understanding typically associated with rights places the concept of group rights in a little tight corner. The questions are: if groups lack moral agency how can they be conceived of as right-holders? What criteria must groups fulfil to qualify as right-holders? There are no simple answers to these questions. Consequently, many reject the very idea that groups can possess moral rights. However, philosophers in support of group rights argue that

right-holding groups should be understood as unified moral entities. For proponents of group rights, there may be justifiable reasons to assign a similar moral status to certain (not all) groups as with individuals (Jones, 1999; French, 1984; Newman, 2011). According to these proponents, the group or collectivity in question must meet two important criteria to be able to bear rights: unity and constancy of identity. The aim here is to meet similar conditions that are traditionally associated with an individual right-holder. If a group meets these conditions, then the group's right, like an individual right, will be conceived as a right held by a single unitary entity. Put differently, a group that has fulfilled these criteria is seen as possessing "its" right rather than "their" right.

Peter French offers a good example of groups capable of a right-bearing status. French (1984) distinguishes between "aggregate collectivities" and "conglomerate collectivities". The former is a mere collection of people such as a crowd or a collection of people by a beach. For French, the structure of an aggregate is such that if moral rights or moral responsibility were assigned to it, that would be reducible to the moral rights and responsibilities of its individual members. Thus, an aggregate does not qualify as a rights bearing group. The conglomerate collectivity, on the other hand, is a unified entity. It has a stable internal structure, an identity and has a decision-making ability. According to French, "what is predicable of a conglomerate is not necessarily predicable of all of those or any of those individuals associated with it" (French, 13). The Red Cross and US Congress are some examples of a conglomerate collectivity according to French. The moral rights and responsibilities of a conglomerate collectivity are not reducible to that of its members. That is, if the Red Cross, for example, acquires or sells property, the Red Cross acts as an agent in these transactions and is not reducible to the individual members who are currently associated with it.

In light of the above, a group right signifies a right held by a group as a group rather than by its individual members severally. The foregoing analysis also shows that proponents of group rights

see no real tensions between individual rights and group rights as it might seem. It is not a binary relationship. Instead, there exist some commonalities. The right of a nation to self-determination is a common and concrete example of what a collective or group right represents. Collective rights have also found powerful expression even from liberal philosophers like Joseph Raz (1986). Raz's view is tied to his interest theory of rights, a version of which discussed earlier. A word of caution is perhaps needed here: the point is that the collective conception that we have discussed thus far should be understood separately from Raz's interest theory of rights. The great appeal of his view, as I see it, is his appeal to interests. Both individuals and right-holding groups usually have wide-ranging interests. This could include interests in land, religion, culture, language, values, among others. Thus, in one way or another, Raz's interest theory may seem unavoidable. Raz argues that:

A collective right exists when the following three conditions are met. First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty (Raz, 208)

The last two conditions, according to Raz, distinguish collective rights from individual rights. From this and Raz's view of rights seen earlier, it can be seen that Raz is supportive of something "in between". That is, Raz is supportive of rights which acknowledge the interests of individuals as individuals and also the interests of individuals as members of a group. By Raz's understanding, group rights exist if a group holds a collective interest that is sufficient to ground duty. An illustration may be helpful. Let us imagine the case of a Uranium Company in a certain town X. The mining activities of the company pollutes the water sources of the town, exposing the inhabitants to radioactive waste. The question for Raz to ask in this instance would be succinct: are the collective interests of the inhabitants of town X endangered by mining activities of the

company? For example, is their water contaminated with radioactive waste? If the answer is yes, then in Raz's estimation, there is evidence of a collective interest with sufficient moral weight to justify the imposition of duties on the Uranium company. In other words, citizens of town X have a collective right to hold the company responsible. For Dwight Newman (2011), to say that a collectivity is in possession of a moral right implies "an entitlement or justified claim whose justification does not depend on whether any legal or political system recognises the right" (Newman,11). That is, the community's right is essentially moral and non-intuitional. Collectivities that can hold such rights are those that stand between individuals and the larger political community. These comprise families, cultural groups, and religious groups as examples.

It is against the foregoing backdrop of collective rights that indigenous rights are understood. From the above analysis, indigenous rights might be understood as rights that defend and protect the collective moral interests of indigenous groups. It need not be stressed that there are competing interests between indigenous and non-indigenous peoples in a liberal state in which the minority status of indigenous people puts them at the disadvantage. Indigenous rights afford indigenous peoples powers and privileges to offset the gap. However, owing to the fact that each indigenous group has its own unique historical and cultural experience, there exist no single or all-encompassing definition of what indigenous rights are. However, whilst significantly different in relation to peoples, place, and history, there is a common denominator that qualifies these different peoples for rights. It is called indigeneity. Hence, Anthony Connolly defines indigenous rights as:

The rights aspired to, claimed, held, and exercised by indigenous peoples qua indigenous peoples—that is, by virtue of them being indigenous peoples and not members of other groups, such as the class of citizens of a nation-state or the class of minority groups within a nation-state. As rights, indigenous rights may be conceived in terms of claims to do with some human fundamental interests (Connolly, 2009).

Connolly's definition brings out three distinctive features of indigenous rights. First, the modifier "indigenous" indicates two things; namely, that indigenous groups are the specific right bearers of indigenous rights and that indigenous rights seek to redress several colonial forms of injustices. Indigenous rights therefore include such rights as rights to land restitution, rights to natural resources, rights of language use and rights to live according to specific cultures. Secondly, indigenous rights are group rights, not individual rights. In accordance with a collective rights framework, indigenous rights are held by and for the indigenous group and not by any specific individual within that group, as an individual. Indigenous rights protect those interests that are inevitable for indigenous people's wellbeing as members of a group. Thirdly, indigenous rights are invoked within given moral, political, or positive legal contexts. As Connolly puts it, this means that indigenous rights "are claimed against the background of a set of norms maintained by a relevant community of discursively interactive agents" (Connolly, xvi). In the majority of cases, indigenous demands have principally been claims of the right of some form of political autonomy. As we saw earlier in the case of the Ogiek indigenous demands in Kenya, for instance, the demand for indigenous autonomy and/or entitlements is designed to prevent or, at least, mitigate government and other non-indigenous group *interference* in the activities of indigenous cultures.

In Lockean terms, indigenous rights can be seen as natural rights of property. This is of significant importance to indigenous people given the centrality of indigenous lands for their collective survival and wellbeing as a people. In Locke's *Second Treatise* (ST), Locke argues strongly in terms of a native right to property that succeeds several generations. Locke argues that:

The inhabitants of any country who are descended and derive a title to their estates from those who are subdued and had a government forced upon them against their free consents retain a right to the possession of their ancestors..., the people who are the descendants of, or claim under, those who were forced to submit to the yoke of a

government by constraint have always a right to shake it off and free themselves from the usurpation or tyranny which the sword has brought in upon them...[ST§192].

This passage brings us to an important dimension of indigenous rights, namely, the nexus between rights and history. Clearly, Locke's argument above is historically charged with terms like: "descended", "ancestors", and "descendants". The argument is premised on the same idea indigenous peoples advance as the basis for a special status within their nation-states: first occupancy. Locke's point is that indigenous peoples have rights on grounds that they were the first occupants of the land. These rights, according to Locke, remain theirs so long as they are not freely transferred to others. When demanding rights and sovereignty over territories, indigenous people do so in the name of first occupancy. For instance, in *Joseph Letuya and Others v. The Attorney General of Kenya* (1997), the applicants, Kenya's indigenous Ogiek people, established their case on grounds that the East Mau Forest territory has been their homeland since time immemorial, long before the creation of the Kenyan State: "before the birth of our nation, our ancestors were living in the Mau Forest as food gatherers and hunters" (Barume, 96). Indigenous people state their demands in the form of what is known in the Nozickian framework (1974) as "historical rights". Territorial demands based on historical rights is not unique to our time. In Tacitus' *Annals of Imperial Rome*, the Spartans present a series of petitions to Emperor Tiberius. The Spartans demand the return of Messene to their possession, a territory they had lost to the Thebans centuries earlier: "I should feel disgraced...if I did not strive with all the strength that is in me to prevent this territory, which our fathers left to us" (Tacitus, book IV). Indigenous people have strong group interests for their ancestral territories. This is not just due to their long historical affiliations with these territories. Importantly, the territories are central today for their wellbeing.

It is also essential to understand indigenous rights in the context of indigenous jurisprudence. Indigenous peoples understand their rights as deriving from the traditions of their indigenous nations. The collective character of group rights is best exemplified in indigenous peoples communal ownership of rights. In a typical indigenous world, “individuals have rights by token of their membership in certain groups. Indeed, it is chiefly through their belonging to, and participation in, the locally anchored moral universes defined by these groups that individuals achieve their social being and essential personhood” (Levi and Dean, 9ff). The community takes ontological precedence over the individual in such societies. In his *On African Socialism* (1964) for instance, the Senegalese philosopher and statesman Léopold Sédar Senghor beautifully explains this in the following words:

Negro-African society is collectivist or communal, because it is rather a communion of souls than an aggregate of individuals...Negro-African society puts more stress on the group than on the individual, more on solidarity than on the activity and needs of the individual, more on the communion of persons than on their autonomy. Ours is a community society (Senghor, 49,93)

A defining characteristic of African societies is this deep sense of communalism. Just as a passing remark, I should underscore here that this relationship is hard to swallow for anyone unfamiliar with indigenous society or other non-Western societies generally speaking. Western philosophers are sure to question the implications of such a relationship on the freedom and rights of the individual members of the society. Suffice it to say that the communalism of the society is reflected in its jurisprudence. The collective holding of property is simply another kind of rights holding. This set-up does not in any way violate the individual well-being of a group's members. Thus, to say that an indigenous of people are having a group right to land means simply that the land is available for the use of all members of the group. The group right in question affords the group collective benefits. This right cannot be reduced to the members. However, it clearly serves them.

From our exposition on indigenous rights so far, it now becomes clear that the framework and definition of indigenous rights are different from the framework and definition of rights within a modern liberal nation-state such as Kenya. Specifically, what we have is a situation in which two parties in a case do not share the same understanding and language that can permit a clear articulation of rights. For instance, Kenya as a nation-state is officially founded on liberal democratic principles. Accordingly, it champions the protection of individual rights and fundamental freedoms. On the other hand, Kenya's indigenous nations have a collective notion of rights that seems to have no place in the Kenyan national constitution. Consequently, it is hard to make a strong case for indigenous rights in Kenya. This fact is illustrated in *Endorois Community Members vs Kenya* (2002). This was a lawsuit in which the indigenous Endorois people of Kenya were challenging their eviction from their ancestral lands by the Kenyan government in 1973 and 1978. The court ruled against the plaintiff. First, though the court recognised that the indigenous Endorois were the *bona fide* occupants of the land, their rights had been extinguished as a result of the designation of the land as a game reserve by the Kenyan government in 1973 and 1978. Second, the court refused to recognise the idea of a community's collective right to property. Finally, the court did not believe Kenyan law should address the issue of special protection to a people's land based on historical occupation or cultural rights. The case brings out the conflict that is inevitable when two different frameworks are brought together. The parties cannot communicate. This is the situation of a "differend" as the French philosopher Jean-François Lyotard brilliantly analyzed in his *The Differend: Phrases in Dispute* (1988). A differend is a case of conflict between two parties that *cannot* be resolved justifiably because both parties do not share a common language in which their dispute might be decided. In Lyotard's understanding,

indigenous peoples find themselves in their current society in a state of a differend. The differend reveals a state of victimization—essentially, a lack of indigenous expression in their political future.

The *Endorois Community Members vs Kenya* (2002) is an example of a differend. Lyotard's differend helps us to see the injustice behind the veil of the liberal social order with regards to indigenous peoples' rights in this case. Essentially, a liberal society promulgates something closer to St. Paul's message in Galatians 3:28: "There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you *are all one in Christ Jesus*". But this is false. To begin from a premise that defends neutrality is to ignore past injustices typical of most postcolonial societies. The Kenyan society, for example, cannot begin from this premise when even the law of the land does not recognise the social experience of a colonially transgressed, minority indigenous group of people. As Jacques Rancière points out, given the presuppositions contained in law, "when the colonizers say to the colonized, 'You have no claim to the land we have settled. Do you understand?' they mean: 'There is nothing for you to understand, you don't need to understand' and even, possibly, 'It's not up to you to understand; all you have to do is obey'" (Rancière, 44-5). In other words, without indigenous legal perspectives becoming part of the Kenyan legal framework, indigenous voices in Kenya shall remain silenced. What the above analysis shows is that liberalism remains deeply embedded in the epistemic and legal order of postcolonial states like Kenya. As Thomas Nagel rightly points out: "it is a significant fact about our age that most political argument in the Western world now goes on between different branches of the liberal tradition" (Nagel, 62). This dominance, as we have tried to demonstrate above, is not only in the West. Liberalism is also a spectre that haunts postcolonial African political thought and state practice. Like other African nations, Kenya prides itself as a liberal democracy. For our purposes, liberalism refers broadly to that body of political and moral theory premised on two main

principles, namely, individualism and freedom. The liberal tradition is a mélange of ideas which insists that the individual is more important than the collective. Liberalism supports a society where individuals decide for themselves or in willful association with others, how they seek to live compatibly with everyone else enjoying an equal set of rights. Thus, for proponents of liberalism, the recognition of group rights implies a denial of individual freedoms and the possibility of societal inequalities. Importantly, the assumptions of liberalism are deeply rooted in Western philosophy: Jeremy Bentham, John Stuart Mill, Thomas Hobbes and John Locke. In contemporary philosophy the champions of liberalism involve such philosophers as John Rawls, Ronald Dworkin and Richard Rorty amongst others. This shows that liberalism has its origins and meaning in Western political and legal traditions. Hence, it cannot be posited as an unbiased view.

In sum, what is at stake philosophically is the relationship between liberalism and collectivism of indigenous peoples—i.e. the presuppositions of liberalism contrast sharply with the collectivist view of indigenous people. I suspect that the question may be raised whether all indigenous peoples are collectivist. Such an impression may arise from this chapter as a hasty generalisation. To be clear, I do not make such a claim. Nevertheless, it seems fair to say that the majority of indigenous peoples appear to be traditionally collectivist in their way of life. The modern state may have changed their traditional way of life, but aspects of collectivist vision of life is evident in many existing indigenous groups. One thing however is certain: indigenous peoples' ways of life are non-Western. The incommensurability created by their different theoretical principles raises some hard questions. Where does the legitimacy of indigenous people's claims reside in a liberal state such as Kenya? Assuming, *arguendo*, that these rights are legitimate, can both systems peacefully co-exist? What political union or arrangement is appropriate for a recognition and accommodation of indigenous rights for indigenous groups

within liberal states like Kenya? To validate the rights of indigenous peoples and guarantee indigenous wellbeing, philosophers have taken different philosophical directions. In the next chapter, I shall present three different philosophical approaches on the question of indigenous rights. These three approaches are employed later in the arguments to be made in the final chapter.

CHAPTER TWO

PHILOSOPHICAL APPROACHES TO INDIGENOUS RIGHTS

“The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures...a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives”

The Van der Peet Decision, par. 42

In the preceding chapter, I examined the meaning of indigenous identity as an indispensable point of departure for anyone interested in indigenous rights in Kenya. I argued that the suggestion that indigeneity lacks validity in Africa because all Africans are indigenous to the African continent is misleading. My underlying thesis is that there are indigenous people in Kenya and Africa generally. Their indigenous status derives from their standing as descendants of the first occupants to specific territories which they regard as their ancestral homes. The analysis of indigeneity led us to develop a discourse of indigenous rights from the general notion of rights in Western philosophy. I tried to define these rights as collective or group rights that exist in recognition, protection, and support of the specific condition of indigenous peoples and their interest in their current nation-states. They are defined as group or collective in the sense that they are rights held by the group as a whole rather than by its members severally. I argued that, as a form of collective rights, indigenous rights stress the vulnerability confronting indigenous groups as nondominant collectivities within the state, distinct from forms of injustices targeting individuals.

I also addressed the challenges indigenous peoples face for the recognition of these rights. I pointed out that there is a clear tension to the absorption of indigenous rights into liberal states where rights are defined in terms of individual autonomy and equality of all persons under the law, such as Kenya. The opposition stems from the clash of the two very different legal orders in the state, one liberal and the other indigenous. Hence, one fundamental problem that emerged at the

end of the chapter was how to resolve the seeming incommensurability of indigenous rights within liberal states as Kenya. A fair relationship is required to guarantee indigenous well-being in such states. There have been many philosophical approaches to accommodate or refute indigenous claims within a liberal state. I focus here on those that argue for a recognition of indigenous claims.

This chapter examines three philosophical proposals for accommodating indigenous rights within liberal states. Even though their broader aim is to establish a just relationship for indigenous peoples in their current states, they differ significantly in their approach. My central interest here is to see how much latitude or normative legal space there is in such accounts for the political traditions and understandings of indigenous peoples in the Kenyan context. I shall examine the three approaches in three different sections in this chapter. In the first section I explore the influential work of Will Kymlicka. I will examine key aspects of his argument for the protection of group rights of national minorities within liberalism. The main point here is to demonstrate the theoretical difficulties in expounding indigenous rights within a liberal paradigm. In the next section I introduce an indigenous perspective in the debate through the philosophy of indigenous scholar, Dale Turner. Turner's work shall serve as an important critique of liberal approaches towards indigenous rights. The aim is to show the source of the legitimacy of indigenous people's rights, indigenous sovereignty, and their status as self-governing nations prior to European contact. Turner's central thesis is that for liberalism to be justified over indigenous peoples, it must be inclusive of indigenous conceptions of political sovereignty. In the final section, I focus on the constitutionalism of James Tully. Tully proposes a revision of constitutions in post-colonial societies as a solution for people who find themselves under political oppression. Tully's thesis shows how indigenous rights can be obscured by the language of alien constitutions. I shall endorse Tully's constitutionalist approach as the best of the three the philosophical approaches considered.

2.1 Will Kymlicka's Liberal Framework of Minority Rights

The philosophy of Will Kymlicka is seminal in the field of minority rights. Kymlicka writes within a liberal framework. His argument has been developed in several key works like *Liberalism, Community and Culture*(1989), *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995), *Politics in the Vernacular: Nationalism, Multiculturalism, Citizenship* (2001) and many others. Kymlicka's philosophy arose as a response to the problem of Québec's claims to a separate political identity in Canada and other related questions regarding minorities. The big question for political philosophy was how such demands for a special status could be reconciled within the core tenets of liberalism. The substance of Kymlicka's argument is to demonstrate that the recognition and protection of group rights of national minorities is consistent with the fundamental principles of liberalism. To achieve this, Kymlicka starts by challenging the supposed ethnocultural neutrality of the liberal state. For Kymlicka (1989), the state's support of a mainstream culture is a clear demonstration of partiality for majority cultures and limitations for minority cultures. These national minorities, according to Kymlicka, "face disadvantages with respect to the good of cultural membership" (Kymlicka, 162). In Kymlicka's view, just as the state has a duty to guarantee conditions for meaningful expression of individual freedoms, the state also has the duty to provide conditions for the flourishing of all minority cultures within its borders. But what arguments does Kymlicka offer as normative basis for a differential status of minorities?

Kymlicka's argument is grounded in indigenous nationhood and cultural membership. Kymlicka understands these minorities from their precolonial status as self-governing nations. A nation for Kymlicka is a "historical community, more or less institutionally complete, occupying a given territory or homeland sharing a distinct language and culture" (Kymlicka,11). Equally, these national minorities each have distinctive cultures. However, these national minorities are

disadvantaged in the dominant culture of the modern liberal state and need special rights for their collective wellbeing. To demonstrate why these minorities, need differential provisions in a state, Kymlicka steadily builds his arguments by exploiting fundamental modern liberal assumptions. For him, there is a vital relationship between meaningful choices and a relatively stable culture. Kymlicka's central claim is that the important role played by culture in constituting meaningful choices for minority cultures is sufficient to show that minority cultures deserve special protection.

Liberal theorists generally believe that autonomy is a *sine qua non* for basic forms of human flourishing and wellbeing. An individual is said to be autonomous when "he or she does not live an unthoughtful, habitual manner but actually and actively judges the standards and rules that govern behavior" (Diger, 167). For Dworkin, an autonomous person is able to give meaning to his life (Dworkin, 31). Similarly, Raz contends that "the autonomous person is part author of his life" (Raz, 370). For Raz, for an individual to act autonomously three conditions must be present: "appropriate mental abilities, an adequate range of options and independence" (Raz, 372). Liberal philosophers also believe that individuals generally seek to live a good life, though they often differ in many ways about what that life comprises. Kymlicka agrees with these views but proceeds to add that a good life is not conditioned only by individual autonomy. In Kymlicka's estimation, culture is an essential element for people to live good lives and enjoy human flourishing. It is a matrix for intelligent choices. Accordingly, it is a precondition for autonomy.

Kymlicka introduces the notion of a "societal culture" to establish the normative basis for which minority group rights may be claimed and on which minority groups may be distinguished. But what precisely is a societal culture? This is a culture that "provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres."

(Kymlicka, 76). This definition shows that a stable or good society is simply what Kymlicka has in mind. Kymlicka observes that societal cultures tend to be territorially bound and marked by a common language (Kymlicka, 76). Societal cultures are closely bound with national groups. He writes, “just as societal cultures are almost invariably national cultures, so nations are almost invariably societal cultures” (Kymlicka, 80). For Kymlicka, therefore, it is necessary that national minorities have rights to their societal cultures in a multinational state. A societal culture is a necessary condition for the autonomy of members of a group. For Kymlicka, autonomy is an important value that must be protected at all levels of human interaction. Liberalism’s commitment to the principle of equality, according to Kymlicka must be asserted strongly in multicultural states to “compensate for unequal circumstances which put the members of minority cultures at a systematic disadvantage in the cultural market-place, regardless of their personal choices in life” (Kymlicka, 133). This compensation, he believes, can be accomplished by granting what he labels as “group-differentiated rights” to national minorities within a liberal multicultural nation-state.

To define group-differentiated rights, Kymlicka, makes a distinction between national minorities and ethnic groups. The former is a historical community within a given territory which has a distinct culture and language, while the latter are mainly recent immigrants from other nations who now live in a society they have freely joined. Only national minorities can have a societal culture. Self-government rights, polyethnic rights and special representation rights are examples of group-differentiated rights that should be granted to national minorities on a permanent basis because they suffer ‘unchosen’ disadvantages. Self-government rights guarantee the political autonomy and territorial jurisdiction of the group. Polyethnic rights provide the means for promoting cultural practices and shield the group from potentially discriminatory laws and regulations. Special representation rights are intended to ensure the group’s inclusion in political

decisions about their future (Kymlicka, 1995). In Kymlicka's framework, Canada's First Nations and Québécois are legitimate candidates for these rights because these groups constitute "societal cultures" that offer their group members a full spectrum of life choices across both public and private spheres. On the other hand, ethnic groups are entitled to a less significant scheme of rights. They may enjoy certain rights, or more properly speaking, some group-specific measures such as policies against racism and discrimination. However, unlike national minorities, ethnic groups cannot "set up a parallel society, as is demanded by the national minorities" (Kymlicka, 1995).

Group differentiated rights, however, are not without conditions. Kymlicka sets limits on the conditions for which group differentiated rights may be claimed. To have a legitimate claim over these rights, a group must satisfy two conditions. First, the group must establish that they have been victims of historical and structural disadvantages. Secondly, the group must demonstrate that their demand for self-government is the collective will of their members (Kymlicka, 113). Wholly considered, the only reason that Kymlicka accords what is obviously a special status to national minorities is because of their long historical association with a territory. Thus, one sees in Kymlicka an effort to satisfy those who may lay claims to territorial rights and historically abused collective interests as well as a simultaneous endeavor to meet the requirements of other minority ethnic groups within the same state. It should be underscored here that even though Kymlicka's project is geared towards the protection of minority groups, his "group-differentiated rights" are not collective rights in the sense of how we have defined them in the last chapter because they are endorsed only "in so far as they are consistent with respect for the freedom or autonomy of individuals" (Kymlicka, 75). With this view, Kymlicka's argument remains liberal. In sum, my assessment is that Kymlicka's argument is ground breaking in liberal political theory. What is innovative in his account is a non-dogmatic approach to liberal theory. Kymlicka is

vividly flexible with liberal principles to accommodate cultural minority groups. His work can be seen therefore as an attempt to find a common ground between two different philosophical frameworks. However, his work has been criticized on several fronts. Kymlicka has been accused of presuming liberal state sovereignty over indigenous peoples. This is the charge brought about mostly by indigenous thinkers as we shall demonstrate in the next approach. Kymlicka's societal culture argument has attracted charges of endorsing cultural relativism. Tomer Perry, for instance, thinks that individual autonomy requires a less demanding conception of culture than Kymlicka's societal culture. For Perry, "individuals can be, and typically are, members of different cultural groups which provide different contexts for different choices as well as meaningful forms of identification" (2014, 3). But this does not defeat Kymlicka's societal culture argument for me. Kymlicka's larger point, as I see it, is a call for the recognition of the human being as a social and cultural being whose way of life is defined by the sociocultural matrix in which she belongs. If people lead their lives "from the inside"—i.e. "in accordance with our beliefs about what gives value to life" (Kymlicka,81) as he rightly argues—then it is safe to assume that not all cultures can be readily appealing to all groups of people. Let's imagine the case of a deeply religious group of people forced to succumb to an invading nation. It happens that the conquering nation is not only deeply atheistic but fosters a belief system that is in total contrast to that of the defeated peoples. I suspect that under the rogue state, the captured people feel like fish out of water. But can they not adapt one might ask? Of course, the conquered peoples certainly can. The problem is that this adaptation is against the will of the people. Against this backdrop, Perry's argument appears overly simplistic to me. Cultural values and people's choices are different. Even if Perry's objective is to argue that people easily adapt, it still does not defeat Kymlicka's argument. If that is his argument, it still makes the case for preservation of a national minority culture for the choice

of abandoning or assimilating to another culture is that of the individual or the group. It is certainly against liberal thinking to argue that “if you want to succeed in this society, you must give up, nay reject, your native language and belief system and adopt that of the majority” (Thompson, 1996).

Kymlicka’s real problem is that he does not follow up his argument for cultural pluralism. In *Multicultural Citizenship* (1995) he ends up with a strong defence of liberal culture. He writes, “some ethnic and national groups are deeply illiberal, and seek to suppress rather support the liberty of their members...” (Kymlicka, 75). In such cases, Kymlicka’s proposal is that liberals “seek to liberalise them” (Kymlicka, 94). These lines reveal Kymlicka’s deep conviction of a liberal culture as a preferable or (if not even) best culture. The simple question is, why do indigenous people continue to remain attached to their cultures even in the midst of a purported “better liberal culture”? The answer is that culture is very important to them as it is for everyone. Even Rawls concedes that culture is a primary good for meaningful choices and identity. I understand Kymlicka’s cultural dimension more as a reality of the contingency of human culture. Bhikhu Parekh has developed a thesis that strongly supports Kymlicka’s. The summary of his position is that a community has a right to its culture for a variety of contingent reasons (Parekh, 176). Some of these reasons may even appear very repugnant to those who do not belong to these societies. Consider for example issues of polygamy and hijab in Islamic cultures, or, the issue of female circumcision in many African cultures. In these instances, who has the final say? The people or an outsider? I will answer that it’s the people. In a multicultural state, these issues “creates a climate in which different cultures can engage in a mutually beneficial dialogue” (Parekh, 168). I suspect that this is one of the scenarios that Kymlicka may want to liberalize. The ultimate decision, however, remains a choice of the people. However, I remain slow to label Kymlicka as a cultural relativist. On the contrary, I think Kymlicka should be applauded for

bringing into the debate serious diversity problems that liberal theory has to face in the modern liberal nation-state. Given that liberalism is an imposition on many formerly colonized indigenous peoples, it is surely not a bad idea for liberal theorists to come to the full realization that people are culturally different. This calls for respect for the different people's own cultural ways of lives.

Some argue that if Kymlicka's project is truly to solve a problem created by settler colonialism, then the granting of internal autonomy to certain indigenous groups within liberal nation-states in the form of group differentiated rights amounts to internal colonialism (Chatterjee, 1992; Tully, 2000). I do not share this opinion. As earlier discussed, most indigenous people do not want complete secession but a certain amount of control on their political destiny within their current states. Someone might say this does not make sense: either you belong like everybody or leave. Relying simply on the place of consent, I will respond that this is a choice that only indigenous people could make, whether to belong to a given nation-state or not to belong. It will only amount to colonisation, I think, if their desire to secede is refused. What is worth noting in Kymlicka's work is that he considers these minorities as nations within the nation-state. I find no better way of representing national minorities other than as "nations" and as a normative basis for self-government rights for minorities. The concept of "nation" connotes territorial sovereignty and a people with a civilization. The concept also carries us back into time to the political status of national minorities at the time of contact. It was as sovereign nations that treaties were reached with colonial powers. Hence, in deliberating on the rapport between the state and indigenous people, it is useful to take seriously this relation. The implications of this nation-to-nation colonial relationship is the focus of the next chapter within the Kenyan context. We now examine Turner.

2.2 Dale Turner's Indigenous Perspective

The second approach that will be considered in this chapter is Dale Turner's. Turner's philosophical context is his country, Canada. Turner is an indigenous philosopher and a member of the Temagami First Nation. Turner's work is an excellent place to start in attempting to get a grasp of indigenous perspectives on indigenous rights. Turner's approach is valuable not simply because of its cogent critique of liberal characterizations of indigenous rights but because of his historical positioning of the argument on indigenous rights and sovereignty. For Turner, the required philosophical point of departure is the colonial treaties between indigenous peoples and the colonial (Canadian) state. In his view: "treaties represent not only binding political agreements but are also sacred agreements and to violate them is morally reprehensible in a political relationship between nations" (Turner, 26). The purpose of Turner's argument is to justify the place of indigenous voices in a post-treaty nation-state like Canada. His fundamental argument is that a postcolonial state is a collaborative political program. Central to this collaboration, in his estimation, should be a critical dialogue between indigenous peoples and non-indigenous peoples.

Turner's perspective is developed in his seminal work, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (2006). While theorists like Kymlicka have focused on the role of liberal theory in justification of some form of internal self-determination for indigenous peoples, Turner in an argument that combines perspectives from indigenous philosophy and Canadian government policies argues that the main problem with the liberal approach is that indigenous peoples' way of life and political philosophies have not been adequately recognized in such approaches. There is little or no space in the work of liberal thinkers or in government policies for indigenous peoples' own perspectives of history, politics or law. As a result, these approaches have all failed as peace pipes. His work is not directed towards another theory of aboriginal rights.

Instead, Turner's project is to demonstrate that to be a peace pipe any aboriginal rights proposal ought to "evolve out of the dialogue between Canadian and Aboriginal peoples" (Turner,5). Turner's main objective is a search for a peace pipe (i.e. a just relationship) between the state and indigenous peoples. A just rapport between Canadian and indigenous peoples, for Turner, can't begin and end with liberal political principles only. Instead, a just political society in a postcolonial state as Canada ought to be founded on shared values between Canadian and indigenous peoples.

Turner starts by observing that indigenous peoples find themselves in a state of dilemma under liberal state. The dilemma is experienced in what he calls "Kymlicka's constraint": "For better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand"(Kymlicka,154;Turner,120).For Turner, the difficulties associated with incorporating indigenous rights into mainstream legal and political discourse is due to their articulation in a Eurocentric epistemological framework that is alien to indigenous peoples. The question is: how can this problem be resolved? Turner is confident that this problem can be resolved by utilizing the existing political vocabulary. Turner contends that:

Given that the dominant political community is a constitutional democracy, rights-based approaches are inescapable. The solution to this problem may lie in shifting the discourse from the language of rights to the language of nationalism, but the fact remains that we must use the legal and political language of the dominant culture (Turner, 110)

His strategy is first of all to define indigenous rights and establish the grounds from which they are derived. This forces him to carry out an examination of the discussion of indigenous rights and indigenous peoples' claims to self-governance as they are framed in Pierre Trudeau's White Paper (1969), Kymlicka's *Minority Rights* (1989;1995) and Alan Cairns' *Citizens Plus* (2000). These attempts according to Turner all claim to be peace pipes because they "claim to respect

Aboriginal peoples and their differences and to define not only the meaning and content of their rights but also their proper place in Canadian society” (Turner, 5). He examines each one of them.

Archetypal of its liberal foundations, the 1969 White Paper of Trudeau’s Liberal government recommended that tribal lands be divided into individual lands. For Turner, this was clearly an attempt that was void of indigenous peoples’ own understanding of their rights. The White Paper for Turner fails to “consider that indigenous rights are a sui generis form of group rights and not merely a class of minority rights” and to “acknowledge that any workable ‘theory’ of Aboriginal rights in Canada must include the participation of Aboriginal peoples” (Turner, 15). Turner also lays special emphasis on the collective nature of indigenous rights. An acceptable account of indigenous rights, he argues, must accept the fact that indigenous rights are “group rights that flow out of Aboriginal peoples’ status as indigenous nations” (Turner, 37). Turner argues that an indigenous view of rights contrasts with a liberal view of rights in the sense that the former is historical while the latter is founded on abstract categories and are basically ahistorical.

Turner also offers a trenchant critique of the liberal theories of Alan Cairns and Will Kymlicka. For Cairns, the moral force of indigenous rights is found in the historical injustices to indigenous peoples in the course of the formation of the Canadian state. Cairns calls for a form of citizenship that can abate the plight facing indigenous peoples. However, although Cairns acknowledges these injustices, Cairns like other liberal theorists assumes the legitimacy of Canada’s underlying sovereignty without any justification. Turner rejects Cairns’ project for his assumption of Canada’s sovereignty and his proposal of provisions of citizenship as an exchange for historical wrongdoing. In his opinion, Cairns’ framework falls significantly short of addressing the bequest of colonialism. Granting indigenous rights are not acts of charity to be met by satisfying Cairns ‘citizenship criteria’. For Turner, the moral force of indigenous rights derives

from indigenous people's territorial and cultural integrity. Against Cairn's arguments, Turner concludes that indigenous peoples are the legitimate sovereigns of their ancestral territories.

On the other side, Turner appears sympathetic to Kymlicka's minority rights framework. Turner concedes that Kymlicka's account is well-intentioned to give indigenous people a voice. However, Kymlicka does not go far enough. He differs with Kymlicka on two main fronts. First, like Cairns, Kymlicka presumes the legitimacy of Canada's underlying sovereignty over indigenous peoples' territories without acknowledging the need to justify such a proposition. Secondly, Kymlicka's account presumes the willful incorporation of indigenous peoples into the Canadian state. Turner argues that many aboriginal peoples never had the opportunity to decide their destiny regarding membership in the Canadian state. This means that Kymlicka's failure to take forced incorporation seriously gives the false impression that all indigenous peoples have conceded to the citizenship of the Canadian state. In Turner's view, if there is such a thing as the inherent right of a people to self-determination, then forcibly incorporated peoples in the Canadian state are in possession of this right. Kymlicka's minority rights for him don't equate to this right.

Turner ultimately rejects each of these liberal approaches in turn, arguing that, "from an Aboriginal perspective, these three liberal theories are not peace pipes" (Turner, 7). Turner offers four criteria an indigenous rights proposal must satisfy to be a peace pipe: i) It must address the legacy of colonialism, ii) It must consider the *sui generis* (or of its own kind) nature of indigenous rights. This categorisation is an important hermeneutic tool in Canadian indigenous rights jurisprudence that needs further elaboration. The term "*sui generis*" is used in *Guerin v. The Queen* (1984) and *Delgamuukw v. British Columbia* (1993). According to Black's Law Dictionary (1990) it means simply "of its own kind or class" (1434). The categorisation according to John Borrows and Leonard Rotman means that indigenous rights do not "take their source or meaning

from the philosophies that underlie the Western canon of law” (Borrows & Rotman, 11). The *sui generis* doctrine recognises indigenous rights as rights having alternative sources and recognises indigenous peoples as the exclusive possessors. This is a very brilliant Canadian legal characterization of indigenous rights that I shall return to at the end of the essay in making a case in support for the constitutional protection of indigenous rights in Kenya. iii) It must question the legitimacy of the initial formation of the Canadian state and, iv) It must recognize that any meaningful theory of Aboriginal rights presupposes Aboriginal participation. Achieving justice demands engagement with the state. Turner believes that the solution to ending oppressive policies that hold Aboriginal peoples under subjugation should involve an articulation and inclusion of Aboriginal peoples’ conceptions of political sovereignty in a liberal justification of Aboriginal rights. The responsibility of bringing indigenous voices into the dominant political discourse, Turner contends, is something only Aboriginal peoples themselves are most competent to do. According to Turner, there is an indigenous epistemology that offers legitimate ways of understanding the world that is missed in the indigenous rights proposals of liberal philosophers.

Indigenous people have their own philosophies... Indigenous philosophies are rooted in oral traditions, which generate explanations of the world expressed in indigenous normative languages...The asymmetry arises because indigenous peoples must use the normative language of the dominant culture to ultimately defend world views that are embedded in completely different normative frameworks (Turner, 81)

For Turner, colonialism has “been woven into the normative political language that guides contemporary Canadian legal and political practices” (Turner 30; see also Macklem 2001). Indigenous intellectuals or “Word Warriors” as he refers to them can defend indigenous epistemology by engaging in continuous political discourse with Western philosophers. It is the responsibility of the state in her effort to resolve claims of unjust treatment of indigenous peoples to begin a just dialogue with indigenous peoples. On their part, Word Warriors must be skilled

enough to be able to navigate both systems. Word Warriors can be efficient through training in what Turner calls “indigenous philosophy proper...a distinctly indigenous activity” (Turner, 99). This training will equip Word Warriors with skills to critically engage “European ideas, methodologies, and theories to show how they have marginalized, distorted, and ignored indigenous voices” (Turner, 100). Word Warriors must be skilled in the legal and political language of the dominant culture. With this, Word Warriors can be more effective in the dialogue.

In sum, Turner’s proposal can be seen to be a very pragmatic approach to indigenous rights. What appears to be particularly distinctive of his account is that it is more of a critique of Canadian realpolitik. Save for the purpose of critique, Turner is less committed to developing a robust theory of indigenous rights leaning towards one philosophical tradition or another. He simply assumes the validity of indigenous sovereignty and nationhood. Indigenous peoples rights spring from these two political facts and these do not need to be framed in purely liberal terms to be meaningful. Unlike Kymlicka, Turner’s justification of indigenous rights is not founded on a liberal argument. His framework offers a unique perspective on what are undeniably complex issues. A number of impressive ideas emerge from his thesis. First, any satisfactory hermeneutics of indigenous claims has to be examined within the colonial treaty making relationships. The language of rights must be able to give a full assessment of rights in relation to treaty promises. This is a proper way to address the colonial legacy, whether it meant adequate inclusion or continued exclusion. Secondly, a plural approach to rights is necessary within a postcolonial state for participation of indigenous voices. Turner actually makes a strong case why indigenous rights ought to be understood as rights of a *sui generis* class. Thirdly, state legitimacy has to be defined in terms of voluntary incorporation of peoples into the membership of a state. Fourth, to achieve a just relation in a postcolonial context, it is useful to incorporate indigenous political philosophies.

Turner's ideas, however, raise some concerns. Turner contends that it is the responsibility of Word Warriors to illuminate the meaning of indigenous political ideas of sovereignty to non-indigenous peoples. Turner believes that indigenous philosophy proper is a preserve for indigenous people only. At the same time, Turner takes for granted that Word Warriors can become versed in non-indigenous thought. I am not particularly sure why Turner creates epistemological limits to non-indigenous ability to engage indigenous thought. There is certainly no doubt that persons of different traditions are better placed to discuss issues about their specific traditions. However, it appears to be the case that in an attempt to emphasize difference Turner commits to a claim which is controversial, if not for all practical purposes totally unfounded. If it's a "distinctly indigenous activity", as he claims, can this be translated? Turner also proposes that groups select their Word Warriors. Regrettably, he is imprecise on the details of this selection.

Nevertheless, Turner has produced an impressive account of indigenous rights from an indigenous sovereignty and nationhood standpoint. For Turner, indigenous sovereignty and nationhood survive non-indigenous peoples' occupation of indigenous territory. These for him are historical facts that form the normative basis for indigenous rights and the unique relationship indigenous people should enjoy with the state. I should underscore that the idea of pre-contact indigenous nationhood is shared by all three thinkers under consideration as we shall see shortly in Tully's account. This forms the basis for the first argument in the next chapter. Another, important idea within Canadian indigenous rights discourse that Turner includes in his peace pipe criteria is the *sui generis* nature of indigenous rights. This feature as we discussed it a short while ago calls for a different approach in understanding indigenous rights. The term indicates that the legitimacy of indigenous peoples' rights cannot be validated using the common law traditions for their source is different. We shall now turn our attention to James Tully's constitutional approach.

2.3 James Tully's Constitutionalism

James Tully is a Canadian philosopher who has produced a compelling account of indigenous rights from a constitutional point of view. Like Kymlicka and Turner, the object of his study is the condition of indigenous peoples in contemporary constitutional democracies. There is much to admire in Tully's substantially broad philosophical output. However, I will focus on two main issues. First, I will explain his argument on indigenous nationhood as the normative basis for indigenous rights. Second, I will explore his critique of the imperialist foundations of modern constitutionalism. Tully's work is distinguished by a historical method for addressing the question. His strategy is to proceed as far as possible in his analysis with recourse to the history of political thought. Tully thinks that Western political philosophy, especially John Locke, deliberately produced philosophy in the interest of empire. Thus, Tully's constitutionalism is an argument that shows how the constitution was complicit in the dispossession of indigenous lands and how the document continues to provide roadblocks in the way of contemporary adjudication of indigenous claims. Tully is highly opposed to Western standards posturing as universal truths that other cultural traditions must satisfy in order to be meaningful and acceptable. Tully advocates for a revision of postcolonial constitutional languages and pluralist forms of constitutional democracy. The constitution is not static. It is an ongoing dialogue. Bill Reid's sculpture, *The Spirit of Haida Gwaii, the Black Canoe* (1986) is Tully's model for accommodating diverse voices within a state. The canoe's occupants are diverse, yet they must depend on each other for a collective survival.

For Tully, indigenous rights derive from indigenous nationhood. To justify these rights according to Tully entails showing that the colonization of indigenous peoples was founded on completely false presuppositions. Tully's target is John Locke's account of political society and of property. Tully argues that prior to colonization, America was a territory of separate stateless

nations, autonomous of each other and the rest of the world. “Their status as self-governing nations,” Tully contends, “rested on the proven ability to govern themselves on a territory over time and to enter into international relations with other nations” (Tully, 421). In his *Rediscovering America: The Two Treatises and Aboriginal Rights* (1993), Tully accuses John Locke of willfully rendering Native American forms of nationhood and property which he was familiar with as fundamentally illegitimate. Locke described Native American society as a “state of nature”, a historically less developed form of European political society. Also, Native American customary land use was not for Locke a legitimate basis of ownership because it was not on the same terms with the European understanding of property. With this misrepresentation, Locke could make two justifications: first, he could argue that the Europeans had a moral obligation, even by force, to bring Native Americans into civilization and second, he could maintain that the Europeans could appropriate native lands as native Americans had no proper recognizable claim to it. Tully contends that Locke’s account is dubious given that Locke was no stranger to the Native Americas. Tully shows that Locke had a rich library of travel books on issues about the Americas. Tully also argues that Locke’s extensive career in the civil service had afforded him sufficient knowledge about the Americas to the extent that Locke had a part in writing the 1699 Carolina Constitution. On these grounds, Tully concludes that Locke knew exactly what he was doing: “Locke was intervening in one of the major political and ideological contests of the seventeenth century” (Tully, 167). Consequently, Locke's account, Tully argues, must be read as a calculated falsification of the facts for the purposes of justifying the dispossession of native lands (Tully, 151). In light of these findings, Tully concludes that because Locke purposefully distorted the facts on the nature of native property and society as seen in Native America, “it follows from the

central theory of government of the *Two Treatises* itself that they have the right to defend themselves and their property, with force if necessary, against these injustices”(Tully, 175).

In *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995), Tully casts a critical look on the language of constitutionalism from the perspective of the struggles of indigenous peoples. “Can a modern constitution recognize and accommodate cultural diversity?”. He asks, “What is the critical attitude or spirit required for justice for demands of cultural recognition?” (Tully, 1). Tully’s objective is to show the role modern constitutionalism has played, and continues to play, in suppressing diverse voices in modern states. In consistently articulate and accessible language, Tully develops a perspicacious assault on many underlying assumptions of liberal political philosophy and modern constitutionalism. Tully describes two types of constitutions, ancient and modern. An ancient constitution refers to all pre-modern European constitutions as well as the *customs* of non-European societies in earlier and lower stages of their historical development. The ancient constitution has a “multiform” structure. It is an “assemblage” of different peoples. On the other hand, a modern constitution is a scenario whereby a people freed from customs willfully impose upon themselves a new form of association. It is the form of constitution operative in contemporary nation states. It is, Tully contends, the type of constitution identified with a specific set of European institutions, what Kant called a republican constitution. These definitive constitutional institutions in turn compose a modern sovereign state (Tully, 67-8). It creates a state as a flat space: all individuals are equal and homogenous. For Tully, however, this is forgery. For Tully, it masquerades as universal but is essentially imperial on three fronts: it justified European colonisation, it validates imperial rule over indigenous peoples in postcolonies, and it still supports cultural homogeneity over cultural diversity in modern societies (Tully, 96).

For Tully, the modern constitution has been nothing but hegemonic. For instance, it was the basis for Locke's provision of justification of taking native American lands and the establishment of sovereignty without requiring the consent of the people. It was also the rationale behind Vattel's and Kant's justifications to refute the claim that aboriginal peoples satisfied the criteria of nations under international law (Tully, 79-82). In Tully's view, the modern constitution is the most undemocratic part in constitutional democracy and ought to be approached as an imperial document. The question is, how can the imperial character of the modern constitution be resolved? How can a modern constitution be read or interpreted to recognize and accommodate cultural diversity? For Tully, one possible way out of this impasse is to understand constitutional language from Wittgenstein's notion of language games (*Sprachspiel*). This is a significant adaptation from Wittgenstein's *Philosophical Investigations, PI* (1953). According to Wittgenstein, "the term 'language-game' is meant to bring out into prominence the fact that the speaking of language is part of an activity, or of a form of life" (1953, §23). The notion of language games conveys the fact that different languages encrypt different perceptions on reality. That is to say, language only has meaning in its specific context. Thus, to convey meaning, a speaker must be willing to speak within the shared linguistic categories of her audience. This revolutionary Wittgensteinian idea, a "form of life" implies that meaning is possible only within its particular context of understanding. The notion, "form of life", is a denial of some claims of universal truths.

From this viewpoint, Tully argues that understanding constitutional orders as games have far reaching implications: one could not stand outside a game and legislate about it or impose rules on it; player A could not criticize player B without a fair acquaintance the rules of player B's game. For Tully, Wittgenstein's theory can remedy the hegemonic character in modern constitutions in three ways. First, it offers a platform of understanding others within their particular

cultural contexts rather than in one's own language of understanding or background. Secondly, it provides the space for a philosophical account of intercultural dialogues. Both sides are able to confront the reality of their cultural differences and have an opportunity of finding common grounds. Lastly, Wittgenstein's language games, over and above the charades of universalism in early European modernity, is for Tully a mirror of the reality of a very diverse world (Tully, 111). Tully steadily lays emphasis on the fact that there is no final or fixed constitution. Contestations are a perpetual reality that must be resolved by dialogue. Each party must be ready to listen, without any conditions or commitments to fixed political theoretical abstractions, to a different perspective from the one it already holds. The ideal constitution is thus a "multilogue" of voices.

One might ask at this point: Given the powerful forces of power and politics that are at stake on the question of indigenous rights, is Tully's "multilogue" realistic? Tully's view is a utopian model. Tully himself honestly admits that "we do not know if postcolonial forms of individual and collective anti-imperial contestation will lead to modifications that only reproduce the hegemony of the informal imperial features" (Tully, 163). Tully is not very elaborate on how a dialogical process moves forward. But there is evidence that Tully is aware dialogue would not be served on a platter of gold: "dialogical negotiations", Tully admits, can include the use of force. (Tully, 163). This position on the use of force, I think, may be defended on grounds of a *jus bellum* theory for reasons of self-determination. However, I am of the view that this needs further support.

Overall, my view is that indigenous peoples have a lot to admire and utilize in Tully. As I have indicated, Tully's argument is a consistent rejection of mainstream theories with universalist substrata. For Tully, these theories are not only complicit in the imperialism in which indigenous peoples have been submerged but they also tend to occlude ways of reasoning that achieve reconciliation. As opposed to the likes of Kymlicka, the indigenous rights question for Tully is

not a matter of the consistency of political theories. Rather, it is a matter of freedom. Following the tradition of Quentin Skinner among and others, Tully is deeply committed to political historical resources for the achievement of freedom. Tully's philosophy, as he puts it, is one that "combines the wisdom of the owl, who seeks to understand who we are and where we have come from, with the transformative ways of the raven, who is endlessly curious about where we are going" (Tully,72). Tully's approach has a very practical intent: it is dialogic and contingent. Like Kymlicka and Turner before him, Tully's point is that the basis for indigenous rights lies in the fact that indigenous people lived as nations with their own legal systems prior to the formation of the Canadian state. Like Turner, Tully contends that theories of justice cannot simply take Canadian sovereignty for granted given that the origins of this sovereignty itself is questionable.

Unlike the duo, a remarkable feature of Tully's account is his discourse on the origins and role of constitutionalism in indigenous rights discourse. While we gain an impressive account from both Kymlicka and Turner on indigenous rights, a serious gap in their account in my opinion is a diminished emphasis on the fundamental place that a state constitution could play in protecting or repudiating indigenous rights. As Allen Buchanan rightly observed, "a moral framework without an appropriate institutional embodiment is merely a moral vision; and vision, though necessary for right action, is far from sufficient" (Buchanan, 127). Tully closes this gap in his own account in an impressive fashion. In a sentence, Tully's shows that the modern constitution is an imposition on indigenous peoples and lacks the capacity of accommodating a diversity of different peoples with different conceptions of the good. As long as the constitution is not locally planted, it remains an obstruction for indigenous peoples. Like Turner, however, Tully contends that the agonism in which indigenous peoples have come to find themselves in would be transcended by dialogue. Tully's constitutionalism forms the substratum of the third argument in next chapter of this thesis.

CHAPTER THREE

PHILOSOPHICAL JUSTIFICATIONS OF INDIGENOUS RIGHTS IN KENYA

“The unity of society and the allegiance of its citizens to their common institutions rest not on their espousing one rational conception of the good, but on an agreement as to what is just for free and equal moral persons with different and opposing conceptions of the good”
Immanuel Kant, *Kant's Political Writings*, 73-74

My discussion up to this point has been driven by two primary goals, namely, (1) to understand the meaning and importance of indigenous identity in postcolonial Kenya, and (2) to examine the typical philosophical arguments proposed by contemporary philosophers on the question of indigenous rights. I argued that on the basis of the etymology alone, indigeneity correctly signifies being native to or originating from a specific territory. In examining the colonial meaning and application of the designation, I clearly refuted the idea that indigeneity lacked identificatory and legal meaning in Kenya. I contended for a view of indigeneity tied to a specific territory. It is on this basis, i.e. on first occupancy, that indigenous peoples' claims are grounded.

Having laid the groundwork for understanding the meaning of indigeneity and indigenous rights in the first chapter, I focused on three influential and important philosophical arguments on indigenous rights. The first, from Kymlicka, followed a liberal approach. I suggested that his view presents significant insights—especially his argument on culture—but is not without its problems. The second indigenous approach from Turner is an important critique of liberal approaches to indigenous rights. Turner's central criticism pointed out that liberal approaches fail to capture the reality and implications of indigenous political sovereignty. While I worried about some of the aspects of Tully's constitutional view, the third argument, I nonetheless found his constitutional approach to be theoretically promising and illuminating in many respects. From the very outset of this study, I have expressed my support for the historical methodology that Tully employs. One

can expect a number of objections to this approach. For the sake of philosophical expediency, there is a tendency to move swiftly from concrete situations to appealing conventional and/or abstract theories of rights that are divorced from indigenous peoples settings. But how could philosophy proceed in this way, without being trapped in imperialism and arrogance, to settle indigenous rights by divorcing itself from the historical backdrop that generated the problem in the first place? My opinion is that the historical approach provides a window onto justice for indigenous peoples.

The present chapter is the culmination of my work. Having articulated what I take to be the proper understanding of indigeneity, indigenous rights and a proper philosophical method, my aim here is to justify the sources of indigenous rights in contemporary Kenyan politics. To this end, I will propose three philosophical arguments in support of indigenous rights in Kenya. Indigenous nationhood is the fundamental concept here. The first, called the “nations” argument, derives indigenous rights from pre-contact indigenous nationhood. The argument interprets indigenous rights from the perspective of nations with territorial and self-governing rights. It hinges on the fact that Kenya’s indigenous peoples never consented to their incorporation into the Kenyan state and, so they reserve the right to determine their political status. The second argument, called the “historic injustice” argument, is an attempt to justify indigenous rights as rights of reparation and restitution. The argument is founded on Kenyan colonial legacy of wrongdoings against many indigenous peoples. Finally, I consider a “constitutional” argument. My central claim in this argument is that indigenous rights cannot be adjudicated using a legal system founded on a different set of rules and divorced from the peoples’ own social experience. Questioning the rationale and repudiating the legitimacy of an imposed constitution on the Kenyan indigenous peoples, I argue that indigenous rights derive from their pre-colonial and pre-constitutional unity as nations with a fundamental right to self-determination. These three arguments graciously

employ ideas from the three philosophical approaches hitherto considered. It should also be made clear that the second and third arguments all follow from the key idea of indigenous nationhood.

3.1 The Nations Argument

The mission of Kymlicka, Turner and Tully in the preceding chapter was to develop mechanisms for a special status or enhancement of indigenous peoples' rights to self-determination within a polity. In spite of their differences in approach, it is evident that they all agree the view that indigenous peoples prior to contact were self-governing peoples. However, as Tully demonstrates, some traditional liberal theorists like Locke willfully developed arguments that misrepresented indigenous reality in order to support European expansionism on indigenous territories. The reliance, for instance, on Lockean theory of property and other dubious doctrines such as *terra nullius*, discovery and settlement all supported European expansionism at the cost of dispossession of the indigenous peoples who had occupied their territories since time immemorial. This led to the colonization and confiscation of indigenous lands. Due to the consequences of these on indigenous peoples, the three arguments all argue in support of the justification of the rights of indigenous nations. As I have shown already, at the heart of indigenous claims, as Oren Lyons has stated, is the idea that "We've always been here. We're not newly built" (Jorgensen, vii). That is, indigenous claims are premised on the idea that they deserve special rights and treatments because they are the first occupants of the land. The assertion of indigenous nationhood is for them sufficient grounds for the justification of differential identity within the postcolonial state. But this argument does not appear strong to some philosophers. What is so great about first occupancy, many ask? And how does this justify rights? We answer this using the Kenyan case.

The colonial order in Kenya was established on the presumption that Kenya's indigenous peoples were self-governing nations with powers to negotiate treaties with the British Crown. This

was the rationale, for example, behind the Crown and the indigenous Maasai treaties of 1904 and 1911 in Kenya. A treaty is understood here as a formal covenant between sovereign states. The meaning and place of treaties for this study cannot be overemphasized. It was within a nation to nation relationship that treaties were concluded with indigenous nations as legitimate sovereigns. These treaties provided the foundations for the erection of the colonial state and the subsequent foundation of the modern nation-state called Kenya. However, not all Kenya's indigenous peoples signed treaties with the British. Kenya's colonial history is also a tale of territorial invasions, land expropriation, cultural suppression, forcible evictions and other forms of colonial state injustices. The focus of nation's argument, however, is on the nations who signed treaties. I examine the case of the Maasai as example. The second category of peoples is the subject of the second argument.

This first argument examines the reasonableness and soundness of sourcing indigenous rights from indigenous nationhood. Thus, it is labeled the "nations" argument. I think that the idea of a nation is relevant in indigenous rights debates in more ways than one. First, the idea of a nation represents the political status that indigenous people use to understand their historical encounter with colonialism and is the barometer through which they seek to define their political relationship in their current states. The term is useful for exploring indigenous peoples' external relationships with other peoples. My strategy in this argument is to demonstrate that if the utility of the term can be understood beyond the simple convenience of contemporary self-identification, then it can serve as a valuable starting point for working through the complex question of indigenous rights in Kenya. Secondly, the notion contains within itself the idea of the right to collective self-determination of a people. Collective self-determination implies the existence of a collectivity, a collective self or a people "that aspires to control its own future and in which rights to self-determine or self-govern may be vested" (Cornell, 42). A unique feature of African colonialism,

generally speaking, is that the colonial mission was legally defined by European powers at the Berlin Conference (1884-1885). The conference recognized the fact that Africans were socially and politically constituted and called for a respect of the pre-contact rights of the peoples. This argument is therefore, in a sense a study of how the British respected what had been clearly defined by Berlin: the respect for indigenous nations and their territorial sovereignty in pre-colonial Africa.

Thus, the question is not really so much about whether indigenous rights can be justified on the basis of indigenous nationhood. While that is important here, the real question shall focus on indigenous consent with regards to colonisation of their territory and their incorporation into the Kenyan state. To be specific, it would be necessary to show whether the Maasai nation voluntarily accepted to be part of the Kenyan state at the time of independence. If it cannot, then a presumption must exist that Maasai right to their ancestral territory (Maasailand) and right to self-determination still exists and must be respected. Accordingly, the Kenyan state has the burden to show that it obtained rights to Maasai territory by some other means. In the absence of this demonstration, my view is that the Maasai nation must be held to be in possession of their collective right as the legitimate sovereigns of their ancestral territories. My claim in this argument is that there is no suggestion in the process of the creation of the Kenyan nation-state indicating that Maasai right to self-determination was extinguished. As such, their claims are not illegitimate.

The argument has four parts. First, for the sake of accuracy, the argument begins with conceptual clarifications of three important notions, namely, sovereignty, people, and nation. With these clarifications settled, I follow Tully's historical approach to arrive at indigenous nationhood in Kenya. Accordingly, the second part of the argument is an overview of Western philosophical discourse on precolonial Africa. The discussion here does not show any premeditated attempt to distort African political realities as Tully claims was the case in the Americas. However, it seems

safe to assume that Western philosophy engaged in the production of a “negative philosophy” on African reality that produced the same effect. Relying entirely on tainted accounts from explorers and missionaries, Western philosophy reached the conclusion that Africans had to be rescued from the claws of a primitive existence. This thinking prepared the ground for Western colonisation that was sold as a moral duty to civilize Africans. However, the inaccuracy of the Western discourse is exposed by a presentation of Kenya’s precolonial political organization. The Maasai nation is presented here as a perfect example of a pre-contact Kenyan indigenous nation founded on indigenous customs. The nation to nation relationship between the Crown and the Maasai is evident in *Ol Ole Njogo and Others v. The Attorney General* (1912). In this lawsuit the Attorney General recognized the Maasai as “a foreign country under its protection, and its native inhabitants are not subjects owing allegiance to the Crown but protected foreigners, who, in return for that protection, owe obedience” (Barume, 93). The presentation ushers us into the third part of the argument , where I will examine carefully the colonial experience of the Maasai nation. The Berlin Conference Act is presented as a statement of recognition of indigenous Maasai nationhood. This recognition, I shall argue, implies that the indigenous Maasai possessed its fundamental right to self-determination. Accordingly, unless it can clearly be legally demonstrated this right was voluntarily yielded, it must presumably exist. The fourth and concluding part of the argument is devoted to recognising and responding to some possible objections against the nations argument.

As a point of departure into the argument, we shall first of all define the notions of sovereignty, people, and nation. For our purposes, I shall adopt Angela Pratt’s definition of sovereignty as “a people’s ability and authority to govern themselves, where “*ability*” is derived from the existence of laws and customs recognized by the group that is being governed, and “*authority*” is derived from the consent of the group that is being governed” (Pratt, 46). In the

context of this discussion, I find it equally important to emphasize that my view of state sovereignty and indigenous sovereignty are the same. This assumption is predicated on the presumption of equality in a treaty relationship. This approach is helpful for two main reasons. First, it helps to avoid putting the liberal (Western) democratic notion of state sovereignty as the barometer against which indigenous sovereignty must conform to be meaningful (Alfred, 2009). Secondly, this approach reaffirms the nature of the historical relationships between the Crown and indigenous peoples at the time of contact. I use “people” here as referring to a cultural group of occupants associated with a territory. The nation is understood here as a historical community of people in a defined geographical territory, having a common history and identity, a collective sentiment of solidarity and a formal political authority over them. Montserrat Guibernau defines a nation as “a human group conscious of forming a community, sharing a common culture, attached to a clearly demarcated territory, having a common past and a common project for the future and claiming the right to rule itself” (Guibernau, 47). A nation is not just some random creation. A definitional characteristic of nationhood as David Miller pointed out is that it “embodies historical continuity” (Miller, 23). Similarly, Yael Tamir associates a nation with “a continuous genealogy” (Tamir, 425). In light of this understanding, I define an indigenous nation as a historically continuous political entity. Importantly, I should emphasize that, unless the situation necessitates modifications in a meaning, this argument comprehends these notions as have been defined here.

In the following paragraphs, I want to explore the dominant Western philosophical discourse on precolonial Africans and the African world. It shall be clear from the account that the dominant view in the West viewed Africa pejoratively. In his *The Wretched of the Earth* (1967) Frantz Fanon summarizes this perception: “For colonialism, this vast continent was the haunt of savages, a country riddled with superstitions and fanaticism, destined for contempt, weighted down

by the curse of God, a country of cannibals” (Fanon, 170). A cursory look at some of the philosophical commentaries of the period actually confirms Fanon’s remark that there was clearly a deep Eurocentric bias against all that was African. A tacit racial logic and species superiority is discernible in the Western philosophical discourse on Africans. For example, in his *Essays and Treatises on Several Subjects* (1777), David Hume wrote that “I am apt to suspect the negroes to be naturally inferior to the whites. There scarcely ever was a civilized nation of that complexion, nor even any individual eminent either in action or speculation”. Immanuel Kant in his *Observations on the Feeling of the Beautiful and the Sublime* (1764) offered strong support to Hume in the following words:

Mr. Hume challenges anyone to cite a single example in which a Negro has shown talents, and asserts that among the hundreds of thousands of black who are transported elsewhere from their countries, although many of them have even been set free, still not a single one was ever found who presented anything great in art or science or any other praiseworthy quality...So fundamental is the difference between these two races of man, and it appears to be as great in regard to mental capacities as in color (Kant, 1764)

On his part, Hegel calls for the total exclusion of the African from any accounts of human rationality and world history. In the Lectures of 1822-1830, Hegel submitted that:

The peculiarly African character is difficult to comprehend, for the very reason that in reference to it, we must quite give up the principle which naturally accompanies all our ideas—the category of Universality. In Negro life, the characteristic point is the fact that consciousness has not yet attained to the realization of any substantial objective existence—as for example, God, or Law—in which the interest of man’s volition is involved and in which he realizes his own being (Hegel, 93)

As Valentin Mudimbe has noted, what is striking from this discourse is that Western philosophers decided to see and present a “Hobbesian picture of a pre-European Africa, in which there was no account of Time; no Arts; no Letters; no society; and which is worst of all, continued fear and violent death” rather than “the Rousseauian picture of an African Golden Age of perfect liberty,

equality and fraternity (Mudimbe 14; Hodgkin 174). With the achievement of modernity, many European philosophers found it impossible to realize that other worlds were real. Africa appeared to them as a very backward continent, *sans* politics, law or even society. But the claim that the African people were not politically organised is inaccurate. The view that the continent was a prototype of the Hobbesian state of nature, the so-called “Dark Continent” as it was called, is a claim that cannot be supported by historical facts. As a matter of fact, the continent was made up of different indigenous nations each of which had developed institutions for social organizations and long-term survival of their peoples and nations. George Ayittey (1991) contends that precolonial African societies were either centralized or acephalous. Acephalous peoples refer to groups of peoples or tribes that lacked a centralised rulership. The former had administrative machinery and judicial institutions. In *Facing Mount Kenya* (1953), for instance, Jomo Kenyatta describes precolonial Kenya as a centralised society organised according to customary regulations.

Like other indigenous societies prior to contact, the peculiar characteristic of pre-colonial Kenya was and is unquestionably the unwritten nature of the customary law (Frémont, 2009). Unlike the statutory tradition of the British commons at the time of colonisation, Kenya’s indigenous institutions were founded on different organic customary and oral traditions. A customary law as Ike Ehiribe has beautifully defined it, is “an amalgam of customs or habitual practices accepted by members of a particular community as having the force of law as a result of long established usage.” (Ehiribe, 131-132). Customary laws take their roots in the practices and customs of each nation or people. They are passed down from one generation to the next by oral tradition. It is not a uniform set of customs prevailing in any given country. There are usually as many customary legal systems as there are different ethnic groups. In Kenya, for example, the Maasai have a different customary law from that of Ogiek indigenous people. Indigenous peoples’

territorial rights, tribal institutions and trade deals were founded entirely on their customary law. Admittedly, this was a much different society compared to the West at the time. But it was fundamentally inaccurate and misleading to imagine the place and the people as a state of nature. It may have lacked the political arrangement of Europe at the time, but it was politically organised.

As a matter of fact, the continent's socio-political organization was clearly recognised in defining the continent's colonial project at the Berlin Conference. The conference set out the patterns for carving up the continent amongst European powers. It acknowledged indigenous nations as political entities possessing a legal personality and valid rights over territories. Most importantly, the Berlin conference did not recognise the doctrine of *terra nullius*, i.e. the dubious legal doctrine of no man's land which held that indigenous territories were unoccupied lands and had no title. On the contrary, it recognised indigenous peoples as legitimate sovereigns over their lands. In its Article 35, the Berlin Conference Act obligated colonial powers across the African continent "to insure the establishment of authority sufficient to protect *existing rights* and to watch over the preservation of the *native tribes*" (BC, Art.35). It is against this backdrop, i.e. the recognition of pre-contact indigenous territorial rights, that I think the indigenous rights debate in Kenya and Africa generally significantly differs from analogous debates in other jurisdictions. Carefully considered, Berlin's call for the recognition of existing rights and protection of tribal institutions within colonial margins is undoubtedly a recognition of the rights of first occupancy and territorial sovereignty. As I indicated in the first chapter, the first occupancy claim is a position that even philosophers of empire who defended British expansionism like John Locke are willing to concede. These territorial rights and nationhood of Kenya's indigenous peoples were recognized by the British at the time of contact. It was on the basis of the recognition that the Crown signed treaties with Kenyan indigenous peoples such as the two Anglo-Maasai treaties of 1904 and 1911.

The British followed the Berlin provisions through a form of administration called indirect rule. This was a British system of colonial administration in which British colonists ruled colonies using pre-colonial power structures or through local chiefs. Indirect rule implied the simultaneous application of both English common law and Kenyan customary laws in the same colony. It must however be stressed that this legal pluralism did not in any way mean that the British held both legal systems in equal esteem. British colonists actually viewed the Kenyan customary legal systems as inferior and significantly deficient to serve the colonial agenda. To check the law, the colonial administration gave local judicial authorities the assiduous task of scrutinizing the customary laws and see which could be compatible with the principles of the law of England. The British introduced the so-called “repugnancy clauses”. These clauses authorized British Magistrate courts to overturn customary laws if they were judged “repugnant to justice and morality” or “inconsistent with any written law” (Pimentel, 73). The colonial order also introduced a new language and reasoning about rights that emphasized private property over and above the indigenous collective property notion. This was to define the property rights of the settler populations that saw a continuous influx into the territory. To fully expropriate indigenous territorial rights to land, for a considerably long period of time, the right to private property rights was an exclusive right to the settler populations only (Kameri-Mbote et al, 2013). In sum, the colonial state in Kenya was an assemblage of different indigenous nations. The Crown allowed each tribe to follow its own customary law. Thus, “the colonial state was from this point of view” as Mamdani has observed, “an ethnic federation, comprising so many Native Authorities, each defined ethnically. Each Native Authority was like a local state under central supervision” (Mamdani, 6). Consequently, it would be expected that if decolonization meant the end of colonial power, then decolonization would have meant a return to a polity similar to pre-contact diversity.

At independence, the over forty previously independent indigenous nations that had been arbitrarily brought together into one territorial, colonial entity called the colonial state was baptized the republic of Kenya without acknowledging the need to justify such a creation (Ogot,16-31). Unlike the colonial state that reflected a federal character, the new Kenyan state was fundamentally a Hobbesian-Weberian structure. It assumed the unanimity of will of all Kenyan indigenous peoples. Consequently, the new polity exercised absolute sovereignty over all Kenyan peoples under a unitary authority. The central problem with the creation of a Kenyan state is that the Crown ignored the fact that pre-contact Kenya like other non-European peoples were not politically and socially organised as a state system. The closest equivalent of pre-contact Kenyan political reality is pre-modern Europe, a period where Europe was not yet associated with the modern state as political form of organization. The question that remains to be answered for the purposes of this argument, however, is whether or not the rights of indigenous peoples were voluntarily yielded when the Crown moved Kenya from a colony status to a state status. Was the end of the British Kenyan colony an end to indigenous peoples' rights? Did the birth of the Kenyan state sweep aside the existing rights and tribal institutions recognised by the Berlin Conference ?

To respond, I must make clear two crucial facts. First, the founding of the Kenyan state did not seek the prior consent of the Maasai nation. The Maasai rights as legitimate sovereigns of the Maasailand could have been ceded in the eve of independence by several means. For example, by way of a plebiscite. The continuous demand for their rights to indigenous autonomy with respect to their lands and territories, resources, and law and custom reflects their collective frustration and unwillingness to be part of the forced and polygamous marriage called the Kenyan state. Secondly, the Maasai treaties were made with the Crown not with the Kenyan state, for both are separate legal personalities. This means that, *ex hypothesi*, their rights were not frozen at the moment of

establishment of the Kenyan state. Thus, my argument is that unless the Kenyan state can show that it derived the right of sovereignty over the Maasai by some other means, Maasai rights to their territories must necessarily exist. The Maasai possess these rights as bona fide descendants of the first occupants of their ancestral lands. The facts demonstrate that the Maasai have every right to question the legitimacy of the Kenyan sovereignty over them. One brilliant point that emerged from *Mabo and Others v. Queensland* (1992) had to do with sovereignty transfers. Inter alia, the Mabo decision reasoned that a mere change in sovereignty was not sufficient to extinguish native title to land. The decision was unequivocally emphatic on the need to respect the indigenous laws:

A right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people (*Mabo, [No 2]* (1992) 175 CLR 1, 60)

This Mabo jurisprudence, in my estimation, is relevant to challenge legal thinking in Kenya. By this logic, it is fair to assume that Maasai territorial sovereignty and right of self-determination has not been extinguished. One must caution here that it is not to be assumed that “they are all Kenyans, after all”. This is a judgement that can be made only by those who do not know that these are very different indigenous nations. The Maasai, for instance, were very different from the Kikuyu. And as we have indicated, they were autonomous peoples at the time of contact. The Kenyan state was constituted without their consent. The Kenyan state, is to say the least, a forced political marriage. The Kenyan state imposes its national sovereignty over the Maasai. Hence, the Maasai again can be seen to have come under some form of internal colonisation under the Kenyan state. It can be seen that the Kenyan state has a Western philosophical idea of sovereignty as a right that resides only in a state. Accordingly, some indigenous philosophers like Taiaike Alfred (2009) and Noel Pearson (2001) have questioned the usefulness of this term in defending indigenous rights. For

them, the idea of sovereignty developed in the Western tradition to define nation states is artificial with regards to indigenous people's relationship to land which is the basis of their argument for rights. However, I do not think the notion of sovereignty could be dismissed without negative consequences on indigenous claims. As I have indicated above, the two should be seen as the same.

As we indicated in the first chapter, a common objection to the first occupancy argument is the position that it is notoriously difficult to establish who *were* the original inhabitants of any territory. For the critics, first occupancy is indeterminate and cannot stand as a logical starting point for the request for justice. Waldron argues that the question of "who was here first" poses "difficulty and danger" (Waldron, 82) because in his opinion the logic of "indigeneity calls for a more radical approach—not just remedial measures to address maldistribution, but a *restoration* to the offspring of indigenous peoples of some or all of the rights—rights of sovereignty, rights of property that were once held by their ancestors" (Waldron, 61). I think there is a profound mistake in these kinds of objections that Waldron puts forward. It is thus very important to repudiate this.

Philosophers like Waldron do not present the full picture of what the first occupancy argument actually means. Their arguments appear to be deliberate attempts to deny a legitimate demarcation between indigenous difference and settler difference in postcolonial societies. Indigenous difference means that indigenous peoples enjoy a priority in time in relation to the territory in question just like any other group of people: Germans in Germany, French in France, to name but a few. But over and above their long historical relationship with territory, first occupancy is also a reaffirmation of indigenous sovereignty. As Patrick Macklem has brilliantly stated, what is truly implicit in the first occupancy argument is not simply "we were here first" but "we were here first as a sovereign nation". Like Tully, Macklem defends indigenous rights by appealing to pre-contact indigenous sovereignty. Macklem argues that "the legitimacy of

indigenous government is not based on the mere fact that indigenous people were prior occupants of the continent, but on the fact that they were prior sovereigns. Not only were they “here first,” but when they were here first, they exercised sovereign authority” (Macklem, 1333-4). This is the line of separation, from a rights perspective, between indigenous nations and other immigrant groups within the same territory. Like Tully, Macklem’s point is that indigenous peoples had the political capacity of self-governance via their own institutions and laws before the coming of any settler population. Indigenous institutions, they argue, need to be understood as culturally different, not inferior. In their opinion, therefore, indigenous laws ought to be considered valid sources of indigenous rights. Macklem’s efforts to extrapolate on the meaning of first occupancy may raise questions concerning whether or not first occupancy should be considered a necessary but not sufficient condition for indigenous rights. My view is that while his elaboration certainly helps in illuminating the facts or may even serve as a legal strategy in indigenous cases in litigations, it is certainly not a necessary condition for indigenous rights. First occupancy in my view is sufficient.

My argument developed here may also be unattractive to those who do not think that the idea of indigenous nationhood is still relevant in contemporary political discourse. There are some who argue that indigenous nationhood has been significantly historically weakened to the point where it is less politically useful today. For example, Tom Holm, Diane Pearson and Ben Chavis (2003) think that the most appropriate characterization is peoplehood not nationhood. For them,

Nations which are primarily viewed as the territorial limits of states that encompass a number of communities do not necessarily constitute a people nor do they have the permanency of peoplehood...nations may come and go, but peoples maintain identity even when undergoing profound cultural change (Holm et al, 17).

They go further to claim that indigenous peoplehood rather than nationhood “serves to explain and define codes of conduct, civility and behaviour within a given environment, and relationship

between people” (Holm et al, 17). They prefer that pre-contact collectivities be thought of simply as collection of people who share a group identity, something closer to Benedict Anderson’s horizontal comradeship (Anderson, 7). Peoplehood does not need territory. It is difficult for me to understand their meaning of peoplehood separate from a mere reference to cultural identity. For example, what does “Maasai peoplehood” mean? Literally, this means simply an identity of a group of people as defined by shared beliefs and practices. It may be fair to assume that a group may have a common identity among themselves. However, there are a number of problems with this proposal. First, they are vague about what generates this identity. As we have indicated in the course of this essay, indigenous identity is tied to ancestral territories. Their identity rests on their collective perception of themselves as the *bona fide* descendants of the first occupants of their ancestral lands. Their identity as a people has been bolstered by their collective colonial experiences within defined territories. The important place that indigenous territories occupy in indigenous identity is something that is missed in the peoplehood view. If relationship to land is at the core of indigeneity, then their view must be seen to be void of the essence of indigeneity.

On another note, there appears also to be a contradiction in their opinion: while they think that pre-contact peoples should be conceived beyond territorial limits, they define indigenous peoplehood “within a given environment”. Is this not an indigenous territory? Whatever the case, I do not imagine how “indigenous” peoplehood could be discussed without reference to territories. I also do not think that their view defeats the usefulness of indigenous nationhood. It seems that their argument is guided by a logic about the utility of political terminologies than by historical facts. Thinking nationally about indigenous issues is not just a strategy. Thinking nationally about indigenous issues positions the discourse within the historical relationships that define

contemporary political relationships. Peoplehood, I should admit, is valuable for collective consciousness. Nevertheless, it is void of the needed historical and legal freight that calls for action.

In sum, my view is that the prior and continuous nationhood of indigenous peoples is sufficient to derive indigenous rights. I can think of no better language to justify indigenous rights other than the one in which the problem was created. As we have seen, language was twisted into a mechanism of colonial oppression. In their search for liberation, the same language remains important for freedom. I do not particularly think that the introduction of new terminologies like “peoplehood” that is outside the central issues under debate and appears to be potentially ambiguous are valuable. Peoplehood and other forms of labels could certainly capture important aspects of pre-contact indigenous peoples. However, it lacks both the logical entailment and historical underpinnings associated with nationhood. On the other hand, nationhood can provocatively illuminate indigenous rights discourse and potentially determine it. In the next argument, I show how indigenous nationhood is relevant on the question of historical injustices.

3.2 The Historical Injustice Argument

In the preceding argument, I have presented what I regard as one of the most fruitful theoretical starting points to understand and derive indigenous rights in Kenya, namely, indigenous nationhood. A focus on indigenous nationhood, I argued, brings clarity to indigenous rights discourse and has the potential to determine it. The argument was founded entirely on the nation to nation relationship between the Crown and the Kenyan indigenous Maasai established by treaties. Indigenous rights in pre-contact Kenya as I indicated was not a subject of debate thanks to their recognition by the Berlin Conference provisions. Accordingly, the legal effect of the treaties was merely to confer on the Crown political jurisdiction over the Kenyan peoples with limited powers of intervention on existing rights and tribal institutions. The central claim of the

argument is that there is no indication to suggest that the Maasai right to self-determination was lost in the process of the founding of the Kenyan state. Consequently, my conclusion was that the Maasai nation continuously retains its right to self-determination—the basic right of every nation to govern itself. As Allen Buchanan (1997) rightfully observes, the right to self-determination for all peoples and nations must be understood as necessary for the promotion of their well-being.

The present argument is intended to justify indigenous rights in Kenya based on historic injustices in colonial Kenya. It responds to a line of reasoning in some political philosophy that trivializes and dismisses indigenous claims as issues of historical (not contemporary) importance. In a number of indigenous land cases in postcolonial Kenya, the main argument put forward in ruling against indigenous nations in Kenya is that such wrongful actions whether they are just or unjust, valid or invalid are not problems that merit new legal questions. The question of the identity of the victims of land appropriation is contested in such cases. The courts do not see the claimants—who in this case are descendants, but not the direct victims, of colonial transgression. Consequently, Kenyan courts in such cases never find indigenous peoples as victims of historic wrongdoing that deserve reparation. The dismissal of indigenous claims on grounds of long historical divide betrays the hopes of reparative justice. The viewpoint of this thesis is that contemporary problems facing Kenya's indigenous people have their origin in the colonial state.

Accordingly, indigenous claims tend to reflect a historical character. Indigenous rights continue to be demands for restitution or reparations in diverse forms: monetary compensations, requests for transfer of lands to the descendants of the original inhabitants of appropriated lands, amongst others. Indigenous peoples make such demands in the understanding that they deserve rectification benefits as a group and as a matter of morality. Nevertheless, justice continues to be denied to many historically wronged indigenous peoples by arguing that we cannot turn back the

hands of time. This gives rise to a number of questions. Is there a justification for illegal possession of land? Are there good reasons for the wrongdoer to keep what he or she stole? Is it appropriate to hold people responsible for the crimes of their ancestors? Or, is there a moral right to reparation? Is there a moral line in time where moral claims cease to be relevant? How far back should we be ready to go in efforts of rectification justice. These questions show that there exists a tense rapport between people living in the present and past wrongdoings in a postcolonial society. Philosophically, the controversy over reparations for historic injustice originates from uncertainties on the legitimacy of the identity of the petitioners, the non-identity problem, and what has now come to be known as the supersession thesis following a line of reasoning from Waldron.

With this backdrop in mind, the aim of the present argument is to show that neither the identity of the claimants nor Waldron's supersession thesis defeats indigenous claims to reparations or any claims to rights of restitutions by indigenous peoples. To put it in a slightly different way, postcolonial justice cannot be divorced from reparations for historic injustices to indigenous peoples. I argue that a liberal society, such as postcolonial Kenya, cannot claim any degree of fairness or justice if it deliberately denies rectification of historic wrongdoing on her indigenous nations. This argument is guided by the same conception of a nation in the first argument, namely, a historically continuous political entity. Within this thinking, the nation is presupposed as an entity with a right to territorial sovereignty. That is, it bears the full right to establish jurisdiction over given territory following its own laws without interference from any outside forces. The argument is predicated on the fact of historical injustices to Kenyan indigenous nations. It is my view that the Kenyan state has a moral duty to address them. I argue that this is a moral obligation that cannot be superseded by time or changed circumstances as Waldron argues.

This argument will be devoted first of all to exploring a classic case of historic injustice in Kenya. I will present the case of the colonial relationship between the Crown and Kenya's indigenous Maasai to instantiate the reality of historic injustice in Kenya. Second, I will introduce the philosophical arguments on historic injustice. I will begin here with the question regarding the identity of the claimants. This is followed by an exposition of one of the most provocative arguments against reparations for historic justice that have been developed in political philosophy, namely, Waldron's supersession thesis. I will argue that while each of these succeeds in illuminating the vital aspects of the historic injustice, neither of them convincingly succeed in taking down indigenous peoples' claims to reparations or rights to return to their ancestral lands. This second argument is premised on a conviction that the descendants of the victims of injustice are in a special relation to those to whom the wrong was done. On the issue of identity, I argue that the question is a false problem in relation to national identity. National identity, I will contend, is a continuous identity. This view stems from my understanding of a nation in the first argument as a historical community. Taken in this sense, it is easy to understand, I think, why a postcolonial state can be seen to have two kinds of peoples: victims and beneficiaries of historic wrongdoing. I will demonstrate using Kymlicka's framework why the former deserves entitlements and why the latter have a duty. Turning next to Waldron, I argue against his view that changed circumstances or the passage of time can "supersede" moral and legal claims to dispossessed property. It is evident that Waldron is not committed to the conventional morality that when something is stolen, justice demands that it be returned to the rightful owner, or at least, that some other form of compensation be reached. Following Tully and Turner, I will contend that Waldron's account of property rights with respect to territorial conquests and colonisation fails because it does not take into consideration indigenous peoples' right to territorial sovereignty. His account, as I see it, rests

on hypotheticals that ignore real problems of justice and justifies invasion. The right to territorial sovereignty, I will argue, is the exclusive right of the descendants of the first occupants of the land. But what happens to the descendants of the colonists? My view is that they have a right to reside but also a responsibility to make reparations on behalf of the historical wrongs of their forebears.

I begin from the general understanding that all peoples have a fundamental right to self-determination. The right to self-determination is generally understood as the right of a nation to be self-governing. In simple terms, the right to self-determination is the view that each and every nation has the right to determine their own political status. With this understanding in mind, to invade a sovereign nation and subject its people into a polity against their collective will, without good reasons, is an action that always encounters widespread condemnation. Hitler's invasion of Poland (1939) and Iraq's invasion of Kuwait (1990) are both memorable examples. This argument looks at this kind of case in the context of Kenya's indigenous peoples. As I indicated in the last argument, not all Kenya's indigenous peoples signed treaties with the British Crown. Primarily, this argument is about Kenya's pre-contact indigenous nations who had no formal treaty relationship with the Crown. These are conquered indigenous nations forced into the Kenyan colonial state against their will and who subsequently became victims of colonial wrongdoings, such as land appropriation and forcible evictions amongst others. Secondly, this argument is also about Crown-indigenous treaty relationships that were made but not honoured by the Crown. Kenya's indigenous peoples continue to stress that their current marginal existence, both their political discriminations and socio-economic hardships, have a direct causal link with the wrongs of colonialism. I share the view of these indigenous peoples that their current precarious and vulnerable political and economic conditions is the direct consequence of colonialism. Therefore, the past is presented in this historical injustice argument as a source of moral obligation for the

Kenyan government. It is legitimate to ask if this is not an obligation that belongs to the British. I do not deny that the British certainly have a role to play. However, the Kenyan state is the colonial state that only changed its name. Thus, my view is that the Kenyan state assumed this obligation.

I do not think that it is difficult to see that there is a causal, logical and moral relationship between people's past actions and the lives of people today. The effects of past actions trigger a chain reaction of benefits or burdens for successive generations. The Crown has engaged in actions in the past that has triggered these kinds of ripple effects. The fact that the Crown conquered some indigenous peoples in violation of their sovereignty and defrauded others through treaties, places an obligation on the part of the government to address these historic wrongdoings in the interest of justice. As discussed above, the government owns this responsibility because of past commitments or actions and in its capacity as the instrument for the promotion of the principle of equality. If so understood, Kenya's indigenous peoples' claims for reparations or rights to return to their ancestral lands would be seen as justified given that their lands were forcibly taken away. Before arguing in support of this claim, it is vital to show evidence of historic wrongs in Kenya.

There is abundant historic evidence to show that Kenya's indigenous peoples are victims of several forms of historic injustices from the British. The very first indication of trouble is that despite being an official signatory of the Berlin Act, the Crown Land Ordinance of 1902 declared all Kenyan communities tenants of the Crown. The Crown, as I indicated earlier, also did not live up to the terms of the 1904 Anglo-Maasai treaty. The 1904 treaty moved some 11,200 Maasai into reserves and transferred over 500,000 acres of prime indigenous land to the Crown for the purpose of expanding European settlements (Anglo-Maasai Treaty, 1904; Abra Lyman & Darren Kew, 2010). Despite the fact that the Crown had agreed with the Maasai in the 1904 treaty that "the settlement now arrived at shall be enduring so long as the Maasai as race shall exists and that

European or other settlers shall not be allowed to take up land in the settlement” (Anglo-Maasai Treaty, 1904), the Crown was able to conclude another treaty under duress in 1911. This new agreement forcibly evicted over 20,000 Maasai (Barume, 92). Despite the fact that the Maasai renounced the Maasai signatories in the second treaty as their leaders or representatives, in *Ole Njogo v. The Attorney General* (1912), the decision of the verdict *inter alia* settled that:

It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations in which this court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy (Ole Njogo decision, 1912)

One hundred years after, in 2004 when the Maasai were excited about the end of the treaty, the Kenyan government refused to honor the end of this treaty, dismissing indigenous claims with proclamations that the Anglo-Maasai treaty terminates after 999 years, rather than 99 (Mburu, 2003). A 2004 Maasai lawsuit challenging the government’s decision, *Moses Lesiamon Ole Mpoie & another v. Commissioner of Lands*, again ruled against the Maasai. Among other things, the case was dismissed on grounds that it was “related to a matter that took place over 50 years previously in the colonial era”. The Maasai case is a classic case of historical injustice in Kenya. As we shall demonstrate in subsequent paragraphs, this is clearly a classic example of Waldron’s supersession thesis which holds that injustice can be superseded by time or changed circumstances.

The question for philosophers here is whether or not reparation is morally defensible. Philosophers have approached this problem from two different angles: there are those who reject claims to reparation based on the question of the validity of the identity of the claimants and there are those who argue that the wrong has been superseded. The first worry is called the non-identity problem and has been raised by a number of philosophers (Parfit, 1984; Thompson, 2001; Meyer 2004). The non-identity problem according to Meyer is the question: “How can individuals today

have a just claim to compensation owing to what was done to others in the past, when the claimants would not exist today had the latter not suffered these harms in the past?” (Meyer, 304). The question arises from the common understanding that the victim of a wrong doing, no matter who this may be, is the legitimate recipient of justice. For instance, Mr. Peter’s stolen gold should be returned only to him if the police recover the stolen gold later. Similarly, it is expected that refugees forced out of their village by an invading force should have the opportunity to return to their homeland under the right circumstances. As easy and natural as these responses might appear, such expectations tend to be particularly problematic when demands for reparations are coming not from the original victims but from their descendants. Should the descendants of the refugees demand reparations from the descendants of the invading force for a crime they certainly did not commit? There are serious doubts about offspring being recipients of reparations. Their victimization claims are challenged through various ways. Many do not find a logical connection between an act committed in the 18th century with a living person today. It is equally very problematic to hold people to account for a historical action that they certainly never committed.

Many philosophers actually do not think that descendants of historic injustice deserve reparations as a matter of moral right on account of this non-identity problem. Jana Thompson for instance has argued that “individuals or collectives are entitled to reparation only if they were the ones to whom the injustice was done” (Thompson, 116). Thompson’s key point is that the claimants are not the “appropriate persons” to whom a redress could be morally justified. The problem with Thompson’s argument is that it embraces a very abstract idea of identity devoid of relationships to peoples and things. As far as indigenous rights are concerned, I think this view is morally misleading because it rests on an overly subjective idea of identity. A better understanding of the individual in an indigenous context, it is important to emphasize, cannot be defined in

isolation. Though not exclusive to them, indigenous people are defined by communal relations. Within indigenous cultures, as we indicated in chapter one, the emphasis is on the community not the individual. Existence is not seen from a Cartesian perspective, focusing on the individual thinker: it's not I am because I think I am. In its place, it is I am because we are. The indigenous collective perspective of identity affords us a better understanding of the effects of wrongdoing.

Thompson's view also misses the "continuous character" of national identity. A national identity is a continuous identity and exists as long as the nation exists. The identity of a nation does not change with a change in the composition of its membership. While there is a continuous change in the membership of a nation through time, the nation remains as a unified whole. My view of national identity is similar to one developed by the famous British historical sociologist Anthony Smith. Smith (1991) traces the origins of nations and national identity and finds them rooted in ethnic identity as a pre-modern form of collective cultural identity. For Smith, national identity does not mean a uniformity of elements over generations but a sense of continuity on the part of successive generations of a given population. Smith thinks that a nation and its national identity are deeply rooted in history. For instance, national identity according to Smith has to do with a "felt filiation, as well as a cultural affinity, with a remote past in which a community was formed, a community that despite all the changes it has undergone, is still in some sense recognized as the "same" community" (Smith, 33). The different generations of a nation and the nation's identity are not seen as standing in succession or isolation, as Thompson does. Instead, they are, as Daniel Butt has rightfully characterized them, a series of overlapping generations. Generations of peoples in a given nation do not stand in isolation. In one form or another, a nation is a product of its own history. Alasdair MacIntyre has beautifully expressed this reality in the following words:

The story of my life is always imbedded in the story of those communities from which I derive my identity. I am born with a past; and to try to cut myself off from that past, in the individualist mode, is to deform my present relationships. The possession of an historical identity and the possession of a social identity coincide (MacIntyre, 221)

Though expressed in personalistic terms, MacIntyre's observation is also very true of a nation. National identity may be seen as a continuum. It is like a chain, each link plate overlapping on the next. But how does this continuity in national identity justify contemporary indigenous peoples demands for injustices? According to Thompson's argument, recipients of reparations must be those to whom the harm was done. However, the historical character of a nation and its continued identity as we have shown here suggests that wrongdoing could very well spread into overlapping generations. Imagine the case of a certain nation X. The nation X invades a relatively weaker nation Y and forcefully brings them under her control against their will. In an effort to suppress the dissenting voices calling for the liberation of the formerly independent nation Y, the government drops an atomic weapon on Y territory. As a direct consequence of the Uranium content of this bomb, the population is nearly annihilated, and its survivors have a high cancer burden. In addition, the children born in the territory Y are born with several kinds of birth defects. This case shows the lacuna in arguments that tend to focus entirely on identity-based questions. It's easy to see from this analogy that such approaches are morally misleading in the sense that they do not take seriously the complete picture of historical transgressions and their consequences in a nation's future. I truly think this is a mistake. As I write, there is a report currently passing on Aljazeera TV on South Africa's plans to retake land forcibly appropriated from blacks during the period of White domination without compensation. Before and during South Africa's apartheid (1948-1994) – i.e. the period of institutionalised racial segregation and discrimination – indigenous lands were seized. This deprivation of land is seen as a key factor for the cause of poverty among

Black South Africans. This shows us that the effect of human actions on a nation can have unimaginable effects on the nation's future. That is to say, the idea that there is no moral/logical link between the past actions of nation X and the current problems facing existing citizens of nation Y, as the examples show, is flawed. The connection between them, X and Y is not up for debate.

However, we are still left with other important question. Can reparations to existing citizens from nation Y be justified in virtue of the historical injustices from nation X? In my view, the legitimacy for reparations towards the existing citizens of nation Y should not be a question for debate if citizens of X and Y nations can be understood as having some normatively important historical relationship to one another. Owing to the historic actions of nation X against Y, this historical relationship, from a corrective justice stance, could indicate that X has a historical obligation to Y. The appeal to corrective justice here is because of its ability to deal with voluntary and involuntary transactions and its focus on transactional injustice. As I have indicated, this argument concerns historic injustices on two kinds of Crown-Settler relations in colonial Kenya—treaty and non-treaty peoples. In simple terms, the principle of corrective justice states that X has an obligation to compensate Y for the harm that X caused. The principle of corrective justice has its classic formulation in Book V of Aristotle's treatment of justice in his *Nicomachean Ethics*. Aristotle contrasts corrective justice with distributive justice. Distributive justice is justice a community owes its members and focuses more on the fair distribution of basic goods and services for the well-being of its members. Distributive justice presumes a politically flat order of equal persons. Aristotle likens two parties' initial positions in a deal to two equal lines. Injustice for Aristotle is any action that upsets this equality by adding to one line a segment detached from the other. As it names indicates, corrective justice seeks to correct a problem. It aims to restore the equality with which the parties entered the transaction. The correction eliminates that segment

from the lengthened line and returns it to its original position. The outcome is a restoration of the original equality of the two lines. Aristotle makes it clear that corrective justice sets out to mollify both parties. It is not an effort towards one party alone. Corrective justice seeks a rectification between wrongful gains and wrongful loss. From the standpoint of colonial historical injustices, corrective justice would necessitate taking away a portion of a beneficiary party's wrongful gains to make good of the victim party's wrongful loss. In my view, corrective justice is a better approach than the non-identity based approach as it is manifestly more problem focused. Will Kymlicka's minority rights account that we saw earlier fosters, I think, Aristotle's view of corrective justice.

Kymlicka's equality argument in a context of multicultural citizenship can be seen as grounded in corrective justice. His argument on equality, as I understand it, is that if the equality condition has been unjustly violated, then some groups in society have incurred harm that warrants rectification. Like Tully, Kymlicka recognises the previously self-governing status of minorities as nations (Kymlicka,1995). Minority nations became minorities involuntarily through colonization, conquest or expansion. According to Kymlicka, the members of minority nations in Kymlicka's estimation are unfairly disadvantaged in the cultural marketplace because they have limited access to the resources required to exercise their cultural identity owing to the dominance of the majority culture. For instance, the "viability of their societal cultures may be undermined by economic and political decisions made by the majority. They could be outbid or outvoted on resources and policies that are crucial to the survival of societal culture" (Kymlicka, 109). Importantly, Kymlicka insists that members of minority nations suffer this for no choice or fault of their own. Because it is against the principle of a liberal society to allow unchosen inequalities in the distribution of goods, Kymlicka argues that any cultural disadvantages be should corrected for by group-differentiated rights. What this means is that, for historically contravened treaty

relationships like the Crown-Maasai in Kenya, special rights should be granted to the Maasai to rectify the unchosen inequalities undeservedly imposed on the Maasai by colonial wrongdoings. For non-treaty indigenous peoples that never decided to leave their own societal culture, Kymlicka contends that they have a natural bond with their societal cultures. As a matter of fact, for this category of peoples, Kymlicka actually holds that “the question is not, how should the state act fairly in governing its indigenous communities, but what are the limits of the state’s right to govern them” (Kymlicka, 118). Put concretely, the Maasai in Kymlicka’s view are still culturally bonded.

A noteworthy observation in Kymlicka’s account evident in the last citation is his recognition of legitimate state authority. It is an uncontroversial claim that state legitimacy rests on the collective will and sovereignty of the people. According to Kymlicka, where state legitimacy is clearly unfounded on account of forcible incorporation, injustice has been done. The injustice manifests itself in the disadvantaged status of indigenous people in the society. Their predicament does not have its origin in a natural disaster like an earthquake. Their disadvantaged status is a direct result of human agency. Consequently, it is fair to assume that it is in the interest of corrective justice that historically wronged indigenous peoples be given rights that correct this. However, philosophers like Waldron do not share this view. For him, wrongs can be superseded.

In his essay “Superseding Historic Injustice” (1992) Waldron proposes and defends what he calls the “Supersession Thesis”. My interest in this well received but controversial argument is due to its focus on the history of wrongful appropriations of indigenous lands by White settlers in Australia, North America and New Zealand. These cases are not significantly different from those under consideration in Kenya save for locational differences. His thesis pays special attention on wrongful appropriation of Maori lands in Waldron’s own country of New Zealand. The thesis is an argument against the idea of reparation for these historic injustices of territorial conquest

and colonization. Waldron's claim in the essay and others following it is this: it is likely that the injustices of wrongful appropriation has been "superseded" in some cases by time and change. Waldron's "Supersession Thesis" begins from the position that "If the requirements of justice are sensitive to circumstances, such as the size of the population or the incidence of scarcity, then there is no guarantee that those requirements (and the rights that they constitute) will remain constant in relation to a given resource or piece of land as the decades and generations go by" (Waldron, 16). That is, if the conditions for justice are circumstantially sensitive, then contemporary circumstances may be sufficient different to override valid instances of historic wrongdoings. In light of this understanding, Waldron presents his "Supersession Thesis" of injustice as follows:

It seems possible that an act which counted as an injustice when it was committed in circumstances C1 may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from C1 to C2. When this happens, I shall say the injustice has been superseded. (Waldron, 24)

Waldron offers a specific example of a supersession of historic injustice. Waldron ask us to consider a situation of plenty of water and each group is legitimately in possession of its own water hole. Out of sheer greed, group Q seizes a waterhole from group P and insists on sharing it with group P. However, Q does not share its own water source with group P. However, if circumstances later change such that this waterhole becomes the only waterhole that is not dry, Q's sharing of the seized waterhole will cease to be unjust. Waldron argues that the injustice has been superseded by new circumstances. Justice demands that they both share that water hole illegally appropriated. Waldron claims that circumstances have changed since these historic injustices occurred. For example, the days of plenty of land has given way to scarcity of lands. Also, the descendants of the settlers have nowhere else to go. This circumstance, according to Waldron, obligates the descendants of the original inhabitants to share their territory with the descendants of the settlers.

On this reasoning, Waldron concludes that it is likely that historical injustices in places like Australia and New Zealand, North America has been superseded. Thus, descendants of the settler populations are not obligated to return territorial rights to descendants of the original inhabitants. By this logic, he suggests that historical injustices in Kenya have been superseded. But is this true?

Waldron's account, in my view, is not convincing. It is evident that his account is founded on distributive justice: the entire argument is all about the distribution of resources to cater for the wellbeing of the community. Clearly, Waldron does not seem to take seriously inherent rights of sovereignty and inheritance. This approach skilfully buries historic wrong doing and supposes a level playing political field. Waldron's account takes off from a seemingly innocuous proposition which in my view does not represent the seriousness of the problem he seeks to solve. The argument employs assumptions that are clearly not factual. Waldron is right that circumstances have changed. However, I am not sure there is scarcity of land in most postcolonial societies. One must be able to look too far away from the amount of land settler populations have as personal lands (farms, ranches, etc.) in comparison with what the original owners have in common to accept Waldron's assumption of scarcity. An important point in his account is the status of the descendants of settlers. What entitlements do they have? It is difficult to define what rights these group have. I agree with Waldron that they have found themselves in a situation that is no fault of their own and they truly have nowhere else to go. I do not think it is morally sound to hold them accountable for historic wrongs they did not commit. I also do not think that they have no rights. From a Lockean property perspective, settler descendants can be seen to have contributed their labour to the territory. This can be seen as legitimate grounds to justify entitlements. My view is that they have a right to reside in the territory. However, it is difficult to establish the grounds for any rights of sovereignty upon a wrongfully appropriated territory. The right of sovereignty is

an inherent right of the indigenous nations as we indicated in Tully. This is the basis, for example, of the treaty of Waitangi (1840) between the Crown and the Maori chiefs of New Zealand. What is vital in my opinion is for settler descendants to recognise that they are beneficiaries of historic wrongs. This consciousness, I think, should not end in apologies for past wrong doing. This acknowledgement would imply a recognition of the fact that others are suffering a historic wrongdoing. Justice demands that rectification be done by the rationing of land or in some other way that guarantees the wellbeing of all in the society, both indigenous and settler descendants in the nation. This is the approach in Canada. In my view, this is a good example for Kenya to follow. It is vital to realise the historic injustice toward the Maasai and take steps towards rectification.

I do not also share Waldron's critique of the place of history in dealing with issues of historic injustices in the account presented by Robert Nozick (1974). Nozick's central claim is that the distribution of goods in a society is just only if the historical transactions preceding the distribution is itself just. For Waldron, the injection of history into the discourse generate unnecessary counterfactuals: what would have happened if some event (which did occur) had not taken place. These for him block the way to seeing what is really at issue in a postcolonial setting. Waldron's approach may be seen as a forward-looking approach to justice. However, I think, a backward-looking approach like Nozick's is a better approach. History occupies also an important place in philosophical framework examined in the preceding chapter. I am of the opinion that indigenous questions are historically situated. Thus, if we are ready to admit that indigenous problems are rooted in history, then any kind of just attempt to solve the problem must be predicated on the relevant historical context. The past, I believe should be surveyed to provide the context and cast light on relevant corners of the questions that even the most sophisticated

philosophical arguments cannot capture. If we take responsibility for our past actions, then we can collectively take responsibility of our own histories. The past has vital lessons for a better society.

3.3 The Constitutional Argument

The legal relationship between Kenya's indigenous peoples and the state is defined by the constitution. One way of questioning the claims of indigenous rights in Kenya has been by reference to the constitution. Legal rights are only protected under the Constitution when there is a very clear constitutional language that refers to such rights. Indigenous rights are not protected in Kenya because they fall outside the kinds of explicit legal rights recognized within the four corners of the modern Kenyan constitutional text. This situation calls up a number of difficult questions in mind. Should Kenya's constitution be the only legitimate basis for judging indigenous claims in Kenya? Is the Kenyan Constitution in its current form an exhaustive and adequate account of the values and valid legal norms necessary for ensuring the collective well-being of its indigenous peoples? Should Kenyan adjudicators limit themselves to the Constitution for interpreting all legal norms or should they make efforts to incorporate indigenous jurisprudence?

These are the fundamental questions to which this argument is addressed. Although this argument may appear as a frontal assault towards Kenya's constitution, what I want to do is to state a case against a narrow textualist interpretation of the constitution as justificatory grounds for rejecting indigenous rights in Kenya. I contend that an approach that is divorced from Kenya's political history is problematic. As I shall demonstrate shortly, modern constitutionalism is a foreign flower on Kenyan soil. Kenya, like the rest of the continent, has no precolonial written constitutional traditions that defends one law for one nation. Originally imposed at independence, a subsequent reform of the Kenyan constitution has been unable to legally acculturate the document to Kenya's indigenous legal traditions and needs. Consequently, the relationship

between Kenya's indigenous peoples and the state has not been a smooth one. This argument questions the rightfulness of adjudicating indigenous rights on constitutional grounds in light of the absence of a constitutional tradition in Kenya. The argument is a genealogical investigation of Kenya's constitutionalism. I explore the relationship between Kenya's indigenous peoples and constitutionalism. I shall demonstrate that the constitution floats as a meaningless cloud over them. Its logic and very complex language contradicts their social experience and indigenous traditions.

The Kenyan constitution is an instance of Tully's modern constitution: it creates a nation-state and attempts to bring it under a uniform order and monological reasoning. Because it is not a law willfully chosen by the people, my assessment is that it is a form of imperialism. Hence, I will argue that the Kenyan state cannot source the legitimacy of indigenous rights from the Kenyan constitution for the simple reason that indigenous peoples' rights antedate the Kenyan constitutional order. Their rights as peoples derives from their pre-colonial and pre-constitutional unity as a sovereign nation. As a consequence, any reasonable assessment of indigenous claims in Kenya, I will contend, must necessarily factor in the unwritten indigenous customary traditions as valid sources of indigenous peoples' law and rights preceding the independence constitution.

The argument is divided into three parts. It starts by examining the concept of a constitution. This section of the argument presents a useful summary of the meaning of the concept of a constitution. Next, I trace the origins of the Kenyan constitution. The exposition here demonstrates how the British crafted an artificial Kenyan state by lumping disparate groups of indigenous peoples together under one nation and one law. It calls into question the legitimacy of Kenya's constitution. In the third part, I argue that Kenya's inheritance of common law constitutionalism has to be reconciled with indigenous legal customs and traditions. Knowing that in reality indigenous culture is still a predominant driving force in Kenyan politics, this section

refutes a constitutional design that does not protect indigenous group rights. In this final section of the argument, I argue that the post-colonial Kenyan state could not guarantee freedom and justice for indigenous groups by a dogmatic commitment to the liberal constitution. My suggestion is that the Kenyan state can achieve a just society by having a constitution that is locally produced. Such a constitution should reflect the nation's cultural diversity. The chapter ends with a recommendation. I argue for a federalist constitutional design: a federation in which different indigenous peoples are granted their political autonomy to pursue their separate collective interests and ends as collectivities. The nature and form of such a federalist constitution should preferably emerge from a dialogue as Tully has proposed. In this regard, I will examine the concept of "majiboism" as one promising federalist constitutional option first proposed at the dawn of Kenya's national independence. To begin, it is imperative to know what we mean by a constitution.

In common language, the constitution is understood as the set of norms duly adopted by the people that governs a nation-state. The constitution provides the foundation upon which a state is founded and functions. It embodies or codifies a set of longstanding norms duly sanctioned by a people within a given territory presumably for the welfare of the citizens within their political union. According to Blerton Sinani, "the constitution represents an initial legal and political substrate on whose adoption depends the building of the state and of the law" (Sinani, 52). The constitution is the supreme basis of law in the nation-state. "Supreme" indicates that the constitution possesses the highest legal and political force within a state. It is the source of government authority and legitimacy and is the law against which all other laws and legal instruments are measured and judged. Giovanni Sartori (1962) has observed that the Latin etymon of the word, *constitutio*, meant simply "enactment" and never suggested the embodiment of a state's uppermost law. However, from the second century, the plural form of the word,

constitutiones, began to be linked with a variety of sovereign enactments and ecclesiastical laws. Constitutions generally exist in one of two forms. A constitution can be either unwritten or written.

An often-cited prototype of an unwritten constitution is the British Constitution. In this case, while there may be several kinds of contracts, there exists no formal written document called “The Constitution”. Nevertheless, there is a higher form of law articulated through different organs of the government. The unwritten constitution is the organic ancient form of a constitution found within the common law and indigenous legal traditions according to Tully (1995). Essentially, an unwritten constitution is an assemblage of wide-ranging local customs. Customs may be understood as the Hartian rules of recognition. In his jurisprudence, Hart (1961) contends that a legal system is founded on one pre-legal social fact: a rule of recognition. Despite efforts of the liberal modern state to eradicate this form of constitution from its tap root through theoretical reasoning and several forms of calculated political actions such as assimilation policies and land expropriations, unwritten constitutions continue to be appealed to in indigenous peoples’ demands.

On the other hand, a written constitution can be one that declares the birth of a nation-state and the values upon which the nation is premised. As the name implies, it is contained in a document. Good examples of this type include the American (1787) and French (1791) constitutions. The preamble of the 2010 Constitution of Kenya begins as “We the people of Kenya...” From a sovereignty point of view, the “We, the people of...” commencement phrase indicates that the sovereign will of the people is the source of the Constitution. Put differently, it means that the legitimacy of the constitution originates from the sovereign will of the people. It represents what Charles Howard McElwain (1947) called an instance of a conscious formulation by a people of its fundamental law. It is a prototype of Tully’s modern constitutionalism. It has its origins in European modernity and is distinguished by its contractarianism, rationalism and a

monistic logic. Modern constitutionalism is associated with state authority and legitimacy in the context of liberal democracies.

Contemporary constitutionalism is based on popular sovereignty. The people “is the locus of “sovereignty”; the will of the people is the source of authority and the basis of legitimate government...government ruled by law and governed by democratic principles. Constitutionalism therefore requires commitment to political democracy and to representative government (Rosenfeld, 41)

Before moving into the next section, accuracy demands that I make a necessary clarification. This is to point out that constitutionalism and a constitution are different. Tully employs both interchangeably. However, constitutionalism is the idea that government authority derives from the people and should be defined and regulated by a constitution. It is the view that the state does not have the liberty to always do what it wants. The state must act within its legal boundaries. Thus, constitutionalism is the theoretical idea linking government authority and the constitution.

In light of the preceding analysis, we are now in a position to study Kenya’s constitutional order. Kenya prides itself as a liberal constitutional democracy. From the analysis above, it is easy to assume that Kenya’s constitution is tied to its indigenous political institutions, or at least, that it is the will of the people. But the truth is that pre-contact Kenya lacked a modern form of constitution. Pre-contact Kenya shows affinity more with Tully’s ancient constitutionalism. If we agree with John Griffiths that “the legal organization of society is congruent with its social organization” (Griffiths, 38), then it would be accurate to state that pre-contact Kenya was founded essentially on legal pluralism. A situation of legal pluralism according to Griffiths is “one in which law and legal institutions are not all subsumable within one system but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another”(Griffiths, 39).The territory that became the present-

day republic of Kenya was essentially a pluralist terrain of different indigenous groups of people. To be very clear, these different nations lacked what Tully calls a modern constitution. They were also never under one legal order. On the contrary, each of them lived according specific customs.

However, with the onset of colonialism, we encounter the same colonial administrative strategy that Tully described in British colonial Americas: the deliberate attempt to force diverse and autonomous peoples into a monolithic state structure. The British in Kenya could not resist the temptation to force upon the people on the eve of their independence a constitutional model and political organization that the people had very little or no familiarity with. The British brought disparate indigenous groups under one colonial authoritarian state as one people under one law in the colonial state. To achieve the colonial objective, absolute obedience was required from the colonized. As Bruce Berman, Dickson Eyoh, and Will Kymlicka have rightfully observed, the colonial state was one in which “people related as subjects and clients, rather than citizens, to an authoritarian state” (2004, 1-21). Mahmood Mamdani (1996) whom we saw earlier in this thesis demonstrated how the colonial system of government denied citizenship rights to African natives in colonial states. From the late 1950s across the entire African continent, with pressure from within and without to grant national independence to colonized peoples, there was one lingering question in the minds of colonial administrators: how do we transition the colonies to independent states? The answer was that the colonies had to be furnished with the paraphernalia of a modern nation-state. Constitutions from the past colonizers served as birth certificates for the newly created African nation-states to gain standing within the global community of civilized nations.

However, the resulting constitution would be anything but Kenyan. The British did not believe the constitution could be established on Kenyan customary laws. Kenyan customary laws

were unsuited for the purpose of a modern state. According to Martin Chanock (2015), the colonial administrations had two important misconceptions of customary laws in Africa. Chanock writes:

The first was that it was archaic and that it must (or would) disappear in a necessarily modernizing state and society. The second was that it was more a system of ancient rules and less about processes for settling disputes, and still less a way of expressing ideas about relationships: ideas that would change as a changing economy and society produce new relationships (Chanock, 24)

With this frame of thinking, the British colonial administration had no option than to impose a liberal constitutional order in Kenya. In an article on Kenya's legal constitution, American legal historian Mary L. Dudziak (2006) offers an insight into the origins of modern constitutionalism in Kenya. The first constitution of Kenya was written in 1962 in Lancaster, United Kingdom, by the then British colonial government. Kenyans had little input in the drafting process. This is understandable for a number of reasons. First, it was a legal form that indigenous Kenyans had little or no familiarity with. Secondly, the predominantly illiterate colonial Kenyans certainly had nothing substantial to contribute in a document of such complexity. Dudziak contends that "when the Kenya independence constitution was completed in 1963, the final act of ratification was not a vote of the people, but the signature of the Queen of England" (Dudziak, 775). However, the 1963 Kenyan independence constitution successfully created the modern state called today Kenya. The question that immediately comes up is, what was the content of the resulting Kenyan constitution? Put it differently, was the content of Kenyan independence Kenyan constitution representative of the social experience of Kenya's many diverse indigenous nations? It was a Westminster model constitution that was shaped according to British common law than Kenyan precolonial customary systems. From the point of view of rights and sovereignty, it was clearly liberal in form and content. In "Kenya: The Struggle to Create a Democracy", Lindsey Gustafson(1995) offers the first troubling implication of Kenya's 1963 independence constitution:

There exists an important cultural source of disrespect for the individual rights recognized in the Independence Constitution. The traditional definition in Kenyan culture of “rights” is less individualistic and more contingent upon group interests than the Western concept of rights, such that the enforcement of the Constitution's individual protections has proven lackluster by western standards (Gustafson, 667)

We can see that the Crown’s reservations against indigenous group rights that was evident in the colonial state was now firmly dealt with in the constitution. Gustafson’s point here is that the 1963 constitution looks more like Britain than indigenous Kenya. In Kuhnian language, the independence constitution amounted to a paradigm shift in Kenyan indigenous conception of rights. Section 115 (2) is the only provision in the entire document that addressed issues of customary rights. This clause limited the recognition of customary law only to those laws that were not considered “repugnant” to written law. It reads that, “no right, interest, or other benefit under customary law shall have effect so far as it is repugnant to any written law”. Chapter V of the independence constitution that is dedicated to the protection of fundamental rights and freedoms has been interpreted in Kenyan case law as relating more to individual than groups. For example, in *Rev. Dr Timothy Njoya & The Attorney General & Others* (2004), the judge insisted that “the scheme of the protection of fundamental rights envisaged by our constitution is one where the individual as opposed to community or group rights are the ones enforced by the courts...the emphasis is clear” (Makoloo, 20). The Kenyan independence constitution had no room for group rights. This explains why indigenous rights remain challenging to justify in today’s Kenyan polity.

The formation process as well as the content of the 1963 constitution raises hard questions regarding its legitimacy. Should an imposed constitutional order serve as the basis for the normative justification of indigenous rights? Of what use is a constitution whose ideological framework is incompatible to the values and lives of its people? Does it matter what rights are enshrined in a constitution if such rights run counter to a people’s cultural values and way of life?

The assumption, as Pimentel (2011) has argued is that “in any society, and any state, the legal system will reflect a *mélange* of doctrines, institutions, and practices reflective of that country's history, culture, and politics (Pimentel, 61). A system rooted in the social experience of the people we may rightfully guess has their consent. As Claude Ake (2000) has argued, there is a correlation between law and social experience. Therefore, “it is extremely alienating for people to live under a system of law which does not connect to their social experience; it gives a pervasive sense of helplessness amid a chaos of arbitrariness” (Ake, 178). Ake’s point here is that, if a constitution is intended to be the expression of the sovereign will of “the people,” then the constitution cannot be divorced from the fundamental laws of the targeted population. A similar opinion is defended by John Rawls in his *Political Liberalism* (1993). According to Rawls, the “exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational” (Rawls, 217). Against this backdrop, my view is that this imposed constitution lacks legitimacy and so cannot invalidate indigenous rights. The imposition of a constitutional order that is alien to the social experience of the people and against their collective will as a people constitutes a violation of their fundamental rights as freedoms. The burden of proof, I think, is on the part of the government to justify the imposition of an alien constitution upon them. Their rights as indigenous peoples are pre-modern constitutional. As we saw earlier in Turner, indigenous rights are *sui generis*—they are rights of a special kind that are rooted in customary sources. These rights are grounded in indigenous peoples pre-contact territorial sovereignty as nations with a fundamental right to their self-determination.

In the last five decades following independence there have been continuous amendments and repeals of Africa’s independence constitutions. Issa Shivji (2003) observes that Africa has

seen three generations of constitutions since independence. Kenya's independence constitution was rescinded in 2010. This shows that a "top to bottom" constitutional approach is problematic. As renowned Kenyan legal scholar and current Supreme Court Judge Jackson Boma Ojwang observed, it was presumed at the outset "that the model of the constitution which came with independence would adjust to the real life of the Kenyan people" (Ojwang, 211-212). The independence constitution was not meant to be a final document. It was to be culturally enriched through time to reflect the needs of the Kenyan people. This leads us to ask, what can be an ideal method to realize a truly Kenyan constitution? Some Kenyan scholars think this must be achieved by totally parting ways with the current constitution. Amilcar Cabral for instance sees the independence constitution as an appendage of the colonial state. Cabral argues that if there should be true independence "it is necessary to totally destroy, to break, to reduce to ash all aspects of the colonial state" (Gustafson, 654). Cabral's viewpoint to me is unnecessarily extreme if not impracticable. What is needed, I think, is not a total separation with the Kenyan colonial legacy. I say this for practical reasons. First, I am not sure how this total rupture can be achieved. As I shall show in some greater detail below, what is important in my opinion is to "acculturate" the constitution to reflect Kenyan indigenous people's social experience and their general worldview.

There is no doubt that Kenya like the rest of the continent has benefited much from Western civilization. It is a fact that the liberal constitution has been tested in many non-Western settings with appreciable amount of success. The tension, as I see it, is not on the merits of the liberal framework. The tension stems rather from the lack of incorporation of indigenous perspectives in the current constitution. Consequently, my opinion is that the two systems can encounter each other in the interests of gaining perspectives that enrich each other without any of them denying itself. I think that if this encounter is properly done it is likely to yield fruitful results. A careful

study of the differences between the two systems can produce a contextualized constitution suitable for the general needs of the state as well as the particular needs of indigenous communities.

One possible objection to my argument above is likely to come from advocates of Montesquieu's constitutional theory. In his *The Spirit of Laws* (1789), Montesquieu argued that "the political and civil laws of each nation...should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another"(Montesquieu, 8). This appears to me as a very rigid stance on the question. From Montesquieu's perspective, my view does not stem from an indigenous rights perspective if the people must accept a contextualized liberal constitution. To be fair, there should be legitimate concerns regarding constitutional transplantations. Laws are very likely to clash especially when they touch on values that two people do not share. For instance, it is difficult to even mention the possibility of minority rights in a Kenyan context for the LGBT community. While this is permissible in the West, this is almost a taboo in Kenya and Africa generally. But assessments for constitutional contextualization cannot be focused on differences only. There are pertinent similarities between different peoples and societies. Kenya, for instance, can borrow a lot from the constitutional models of countries like Australia, Canada, or even South Africa that have a rich experience with minority rights issues.

A number of countries have successfully operated constitutional schemes that are based on systems developed in the West through a process of cultural adaptation. For example, the Canadian Charter of Rights and Freedoms (Constitution Act of 1982, Pt I) was useful in constitution-making processes in South Africa, New Zealand, and Hong Kong and the Basic Law in Israel (Chouldry, 2006). It is actually common and sound practice in law to appeal to precedents in approaching cases. These precedents could come from outside the social experience and the case law of the states concerned. Foreign precedents can fill gaps in domestic law, clarify a legal reasoning, or

even aid constitutional models (Hill,1989). Precedents have proved very helpful in resolving indigenous rights cases. For example, the Australian Mabo case (1992) was cited in the Kenyan Ogiek (1999) indigenous title case. Therefore, while there may be reasonable disagreement concerning where to draw the lines, I think what is needed is a sound methodology for contextualizing a foreign constitution to Kenyan indigenous culture, values and political institutions. This is an exercise in what is referred to as comparative constitutionalism (Jackson & Tushnet, 1999). Comparative constitutionalism is driven by the presumption that “there is a significant degree of congruence between problems and their possible solutions across the spectrum of contemporary constitutional democracies” (Zweigert &Kotz, 8). Consequently, the usefulness of constitutional models transcends the particularism of their socio-legal environment. In light of this, we can hypothesize that while an indigenous constitution should normatively be tied to the history and political traditions from which it draws its origins and meaning, it is not inconsistent with the objective of establishing an indigenous constitution to look beyond the legal jurisdiction of a particular culture. I am convinced there is a lot to learn from other legal contexts.

I should emphasize that my proposal is not intended as a mere borrowing and uncritical activity. As former Canadian Supreme Court Justice Claire L’Heureux-Dubé observes, in comparative jurisprudence, “judges are not into passive reception of foreign decisions, but in active and ongoing dialogue” (L’Heureux-Dubé, 15-16). In other words, it is a rigorous dialogue with foreign jurisprudence. I suspect that the meaning of dialogue and how it operates may remain vague without some elaboration. Suffice it to say that I am using dialogue here in a strictly Gadamerian sense: dialogue as conversation. Dialogue could be between partners, or interpreters and a text, historical events, amongst others. Genuine dialogue is the attempt to understand each other, or some subject matter, by Socratic dialectics. It is the coming to understanding through

questions and answers. The participants in a dialogue understand themselves as equal partners in a joint search for meaning and truth. Partners in a dialogue are like players in a game. Therefore, it is required that the players equip themselves with the necessary skills of the game. This would necessitate experts like Turner's Word Warriors, people who are skilled in both systems. Like Tully, Gadamer contends that genuine dialogue is always a continuous process. Through dialogue, Kenya's Word Warriors can adopt a constitutional framework that accommodates deliberative exchange involving diverse representative voices, a multi-logue. Accordingly, the ensuing constitution cannot be claimed to be an imposition on any people. Tully's multi-logue actually means simply that each indigenous nation retains the right to determine its own affairs on its own territory according to its own laws. The question is, what form of constitution is right for Kenya?

My guess is that a federal constitution like the Manjibo constitution of 1963 could better serve Kenya. This is a federal constitutional model first proposed by the British. This was adopted in 1963 and abandoned a year later for political reasons by the dominant Kikuyu tribe. The British had already experimented a federal constitutional model in their former colonies of Nigeria and Uganda that had gained independence earlier in 1960 and 1962 respectively. To their credit, in multi-ethnic states as Kenya, the British were aware that the concentration of power in the hands of a potentially dominant ethnic group was sufficient enough to destroy the state. Accordingly, the 1963 Manjibo Constitution was intended to keep in place a similar form of decentralized power structure that the British had used in their administration of the colonies through Indirect Rule. The Manjibo constitution was intended to keep in place a central government as the colonial state had been, while at the same time entrust power to the peripheries from provinces down to counties.

Unlike the monocentric orientation of the current modern Kenyan constitution, a federal constitution is likely to be diversity-friendly. As Kymlicka (1995) has counselled, multicultural

states must begin from the reasonable assumption that cultural diversity remains a serious challenge. Once this recognition is made, it becomes easier to see the necessity for minority rights that enhance freedom within groups and equality between minority and majority groups. In concrete terms, under a federal constitution, Kenya would be able to represent its forty-two indigenous nations as politically autonomous units. Each unit is expected to employ its own autonomy in accordance with its own needs. A federated Kenya, I think, has the promise of melting the debate about indigenous rights. Under a federal plan, each indigenous nation has the potential ability to live according its own laws and sustain cultural values within their ancestral territories with less intrusions from the centre. A federation can unify Kenya's cultural diversity.

What all these means is that a truly Kenyan constitution, *mutatis mutandis*, would be a mixed bag of different provisions defending both individual rights and group rights. In other words, indigenous rights need to be constitutionalised for the sake of protection. The two must go together by necessity. I do not harbour any illusions that this is easy to produce. Issues about compatibility of the two legal languages could be raised against this proposal. However, unless we are prepared to sacrifice justice on the altar of compatibility, I think it is the just the right thing to do. As I have said above, Kenya can learn a lot from other constitutional models. A good illustration of this proposal is the Canadian Charter of Rights and Freedoms (1982). Although rights in the Charter are written and understood essentially from an individual standpoint, the text contains provisions to cater for the collective rights needs of the Canadian indigenous needs. This has been interpreted as a form of "political compromise" (McDonald, 312). I don't think, however, that Canada's case defeats my argument of the conflict between liberalism and collectivism. The Canadian example is a very rare situation. The conflict between the two systems is theoretically clear. An analogous arrangement could happen in Kenya if there was the political will to do so.

CONCLUSION

The focal point of this study has been to offer a philosophical defense of a much-debated issue, namely, indigenous rights, in postcolonial Africa using the republic of Kenya as a case study. The delimitation of scope, specifically to the republic of Kenya, is motivated by a quest for rigorous analysis and an elaborate treatment. The study progressed through three chapters. The first chapter addressed the key question of indigeneity in Kenya, the second chapter focused on the relevant philosophical framework on the subject, and the last chapter was my own defense of indigenous rights in Kenya. In our examination of the question of indigeneity, we devoted time to analysing why the concept of indigenous identity is controversial in postcolonial Africa. Working from the roots up and examining the usage of the term in its colonial milieu, I rejected attempts that reduce the meaning of indigeneity to the colonial era only. I also showed that indigeneity has been harmed by essentialism. Essentialist definitions, I argued, by virtue of their criterial commitments in search for a “one size fits all” definition, miss the mark: they proffer criteria that no single indigenous group can entirely satisfy. What, then, is indigeneity in this study? Indigeneity is an identity with strong ties to a specific territory based on appeal to first occupancy. By this reasoning, the Kenyan Maasai can be said to be unquestionably “indigenous” to the Maasailand.

Having shown the meaning and legitimacy of indigeneity in Kenya, I turned in the second chapter to the task of examining the relevant philosophical framework on indigenous rights. Kymlicka’s liberal approach sought to reconcile indigenous rights to the core principles of liberalism. I argued that although Kymlicka’s project is well intentioned and has been well received as one of the most significant contributions from contemporary philosophers offered to this discussion, Kymlicka’s search for compatibility between indigeneity claims and liberalism commits the error of assuming the legitimacy of the liberal state over indigenous territory without

finding any need to justify this assumption. Kymlicka's thesis, I pointed out, compromised both sides of the spectrum in his search for a common ground. Specifically, I noted that his notion of "group differentiated rights" are strictly not group rights as indigenous people would understand. The misguidance in the liberal approach was exposed in the second argument from indigenous scholar, Dale Turner. I argued that Turner's four peace pipe criteria form an important contribution to the debate and has the potential to create a fairer Indigenous-State relationship. James Tully's constitutionalism afforded us a clearer understanding of the origins of the indigenous rights problem. Notably, Tully's account detailed the limitations for accommodating cultural diversity inherent in the modern constitution. The journey through this philosophical argumentation asserted the truth of pre-contact indigenous territorial sovereignty and nationhood. These philosophers, as I demonstrated, all argued that at the time of contact, indigenous peoples were not living in a state representative to the Hobbesian state of nature. On the contrary, they were self-governing nations.

That indigenous peoples existed as self-governing peoples with their own laws prior the formation of statehood is the foundation of their argument for indigenous rights within their current polities. The three arguments that I presented in the final chapter of the study, although founded on three different perspectives, is predicated on this fact. In the first argument I argued that unless the Kenyan state could demonstrate the consent of incorporation of indigenous peoples such as the Maasai into the Kenyan state, the legitimacy of the state over the Maasai people and the ancestral Maasai territory cannot be defended. On these grounds, I argued that Maasai claims of territorial rights over the territory are legitimate. In the second argument, I contended that the historic injustices on Kenyan indigenous peoples ranging from forced incorporation, forcible evictions and land appropriation tantamounted to a sufficient basis for a moral case of reparations and restitution. In the third argument, I argued that indigenous rights derived from indigenous

peoples' laws prior to the Kenyan state formation. They are pre-modern constitutional, i.e. they pre-existed the nation state. I refuted the idea that an "imposed" constitution could be the basis of denying indigenous peoples rights in Kenya. I should emphasise that I did not any way subscribe to constitutional relativism. A strong case was made in support of constitutional transplantations provided it received the people's endorsement. The thesis concludes with suggestions for Kenya.

At the heart of my recommendation is the need to recognise the cultural diversity of Kenya and Kenya's indigenous peoples' right to political autonomy. The forced integration of Kenya's indigenous peoples into a political structure that marginalises them as I have shown in the thesis is not without consequences. I do not think that the common good of a multiethnic society such as Kenya can be accomplished with a political arrangement which disregards the cultural diversity and rights of indigenous nations to self-determination. My position is that with a federalised constitutional arrangement, it is possible to create a fairer society that no one group is politically oppressed. To be sure, a federation is itself not a perfect political arrangement. Of course, a federation is not sufficient to protect and accomplish the objective good of all the cultural groups in a state. However, in a society like Kenya where cultural identity has been shown to be a significant and volatile fault line, a federation, hypothetically, would realize the benefit of each group having a greater say in its internal affairs. If well designed, guided and directed by political goodwill, a federated Kenya can accomplish a fairer society than a unitary democratic government with powers concentrated in the centre. This proposal is consistent with the principles of liberal democracy as democracy is understood to imply respect for rights and participation. Nigeria, another former British colony is a good example of what a federation should mean for Kenya. Of course, the Nigerian experiment is not without its problems. However, it is fair to admit that it has helped the Nigerian peoples to live as one nation despite the challenges posed by its great diversity.

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