

# **Decentralisation and inclusion in Kenya**



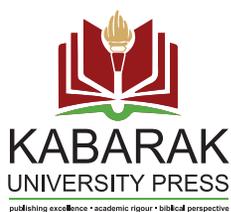
# Decentralisation and inclusion in Kenya

From pre-colonial times to the first decade  
of devolution

J Osogo Ambani & Caroline Kioko (eds)



publishing excellence · academic rigour · biblical perspective



DECENTRALISATION AND INCLUSION IN KENYA

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# Contents

Acronyms/ Abbreviations.....	xi
List of cases .....	xv
List of authorities .....	xix
Foreword .....	xxv

## Chapter 1

<b>Introduction .....</b>	<b>1</b>
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## Chapter 2

<b>Illegitimate contradictions: The construction of centralisation, exclusion and marginalisation in the Kenyan State.....</b>	<b>11</b>
Introduction .....	11
The finesse of late colonialism .....	15
Contextualising the upheaval of the colonial arrival.....	17
Pre-colonial ebbs and flows prior to the colonial upheaval, 1800-1897 .....	17
The illegitimate contradiction of the colonial encounter, 1897-1963	22
Explaining the tenacity of unjust power structures .....	23
The native question .....	28
Fictive traditions and ideologies and Africa’s diminished worldview .....	32
The exclusion and marginalisation of African women and youth. ....	32
The exclusion and marginalisation of African PWDs.....	37
Containerisation and the invention of negative ethnicity and politics .....	41

‘Grievance politics’ and the ‘other native’ question.....	45
Some conceptual clarifications.....	47
Homogenising mission of the colonial state.....	47
Bastardisation of political participation in civil society.....	48
The colony in the post colony.....	50
Development planning and exclusion.....	53
Sessional Paper No 10 of 1965 and exclusionary continuities....	56
District Focus for Rural Development.....	59
By way of conclusion: ‘Reverse late constitutionalism’?.....	66

### Chapter 3

<b>Decentralisation of power in Kenya in historical perspective.....</b>	<b>69</b>
Introduction.....	69
Some cursory remarks on the pre-colonial period.....	73
Governance in the colonial period, 1897-1963.....	74
Indirect colonial rule.....	78
Governance in independence Kenya.....	85
Reconcentration of power.....	91
Decentralised planning and development.....	95
The re-entry of colonial economic and investment policies.....	97
Recentralisation in the Moi era, 1978 to 2002.....	98
Proposed models of decentralisation during the constitu- tion-making process (1999 to 2010): Multiple drafts, varied inter- ests.....	109
The Constitution of Kenya Review Commission Draft.....	110
Bomas Draft.....	113
Wako Draft.....	116
The Harmonized Draft.....	118

Revised Harmonized Draft ..... 119

Decentralisation under the 2010 Constitution: Another half-hearted attempt? ..... 120

    The 2010 promise ..... 121

    The model of governance under the 2010 Constitution..... 123

    The faltering promise: Obstacles to a working devolution ..... 130

    Conclusion..... 145

**Chapter 4**

**Marginalisation in Kenya in historical perspective (1963-2021): The starts, false starts and the last promise ..... 149**

Introduction ..... 149

A history of marginalisation..... 152

    Land and marginalisation ..... 155

    Political participation and marginalisation ..... 158

    Economic marginalisation..... 168

    Regional disparities..... 173

    The civilising mission ..... 182

    Education..... 189

Privilege and marginalisation ..... 191

    Women ..... 193

    Youth ..... 198

    Persons with disabilities ..... 202

Measures to redress marginalisation ..... 206

    Pre-2010: The false starts ..... 206

    Post-2010 constitutional protection: The last promise ..... 210

    Challenges to political inclusion ..... 220

Challenges with implementation of policy measures .....	225
Conclusion .....	228

## Chapter 5

### **Devolution and the promise of democracy and inclusion: An evaluation of the first decade of county governments, 2013-2022.... 231**

Introduction .....	231
County institutions and the inclusion of the marginalised .....	233
Women, devolution and inclusion.....	233
Women's participation through leadership of legislative institutions .....	271
Youth, devolution and inclusion .....	279
Youth's participation through elections by ballot .....	279
Youth participation through nomination .....	283
Youth participation through appointive positions.....	286
Youth participation through leadership of legislative institutions	287
Persons with disabilities, devolution and inclusion .....	289
Participation of PWDs through elections.....	291
Participation of PWDs through the nomination process.....	295
Participation of PWDs in appointive positions.....	300
Participation through leadership of legislative institutions.....	301
County laws and policies, devolution and inclusion .....	303
County laws through the lenses of the marginalised groups ...	303
County programmes through the lenses of the marginalised groups.....	310
Conclusion .....	316

## List of tables

Disbursement of Equalization Fund to marginalised counties.....	145
Counties.....	238
(MCA).....	238
Women elected.....	238
Table 3: Variance in percentages of elected women between 2013 and 2017.....	247
Table 4: Election of women by nomination to the study county assemblies .....	249
Table 5: Composition of the study counties by gender .....	249
Table 6: National Cabinet positions occupied by women 2013-2022 ..	259
Figure 11: Portfolios held by women in CECs, 2013-2017.....	260
Table 7: Gender representation in the County Executive Committee Kakamega County .....	262
Table 8: Gender representation in the County Executive Committee of Garissa County.....	265
Table 9: Gender representation in the County Executive Committee of Mombasa County .....	266
Table 10: Gender representation in the County Executive Committee of Nakuru County.....	268
Table 11: Gender representation in the County Executive Committee of Narok County .....	269
Table 12: Speakership of county assemblies by gender, 2013-2022	273
Table 13: County assembly leadership in the study counties (2013)...	274
Table 14: County assembly leadership in the study counties (2017)...	274
Table 15: 2017 Women-led committees in the county assemblies of the study counties .....	276
Table 16: Nominated and elected youth in the 2013 elections .....	280

Table 17: Youths elected during the 2017 General Elections.....	280
Table 18: Youth nominated to the study county assemblies in 2013...	284
Table 19: Youth nominated to the study county assemblies in 2017...	285
Table 20: Committees of Parliament led by youth, 2013 .....	287
Table 21: Committees of Parliament chaired by youth, 2017 .....	287
Table 22: Persons with disabilities elected to Parliament 2013-2022...	291
Table 23: The population of PWDs in the study counties.....	292
Table 24: Persons with disability in the National Assembly in 2013-2017 .....	293
Table 25: Persons with disability in the Senate 2013-2017 .....	294
Table 26: Persons with disabilities elected to county assemblies, 2013-2017 .....	294
Table 27: Persons with disabilities in the study county assemblies (2013).....	295
Table 28: Persons with disabilities in the study county assemblies (2017).....	295
Table 29: Representatives of PWDs in the study county assemblies and their membership in county assembly committees 2013.....	302
Table 30: Representatives of PWDs in the study county assemblies and their membership in county assembly committees 2017.....	302
Table 31: Examples of Garissa County laws on women.....	304
Table 32: Examples of Kakamega county laws on women .....	304
Table 33: Examples of Mombasa County laws on women .....	305
Table 34: Examples of Nakuru County laws on women.....	306
Table 35: Examples of Narok County laws on women .....	306
Table 36: Examples of laws on youth in Garissa County .....	307
Table 37: Examples of laws on youth in Kakamega County .....	307
Table 38: Examples of laws on youth in Mombasa County.....	308
Table 39: Examples of laws on youth in Nakuru County .....	308
Table 40: Examples of laws on youth in Narok County.....	309

## Acronyms/Abbreviations

AA	affirmative action
ADCs	African District Councils
AGPO	Access to Government Procurement Opportunity
AIEs	Authorities to Incur Expenditures
APRM	African Peer Review Mechanism
APRM-CRM	African Peer Review Mechanism Country Review Mission
ASALs	arid and semi-arid lands
BEAA	British East African Association
CADP	county annual development plan
CBF	Constituency Bursary Fund
CCRD	Committee of the Care and Rehabilitation of the Disabled
CDA	Coast Development Authority
CDB	County Development Board
CDF	Constituency Development Fund
CDTF	Community Development Trust Fund
CECM	County Executive Committee Member
CECs	County Executive Committees
CIC	Commission for the Implementation of the Constitution
CIDP	county integrated development plan
CIPEV	Commission of Inquiry into Post-Election Violence'
CKRC	Constitution of Kenya Review Commission

CoE	Committee of Experts
CoG	Council of Governors
CRA	Commission for Revenue Allocation
CT-OVC	Cash Transfers to Orphans and Vulnerable Children
DAC	District Advisory Committee
DDAC	District Development Advisory Committee
DDC	District Development Committee
DFRD	District Focus on Rural Development
DvDC	Divisional Development Committees
EALA	East African Legislative Assembly
EAP	East African Protectorate
ENNDA	Ewaso Ng'iro North Development Authority
ENSDA	Ewaso Ng'iro South Development Authority
FIDA	Federation of Women Lawyers
FPTP	first past the post
GDP	gross domestic product
GEMA	Gikuyu Embu Meru Association
HSNP	Hunger Safety Net Programme
IBEAC	Imperial British East Africa Company
ICT	information and communications technology
IEBC	Independent Electoral and Boundaries Commission
IPPG	Inter Parties Parliamentary Group
KADU	Kenya African Democratic Union
KADU	Kenya African Development Union
KANU	Kenya African National Union

KAU	Kenya African Union
KCB	Kenya Commercial Bank
KHRC	Kenya Human Rights Commission
KLGRP	Kenya Local Government Reform Programme
KMPDU	Kenya Medical Practitioners and Dentists Union
KBS	Kenya Bureau of Statistics
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission on Human Rights
KNCU	Kilimanjaro Native Cooperative Union
KTWA	Kavirondo Taxpayers Welfare Association
KVDA	Kerio Valley Development Authority
LASDAP	Local Authorities Service Delivery Action Plan
LATF	Local Authorities Transfer Fund
LBDA	Lake Basin Development Authority
LegCo	Legislative Council
LNCs	Local Native Councils
MCA	member of county assembly
MRC	Mombasa Republican Council
MTEF	Medium Term Expenditure Framework
MYWO	Maendeleo ya Wanawake Organisation
NARC	National Rainbow Coalition
NCC	National Constitutional Conference
NCPWD	National Council for Persons with Disabilities
NDDF	National Disability Development Fund
NDI	National Democratic Institute
NFD	Northern Frontier District
NGAAF	National Government Affirmative Action Fund

NGEC	National Gender and Equality Commission
NMS	Nairobi Metropolitan Service
NONDO	Northern Nomadic Disabled Persons' Organisation
NSNP	National Safety Net Programme
ODM	Orange Democratic Movement
OPCT	Older Persons Cash Transfer Programme
PSC	Parliamentary Select Committee
PWDs	persons with disabilities
PWSD-CT	Persons with Severe Disability Cash Transfer
RDAs	regional development authorities
RMFL	Road Maintenance Fuel Levy
SAPs	structural adjustment programmes
TA	Transitional Authority
TARDA	Tana and Athi River Development Authority
TJRC	Truth Justice and Reconciliation Commission [Kenya]
TNA	The National Alliance
UDPK	United Disabled Persons of Kenya
UFS-CT	Urban Food Subsidy Cash Transfer
UK	United Kingdom
UN	United Nations
UNICEF	United Nations Children's Fund
UPE	universal primary education
VTC	vocational training centre
WEF	Women Empowerment Fund

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# Foreword

I received very warmly the invitation to write the Foreword to this book for two important reasons. First, I am a firm believer in credible legal education because a country's legal system can only be as strong as the learning and education that its lawyers receive. Second, even in my retirement, I continue to champion the ideals of our Constitution, including devolution, democracy, equality and non-discrimination, which, incidentally, are also the focus of this book.

Please allow me to speak about these subjects of legal education, our Constitution and the book briefly.

Our people aspire to have a society whose true and primary foundation and pillars are justice, respect and adherence to the rule of law. This is only possible when we have a legal profession whose members are not only competent in the knowledge and application of the law and legal practice, but also when we have a body of lawyers that have integrity, human values, and virtues that are espoused in our Constitution.

As an institution with Christian foundations in its philosophy and approach to teaching and learning, we have an expectation that professionals who go through Kabarak University reflect the same standards and values; which are, integrity, discipline, hard work, and all the ethical and moral values that form the package of Christian virtue in the contemporary world. These values are only achievable where they are inculcated very early in places such as the families, churches and learning institutions.

In this regard, I am happy to learn that Kabarak University School of Law is in the process of laying out a strategic framework with the view to setting 'a very high bar for excellence, ethics and virtue in legal education'. In its strategic plan, Kabarak University School of Law aims to impact the universe through excellent legal education, cutting-edge

legal and interdisciplinary research, and devoted community service – all of them from ethical and biblical perspectives. As a Christian, I associate myself not just with excellent legal education, research and community service, but equally with the Christian foundations in the approach to learning. As some of you may recall, when determining the presidential election petition in 2017, I underlined that ‘the greatness of any nation lies in its *fidelity* to the constitution and adherence to the *rule of law* and above all the fear of God.’ This statement was true then, and remains so today, and only lawyers with a solid foundation, such as that which Kabarak University promises, can be relied upon to realise these ideals. This is why I am proudly associating with Kabarak University.

Our Constitution carries with it a big promise. In fact, many commentators, including judicial officers, have classified it as a transformative constitution. I agree with this view because our Constitution charts a new path for our people. It is already acting as a bridge between a past riddled with tyranny, centralised authority, exclusion and marginalisation at multiple levels and a future all-inclusive democratic society. In this aspiration, the people reign sovereign, power is dispersed far and wide, and the language of human rights is recognised currency.

We have come from far. There were days when women rights or their political inclusion did not matter. I talk here about the days when an entire Cabinet could be named without a female member; when superior courts of record were the preserve of white or Asian men; and Parliament was a privilege of older men. All this despite the fact that women are not only just as qualified as men are to lead, but also possess intrinsic and unique leadership perspectives that men don’t have.

Empirical research has shown that women have an innate ability to hold their egos in check, and *take the time to listen instead of reacting right away*. Furthermore, as natural multitaskers, women are more naturally imbued with empathy and emotional intelligence. Women have the ability to decisively and quickly respond to simultaneous and different tasks or problems at a time, a critical component to successful leadership.

Despite these unique leadership qualities, based on odious notions of patriarchy, the exercise of political power remains uncivil and has maintained a constant exclusion of women, who constitute about 50.5 per cent of our population, from mainstream political representation. This fact has not only become an obstacle to women's advancement and development but has also impeded women's participation in the many issues we face as a nation.

A similarly unfortunate exclusion is also experienced by the youth. Despite the risk we run of unleashing the youth bulge into 'a demographic disaster' instead of transforming it into 'a demographic dividend', our society often considers the youth voice as an irritant.

Despite the fact that God has endowed most persons with disability with enormous and unique potential that ordinary people do not possess, we have not given much thought to their plight but instead, our conscience remains undisturbed and unstirred by their challenges, leading us to invariably consider them as outcasts.

Marginalisation has also been experienced in some regions of our country. Certain areas, particularly at the Coast and the former Northern Frontier District, were relegated from the development agenda and their fate was sealed through official policies such as the *Sessional Paper No. 10 of 1965*.

Cognisant of these anomalies, our Constitution, and specifically its transformative aspects, seeks to change the above situation in many and fundamental ways. The Constitution provides for, and requires us, to reflect the diversity of our country in all our institutions of governance. It is a rallying call to all of us, leaders and the people, to put into practice, the true meaning of nation-building and to achieve a society where everyone not only feels part of, but actually and truly belongs.

Being normative, the Constitution provides clear obligations, including timelines for its implementation, and in some instances, sanctions for non-compliance. The framers understood that changing a culture to facilitate inclusion may meet resistance, and therefore put

in place mechanisms to ensure implementation. A clear example is the constitutional provisions to ensure gender inclusivity and diversity. The constitutional requirement to ensure every state or public institution (whether appointive or elective) has not more than 2/3 of the members of the same gender was one such requirement. This salient provision of the Constitution was clear in terms of its meaning and application, yet, Parliament did not, in my assessment take the import of this requirement. It is with this in mind, and after a lot of patience with Parliament that, as the Chief Justice, I issued the Advisory to the former President of the Republic of Kenya, His Excellency Uhuru Kenyatta, in 2020, to dissolve Parliament for its failure to enact the legislation required to realise the 2/3 gender rule. Although the matter is still pending in our courts, I consider this an important milestone in our country's pursuit of the ideals of equality and non-discrimination.

It is for these reasons that we should all celebrate this book, *Decentralisation and inclusion in Kenya: From pre-colonial times to the first decade of devolution*, which speaks specifically about the issues I have raised above.

The book explores the conceptual basis for the historical relationship between decentralisation and inclusion in Kenya, discusses decentralisation in historical perspective, reviews inclusion also historically, and finally uses data to assess the first decade of devolution.

The book finds, and quite accurately, in my view, that our history from the advent of colonialism is one of the 'struggles for decentralisation and inclusion by those on the outside, and efforts to congest more powers at the centre and to exclude the others by those on the inside'. It also finds, and rightly so, that 'the clamour for decentralisation and inclusion won a major battlefront when the 2010 Constitution, which entrenched devolution as one of the overarching principles, was promulgated'. Indeed, devolution, as the new Constitution envisions, brings with it the promise of democratic and accountable exercise of power, national unity, self-governance, public participation, social and economic development, provision of proximate services, equitable sharing of

national and local resources, the rights and interests of minorities and marginalised communities, decentralisation, and separation of powers. Kenya's devolution is about democracy and accountability, and equality and inclusivity, which ideals are critical for marginalised groups.

After studying our entire history of decentralisation and inclusion the book concludes that there is a positive relationship between decentralisation and the inclusion of various groups; that the more we decentralise the more we include.

On the other hand, and as the scholars confirm in their findings, the centralisation of power is inimical to plurality and inclusion. Indeed, Kenya's pre-2010 history confirms that that the more we centralised, the more we marginalised. The development and completion of this book is a considerable milestone towards the evaluation of the gains that we as a country have made in terms of representation and inclusion of not only women, but also other special interest groups such as youth and persons with disabilities. Let me appreciate the authors of this indispensable and timely piece by highlighting what I believe to be the principal contributions they have made to the discourse on decentralisation and inclusion in Kenya: **First**, the book traces the evolution of decentralisation and inclusion in Kenya through three pivotal periods of the country's history, that is, from pre-colonial times, through the colonisation period, and finally to the post-independence epoch beginning in 1963. This historical exposition gives the reader the benefit of understanding why devolution took centre-stage in the deliberations leading to the new constitution and the momentous ramifications it holds for the special interest groups outlined in Article 100 of the Constitution. **Second**, the book provokes us to remember those we often neglect. For example, how often do we reflect on how many persons living with disabilities hold important and influential State and public offices in our counties and in our country? The authors of this book have gone to great lengths to answer this question through the empirical study of representation in five counties: Garissa; Kakamega; Nakuru; Narok; and Mombasa.

**Third**, I believe the contents and findings of the book provide a roadmap on how the transformative potential of law could be harnessed to improve the protection of the marginalised and challenge not only the institutions of government, but also us, members of the public. It is our vigilance that will enable us to capture and develop progressive practices towards implementing our Constitution.

With the above in mind, I have no doubt that the book is a crucial resource for institutions of government, policy-makers, trainers, and benchmarking, research and development initiatives on decentralisation and inclusion, especially on women, youth and persons with disabilities. I should also say that I am very encouraged that Kabarak Law School conducted this research, validated and published the findings. I believe that this is the true purpose of a University – to generate knowledge. Further, what encourages most is both the students and members of faculty were involved in this research. This is inspirational and is the way to go in training the next generation of lawyers. I want to thank the researchers (Prof Osogo Ambani, Lucianna Thuo, Humphrey Sipalla, Elisha Ongoya, Petronella Mukaindo, Caroline Kioko) who wrote the various chapters, the editors (Prof Osogo Ambani and Caroline Kioko) and the entire Kabarak Law School, together with Heinrich Böll Stiftung for delivering on this product. More so, I thank Prof Henry Kiplangat, the Vice Chancellor, Kabarak University, for his visionary leadership of this promising University. I look forward to working with Kabarak University in the future.

Thank you all and God bless.

Chief Justice (emeritus) David K Maraga, FCI Arb, EGH

Nairobi, October 2022

# CHAPTER 1

## Introduction

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*J Osogo Ambani and Caroline Kioko*

Mahmood Mamdani's *Citizen and subject*<sup>1</sup> is a good starting point for conceptualising power and marginalisation in Africa generally and even Kenya specifically. This framework appreciates that the colonial project was both illegitimate and contradictory from the very beginning. It was illegitimate because it was imposed on the native populations. It was contradictory in the sense that its objects and means were bad even for its own existence. The challenge that faced the colonialists was how, as a foreign minority race, they could rule over native majority races but yet still extract resources and labour not just for the settler community but also for their economies back in Europe. The result was always a bifurcated state in which a small racial minority enjoyed privileged 'citizenship' status while the majority was mistreated as 'subjects'.

Colonial history in Africa generally and Kenya especially is one of state-sanctioned usurpations against the natives. Colonial policies of apartheid relegated native Africans to the reserves where marginalisation, discrimination and other violations of human rights were prevalent. Although the colonial project in Africa commenced after the French and American revolutions, the colonialists only applied the rights associated with these uprisings to the white minorities, *the citizens*. This privileged group, which, in Kenya's context, inhabited fertile highlands and better-furnished urban areas, enjoyed the freedoms of assembly, association, expression, among others, and were gradually entitled to

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1 Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton/Fountain/James Currey, 1996.

representation in the legislative bodies.<sup>2</sup> On the other hand, the native Africans were not entitled to the above-mentioned rights. As *subjects*, the native Africans did not bear even critical rights like participation and representation until towards the end of the colonial epoch.<sup>3</sup> Moreover, displacements, landlessness, police brutality, and poor infrastructure, among others, were some of the main highlights of life in the native reserves. Colonial power in the native reserves was, plainly speaking, authoritarian. Instead of rights, the colonial powers governed Africans through a modified system of customary law whose administrators, the chiefs, were under their total control and instruction.<sup>4</sup> African customs only applied where they did not threaten colonial power and western civilisation. Native customs were modified to align with colonial values like patriarchy and the extractive objectives of the colonial state and its morality.<sup>5</sup> Colonial policy and morality enhanced the marginalisation of women, youth, persons with disabilities (PWDs), rural populations and other minority groups.

Independence was meant to alter this situation. In fact, the nationalist movements in Africa invariably mobilised populations around grievances related to land and the lack of inclusive and democratic governance. Paradoxically, these ideals did not always follow independence. For most of Africa, the old challenges remained. Despite taking over the implements of power, the post-colonial State only benefited a small privileged class. The rest of the population continued to be treated as if they were subjects. The State continued to be both alien and aggressive to them. Its design and architecture

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2 Richard Wolff, 'The economic aspects of British Colonialism in Kenya, 1895 to 1930' 30(1) *The Journal of Economic History* (1970) 273-275.

3 In Kenya's context, although the Devonshire White Paper of 1923 stated that the interests of native Kenyans were paramount, it however, noted 'that time was not yet ripe for direct native representation in the Legislative Council'. See the Final Report of the Constitution of Kenya Review Commission, 18.

4 Robert Lignor, *Colonial transformation of Kenya: The Kamba, Kikuyu and Maasai from 1900 to 1939*, Princeton University Press, 48-55.

5 Lignor, *Colonial transformation of Kenya: The Kamba, Kikuyu and Maasai from 1900 to 1939*, 3-14.

was hierarchical. At the very top of the pyramid was the political and bureaucratic class – invariably ‘able-bodied’ male and increasingly elderly, which the colonial experience socialised to use State apparatuses to extract for its self. At the very bottom of the pyramid were ordinary people condemned to endure marginalisation and an oppressive and negligent State. The colonialists bequeathed a state designed to deliver clientelism, corruption, ethnic tensions, police brutality, socio-economic deprivation, and marginalisation and inequities on the basis of gender, sex, age, disability, and ethnicity, among others.

Such a state was certain to fail. And it did. Invariably. In Kenya, the people have historically had frosty relations with their own State. Until 2010, when a new constitutional order was established, many ordinary Kenyans complained about a lethargic and partial public service,<sup>6</sup> a brutal and corrupt police force,<sup>7</sup> an unjust and dependent Judiciary,<sup>8</sup> and an exclusive, unaccountable and greedy male-dominated political leadership.<sup>9</sup> These judgments are not surprising given the framework described above.

Therefore, the Constitution of Kenya, 2010 (2010 Constitution), attempts to decolonise the State by democratising it to entrench ordinary people at the centre of power, and to de-tribalise, de-urbanise and accommodate all groups for the sake of equality, equity and political tranquility. In this sense, the 2010 Constitution should be seen as a transitional document. It is a manifesto meant to re-engineer a society with a troubled past. Clearly embedded in it is a re-ordering of power with the result that the ordinary people now matter regardless of their gender, sex, age, disability, and ethnicity, amongst others. The 2010 Constitution envisions a State that for the first time must serve its people.

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6 Final Report of the Constitution of Kenya Review Commission, 11.

7 Final Report of the Constitution of Kenya Review Commission, 15.

8 Final Report of the Constitution of Kenya Review Commission, 13.

9 Final Report of the Constitution of Kenya Review Commission, 18.

The 2010 Constitution has turned tables. It has recognised people's sovereignty. It has established a framework for equal citizenship. It has affirmed human rights and introduced mechanisms for holding leaders accountable. It's very design and architecture confirms this position. The 2010 Constitution begins with the concept of sovereignty of the people. It articulates provisions on citizenship early at Chapter Three. And the Bill of Rights follows at Chapter Four. The 2010 Constitution places the principles of leadership and integrity at Chapter Six,<sup>10</sup> way ahead of the Legislature and Executive chapters, which appear at chapters Eight and Nine respectively. This set up, alone, represents a major revolution aimed at elevating the status of the ordinary people – now considered sovereign. And that is before one considers the constitutional scheme of devolution of power, which is one of the most transformational aspects of the 2010 Constitution. The 2010 Constitution has put a new order in sight.

The objects of the devolution of government under Article 174 of the 2010 Constitution are—

- a. to promote democratic and accountable exercise of power;
- b. to foster national unity by recognising *diversity*;
- c. to give powers of *self-governance* to the people and *enhance the participation* of the people in the exercise of the powers of the State and in making decisions affecting them;
- d. to *recognise the right of communities to manage their own affairs* and to further their development;
- e. to protect and promote the *interests and rights of minorities and marginalised communities*;
- f. to promote social and economic development and the

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10 In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, Civil Appeal 290 of 2012, Judgement of the Court of Appeal of 26 July 2013 (eKLR), the Court of Appeal noted: 'The historical and political context against which leadership and integrity principles are entrenched in the Constitution of Kenya (2010) leave no doubt that a new constitutional ethos has been called forth.'

- provision of proximate, easily accessible services throughout Kenya;
- g. to ensure *equitable sharing* of national and local resources throughout Kenya;
  - h. to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
  - i. to enhance checks and balances and the separation of powers.

Clearly, the 2010 Constitution associates devolution with democratic and accountable exercise of power; national unity; self-governance; public participation; social and economic development; provision of proximate services; equitable sharing of national and local resources; the rights and interests of minorities and marginalised communities; decentralisation; and separation of powers.<sup>11</sup> Studied keenly, these objects promise democracy and accountability, and equality and inclusivity, which are the ideals pursued by the marginalised groups identified by Article 100 of the 2010 Constitution, namely, women, youth, PWDs, ethnic and other minorities, and other marginalised communities. At the close of a decade since the devolved governments were operationalised in 2013, time is ripe to evaluate the original promise of devolution to democratise and include the marginalised groups identified above.

But has devolution delivered on these fronts? This book studies the extent to which the first decade of devolution, 2013-2022, realised democratic inclusion for three marginalised groups – women, youth, and PWDs. That actual work is done in Chapter 5, where Lucianna Thuo and J Osogo Ambani provide answers to the three main research questions, whether: i) the institutions of county governance incorporated members of the marginalised groups; ii) the counties enacted laws and policies

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11 Constitution of Kenya (2010), Article 174. Article 10 also introduces the values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised as national values and principles that undergird the 2010 Constitution. [emphasis added]

that are responsive to the rights and welfare of the marginalised groups; and iii) the counties initiated projects that resonate with the needs of the marginalised groups.

That empirical study finds that devolution institutions included women, youth and PWDs just as had been hypothesised. However, the levels of inclusion were not always on point. As Chapter 5 shows, the representation of women in county assemblies through ballot was still wanting. By the close of the first decade of devolution, women's performance in the member of county assembly (MCA) electoral contests was yet to match the performance of the youth for the same positions and their like in parliamentary contests. To meet the 2/3 gender rule, a top-up formula was applied successfully although again it had its downfalls. For instance, nominated female MCAs were thought to be of a lower cadre and on this basis would be denied opportunities to head county assembly committees. Since the nominated MCAs do not represent any constituency or run any fund or kitty, their visibility appears to have been diminished to the extent of being unable to convert their advantage to success in subsequent electoral contests. Some women MCAs chaired committees of the county assemblies with some taking charge of committees that are usually thought to be important. In rare but increasing occasions, some women were elected to the positions of speaker and deputy speaker. Women were also appointed to the county executive committees although many counties failed to meet the constitutional 2/3 gender rule in the executive appointments. On the positive note women county executive committee members were appointed to both important and inferior county executive committee offices contrary to the usual thought that they are only considered for inferior departments like social services.

The youth (especially male youth) outperformed women in the electoral contests for the MCA positions and not more. Compared to the women, the youth performed poorer in the leadership of county assembly committees, speakership and appointments to the county executive committees. Even then, our research had to reckon with absence of desegregated data which also affected our analysis on

the inclusion of PWDs. Available information points to a poor show by PWDs in the electoral contests for the MCA seats and in all other relevant positions. Yet the constitutional affirmative action measures aimed at including PWDs were not always followed. Thuo and Ambani also find that there are hierarchies even within this category with persons with physical disabilities ranking above the other PWDs in terms of inclusivity outcomes. Chapter 5 also finds lots of evidence to support the conclusion that county laws and programmes responded to the needs of the marginalised groups noticeably.

Chapter 5 does not hang in the air like a cloud. It rests on a solid foundation of literature review conducted over three chapters. The conceptual framework, which Humphrey Sipalla articulates at Chapter 2, traces the two variables of the study – centralisation and marginalisation – to their genesis, the colonial epoch. Sipalla takes us back to the illegitimate and contradictory aims of the colonial State, which he claims are the foundations for its proclivity for centralisation and exclusion. The conceptual chapter credits the colonists with altering the native customs to the extent that what are sometimes thought to be traditionally African may very well be foreign impositions. Since exclusion was engrained at the very core of the colonial State, it was not the kind to simply fade away at independence. This explains why the centralisation and marginalisation tendencies continue decades into our independence. But it is Sipalla's wise counsel towards the end of his exegesis which is most thought provoking: 'to achieve the promise of reinstating the marginalised to their "peaceable occupation of societal spaces" in the theorised pre-colony, we must approach the overthrowing of such marginalising structures with as much reverse finesse of "late constitutionalism" as the colonialist did with late colonialism'.

By the time Petronella Mukaindo and Elisha Ongoya pick up the conversation on decentralisation in historical perspective at Chapter 3, the tempo is already set. Like Sipalla before them, they focus significant accusations on the colonisers and their faithful successors for the centralising tendencies that have characterised Kenya's polity. Through

their very comprehensive review of literature on decentralisation in Kenya, Mukaindo and Ongoya are enabled to re-enact our journey. It begins with the colonialists sowing the seed of centralisation, and nurturing it so thoroughly throughout the colonial epoch as to immediately outmanoeuvre the majimbo system entrenched in the Independence Constitution. Those forces would be powerful enough to neutralise nearly all subsequent efforts at decentralisation. Indeed, post-colonial Kenya has attempted a number of decentralisation initiatives from local government to other forms of deconcentration, delegation, and fiscal decentralisation, which eventually yielded to the 2010 Constitution - none of which have been free of attack.

Lucianna Thuo and Caroline Kioko write about the history of marginalisation in Kenya at Chapter 4. They tell us about how three major epochs - pre-colonial, colonial and post-colonial - shaped marginalisation to what we understand it to be today. One thread weaves across their entire exposition, that is, State policies and their impact on inclusion. Like their colleagues, they accuse the colonial and post-colonial policies for today's state of marginalisation. They identify Sessional Paper No 10 of 1965, among others, as an example of post-colonial policies that added on the colonial legacy of marginalisation. Thuo and Kioko point us to a number of remedial measures attempted by independence governments, although it is not lost on them that most of these ended up as false starts. The question is, will the 2010 Constitution end up as another false start? The first decade has told us a few positive things but vigilance will still be required.

Given this backdrop, we are right to say that the entire study vindicates our initial hypothesis that there is a positive relationship between decentralisation and the inclusion of the various groups; that the more we decentralise the more we include. And that the converse is also true: the more we centralise the more we marginalise. Yet this clear state of affairs has not settled the matter. Those on the outside continue to agitate for decentralisation and inclusion while those on the inside continue to resist such changes and to clawback on the gains. This is the story of devolution under the 2010 Constitution. It is also

the story of the 2/3 gender rule under the same normative framework. The above notwithstanding, the emerging truism that the clamour for decentralisation and inclusion won a major battlefield when the 2010 Constitution, which entrenched devolution as one of the overarching principles, was promulgated, survived the rigours of the research.

Our study deployed a number of research methodologies. First, we reviewed literature on the subjects of decentralisation and inclusion in Kenya. Most of the literature review is carried in chapters 2, 3 and 4 of this book. Second, we selected five county government case studies – Garissa, Kakamega, Mombasa, Nakuru and Narok – and three marginalised groups – women, youth and PWDs – to enable an in-depth analysis of the specific counties and marginalised groups and to provide diverse contexts for the research as the cases selected have an urban<sup>12</sup> and rural<sup>13</sup> feel, a nomadic<sup>14</sup> and sedentary<sup>15</sup> context, and African<sup>16</sup>, Christian<sup>17</sup> and Islamic<sup>18</sup> religious backgrounds as well as diverse demographics of gender, sex, age and disability. Third, using very loose questionnaires, we interviewed knowledgeable persons in the study counties in our quest for answers to the research questions stated above. Fourth, we presented our research findings before the Kabarak University Annual Law Conference, held on 15 and 16 June 2022, at Kabarak University, where representatives of the study counties and the marginalised groups and other participants validated the findings of all our chapters. Finally, we analysed the findings of literature survey and field research and reduced them into the book, *Decentralisation and inclusion in Kenya: From pre-colonial times to the first decade of devolution*. Enjoy the print.

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12 Mombasa and Nakuru.

13 Garissa, Kakamega and Narok.

14 Garissa and Narok.

15 Kakamega, Mombasa and Nakuru.

16 Narok.

17 Kakamega and Nakuru.

18 Garissa and Mombasa.



## CHAPTER 2

# Illegitimate contradictions: The construction of centralisation, exclusion and marginalisation in the Kenyan State

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*Humphrey Sipalla\**

*'whoever controls the process of identification wields power to even determine existence.'*<sup>1</sup>

### Introduction

Power is fickle, they say. Its wielders, therefore, wield it fleetingly. It is both potent and fragile. How can something so abstract and intangible be responsible for so much tangibility, such real world effects? The choices flowing from power wielding create categories of being and knowledge. These ontologies and epistemologies define the existence of individuals, their communities, their nostalgic past and the hazy

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1     \* I am inordinately thankful to Prof J Osogo Ambani, with whom I spent many late nights debating the contours of this chapter conceptualising the construction of power and its exclusionary and marginalising effects in Kenya. While I have written this piece, many of the insights flow from these tea-coffee driven chilly nights. I also thank the vibrant interventions of the participants of the validation workshop held to test the findings of the research. All errors, omissions *and* idiosyncrasies however remain mine alone.

M Morare, 'The power of identity', BA Synthesis Paper, *Arrupe College*, Harare, 2000, 5, cited in Festo Mkenda, 'Building national unity in sub-Saharan Africa: The impact of state policies on the Chagga community of Northern Tanzania' PhD thesis, *Campion Hall*, University of Oxford, 2009.

futures of their yet-to-be-born. The tangible effects of intangible power have trans-generational effects. In no area of Kenyan-lived reality is this more true than the situation of the excluded and the marginalised.

Marginalisation has been variously understood in the Kenyan context. The Kenyan Truth Justice and Reconciliation Commission understood historical marginalisation primarily as a 'social'<sup>2</sup> process. While not inaccurate, such a view may not describe fully the political phenomenon that we seek to interrogate. Another view rightly notes that marginalisation consists of ignoring the particularities of a group, which makes blanket state interventions inadequate to respond to their needs.<sup>3</sup> Yet, it is evident that marginalisation involves the adequacy of resources necessary for a dignified life. The allocation of resources however consists of political, and not merely social phenomena. Its characteristics undoubtedly include: a centre that holds and distributed resources, a number of particular groups or classes that require specific responses to keep up with a need for a dignified life, a history of uneven access to the resources in contention, and a privileged group(s) whose interest(s) lies in maintaining exclusive control over the resources in question.

While the above elements manifest in social norms, economic interests and cultural rites, they are primarily a political concern. As such, this chapter proposes to understand marginalisation as a political process that determines the social norms, economic interests and cultural institutions that grant and maintain access of a certain classe(s) or group(s) to resources, while excluding certain other classes or groups. In this marginalisation consists of exclusionary choices in a centralised polity.

This present study aims to unpack how devolution as established in the Constitution of Kenya 2010 (2010 Constitution) has served the marginalised or how it has promoted inclusion.

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2 Truth, Justice and Reconciliation Commission Report, (2013) Vol IIB, 12.

3 African Peer Review Mechanism (APRM), *Country review report of the Republic of Kenya*, 2014, 14.

Article 100 of the 2010 Constitution provides this present study with a basis for centring its research:

Parliament shall enact legislation to promote the representation in Parliament of

- a. women;
- b. persons with disabilities;
- c. youth;
- d. ethnic and other minorities, and
- e. marginalised communities.<sup>4</sup>

To achieve this goal, this study will delve back into the construction of the power structures that produced the marginalisation and exclusion experienced by the Article 100 groups in the first place. This requires that we interrogate the origins of centralised power and privilege from the dusk of the pre-colonial period in Kenya. The aim is to describe how centralisation and decentralisation shaped marginalisation and exclusion in Kenya.

This chapter unpacks how power *was* constructed and reproduced in Kenya and *how* the constructed reproduction defined privilege and inclusion, and occasioned exclusion and marginalisation of the groups described in Article 100. This present chapter adopts a political, historical approach, seeking to trace the development of power construction in Kenya from colonisation through the formation of the rudiments of what would become Company, then Colonial Government,<sup>5</sup> to the current **State** we now seek to transform.

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4 While acknowledging that the text of the above provision is applicable to representation in Parliament, this present study adopts the list as it provides a constitutional basis for a listing of subjects of marginalisation.

5 Githu Muigai traces these rudiments to the foundation of the association and later the company that was established to colonise us, that is, the British East African Association (BEAA) in May 1887. Githu Muigai, *Power, politics, and law: Dynamics of constitutional change in Kenya, 1887-2022*, Kabarak University Press, 2022, 48. Ghai and McAuslan, on the other hand, begin their historical study of the legalisms of Kenya around the same time but with focus on the General Act of the Berlin Conference. Yash Pal Ghai, JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present*, Oxford University Press, first published 1970, (Reprint with new Introduction) 2001.

Our starting point is that the colonial imposition arrives not to fill a void, paint a *tabula rasa*, or occupy a *terra nullius* in the pre-colonial, but rather comes intent on displacing existing social, political and economic structures. Such displacement is not benign, and this point will be demonstrated abundantly in the discussion below.

The establishment of the colonial order – which ultimately reproduces itself in the current State and its power structures – was both illegitimate and contradictory. The primary concern of the designers of the colonial power structure was the vexing problem of how a ‘tiny minority’ could establish and maintain control and exploitation of a vast and varied majority. This problem, which the colonialists referred to as the ‘native question’, became the overriding design objective of the Colonial State. The answer to the problem resulted in a bifurcated state. At the transition to independence, this problem, when transferred to the African independence rulers, was transformed into ‘the other native question’ meaning the problem of one African ruling majority controlling and exploiting other African minorities and non-ruling majorities. Again, the answer necessitated the perpetuation of unjust structures and an ever-more centralised state, all in the name of nation-building. At best, all through this century-old experience, remains illegitimate and contradictory.

By necessity, such illegitimate and contradictory power structures displace persons, communities, whole societies and entire categories of being human. The most affected by this displacement from their zones of peaceable occupation of societal spaces are the groups listed in Article 100: women, youth, persons with disabilities (PWDs), ethnic and religious minorities and other marginalised groups.

But first, we must briefly interrogate the pre-colony’s nature to found the claims we seek to make below.

### *The finesse of late colonialism*

Late colonialism brought a wealth of experience to its African pursuit.<sup>6</sup>

Ali Mazrui opens his nine-part BBC documentary, *The Africans: A triple heritage*, with a disturbing observation of the brevity of formal colonialism in East Africa.

It is not often realised how brief the colonial period was. When Jomo Kenyatta was born, Kenya wasn't as yet a Crown Colony. He lived right through the entire period of British rule, he outlived British rule by 15 years ruling Kenya by himself. If the colonial period was so brief, how deep was the impact, how strong?<sup>7</sup>

How could a phenomenon so brief as to not even span the lifetime of a Kenyan create such momentous and unbending changes to our societies? Is it possible that our societies did not have sufficient cultural foundations to withstand so short a foreign encounter? Is the rapid and long-term success of the colonial project proof of European cultural superiority?

Mahmood Mamdani offers an irresistible explanation for this phenomenon. The finesse of late colonialism. Mamdani notes that the policies of divide and rule – read as the specific mastery of ‘tribe’ creation and social stratification that became the hallmark of colonialism in much of settler colony Africa, including Kenya – was a method refined from centuries of prior colonisation.<sup>8</sup>

The finesse of late colonialism sits on two pillars: a wealth of colonial experience, and a formalised discipline of execution. First is

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6 Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton/Fountain/James Currey, 1996, 21.

7 Ali Mazrui ‘The Africans: A triple heritage – Program 1: The nature of a continent’ *Youtube* min 35.25-35.58, BBC 1986.

8 Example is here given of the cutting up of Native American communities into many ‘distinct’ tribes and races as an American invention which the British became adept at. Mamdani, *Neither settler nor native: The making and unmaking of permanent minorities*, Vita Books, Nairobi, 2020, 3.

a wealth of knowledge of *how* to colonise. By the time the colonialists arrived on our continent, not simply to pass by and trade from the coast but control the deep interior, they came on the back of three to four centuries of colonising Latin America and Asia. From the decimation of the pre-Columbian American peoples to the humiliation<sup>9</sup> of the Chinese Empire in the Opium Wars and the instrumentalisation of international law, as evidenced in the incredulous Treaty of Nanjing.

Coupled with this knowledge was the discipline of execution. A vast methodical empire-wide civil service already existed to implement the knowledge of the respective colonial headquarters. For instance, Festo Mkenda's historical study of the Chagga highlights the effect of civil servants on the advancement of the colonial project. For example, Donald Cameron, who had served under Fredrick Lugard in Nigeria, went on to properly establish the administration of the British colony in Tanganyika.<sup>10</sup> Lugard went on to export his 'indirect rule' to other parts of the empire.<sup>11</sup>

The effect of late colonialism and a well-oiled exploitation machine was evident in the colonisation of our region. It is impressive to note just how effective every single ordinance and decree from 1897 to the late 1950s was at overhauling African politics, economics and culture. The choice of legislation, order of enactment, and specificity of provisions are so precise that each one delivers a deathblow to the aspect of African culture it sought to regulate. While late colonialism did not eliminate fumbling errors, the crux of the matter is that it was no trial and error experimentation.

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9 For a fascinating study of this phenomenon in contemporary times, see Bertrand Badie, *Humiliation in international relations: A pathology of contemporary international systems* Vol 31(1) (French Studies in International Law), Hart Publishing, Oxford, 2017.

10 Mkenda, 'Building national unity in sub-Saharan Africa' Chapter III, 10-11.

11 Remarks by Dr Tom Kabau at the validation workshop (for the research project whose findings are published in this volume), Kabarak University Annual Law conference, 15-16 June 2022, emphasising that Fredrick Lugard later became Chancellor of his alma mater, Hong Kong University. The point here is that, what was effected by late colonialism was by no means haphazard.

## Contextualising the upheaval of the colonial arrival

### *Pre-colonial ebbs and flows prior to the colonial upheaval, 1800-1897*

It is not unusual to come across the misconception that pre-colonial Africa was a static, immutable paradise, and that those who study coloniality unjustly romanticise pre-colonial Africa.<sup>12</sup> Such a view is not only a flawed premise to base research on the colonial encounter, but also patently inaccurate by the historiographical record. To illustrate the true nature of the colonial upheaval on the minutiae of African politics, economics and culture that leads to the exclusions and marginalisation of women, youth, PWDs and ethnic and religious minorities, we must recount the goings-on in our region in the century prior to the formal imposition of colonialism.

There are several ways in which one can interrogate the particular and peculiar virulence of the colonial upheaval. One approach is to recounting the situation of pre-colonial societies, complete with their ups and downs of political and economic life. Such a recounting, as we shall attempt below, aims to demonstrate that pre-colonial Africa was not frozen in space and time. Still, those significant changes were commonplace as empires fell, trade routes were fought over, and whole populations were displaced. By contrasting pre-colonial turbulence with the colonial upheaval, we may better contemplate the tenacity of the exclusionary and marginalising power structures that the 2010 Constitution sought to correct.

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12 These fears were raised at the validation workshop for the field research component of the research project that births this volume. This validation was held during the Kabarak University Annual Law Conference on 15-16 June 2022. It must be said, such fears are not unfounded as the romanticisation of precolonial Africa has been used to excuse equally discriminatory points of views. Taking cognisance of this is central to the validity of the claims we make in our study.

By the first quarter of the nineteenth century most of the societies of the East African hinterland were developing independently. They were certainly not stagnant, as some anthropological descriptions would tend to suggest.<sup>13</sup>

It is well established that in the 1800-45 period, the East African coast and hinterland had politically independent 'city states and interior societies' that engaged each other in local, regional, and transoceanic trade.<sup>14</sup> This trade was characterised by increased demand for ivory, enslaved people, and other goods. It incentivised Arab and Swahili traders to venture inland, not just on the back of the Nyamwezi, Yao and Kamba routes for trade but to take them over eventually.<sup>15</sup>

This trade had a significant but not transformative impact on the interior societies' social, economic, and cultural life, including the introduction of Islam and the Swahili language as far inland as Buganda. On the other hand, the Nguni invasion from southern Africa is 'notable ... , especially in its consequences for the formation of new states and the disintegration of existing ones'.<sup>16</sup>

Further, the rise of the Omani hegemony in Zanzibar advanced its commercial enterprise and expanded the trade in enslaved people and ivory. This expansion quickened the establishment of

[A] very unequal exchange between representatives of oriental and western capitalism – the Asian, European and American merchants – and the indigenous peoples of the coast and hinterland, whereby the former benefitted *disproportionately* from the international trade they fostered, developed and controlled. This contributed, in turn, to underdevelopment in East Africa.<sup>17</sup>

Noteworthy here is that the rise in exploitative capitalist trade

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13 Isaria N Kimambo, 'The East African coast and hinterland, 1845-80' in JF Ade Ayaji (ed) *General history of Africa: Africa in the Nineteenth Century until the 1880s, Vol VI*, UNESCO/Heinemann/University of California Press, 1989, 261.

14 Al Salim, 'The East African coast and hinterland, 1800-45' in Ade Ayaji (ed) *General history of Africa: Africa in the Nineteenth Century until the 1880s, Vol VI*, 259.

15 Salim, 'The East African coast and hinterland, 1800-45', 260.

16 Salim, 'The East African coast and hinterland, 1800-45', 232-3.

17 Salim, 'The East African coast and hinterland, 1800-45', 260. [emphasis added]

was an effect of the political upheaval of the settlement of the Omani dynasty in Zanzibar. However, indigenous communities, particularly in the hinterland and to some extent at the coast, retained autonomy over their political and cultural life, with coastal communities enjoying limited political choice and paying tributes.<sup>18</sup> The preceding presence of the Portuguese that ended in 1728 had been so superficial that eventually it was erased from the culture, economics and politics of coastal communities. Relics in brick and mortar – Fort Jesus – and certain words in Swahili are the only extant evidence of a four-century-long Portuguese presence on the East African coast.

It can very well be ascertained that western colonialism took full advantage of the ebbs and flows of regional and local rivalries and wars over politics and trade to establish itself. For instance, the Mazrui only sought an agreement with the British operating out of Bombay to establish Mombasa as a British Protectorate in 1824 in response to the swift and growing influence of the Omani hegemony.<sup>19</sup> Similarly, among the Chagga, a loose federation of chiefdoms was all that remained of the successful attempts of Horombo to forge a unified Chagga polity. Horombo died in battle against the Maasai in about 1830. 'Horombo's empire did not survive his demise.'<sup>20</sup> It took nearly half a century for another Chagga chief, Mandara of Moshi, to show imperial promise. To arrest increased rivalries around the mountain, Mandara welcomed both Zanzibari and German 'protection' in quick succession in 1885, and soon after to British 'protection'.<sup>21</sup> What seemed like benign associations to quell local challenges soon became the tragedy of colonial humiliation for both the Mazrui and the Chagga. This scenario is replicated all across Africa.

We also hasten to highlight the significance of international trade on the East African coast, and note its relative innocuous presence as juxtaposed with the colonial encounter that was to come.

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18 Salim, 'The East African coast and hinterland, 1800-45', 211-60.

19 Salim, 'The East African coast and hinterland, 1800-45', 219.

20 Mkenda, 'Building national unity in sub-Saharan Africa', Chapter II, 39.

21 Mkenda, 'Building national unity in sub-Saharan Africa', Chapter II, 42ff.

Zanzibari Sultan Sa'id signed commerce treaties with the Britain, France, German and USA states. The US-Zanzibar commerce treaty of 1833 is a fascinating case study, whose analysis is worthy of fuller reproduction.

The treaty provided the Americans with very favourable terms: 5 per cent duty on American goods imported into East Africa and no duties on East African goods purchased by the Americans. American shipping in East African waters increased significantly after the treaty was signed. The Americans carried away goods such as ivory, gum copal, and, as the industry grew, cloves in large quantities. They imported into Zanzibar sugar, beads, brassware, guns and gunpowder and the cotton cloth that became famous in East Africa as 'Merekani' (American). American sales rose from \$100000 in 1838 to \$550 000 at the time of Said's death in 1856, with American cotton imports showing the greatest increase. The USA became the most important Western nation to trade in East African waters, commercially overshadowing the British. It was indeed this fear of being overshadowed by the Americans that spurred the British to sign a similar treaty with Said in 1839.<sup>22</sup>

The various foregoing examples only serve to demonstrate that it is, in fact, the existence of 'normal' ebbs and flows in the largely independent polities of indigenous Africa that opened a gap that was well exploited by colonial intent.

Another example of 'normal ebbs and flows' is that of localised climatic disasters. The Kamba dominated the long-distance trade into the hinterland until the 1880s when they lost this dominance to Arab and Swahili traders.<sup>23</sup> Johann Krapf is recorded to suggest that the famine of 1836 triggered the late pre-colonial Kamba's prowess in long-distance trade.<sup>24</sup> As we have opined above, this long-distance trade presented the opportunity that exploitative colonialism sought. Henry Mwanzi adds to this point.

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22 Salim, 'The East African coast and hinterland, 1800-45', 230-1.

23 Kimambo 'The East African coast and hinterland, 1845-80', 270.

24 Kimambo 'The East African coast and hinterland, 1845-80', 270.

There were ecological changes taking place in East Africa in the 1890s, which also affected response to foreign penetration. The whole region underwent ecological stress resulting in drought with consequent famines. Rinderpest epidemics also occurred. Again, some societies were affected by these natural calamities more deeply than others. Pastoral societies, such as the Maasai of Kenya, seem to have been hit worst of all.<sup>25</sup>

A different approach to understanding the distinction between pre-colonial perturbations and colonial upheaval can be attempted. It is curious to note that while the Portuguese made little impact on the East Coast of Africa despite their significantly extended stay and in contrast to their devastating occupation of colonies in the Americas, the colonialism that entered the stage in East Africa in the mid-1800s made a swift and devastating capture of the various societies of our region.

Such deftness was not perchance but was the fruit of centuries of preparedness, of experience in colonial exploitation. This is what we join Mamdani in calling 'the finesse of late colonialism'.<sup>26</sup>

The foregoing journey into history sought to describe the nature of the pre-colony as formed of societies that experienced the 'normal' instability caused by wars, climatic disasters and the rivalries of local and regional hegemony. As such, it demonstrates that the pre-colony immediately prior to the entry of colonialism was no romantic destination. This therefore serves to accentuate the stark difference of the societies of the pre-colony with the upheaval in social order that colonialism visited on these same societies. As such, the true significance of this upheaval is more clearly contemplated.

### **The illegitimate contradiction of the colonial encounter, 1897-1963**

As stated above, our starting point is the recognition that the imposition of the colonial power structure was not benign, did not find

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25 Mkenda, 'Building national unity in sub-Saharan Africa' Chapter II, 15-6.

26 Mamdani, *Citizen and subject*, 21.

a blank sheet but *necessarily* had to displace the *existing occupants of social order*, and not simply the social order itself. Of those displaced, women, youth, PWDs, ethnic and religious minorities, and other marginalised communities fair the worst.

This upheaval in the social order of African societies occurred because the colonial power structure was not designed to recognise or tolerate social structures other than its own. This is not unique to Africa. The very nature of the nation-state, even as it was established in Europe after the Westphalian settlement, demanded just as violent and destructive an invention of nationhood.<sup>27</sup> In Mamdani's words,

The birth of the modern state amid ethnic cleansing and overseas domination teaches us a different lesson about what political modernity is: less an engine of tolerance than of conquest. *Tolerance had to be imposed on the nation-state long after its birth* in order to stanch the bloodshed it was causing.<sup>28</sup>

For the African – and Kenyan – case, the colonial encounter was illegitimate because it was foreign and inimical to tolerance. It was also contradictory as it sought to subjugate in the name of altruism, what the colonialists first called the civilising mission.<sup>29</sup> The effect of this cognitive dissonance was not lost on the colonialists at the time.<sup>30</sup>

The displacement intent and violent nature of the initial colonial encounter may also explain the genesis, if not persistence, of another critical burden contemporary Africa bears: the normalisation of grand theft and plunder of state and public resources. Mazrui locates the

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27 'The Castilians had to impose the nation in order to make it thinkable.' Mamdani, *Neither settler nor native*, 3.

28 Mamdani, *Neither settler nor native*, 2.

29 'The light of civilization could shine wherever populations conformed to Eurocentric ideals. Thus did Europeans turn to the colonies and seek to build there the avatar of modernity: the nation-state, as it existed in Europe.' Mamdani, *Neither settler nor native*, 2.

30 Jan Smuts considered such a negative approach formulated in ignorance. Mamdani *Citizen and subject*, 5. [emphasis added]

problem of corruption and moralised plunder of public resources in the alien-ness of the colonial state. His description is categorical:

[T]he colonial regime was alienated from the people *not only because it was in foreign hands but also because it was artificial, newly invented. And so, it lacked legitimacy.* And government property therefore lacked respect. It became almost a patriotic duty to misappropriate the resources of the government. After all, since the regime was foreign, it was like stealing from a foreign thief, and stealing from a foreign thief could be an act of heroic restoration.<sup>31</sup>

The hostile foreign entity remained unwilling to change itself to be part of the societies it acts as overlord. As such, it was not unconscionable to plunder it. In the words of the Ghanaian street talk that Mazrui recounts, 'Kwame Nkrumah has killed an elephant. There is more than enough for us all to chop.'<sup>32</sup>

### *Explaining the tenacity of unjust power structures*

Kenya's history is replete with successful repulsions of structural reform toward redressing exclusion and marginalisation. Such success cannot be understood by mere acceptance of exclusionary effects without interrogating the structural genesis and perpetuation of the exclusionary and marginalising tendencies of the Kenyan State. In this brief section, we shall attempt to understand why such injustice has been so successful at resisting change.

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31 Ali Mazrui, *The Africans: A triple heritage*, 'Programme 7- A Garden of Eden in decay', *YouTube*, minute 45.40-47.47, 1986. [emphasis added]

32 The full quote in context: "... Well, have African attitudes towards government resources changed since independence? Let me tell you a story. Rumour has it that not long after Ghana's independence, one conscientious auditor discovered irregularities. He went to report to his superior officer. There was evidence of gross misappropriation of government resources. The worldly-wise superior officer got up, put his arm round the idealistic young auditor and said, 'My dear boy, you don't seem to realise that Kwame Nkrumah has killed an elephant. There is more than enough for us all to chop to eat.' Nkrumah was of course the president of Ghana at that time. The elephant in question was the colonial state lying at his feet. Nkrumah's supporters were saying, there was more than enough for them all to eat. There hasn't been much of a change to African attitudes to government property since those old colonial days." Mazrui, *The Africans: A triple heritage* - Program 7, minute 45.40-47.47.

It is easy from our point of view today, to downplay the focus with which colonialism came to overturn African societies. It is not simply a philosophical point of view. One view is to recognise that the colonial encounter wrought upheaval. Another is to accept that such disruption was intended and its practice perfected over centuries and upon the sweat and blood of other Global South peoples before the African encounter. These opposing points of view result in distinct understandings of the nature and persistence of contemporary exclusions and marginalisation.

In order to appreciate why marginalisation is so tenacious, it is important to recognise the structural capacities of power systems. Power systems are adept at resisting revolution and co-opting those social forces that seek to reform it. The history of Kenya's constitutional development<sup>33</sup> betrays consistent contestations, which, until the promulgation of the 2010 Constitution,<sup>34</sup> have been impervious to both popular demands for justice and reform, and the specific claims to redistributive justice and affirmative redress for longstanding exclusions.

Were it simply that the exclusionary effects of the colonial encounter were, in effect, not in intended design, then the reform and redress strategies would be distinct and effective. The former concludes that all that is needed to transform injustice in society is the furious activity of the developmental state. This seemingly innocent error in addressing exclusions and marginalisation, that which celebrates the advancement of colonially constructed privileges – in classist, patriarchal,<sup>35</sup> ageist,

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33 See generally, Muigai, *Power, politics, and law*; Ghai and McAuslan, *Public law and political change in Kenya 1970*; Willy Mutunga, *Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997*, 2<sup>nd</sup> edition, Strathmore University Press, 2020.

34 Muigai, *Power, politics, and law*, 376-78, when reflecting on the unprecedented capacity of Kenya's 2010 constitutional order to resist elite change machinations.

35 As Tabitha Kanogo puts it, "By following the effects of the all-pervasive ideological shifts that colonialism produced in the lives of women, the study investigates diverse ways in which a woman's personhood was enhanced, diminished, placed in ambiguous predicaments by the consequences, intended and unintended, of colonial rule as administered by both the colonizers and the colonized" Tabitha Kanogo, *African womanhood in colonial Kenya, 1900-1950*, Ohio University Press,

religious or other dominations – results in the false belief that the prosperity of the unjust privileged will engender altruistic donations of developmental impetus to marginalised areas and sectors. Such views have been promoted and attempted before and only serve to perpetuate exclusion and marginalisation.

The colonial era had the ‘Railway economy’.<sup>36</sup> Post-independence Kenya had the President’s Foreword to Sessional Paper No 10 of 1965 that summarily dismissed the national debate on how a revolutionary and just development may be attempted to redress the errors of colonialism. Post-2010, Kenya has had political debates and amendment bills seeking to reform the Equalisation Fund and rework the preferential allocations to historically marginalised counties, among other efforts to undermine the system of devolved government.<sup>37</sup>

The other possibility is to explain the tenacity of structural injustice as mere administrative continuities. Such an approach suggests that thwarting reform efforts is not a proactive, deliberate process of securing privileged interests but the result of the sheer momentum of bureaucratic habit in the Kenyan State. However, a few occasions point to a differing explanation. The co-optation of reform forces throughout Kenya’s history is testimony to deliberate efforts to ensure reform does not occur. We propose two illustrations; the Kenya African Democratic Union (KADU) started as a pro-devolution, pro-marginalised political party, but its stalwarts ended up as core components of Kenya’s post-

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Athens/James Currey, Oxford/EAEP, Nairobi, 2005; See also, Brett L Shadle ‘Book review: *African womanhood in colonial Kenya, 1900-1950* by Tabitha Kanogo’ 39(2) *The International Journal of African Historical Studies* (2006) 336-338.

36 We are thankful to Dr Godfrey Kiprono Chesang for his insights and his articulation of these terms. Personal communication with Humphrey Sipalla on 6 June 2022.

37 Constitution of Kenya (Amendment) Bill (No 2 of 2013); Constitution of Kenya (Amendment) Bill, 2018; Constitution of Kenya (Amendment) Bill, 2017; and certain components of the Building Bridges Initiative that touched on the established devolved government system, as cited in Muigai, *Power, politics, and law*, 368, 370, 371, 375, 378.

independence imperial presidency.<sup>38</sup> The other is the Maendeleo ya Wanawake Organisation (MYWO), whose paternalistic and nepotistic but philanthropic roots allowed it to be weaponised to mute women's resistance to patriarchal political exclusion in single-party Kenya.<sup>39</sup>

Githu Muigai recognises the danger of ignoring the deliberate power of political play in legal and societal reform.

If constitutional scholars continued to insist on viewing the constitution as a set of rules defining the institutional arrangements of government and setting out rights and obligations of citizens, they will continue to miss the critical role of power and politics as the basis of the constitution and the constitutional order. For as long as the constitution is in flux, that the underlying polity that it seeks to regulate is unsettled, then the attempt to manipulate the constitutional document to reflect the political reality of power, mostly by amending, it will persist.<sup>40</sup>

It is probably, for this reason, that appeals to discerning voters in contemporary democratic Kenya to vote wisely or suffer the consequences of the wrong choice of leaders ring hollow. While it is undeniable that charismatic, forward-thinking leaders have recorded admirable changes in their areas of jurisdiction, particularly in the counties,<sup>41</sup> this is insufficient to explain the phenomenon of persistent

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38 Muigai, *Power, politics, and law*, 222.

39 Audrey Wipper 'The Maendeleo Ya Wanawake Organization: The co-optation of leadership' 18(3) *African Studies Review* (Dec 1975) 99-120.

40 Muigai, *Power, politics, and law*, 15. See also, Mutunga, *Constitution-making from the middle*, for a description of the details of such power play in period covered.

41 At the validation workshop for the fieldwork for this research, the stark differences in developmental work between Kakamega and Garissa counties, including even in the nomination and election of persons from the Article 100 list of marginalised groups, was argued as evidence of the personal agency and decisive progress that a forward thinking leader can have. In this regard, Kakamega County and Governor Wycliffe Oparanya was clearly the model to be emulated. The transformative leadership of Prof Justice Willy Mutunga of the Kenyan Judiciary is another such example. Our nuanced contention here is that while examples of exemplary leadership cannot be gainsaid, their existence is insufficient to explain the phenomenon of tenacious reform clawback Kenya repeatedly witnesses, for

marginalisation. The interest of the privileged classes in society will undoubtedly define what is the centre and who gets admitted to it. By this, such interests also define the periphery and those who are excluded from the centre become by definition relegated and marginalised. The approaches that perceive persistent marginalisation as unintended effects and/or results of mere administrative continuities can only be auxiliary aids in this quest for understanding.

Mamdani warns against 'a paralysis of perspective'.<sup>42</sup> It is important not to downplay the concern that a focus on coloniality may obscure our sense of contemporary agency, not just to take responsibility for the injustices that persist in our society six decades after the purported end of the colony, but also our agency in forging a transformational present.<sup>43</sup> What should be of concern in any analysis of the construction and structure of power is 'how power is organised and how it tends to fragment resistance in contemporary Africa', a 'dialectic of state reform and popular resistance' that is 'forged through the colonial experience'.<sup>44</sup>

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instance, in the fight against grand corruption in the first presidential term of Mwai Kibaki. See Michela Wrong, *It's our turn to eat: The story of a Kenyan whistleblower*, Harper Perennial, 2010.

42 Mamdani, *Citizen and subject*, 3. He urges that one not take any side but rather, 'sublat[e] both, through a double move that simultaneously critiques and affirms. To arrive at a creative synthesis transcending both positions, one needs to problematize each.'

43 This important critique was also raised at the Kabarak Law School Annual Law Conference, held on 15-16 June 2022 at Kabarak University Auditorium. This conference served as a validation workshop for stakeholders, particularly those working in devolved governments, various constitutional commissions and civil society formations in Kenya on the findings of the fieldwork conducted by the authors of this volume. Dr Phitalis Were Masakhwe was particularly forceful that present day agents must take responsibility for contemporary injustices and that the counties that chose wise leaders have seen transformational change [giving the example of Kakamega County], unlike those that shirked the transformational moment.

44 Mamdani, *Citizen and subject*, 3.

It has been noted that ‘the problems that bedevil Kenya as a nation go far beyond questions of culture and identity.’<sup>45</sup> In fact, it seems inescapable that ‘awareness of the role and/or lack of equity and social justice in causing Kenya’s persistent problems ... is indispensable in fashioning ‘how to bring marginalised groups into the mainstream’.<sup>46</sup>

Speaking of PWDs but in language that speaks to all categories of the excluded and marginalised, Phitalis Masakhwe notes that ‘some PWDs internalise these labels with the effect that it reinforces feelings of helplessness and hopelessness among those with disabilities.’<sup>47</sup> Such is the purpose of structural injustice: to engender defeatism among the resistant.

### *The native question*

The colonial enterprise faced from the onset a vexing question: How does a small exploitative minority maintain control of a numerically superior and exploited majority? ‘The problem of stabilising alien rule was politely referred to as “the native question”’<sup>48</sup> For such an enterprise to succeed, it must set out, with intent and haste, to upend the societal order it finds. As discussed earlier, the colonial intent found a foothold in the spaces left in the normal ebbs and flows of life in pre-colonial Africa. In these contestations, it found weaknesses to exploit to overthrow the prevailing order.

Political systems, economic resources and religious and spiritual certainty were targeted for overthrow.

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45 George Gona, Mbugua wa Mungai ‘Introduction’ in George Gona, Mbugua wa Mungai (eds) *(Re)membering Kenya: Interrogating marginalization and governance*, Vol 2, Twaweza Communications, 2013, 14.

46 Gona, wa Mungai ‘Introduction’ in *(Re)membering Kenya*, 15.

47 Phitalis Masakhwe Were ‘Disability discrimination: A personal reflection’ in Gona, wa Mungai (eds) *(Re)membering Kenya*, 63.

48 Mamdani, *Citizen and subject*, 3.

The political system of the natives was ruthlessly destroyed in order to incorporate them as equals into the white system. The African was good as a potential European; his social and political culture was bad, barbarous, and *only deserving to be stamped out root and branch*.<sup>49</sup>

As can be expected, the then-privileged sections of African society rejected colonialism, while the western presence attracted those without a position in society. Rejection of this forcible imposition resulted in fierce resistance, in both violent and non-violent ways, in the rebellious establishment of parallel structures or brutal guerrilla attacks on colonial and settler establishments.<sup>50</sup>

This led to the colonialists abandoning their civilising mission and adopting a method whose chief aim was maintaining order.<sup>51</sup> Such order was created by further dividing the targeted societies along lines that strengthen them and instead uniting them along lines that encourage societal fissures. As a result, various native minorities were *created*<sup>52</sup> under disparate native elites, who would later form the basis of post-colonial leadership, and with it, the ethnic strife and political instability that characterises much of the African post-colony.

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49 Jan Smuts, cited in Mamdani *Citizen and subject*, 5. [emphasis added]

50 Mkenda, 'Building national unity in sub-Saharan Africa', describing violent Chagga resistance to imposition of colonial rule towards the end of the nineteenth century and the civil society resistance through alternate community organising in the years after the War of 1914-1919. See also, David Throup, *Economic and social origins of Mau Mau, 1945-1953*, James Currey, London, 1988; Bruce Berman, 'Bureaucracy and incumbent violence colonial administration and the origins of the "Mau Mau" emergency' in Bruce Berman and John Lonsdale (eds) *Unhappy valley: Conflict in Kenya and Africa*, James Currey, London, 1992; Daniel Branch, *Defeating Mau Mau, creating Kenya*, Cambridge University Press, New York, 2009; Carl Rosberg and John Nottingham, *The myth of 'Mau Mau': Nationalism in Kenya*, Praeger, New York, 1966.

51 Mamdani, *Neither settler nor native*, 3.

52 The term is here used advisedly and its significance can hardly be gainsaid. The ethnic identities that end up as important drivers of exclusion and marginalisation are themselves artificial creations of the colonial project, as we shall demonstrate below. Suffice it to say that even literature from the colonial period clearly shows the evolution of names and definitions of these ethnic groupings.

The shift from the direct rule of the civilising mission to the indirect rule of colonial order produces the violent nationalism and intractable post-colonial contestations that pour forth in Africa. The forging of a post-colonial nation from the numerous bifurcated separations was itself done with unbending force and brutality,<sup>53</sup> which could, in many cases, be so disruptive as to be experienced by the local populations as the grinding to a halt of time itself.<sup>54</sup> For the women, youth, PWDs and ethnic and religious minorities, some interesting reflections arise from the above claim.

Mamdani records that the power structures that exclude and marginalise were but part of a range of customary systems at the dawn of colonialism.

In the late nineteenth century African context, there were several traditions, not just one. The tradition that colonial powers privileged as the customary was the one with the least historical depth... But this monarchical, authoritarian and patriarchal notion of the customary ... most accurately mirrored colonial practices.

This view should not be baffling. If the answer to the native question was to overthrow existing power, then the least entrenched custom was preferable, and most attractive to the colonially installed chiefdoms.<sup>55</sup> Mamdani then concludes:

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53 'The result was an era of blood and terror, ethnic cleansing and civil wars, and sometimes, genocide.' Mamdani, *Neither settler nor native*, 3.

54 For a description of forced sedentarisation or 'manyattazation' policy of the Shifta War 'gaf Daba' of 1963-8, all in the name of urgent post-colonial 'maendeleo', development, see Sean Bloch, 'Stasis and slums: The changing temporal, spatial, and gendered meaning of 'home' in Northeastern Kenya' 58(3) *Journal of African History*, (2017) 403-23. See also, Humphrey Sipalla, 'A human rights consistent apartheid: Constitutional design of the African state, indigenous peoples' self-determination and the 'other native' question' in Humphrey Sipalla, J Osogo Ambani (eds) *Furthering constitutions, birthing peace: Liber amicorum Yash Pal Ghai*, Strathmore University Press, Nairobi, 2020, 261.

55 Mkenda demonstrates this in the case of the Chagga. See generally Mkenda, 'Building national unity in sub-Saharan Africa, Chapter III.

It should not be surprising that custom came to be the language of force, masking the uncustomary power of Native Authorities.<sup>56</sup>

It should also then not be surprising that such a power structure results in exclusion and marginalisation.

The deduction here is that if women, youth, PWDs and religious and ethnic minorities found themselves excluded under the colonially-contrived custom, then it could follow that *these categories of being (human) enjoyed pride of place in the pre-colonial custom*. To illustrate, albeit briefly, it is well known that many of the African resistance leaders at the dawn of colonialism in what is now Kenya were women and young men. Mekatilili wa Menza, the fierce and indefatigable Giriama leader, and Koitalel Arap Samoei, who led the Nandi in unflinching resistance to the building of the Railway until his assassination while still in his mid-twenties. In fact, it is also curiously true that many of the liberation leaders of the 1950s and 1960s were young men barely in their 20s, with the glaring exception of President Kenyatta who ascended to the presidency well into his sixties. The idea, therefore, that only older men are natural leaders over women, youth, PWDs, and ethnic and religious minorities is logically at odds with what the pre-colony was. Again, the historiographical record is replete with evidence in support. To be sure, the same denigration of positive African culture must have been central to the success of the colonial enterprise, as expressed in the native question. Africa had to be diminished in the eyes of the Africans to sustain the colonial intent.

To recap, the essence of the native question was the need for a tiny and foreign minority to rule over an indigenous majority. To achieve this goal, two broad solutions were implemented: direct rule for the colonialists – who then were citizens of the Empire, and indirect decentralised despotic rule for the natives – who then were the imperial subjects. This resulted in a bifurcated state that treated citizens

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56 Mamdani, *Citizen and subject*, 22.

and subjects differently.<sup>57</sup> The central state, reserved for citizens, was governed by a civil law regulated by separation of powers, which granted citizens standing to complain against government overreach. Here, racially-defined citizens had rights and freedoms, and their culture was respected and promoted. The native, on the other hand, was held prisoner within a local despotic chieftainship that had bastardised her culture and invented a shallow autocratic customary law. Such a native was physically limited to defined areas and required a pass. In Kenya, this was called *kipande*. Finally, native religion was demonised, and Christianity became the tool for the advancement of the Africans in the colony. And herein lies the contradiction of the colonial state – that lives on into the post colony.

### **Fictive traditions and ideologies and Africa's diminished worldview<sup>58</sup>**

#### *The exclusion and marginalisation of African women and youth*

'In some western literature, for example, African culture is presented or misrepresented as being at odds with human rights values.'<sup>59</sup> Nkiru Nzewgwu reminds us that the current perceptions of

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57 This is the central thesis of Mamdani's *Citizen and subject*.

58 Nkiru Nzewgwu, *Family matters: Feminist concepts in African philosophy of culture*, State University of New York Press, 2006, 6, cited in Mariam Kamunyu, 'Square pegs for square holes: An 'African' approach to gender responsiveness' in Frans Viljoen and others (eds) *Exploring African approaches to international law: Essays in honour of Keba Mbaye*, PULP, 2022, 49.

59 Mariam Kamunyu, 'An "African" approach to gender responsiveness', 48. Kamunyu gives the example of Jack Donnelly *Universal human rights in theory and practice*, Cornell University Press, 2013, 71-89. See also, Leti Volpp 'Feminism versus multiculturalism' *Columbia Law Review* (2001) 101, for a refreshing critique of the former Eurocentric view, presented thus: 'Incidents of sexual violence in the West are frequently thought to reflect the behaviour of a few deviants – rather than as part of our culture. In contrast, incidents of violence in the Third World or

African culture are warped misrepresentations of western thought and, I would add, political interests. Giving the western perceptions of the Igbo family as an example, she notes that early western ethnographers, Christian missionaries and colonial anthropologists only saw families 'through their patriarchal lens and the male-privileging value scheme of western epistemology' in Igbo culture.<sup>60</sup> Mariam Kamunyu adds that through such misinterpretations, these commentators only reinforced their perceptions of 'patriarchy as the organising principle of the Igbo'.<sup>61</sup>

John Oloka-Onyango and Sylvia Tamale add to this critique of what became tragically enduring perceptions of African culture. They assert that colonialism sought 'to transform existing social, political and cultural structures of organisation'.<sup>62</sup> This was not just a political project. Colonial laws were written to 'superimpose elements which were manifestly alien to the context in which they were introduced',<sup>63</sup> not simply to regulate what cultural elements they found in African cultures.

The view that it was not cultural for Africans to discriminate against women is not merely our assertion. Martin Chanock comes to a similar conclusion about the intention and effect of colonial laws on the status of women and the dignity of African culture:

*Women were de-equalized* – first (alongside the men) through the mechanics of the juridical system imposed by the colonialist which discriminated against "natives" and secondly through the reinterpreted "customary law" that was progressively (re)constructed by the colonialists and specific African men.<sup>64</sup>

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immigrant communities are thought to characterise the culture of entire nations.' Nkiru Nzwengwu, *Family matters*, 48.

61 Kamunyu, "An "African" approach to gender responsiveness', 48.

62 Oloka-Onyango and Tamale, "'The personal is political" or why women's rights are indeed human rights: An African perspective on international feminism' 17 *Human Rights Quarterly* (1995) 723.

63 Kristin Mann and Richard Roberts *Law in colonial Africa*, James Currey, 1991, 9.

64 Martin Chanock, 'Neither customary nor legal: African customary law in an era of family law reform' 3 *International Journal of Law and the Family* (1998) 72-88 as cited in Kamunyu 'An "African" approach to gender responsiveness' 49. [emphasis added]

All these injustices of history have resulted in a host of ‘predicaments that accompany African culture’, that is, in Kamunyu’s words, ‘its potential for distortion and propensity for gender bias’.<sup>65</sup> Celebrating African culture’s possibilities of reform, Kamunyu notes again that it is in ‘the very nature of culture, which is fluid as opposed to static and immutable,’<sup>66</sup> to reform for the better. Abdullahi An-Naim counsels that ‘every culture is constantly changing through the interactions of a wide variety of actors and factors at different levels of society’.<sup>67</sup> This capacity of culture to change is further demonstrated in Mkenda’s historical account of the radical political, economic, and social changes among the Chagga of Kilimanjaro from the 1830s to 1960.<sup>68</sup> So drastic were the changes that in the short period of the introduction of colonialism from the 1880s to the 1930s, the Chagga had transformed from an archipelago of loosely related chieftainships to chieftainships speaking such varied dialects as to not universally understand each other to a semblance of the unilingual single political and communal force we know today. If colonialism changed African culture, then it is, in fact, illogical to presume that contemporary, traditional practices that discriminate against the women, youth and PWDs were not part of that change. The more plausible conclusion is that reached by various African scholars discussed in this chapter on the distortion of culture.

It is also illogical to resign to the notion of a rigid, immutable culture, unrepentant of its weaknesses. It is not reasonable to conclude that certain particular cultures are impervious to change and influence, solid and insulated in their beliefs, practices and rituals.<sup>69</sup> Jane Cowan

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65 Kamunyu ‘An “African” approach to gender responsiveness’ 49.

66 Kamunyu ‘An “African” approach to gender responsiveness’ 49.

67 Abdullahi An-Na’im, J Hammond ‘Cultural transformation and human rights in African societies’ in Abdullahi A An-Na’im (ed) *Cultural transformation and human rights in Africa*, Zed Books, 2002,13.

68 Mkenda, ‘Building national unity in sub-Saharan Africa’.

69 At the validation workshop, some frustration was expressed at the slow pace of development in some counties, with Garissa being named among the worst fairing, and in particular at advancing reform of societal bias against women, youth, persons with disabilities and other minorities. Indeed, considering the vast

and others define this as ‘the popular conception that a group is defined by a distinctive culture and that cultures are discrete, clearly bounded and internally homogeneous, with relatively fixed meanings and values.’<sup>70</sup> Celestine Nyamu furthers this view:

... culture is itself being vehemently contested, negotiated, and debated. This suggests that the numerous disagreements and conflicts within this debate are not simply unpleasant, external disturbances to an otherwise stable and harmonious [culture], but rather constitutive of it. *Disagreements and conflict as culture...*<sup>71</sup>

If culture is fluid<sup>72</sup> and constitutive of mutable positions, so is customary law, not just that of pre-colonial Africa but the autocratic and marginalising form it took under colonialism and the immediate post-independence era to today. Kamunyu sees this reconstruction and transformation of culture and customary law as achievable ‘through internal discourse within each culture’.<sup>73</sup> We hasten to add, not only by internal discourse but also by the influences that the participants of that internal discourse bring from the ‘outside’. Whether compelled or cajoled, cross-cultural discourse can be seen as ever present in the fluidity and mutability of culture from pre-colonial Africa to date. As such, a sweeping statement such as ‘custom has traditionally reflected

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changes one sees in counties like Kakamega, the slow pace of change in others is positively deflating. Other participants however expressed hope that the example of galloping counties will spur public agitation for quicker transformation in the slower counties.

70 Jane K Cowan, MB Dembour and RA Wilson (eds) *Culture and rights: Anthropological perspectives*, Cambridge University Press, 2001, 3, cited in Kamunyu ‘An “African” approach to gender responsiveness’, 53.

71 Celestine Nyamu, ‘How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?’ 41 *Harvard International Law Journal* (2000) 382, cited in Kamunyu, ‘An “African” approach to gender responsiveness’, 53.

72 Kamunyu, ‘An “African” approach to gender responsiveness’, 54. See also Sylvia Tamale ‘The right to culture and the culture of rights: A critical perspective on women’s sexual rights in Africa’ 16 *Feminist Legal Studies* (2008) 47-69.

73 Kamunyu, ‘An “African” approach to gender responsiveness’, 54.

male interests, dominance and power over women<sup>74</sup> may seem to be at odds with – or the very least be imprecise as to the provenance of such interests, dominance and power – the reflections of Nzewgwu and Mamdani on the construction of marginalising culture and its customary law.

Gender equality, and we would presume, gender inequality as well, ‘... is the product of intense political struggle and cultural work, not immanence’.<sup>75</sup> Tamale reminds us of the ‘emancipatory potential of culture’.<sup>76</sup> Such a view that affirms the agency of the African to reform, and recreate a new, their world, is precisely one that best describes the political and cultural journey of power and marginalisation that is discussed in this book.

It would be fatal for the student of marginalisation and exclusion to succumb to two misinterpretations of the foregoing discussion. First, we do not understand ourselves to be externalising the current exclusions and marginalisation to a far-flung foreign entity in space and time, thereby exonerating our own society from responsibility. It is true that, in the lived reality of the woman, the young person, the PWD and the member of an ethnic and religious minority, the injustice they face has a very real and neighbourly face. The injustice is within our society and nearby. The foregoing reflections, we insist, aim to understand why a culture so demeaning to human dignity could have arisen among us in Africa. It seeks to unearth and explain that nagging question that indeed has troubled many an intellectual African, that is, why we find so many instances of unjust customs among our traditions. In this sense, then, the foregoing serves to confront this dissonance. It also then serves to reaffirm that along with the fluidity of culture and

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74 As asserted by Chaloka Beyani ‘Toward a more effective guarantee of women’s rights in the African human rights system’ in Rebecca J Cook *Human rights of women: National and international perspectives*, University of Pennsylvania Press, 1994, 299.

75 Martin Chanock ‘Human rights and cultural branding: Who speaks and how’ in Abdullahi A An-Na’im (ed) *Cultural transformation and human rights in Africa*, Zed Books, 2002, 43.

76 Tamale, ‘The right to culture and the culture of rights,’ 48.

our agency as Africans, the contrived ‘despotism’<sup>77</sup> of our cultures is properly within our agency to reform, if not revolutionise.

The second caution goes to the presumption that the colonial is past. The central argument of this paper is to highlight the insidiousness of continuities of power. Like matter in a Newtonian world, it cannot be so easily destroyed but only changes in state. Assuming that the past is gone prevents a true introspection of what ails us, thus preventing the full transformational effects of the current constitutional order from materialising in the minutiae of everyday culture. Tamale is quick to caution us:

[C]olonialism maintains a stranglehold on knowledge production through an elaborate publication infrastructure largely based in the global North which plays the role of gatekeeping on what qualifies as “legitimate” publishable knowledge.<sup>78</sup>

### *The exclusion and marginalisation of African PWDs*

Politics and political processes are crucial in governance and it is extremely risky for citizens to be excluded from them; the situation becomes even more perilous when national institutions are constructed without inclusion of, especially, persons with disabilities.<sup>79</sup>

As we have already discussed above, the state constructed by the colonial project had every intent to exclude and marginalise. It needed to impose a new shallow and contrived customary law to ensure that the majorities would not find their step enough to assert their claims. PWDs bore the brunt of the objectification of the African that was to be the basis of the colonial state. Such exclusion and marginalisation were

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77 Mamdani is categorical that this contrived custom is despotic, and that the creation of numerous ‘decentralised despotic’ centres of customary rule was necessary to create and maintain foreign control over the oppressed majority. *Citizen and subject*, 22ff.

78 Sylvia Tamale, *Decolonisation and afrofeminism*, Daraja Press, 2020

79 Masakhwe ‘Disability discrimination,’ 15.

not a reflection of Africa before colonialism. They were consistent with European practices and prejudices, most closely resembling the colonial project's ends.<sup>80</sup>

An immediate concern of the colonial project was the supply of cheap labour to work the farms established on alienated land. Mamdani illustrates this from the employment of penal law. Take the case of Malawi:

[T]he number of convictions in colonial Malawi rose from 1,665 in 1906 to 2,821 in 1911 to 3,511 in 1918. Two-thirds of the latter were for new statutory offenses that had nothing to do with custom: of 8,500 convictions realised in 1922, 3,855 were 'for offenses against the Native Hut and Poll Tax Ordinance of 1921,' 1,609 for 'leaving the Protectorate without a pass,' and another 705 for 'offenses against the Employment of Natives Ordinance'. A decade later, a second category of convictions appeared alongside those for failure to pay tax, breach of a labour contract, or insisting on free movement. That year, 776 were convicted for offenses against the Forest Laws, 387 for violating Township Regulations, and 227 for breaches of the tobacco and cotton uprooting rules.<sup>81</sup>

It is important not to underestimate the vigour with which the colonialist enforced violations of their poll tax as it explains this rather innocuous statement: 'contract work was stimulated by tax'.<sup>82</sup> It would take the African months of work to pay his annual tax, and should one choose not to find work, they would be liable to a 'forced contract, or worse still, "correctional labour"'.<sup>83</sup> It was not unusual for the earliest colonial codes to demand all Africans to work.<sup>84</sup> In the case of the Chagga, and this point will impact on Chagga political organisation, a gap in regulation occasioned by a change of colonial power had the

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80 See generally, Mamdani, *Citizen and subject*, 'Introduction'; Mamdani *Neither settler nor native*, 'Introduction'.

81 Mamdani, *Citizen and subject*, 128.

82 Mamdani, *Citizen and subject*, 154.

83 Mamdani, *Citizen and subject*, 154.

84 In Mozambique, this was the 1899 Code. Mamdani, *Citizen and subject*, 154.

Chagga able to grow their coffee and organise themselves to sell it for cash.

Most Chagga never liked full time employment in settler plantations. They preferred *kibarua* – casual labour for a day or few hours – which they could do when they wanted to. Later, as they accessed cash through coffee, they even did not need *kibarua* to pay tax. [...] To tame Chagga labour, a *kipande* (card) system was introduced whereby every able-bodied man was required to work in a plantation or public work for a month, with a signature entered on his card for every completed day of work. It was meant to ensure each man worked for at least thirty days in a year.<sup>85</sup>

These and many other such legislations are what *created disability*. With the very forceful imposition of the poll tax, an elderly PWD suddenly became dependent on the fourteen-year-old ‘able-bodied male’ capable of working to earn the tax and save the family from exacting punishments. It did not matter what status a person with a disability may have had, by lineage, wealth or spiritual importance, in the pre-colony. With the harsh enforcement of the poll tax, their status as “‘different” human beings in need of special attention and separate programmes, the charity model<sup>86</sup> was inaugurated.

The colonial policy created the

[S]ocial and development dimension [in which] disability is attributable to environmental restrictions and inhibitions. In this case, the inaccessible environment is the problem, not the impairment *per se*. [...] *What hinders the participation of persons with disabilities in development is not their impairments, but environmental barriers created by society through acts of omission or commission.*<sup>87</sup>

The colonial obsession with exploiting all objects in its reach and objectifying human beings ensured PWDs slipped out of the facility and into invisibility. As an example of how the post-colony continuity impacts the excluded,

[I]n Kenya, although there have been national censuses every ten or so

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85 Mkenda, ‘Building national unity in sub-Saharan Africa’, Chapter III, 31-2.

86 Masakhwe ‘Disability discrimination: A personal reflection’, 60.

87 Masakhwe, ‘Disability discrimination: A personal reflection’, 60. [emphasis added]

years, no major disability-targeted census has been carried out. There is no clear data indicating the exact number of persons with disabilities, their age, type of disability and geographical distribution.<sup>88</sup>

This was true as at the time of the passing of the transformational agenda of the 2010 Constitution.

Masakhwe is forceful of the state of cultural practice regarding PWDs:

[I]n many communities, disability is received negatively, as bad omen and as a curse. Hence, many families get embarrassed to the extent of at best hiding, if not at worst immolating such a child. Others are just abandoned to die particularly in many pastoralist communities where carrying a person with a disability as they move from place to place to look for pasture is considered a burden. A reflection of the local naming of disability reveals the non-value most Kenyan societies assign to persons with disabilities. Words like 'kyonze' in Kikamba, 'kionje' in [g]ikuyu language show that persons with disabilities in those communities are considered 'non-living' things and not as human beings; the 'ki-' prefix in these words speaks to this position. Words like "viwete", 'viziwi', 'vipofu' in Kiswahili equally fall in that category (see also wa-Mungai 2008; wa Mungai 2009). *This depersonalisation is a conceptual preconditioning of community members for the ostracisation of persons with disabilities.*<sup>89</sup>

Masakhwe makes compelling arguments against the denigration of African culture with which the PWD lives. Our built environment, in schools, churches and almost all public road infrastructure, is dismissive of the access needs of PWDs. The sheer struggle a person with disability has to live with to simply take a short matatu (public transport) ride in Kenya is stark evidence of an unacceptable disregard. Masakhwe, in fact, wonders why, when an entity fails to pay tax, the Government is quick to act against such failing. Still, no building is condemned for being inaccessible to PWDs.<sup>90</sup>

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88 Masakhwe, 'Disability discrimination: A personal reflection', 61.

89 Masakhwe, 'Disability discrimination: A personal reflection', 62. [emphasis added]

90 Remarks made by Dr Masakhwe at the validation workshop held at the Kabarak University Annual Law Conference, 15-16 June 2022.

It is our contention that this tendency in our societies for such extreme disregard was cultivated by the objectification of African labour during colonialism.

### **Containerisation and the invention of negative ethnicity and politics**

Having overthrown pre-colonial power structures, diminished positive customs and imposed new categories of self-concept that elevated the previously underprivileged, the colonial project needed to contain the African subject in this secluded contrived custom. This was done by restricting the physical movements of the colonial subject. The infamous 'reserves', whose corrupted version '*risaf*', the Kenyan slang term for ancestral home, were legislated into existence through the double-speak of protection treaties. The most infamous are the Anglo-Maasai treaties of 1904 and 1911, whose effect of destroying Maasai power through deceitful legal machinations is well documented.<sup>91</sup>

Containerisation had several important effects in forming exclusionary socio-political factors in the colony. 'Separated into many distinct races and tribes, the natives would look to their 'own' rather than each other...'<sup>92</sup> It established the pervasive and corrosive politics of xenophobic clannism, 'tribalism' nationalism and religious chauvinism. Containerised communities, restrained in their reserves, could only then define themselves by not being the other, which was unnecessary in the pre-colony.<sup>93</sup> The well-intentioned attempts at nation-building after independence were prone to fall into effects of this original sin in

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91 *Ole Njogo and others v AG of the EA Protectorate* (1914), 5 EALR 70, cited in Ghai and McAuslan, *Public law and political change in Kenya*, 20-3; See also the *Ole Njogo* case as discussed in James Gathii, 'Imperialism, colonialism and international law' 54(4) *Buffalo Law Review* (January 2007), 1013.

92 Mamdani, *Neither settler nor native*, 3.

93 See also, Felistus Kinyanjui 'Citizenship and nationhood in post-independent Kenya' in Gona, wa Mungai (eds) *(Re)membering Kenya*, 115-18.

our politics. 'Like the other *isms*, nationalism is as much an ideology of exclusion as it is of inclusion.'<sup>94</sup>

The western notion of cultural superiority becomes the hallmark of the politics of the Africans who take up westernisation.

In the late 19<sup>th</sup> century, all communities subscribing to ideologies other than nationalism were viewed by those who imagined themselves as 'nations' to be lacking civilization. Such 'uncivilized' communities were seen as suffering from a deficiency that called for and sufficiently justified, at worst, subjugation, dispossession or extermination and, at best, paternalistic control.<sup>95</sup>

In tracing the 'geography of an identity', Mkenda records the ancestries of the members of the Chagga identity in the late nineteenth century. Given contemporary perceptions of ethnic purity, this statement is worthy of fuller reproduction.

Considering the Kamba to be born travellers, Krapf noted their existence in almost every country of East Africa. Some of the Kamba traced their origins to Kilimanjaro. Krapf also noted that the Rabai section of 'Wanika' traced their roots 'in the territory of Rombo a tribe in Dschagga.' [...] Some of these Wachagga who migrated to Taveta could have had a previous Maasai, Kamba or Kikuyu origin. [...] Finding the Kikuyu to be just as diversified, Godfrey Muriuki declared their refined myths of common ancestry 'practically worthless' and 'clearly unhelpful', which conclusion earned him reproach from local reviewers.

*What this Chagga story suggests, which further research might confirm, is that, for the communities in this region of East Africa and possibly beyond, the ethnobiological notions of community identity which put an accent on blood and descent are probably as foreign as they are obviously ephemeral.*<sup>96</sup>

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94 Oliver Zimmer, *Nationalism in Europe, 1890-1940*, Palgrave Macmillan, 2003, 50, cited in Mkenda, 'Building national unity in sub-Saharan Africa' Chapter II, 15-6.

95 Claude Levi-Strauss, 'Anthropology: Its achievement and future', 7(2) *Current Anthropology*, (1966) 126, cited in Mkenda, 'Building national unity in sub-Saharan Africa' Chapter II, 15-6.

96 Mkenda, 'Building national unity in sub-Saharan Africa' Chapter II, 15-6, citing the following historical sources: Krapf Johann L, 'Mt. Kenia' 4(12) *Proceedings of the Royal Geographical Society and Monthly Record of Geography*, The Royal Geographical

To further illustrate the status of the pre-colony in Eastern Africa as regards mobility of persons and the fluidity of citizenship in communities, the historian Mkenda makes this most remarkable off-the-cuff statement regarding population growth at peak prosperity times around Kilimanjaro.

As families grew and economic and political pressure intervened, clans split and their off-shoots moved to settle in other localities on the mountain, even as others went further to become Taita, Kamba, Meru, Maasai, etc.<sup>97</sup>

Such historiography is indispensable in understanding the colonial *need* for containerisation. Localised decentralised despotism, so necessary for the answers to the native question, was impossible if Africans were not compelled to believe in a 'unilinear evolutionism',<sup>98</sup> a singular ancestry and the immutability and inevitability of the despotic custom that they were living under during colonialism. Simply put, if the downtrodden Maasai knew they could so easily go on and become Kikuyu, and rise to respectable citizenship, then equally move back and gain another citizenship as need and ambition dictated, then what hold would the colonial enterprise have on such a one? Such a free spirit had to be eliminated in the individual who could serve as a dangerous example to the populace.

In fact, such an example exists in reality. The UNESCO *General History of Africa* records this to be the life of Waiyaki wa Hinga.

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Society (with the Institute of British Geographers) Wiley, 1882,753; Dundas Charles, *Kilimanjaro and its people: A history of the WaChagga, their laws, customs and legends, together with some account of the highest mountain in Africa*, Cass London, 1968, 45; J Forbes Munro, 'Migrations of the Bantu-speaking peoples of the eastern Kenya Highlands', 8(1) *Journal of African History* (1967) 26; Krapf, *Travels*, 182; RF Morton, 'The Shungwaya myth of Miji Kenda origins', 5(3) *International Journal of African Historical Studies* (1972) 401; Hollis, 'Notes', 103, 101-104; G Muriuki, *A history of the Kikuyu 1500-1900*, London, 1974, vii, 47; for an overview of responses, ES Atieno-Odhiambo and WR Ochieng, 'A history of the Kikuyu 1500-1900', 4(2) *JEARD* (1974). [emphasis added]

97 Mkenda, 'Building national unity in sub-Saharan Africa' Chapter II, 16-7.

98 Mamdani, *Citizen and subject*.

A number of Maasai families such as the Waiyaki and Njonjo families took refuge [from the Rinderpest epidemic] among the neighbouring Gikuyu where they were to play a different role both in relation to their response to colonial advance and in relation to the colonial system that was consequently set up, as well as post-colonial society.<sup>99</sup>

Waiyaki, the Maasai-born Gikuyu anti-colonial leader, was buried alive by the colonialists.

Therefore, it is important to reaffirm that the historical record is unequivocal as to the possibilities of human advancement, the freedom of movement and the mutability of citizenship to a community in the African pre-colony. To my mind, our communities practised a 'universal naturalisation' approach to citizenship. Anyone could, in theory, come, learn our ways, be initiated and be part of us. The 'other' was ephemeral, referring only truly to the one who has not spent sufficient time with us.

Attacking the pre-colony's free movement is not restricted to the colonial project. As a testament to the continuity of the post-colony, the President Kenyatta Government embarked on a brutal campaign to control the Somali, Borana and other northern people by forcing them into settlements and townships that were no more than massive open-air prisons. Given that these peoples had defined themselves by the cyclic seasons of their vast areas of movement, compelled township life was undefinable agony. Sean Bloch 'uses this very opposition of world views [western linear time and African cyclic time as described by John S Mbiti]<sup>100</sup> to explain the anguish of the communities of North-eastern Kenya in the forced sedentarisation or 'manyattasation' policy of the Shifta War "gaf Daba" of 1963-8.' Even more debilitating is that

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99 Henry A Mwanzi 'African initiatives and resistance in East Africa, 1880-1914' in Albert Adu Boahen (ed) *General history of Africa, Vol VII: Africa under colonial domination 1880-1935*, 152.

100 John S Mbiti, *African religions and philosophy*, Second Edition, Heinemann, 1990, 15-28. See correspondingly, Samir Amin, 'Underdevelopment and dependency in Black Africa: Origins and contemporary forms,' *Journal of Modern African Studies* (1970) 10.

such evisceration of culture was done ‘all in the name of ‘maendeleo’, development.<sup>101</sup>

Containerisation enabled the decentralised despotism of contrived custom<sup>102</sup> by eliminating possibilities of escape. The African was frozen in time, and this poor example of African culture was crystallised as the norm. Ethnic communities – called tribes – were thus formed by the definition of the other. This laid the foundation for another debilitating aspect of African reality: a politics of negativity. In addition, some numerically inferior groups were simply ignored out of existence and subsumed into larger groups, as happened to the Sengwer and Ogiek in Kenya. New majority and minority contestations erupted within these contained tribal units. It bears adding that containerisation was itself necessitated by the vast land alienation that the advent of colonialism brought. It follows that these contained units for the Africans had less arable land to go around, further exacerbating negative identity politics through resource contestations. With such a background, a mediocre politics of grievance and negativity was entrenched among the African majority.

*‘Grievance politics’ and the ‘other native’ question*<sup>103</sup>

Godfrey Kiprono insists that the plague of Kenyan politics is its tendency to define its mission from grievance, from the negative. Its vision is thus debilitated by its origins. The containerised African then began to form their identity around that which they lacked, were prohibited from, and more so, that which may have been accessible to the ‘other’. While controlling the collective of the ‘natives’ is the core colonial question,

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101 See generally Sean Bloch, ‘Stasis and slums: The changing temporal, spatial, and gendered meaning of ‘home’ in Northeastern Kenya’ 58(3) *Journal of African History* (2017) 403-23, cited in Sipalla, ‘A human rights consistent apartheid’, 261, fn 90.

102 Mamdani, *Citizen and subject*, 22ff.

103 We are thankful to Dr Godfrey Kiprono Chesang for his insights and his articulation of these terms. Personal communication with Humphrey Sipalla, 6 June 2022.

[T]he contemporary question for the indigenous majority ruling the barely post-colonial but mostly neo-colonial state is how to dominate other, not fellow, indigenous minorities and non-ruling majorities. We will call this, the “other native question”.<sup>104</sup>

The dual effect of contrived custom and containerisation makes this despotism inescapable for the African. The state grows to ‘[displace] the community, and increasingly the family, as the framework within which an individual or group’s life chances and expectations are decided. The survival of community itself now depends on rights of association and assembly.’<sup>105</sup> But those very rights to associate and assembly are curtailed by containerisation. ‘In most cases, districts were ethnic enclaves, and racism was evident, with African occupying the bottom rung’.<sup>106</sup>

It follows that plotting on the Kenyan map, the hotspots of electoral violence are almost exclusively along the boundaries of colonially contrived containers. These containers are the administrative units of the colony and post-colony, that is, the districts and now, counties. The decision to base the borders of the new counties on the district borders of the old constitutional continuity raises the concern that these boundaries were drawn to define ethnicities, to divide and rule. As such, to build a constitutional order on such fundamental errors was to birth certain counties with the burden of injustice by design. Not only would certain communities be perennial minorities by colonial design – an unfair burden for a contemporary county to start with – but the entrenched developmental injustices of the colony and post-colony would also weigh heavily on such local governments.<sup>107</sup> Attempts to

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104 Sipalla, ‘A human rights consistent apartheid’, 257-8.

105 Yash Ghai, ‘Rights, duties, responsibilities’ in J Caughelin, P Lim, B Mayer-Konig (eds) *Asian values*:

*Encounter with diversity*, Curzon Press, London, 1998, 169.

106 Kinyanjui ‘Citizenship and nationhood in post-independent Kenya’, 117.

107 See generally, Abraham Rugo Muriu ‘Number, size and character of counties in Kenya’ in NC Steytler, Yash P Ghai (eds) *Kenyan-South African dialogue on devolution*, Juta, 2015.

redress these developmental injustices will be discussed later in this chapter.

From the foregoing, it should be no surprise that politics based on negative 'othering' and misunderstood grievance only leads to a negative peace. In the absence of direct violence, societies living in negative peace will often find themselves in the form of victimhood, such as receiving humanitarian and food aid, struggling against dictatorship, repression and occupation, and efforts to overcome prejudice.<sup>108</sup>

### Some conceptual clarifications

#### *Homogenising mission of the colonial state*

One of the ironies of the colonial project as applied to the settler colonies like Kenya is that while the colonial method entailed inane distinctions and separations, the nation-state it sought to forge bore an irrepressible tendency to homogenise. Its effect is seen in the immediate post-colonial project of nation-building, whose unbending force and brutality we have referred to above. Colonial 'power reproduced itself by exaggerating difference and denying the existence of an oppressed majority'.<sup>109</sup>

Such an unbending force was primarily epistemological. In fact, ontological. The identities borne of a few decades of containerisation became the basis of exclusionary negative identities. Sadly, nation-building was achieved, many times, by forceful erasure of differences and fashioning the new nation along the imaginations of the big-

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108 George Gona 'Dealing with the aftermath of the election violence of 2007/2008: Kenya's dilemmas' in Gona, wa Mungai (eds) *(Re)membering Kenya*, 219. In contrast, positive peace 'entails the presence of activities meant to bring relief for past or present violence.'

109 Mamdani, *Citizen and subject*, 8.

figure nationalists of the Independence era.<sup>110</sup> The nation-state's drive to homogeneity requires the 'ejecting of those who would introduce pluralism'.<sup>111</sup>

This mission imposed a top-down uniformity, and specificities were rejected as an attack on unity and progress.<sup>112</sup> This 'homogenising mission of the state'<sup>113</sup> eliminated the possibility of claims for justice from the excluded and marginalised. Yash Ghai argues that even in the civil state where citizens have rights and standing to complain, the liberal state remains inimical to pleas for inclusion instead of fostering 'a pluralistic state of diverse cultural and national groups'.<sup>114</sup> For Ghai, this results in a post-colonial posture in constitution-making, 'which produce[s] a degree of rigidity and inflexibility and [is] unable to accommodate diversity'.<sup>115</sup>

Therefore, the exclusion and marginalisation of the subjects of our study, especially women, youth, and PWDs, is completely lost even when the clamour for African interests increases in the run-up to independence. We will return to this point later in some detail.

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110 Mamdani traces this imposition of a national identity as subjects of a hitherto non-existent state to the post-Westphalian nationalist projects in Europe. 'The Castilians has to impose the nation on order to make it thinkable.' *Neither settler nor native*, 3.

111 Mamdani, *Neither settler nor native*, 4.

112 Statement by the President, *Sessional Paper no 10 of 1965*.

113 Ghai 'Ethnicity and autonomy', 2.

114 Ghai, 'Preface to the 2001 Issue' in *Public law and political change in Kenya*; see also, Sipalla, 'A human rights consistent apartheid' 264.

115 See also, Ghai's view of the centralising and exclusionary nature of the Westphalian nation-state 'which produce a degree of rigidity and inflexibility and are unable to accommodate diversity'. Ghai, 'Introduction' in in Yash Pal Ghai, Sophia Woodman (eds) *Practising self-government: A comparative study of autonomous regions*, Cambridge University Press, 2013, 3-4.

*Bastardisation of political participation in civil society*

An important effect of the colonial order was to upend the legitimate political class of the pre-colony and subdue the politics of these communities. Imprisoned in her local despotic customary rule, the African could not participate in government affairs and could not be trusted to govern herself.

But no people can exist without some form of political organising. 'How people obtain their means of livelihood is, in fact, the starting point of their cultural fermentation.'<sup>116</sup> An important yet understudied component of the construction of exclusion and marginalisation is the bastardisation of political participation by limiting it to the exclusive political party form. African civil society engagement with politics between the end of the War in Europe of 1914-1919 and the start of the War in Europe of 1939-45 shows community organising was largely based on people's livelihoods. Examples include the Kavirondo Taxpayers Welfare Association<sup>117</sup> and Kilimanjaro Native Cooperative Union.<sup>118</sup>

In Kilimanjaro, political organisation developed from the subdued chieftaincies of the pre-1880 era to what became 'the hub of Chagga political life' in the form of the Chagga Council and 'the hub of Chagga economic life' in the form of the Kilimanjaro Native Cooperative Union.<sup>119</sup>

In 1944, [...] the Colonial Government appointed Eliud Mathu as the first African representative of the African community in LegCo. In October [1944] the Government permitted the formation of a nationwide political

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116 Ali A Jahadhmy, *Anthology of Swahili poetry*, 192, Heinemann, 1977 p. vii, cited in Mkenda, 'Building national unity in sub-Saharan Africa,' Chapter II, 16.

117 Muigai, *Power, politics, and law*, 107.

118 Mkenda, 'Building national unity in sub-Saharan Africa' Introduction, 16.

119 GK Whitlamsmith, *Recent trends in Chagga political development*, KNCU Printing Press, Arusha, 1957, 19, cited in Mkenda, 'Building national unity in sub-Saharan Africa' Introduction, 16.

party representing the vast constituency of about 4 million people. This was the Kenya African Union (KAU).<sup>120</sup>

In the post-war period, the political participation of the Africans began to be restricted to the political party form of corporation. The post-colony also made deliberate efforts to co-opt and subsume trade unions, farmers' groups and any other form of civil life into the singular drive to forging a nation, usually in the form of a political party. This political party then replaced the government and state in the lives of the citizenry. These developments continue to restrict the imaginaries of our contemporary civil life and political participation. Yet, it is precisely in such civil life that the lived experience of women, youth, PWDs and religious and ethnic minorities may best be expressed. As will be seen in this chapter and the rest of this book, the transformational agenda of the 2010 Constitution begins to open spaces for civil organising to compete with and occupy the space of political parties in the coveted role of government formation. I foresee independent candidates to offer the promise of revolutionary candidatures in the years to come, especially at the local county level.

### **The colony in the post colony**

As colonialism began to draw down, it became clear that some changes had to be made to sustain the future of the Kenyan Colony in such a manner as not to upend the colonial order. White settlers were initially keen to take over minority rule from the Colonial Office. Muigai records the situation thus:

[I]n a scheme published in 1949 known by its revealing title, *The Kenya Plan*, the Electors Union [the main political outfit of the white settlers] rejected African majority rule of any other form of quantitative democracy ... The Electors Union demanded increased settlement by Europeans, the creation of a new British dominion, autonomy in the non-native areas and the greatest possible executive control by the European community.<sup>121</sup>

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120 Githu Muigai, *Power, politics, and law*, 102.

121 Muigai *Power, politics and law*, 101.

However, the Colonial Office was not blind to the ‘incompatibility between African and European claims upon central State institutions’, as well as infighting among African political players.<sup>122</sup> The Colonial State was fully aware that the problem of the native question was even more tenuous than if the settlers were to be left to their own devices. British colonial practice had long been somewhat suspicious of settler supremacy in the colonies.<sup>123</sup> Expressed in beguilingly philanthropic terms, the ‘paramountcy of native interests’ was a long-held principle in the Colonial civil service.<sup>124</sup> Cameron, Tanganyika’s second governor, was known to have remarked back in the 1920s that ‘the European is the experimental factor, not the native’.<sup>125</sup> For Kenya, the intensity of the Mau Mau revolt was such as to dispel any hope that the settlers could, without the massive direct involvement of the Colonial Office, sustain a colony.

By the late 1950s, it was the settlers who now championed, through the minority African communities, a radical decentralisation of the soon-to-be independent Kenya. But the allure of the central State and its overwhelming control of the societies it governed was certainly the strong preference of most African communities. Here, the ‘other native question’ discussed above begins to present itself.

The formation of [the Kenya National Democratic Union, KADU] doubtlessly stemmed from a distrust of KANU leadership, fears of domination by

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122 Muigai, *Power, politics and law*, 101.

123 I wager this ‘official’ attitude developed from the British’ early loss of the prized possession, the thirteen colonies of the New World to their own settlers. Britain has since been keen to oppose settler autonomy, and even supported UN efforts to prohibit the establishment of statehood on the basis of racial discrimination, all in an effort to contain the Unilateral Declaration of Independence by the Rhodesians.

124 Mkenda, ‘Building national unity in sub-Saharan Africa’ Chapter III, 10. See also, Muigai, *Power, politics and law*, 83-88.

125 Charlotte Leubuscher, *Tanganyika Territory: A study of economic policy under mandate*, Oxford University Press, London, 1944, 30, cited in Mkenda, ‘Building national unity in sub-Saharan Africa’ Chapter III, 10. See also, Donald Cameron, *My Tanganyika service and some Nigeria*, University Press of America, 1982, 18, 87-8, on how deep seated Tanganyika settler dislike for his views was.

larger ethnic groups, pressure from constituencies, but it also represented the ongoing political jockeying for power. Whether KADU would be the counterweight to a party [KANU] with the program of creating a one-party state remained a question for the future...<sup>126</sup>

Big figure politics<sup>127</sup> concentrated power in the centralised post-colonial state far more than had been under colonial rule. Focussing primarily on a few larger than life figures in the politics of nation-building exacerbated tendencies toward autocracy already imbedded in African culture and the negative politics cultivated by containerisation. It is our contention that this tendency to focus on big names and ignore the African (rural) masses certainly pushed even further from the political centre the urgency to reverse the exclusion of women, youth, PWDs and ethnic and religious minorities.

President Kenyatta's rule 'was a continuation of the colonial regime with Kenyatta as the new African governor and the Kikuyu as the new white elite'.<sup>128</sup> President Kenyatta's actions betrayed the spirit of the struggle against colonialism and the process of nation-building.<sup>129</sup> Away from the swift overhaul of the decentralised Independence Constitution and related statutes, arguably the most consequential was his sudden stamping out of the national debate on the development path of the new nation, as we will discuss below.

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126 Muigai, *Power, politics and law*, 164.

127 The term 'big figure politics' is used here to refer to the tendency to recount the history of African struggle for independence as the extraordinary handiwork of a few larger than life men, and ignoring the groundswell of mass mobilisation that contributed life and limb, fortune and opportunity to make the careers of these big figures possible. Mkenda criticises this approach to African nationalism for being top down and city and urban centre centric, which implies assuming that the rural masses cared little for their freedoms. 'By focusing solely on 'liberation movements' and 'national figures', the approach denies agency to the African masses, who appear in it as neither understanding colonialism nor asking for independence.' Mkenda, 'Building 'Building national unity in sub-Saharan Africa - Introduction', 7. It is understood in this study that big figure politics perpetuates a politics of centralisation in the nascent African states.

128 Kinyanjui 'Citizenship and nationhood in post-independent Kenya', 119, citing Jeremy Murray-Brown, *Kenyatta*, Allen & Unwin, London, 1972, 119.

129 Kinyanjui 'Citizenship and nationhood in post-independent Kenya' 120.

These political and administrative continuities are not unimportant to the question of exclusion and marginalisation. As discussed earlier, as late as 2013, the Kenyan National Census took no note of PWDs, leading to their relative invisibility from public policy interventions. This tendency by State institutions to dismiss the agency of PWDs manifests even in the employment policies of the security agencies of the state, which are an important employer of youth. Uncritical employment policies simply lock out young PWDs from job opportunities regardless of their intellectual capacities.

For instance, national programmes such as the National Youth Service and recruitment into the armed forces leaves out youth with disabilities yet it is clear that not all roles in these institutions (computing, data entry and analysis, human resource skills, accounting, strategic planning, intelligence training and artisans, for instance) require non-disability of the body as a precondition...<sup>130</sup>

The disregard for PWDs, even among the marginalised groups listed under Article 100 of the 2010 Constitution, is an apparent continuity. The National Disability Development Fund, provided for in the Persons with Disability Act (2003) is unestablished, while the Women and Youth Enterprise Funds are operational, despite lacking statutory backing.<sup>131</sup>

## **Development planning and exclusion**

This study contends that centralisation of development planning has irrevocable multiplier effects on exclusion and marginalisation. Centralised development planning had persisted in Kenya from the colonial period. This is consistent with the understanding that colonialism was an extractive enterprise. In the context of our present attempt to unpack the construction of power in Kenya and how such construction reproduces exclusion, the political posture of the post-

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130 Masakhwe, 'Disability discrimination: A personal reflection' 64.

131 Masakhwe, 'Disability discrimination: A personal reflection' 65.

colonial Kenyan State is of particular interest. Why, if independence was at least a reformatory, if not a revolutionary moment, did the Kenyan State largely maintain a centralised approach to development planning and implementation?<sup>132</sup>

Central planning for hundreds of differentiated projects and localities was likely to fail because of the location-specificity of conditions and needs. Furthermore, access to the higher decision-making levels of government and the administrative freedom to tailor programs precisely to local conditions were frequently sacrificed for administrative convenience when projects were generalised. Highly centralised administration of national programs made it difficult to carry out the experiments with program content and delivery methods that were essential if rural development programs were to meet the diverse needs of these areas.<sup>133</sup>

It is noteworthy that much of the literature on development planning and implementation is related to project planning and economic policy. Not nearly enough literature, we opine, exists from a legal and political analysis. This is despite the literature recognising the project utility, if not political and administration of justice expediency of decentralisation.

Decentralisation enables people to participate more directly in developing and managing development projects. *It helps empower people previously excluded from decision-making.* In this way, a country creates and sustains equitable opportunities for its entire people.<sup>134</sup>

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132 This centralised approach seems to be wide conclusion of relevant scholarship. See Fiona Mackenzie and D Taylor, 'District Focus as a strategy for rural development in Kenya: The case of Murang'a District, Central Province' 8 (2) *Canadian Journal of Development Studies* (1987); Antony Musyoki Mbandi and Mary Nyawira Mwenda, 'Influence of project implementation strategies by religious organizations on rural development: A case of Kitui Catholic Diocese, Kitui County, Kenya' 6(1) *European Journal of Business and Management Research*, (January 2021) 4; Patrick O Alila and Rosemary Atieno, 'Agricultural policy in Kenya', *Institute for Development Studies*, 2004.

133 Mbandi and Mwenda, 'Influence of project implementation strategies by religious organizations on rural development', 4.

134 Mbandi and Mwenda, 'Influence of project implementation strategies by religious organizations on rural development', 6, also citing, Dennis Rondinelli,

Marcel Rutten notes that the antecedents of government planning in the 1940s<sup>135</sup> as merely administrative, devoid of political input<sup>136</sup> – and therefore insulated from popular sentiment. Rutten describes it thus

Th[e] concept of ‘good housekeeping’ dominated the British administrative system transplanted into the colonies. Although the system was based on indirect rule (making use of the prevailing indigenous administrative or authority units) *planning was still mainly a task for central authorities.*<sup>137</sup>

While this highly centralised ‘vertically integrated development administration and planning machinery’<sup>138</sup> was inherited at independence, Sessional Paper No 10 of 1965 sought to make some important changes, as we shall see below.

It is important to note that development planning for inclusion and demarginalisation requires the stability of politics. The District Focus on Rural Development (District Focus) inaugurated the district as the locus of planning, implementation and management of rural development. This study contends that this policy contributed immensely to laying down the rudiments of success for the devolution established by the 2010 Constitution. What is noteworthy here is that it was only after President

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‘Implementing decentralizing policies in Asia: A comparative analysis,’ 3 *Public Administration and Development*, (1983) 181-207. [emphasis added]

135 RE Vente, *Planning processes: The East African case*, IFO Afrika Studien 52, Weltforum Verlag, Muchen, 1970, 26, cited in Marcel MEM Rutten, ‘The District Focus Policy for Rural Development in Kenya: The decentralisation of planning and implementation, 1983-9’ *Third World regional development: A reappraisal*, Paul Chapman Publishing, 1990, 154.

136 This assessment of colonial government public policy making as being decidedly apolitical, and Colonial Government hostility to ‘unofficials’ is also noted by other Kenyan scholars of the period. ‘the Commissioner was ‘anxious to avoid unofficials’ preferring instead an EC composed of officials only ‘to advise him on the application and execution of enactments, the conduct of native affairs and all important issues connected with the administration.’ Ghai and McAuslan, *Public law and political change in Kenya*, 44, cited in Muigai, *Power, politics, and law*, 63.

137 Rutten, ‘The District Focus Policy for Rural Development in Kenya’, 155. [emphasis added]

138 Rutten, ‘The District Focus Policy for Rural Development in Kenya’, 155.

Moi had 'established a loyal civil service' that he set out to 'introduce the politics of decentralisation' in the form of District Focus.<sup>139</sup>

*Sessional Paper No 10 of 1965 and exclusionary continuities*

On the face of the record, Sessional Paper No 10 of 1965 was to be a transformational document. Coming in soon after independence, it was the first formal attempt at the post-colony laying down its development planning policy. Moreover, at least at the beginning, it seemed to have been drafted with a vision for justice and transformation from the colonial order. Consider its third paragraph:

Every member of society is equal in his political rights and that no individual or group will be permitted to exert undue influence on the policies of the state. The state, therefore, can never become the tool of special interests, catering to the desires of a minority. The state will represent all the people and will do so impartially and without prejudice.<sup>140</sup>

The Policy opened with visionary policy statements, reaffirming political equality, social justice, human dignity, freedom of conscience, freedom from want, disease and exploitation, equal opportunities and the equitable distribution of high income per capita as universal aspirations of societies, including Kenya. These grand opening statements alluded to a revolutionary policy that would have made significant strides in reversing the exclusion and marginalisation of women, youth, PWDs and ethnic and religious minorities.

At its promulgation, while the use of the term African socialism was en vogue, a systematic declaration of its contours and public policy implications had not been attempted by any African government.<sup>141</sup>

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139 Kinyanjui 'Citizenship and nationhood in post-independent Kenya', 122.

140 Sessional Paper no 10 'On African socialism and its application to planning in Kenya' 1965.

141 Barack H Obama 'Problems facing our socialism: Another critique of Sessional Paper no 10' *East Africa Journal*, July 1965, 26.

Its first contribution, therefore, was being the first to attempt such a systematic description in formal government policy. It lays down the policy objectives of Kenya's vision of African socialism, its priorities and development targets. It is also categorical of Kenya's 'positive non-alignment', seeking neither 'western capitalism nor eastern communism'.<sup>142</sup>

Sessional Paper No 10 of 1965 proposed important changes to centralised development planning.

Planning is a comprehensive exercise designed to find the best way in which the nation's limited resources – land, skilled manpower, capital and foreign exchange – can be used. [...]

Planning cannot be done effectively unless every important activity is accounted for and every important decision-maker involved. [...]

Planning will be extended to provinces, districts and municipalities, so as to ensure that in each administrative unit progress towards development is made.<sup>143</sup>

These statements indicate that the independence technocrats, if not political leaders, were conscious of the necessity 'to treat development of the young independent state as a very important issue'.<sup>144</sup>

Barack Obama (Snr) is unconvinced by the Sessional Paper's focus on planning, a largely technocratic economic task, and its 'divorce from the politico-socio-cultural context', which ought not to be ignored.<sup>145</sup> In particular, on the core question of land tenure and management, Obama is unconvinced by the Policy to prefer individual title over communal ownership.<sup>146</sup> He also questions whether Kenya can maintain free enterprise while ignoring the ongoing class formation and its attendant problems.

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142 'Statement by the President' Sessional Paper no 10 'On African socialism and its application to planning in Kenya' 1965.

143 Sessional Paper no 10 of 1965, 1, 49, 51.

144 Rutten, 'The District Focus Policy for Rural Development in Kenya', 155.

145 Obama 'Problems facing our socialism', 27.

146 Obama 'Problems facing our socialism,' 28.

A reading of the Policy and its contemporaneous critique reveals an abiding concern for the big themes of the day: Africanisation, capitalism vis-a-vis socialism and its effects on ownership of farms and foreign investment initiatives, land tenure systems, the role of African traditions, lack of skilled human resources, taxation policy and the growth of national savings. The Policy certainly placed a preeminent focus on the fastest possible economic growth. This concern superseded all other national objectives, especially those related to decentralisation, reversal of colonial neglect of certain areas and communities, and the place of those excluded from the colonial enterprise, that is, women, youth, PWDs and ethnic and religious minorities. These social justice aims, so grandly declared at the opening of the Policy, are forgotten as the parameters of planning are laid out. As Obama points out, the Policy focussed on growth and ignored development.<sup>147</sup>

The Government talks of dealing only with areas where the returns out of any development programme are ostensible. But surely, the returns are low only because these areas are and were underdeveloped in the beginning. Must we be so short-sighted as to look only into intermediate gains when these areas are rotting in poverty?<sup>148</sup>

The Policy, in paragraph 62, details the human resource shortfalls the country was facing. Curiously, the valorisation of the African is completely lost on the Government. Traditional health systems, which remain widely used today, were and still are completely ignored. The practice of traditional birth attendants is a prime example of the Government lamenting a lack while ignoring the abundant traditional knowledge around it.

It is evident that the transformational vision of the Policy was hardly embarked upon. The presidential foreword to the Policy is the lens with which we understand how this comes to be.

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147 Obama 'Problems facing our socialism,' 29.

148 Obama 'Problems facing our socialism,' 32.

There has been much debate on this subject and the Government's aim is to show very clearly our policies and also explain our programme. *This should bring to an end all the conflicting theoretical and academic arguments that have been going on. ... we need political stability ...we cannot establish these if we continue debates on theories and doubts about the aims of our society.*<sup>149</sup>

In light of our subjects of marginalisation, and even in terms of the historically underdeveloped areas and sectors of Kenyan life, the country would have benefitted greatly had the then President been more open to critique. The net effect of this autocracy, whose origins in despotic customary law we have already discussed, was the continued colony within independent Kenya. It would take another two decades for Daniel Arap Moi to ascend to the presidency, recall his majimboist politics and attempt Kenya's first real effort at decentralisation and reversal of colonial marginalisation. This effort, called District Focus, is the focus of our inquiry below.

### *District Focus for Rural Development*

District Focus was initiated by the Government in July 1983.<sup>150</sup> Coming after the upheaval of the August 1982 coup, this programme's timing indicates confidence in President Moi's Government over the consolidation of State power. More so, because District Focus can be seen as a proactive attempt to redress some of the extreme inequalities of the development choices of Sessional Paper No 10 of 1965, its initiation can be seen as a subtle attempt to decentralise development policy, itself a spill over of the majimboist KADU ideals that President Moi once held.<sup>151</sup>

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149 'Statement by the President' *Sessional Paper no 10 of 1965*. [emphasis added]

150 Rutten, 'The District Focus Policy for Rural Development in Kenya,' 154, 157.

151 Muigai, *Power, politics, and law*, 164, 183; Kinyanjui 'Citizenship and nationhood in post-independent Kenya' 122.

District Focus aimed to decentralise development planning. It transferred 'considerable responsibility from ministerial and provincial headquarters to the district level officers' while maintaining responsibility for policy and planning of multi-district and national programmes at the ministerial level.<sup>152</sup> Curiously, this arrangement required collaboration between these two levels of government planning.

District Focus was a significant upgrade, a half-hearted attempt under the previous regime to decentralise planning and promote inclusion in the development priorities. As an effect of the intention to decentralise as indicated in Sessional Paper, No 10 of 1965, the Special Rural Development Programme was experimented in six pilot areas between 1967 and 1977.<sup>153</sup> This was the first time Kenya attempted horizontal planning, but its success was short-lived, partly because of 'problems of a political nature at the local administrative level'.<sup>154</sup> Among its successes, however, was the establishment of a District Development Committee (DDC) as a body of officials and the post of a District Development Officer (DDO). Moreover, the First National Development Plan (1966-70) and Second National Development Plan (1970-4) were 'still mainly the product of central planners'.<sup>155</sup> While the Third Plan (1974-8) introduced 40 District Plans, one for each district, these again were centrally planned, including with expatriate advisers. Being so removed from not only the political reality of the subject of development and the official implementers, it is no surprise that these District Plans received a damning assessment.

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152 Rutten, 'The District Focus Policy for Rural Development in Kenya', 154, 159; Office of the President, *District Focus for Rural Development*, revised March 1987, Government Printer, Nairobi, 1.

153 Rutten, 'The District Focus Policy for Rural Development in Kenya', 155.

154 Rutten, 'The District Focus Policy for Rural Development in Kenya', 155.

155 Rutten, 'The District Focus Policy for Rural Development in Kenya', 155.

...they contained too many proposed projects, failed to set clear principles, lacked detail needed by operational ministries and *failed to merge with the national budgetary system*.<sup>156</sup>

All through the 1970s, the Government sought to learn from these failures and implement administrative remedial actions, such as training DDOs and providing clear guidelines for district-level planning. While nominal progress was witnessed, nothing transformative was achieved. One factor noted in the literature that is of prime importance to our discussion is that 'the DDC had no authority to require action or cooperation from the operating ministries'.<sup>157</sup> This lack of authority to compel recognition of local priorities would continue to plague decentralisation of planning and implementation of development until the 2010 order.

The foregoing discussion indicates persistence of the colonial tendency towards distrust for unofficials<sup>158</sup> and exposing government operations to political direction. Again, bereft of the popular demands that political direction can bear in a liberal political order, development planning could not, even with these local decentralised civil service organs, be responsive to the plight of the masses, let alone redress concerns of the marginalised and excluded.

The sudden and destabilising political change at the end of the 1970s ushered in a new presidency that was interventionist in the economic business of administration and development. International economic upheavals such as the 1976-7 surge in coffee prices and the 1979 oil crisis upended Government finances, driving it to the constricting arms of the International Monetary Fund (IMF) and World Bank structural adjustment in the early 1980s.<sup>159</sup> These events led to the following

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156 John M Cohen and Richard M Hook, 'Decentralized planning in Kenya' 7 *Public Administration and Development* (1987), 82, cited in Rutten, 'The District Focus Policy for Rural Development in Kenya', 156.

157 Rutten, 'The District Focus Policy for Rural Development in Kenya', 156.

158 Muigai, *Power politics, and law*, 64-5.

159 Rutten, 'The District Focus Policy for Rural Development in Kenya', 156.

paragraph in the 1982 Report of the Working Party on Government Expenditures, which in turn became the foundational philosophy of District Focus:

[T]here is a lack of sharp, carefully coordinated focus on rural development at district level. There is too much emphasis on provision of services and too little emphasis on *involving the people and their resources in the development process*. Yet, because officers in the field identify more with their superiors in Nairobi than with the people of the district, even the provision of services is carried out negligently *and without dedication to or respect for the people being served*. Distance precludes the adequate enforcement of discipline and accountability. Family, farm and national development all suffer as a result.<sup>160</sup>

These recognitions are remarkable for the time as they indicate frustration at the imperviousness of the vertically integrated structure not only to local needs and political demands but even to their own need for administrative efficiency. While it is true that nothing in this text suggests a recognition of the value of democratic direction or even recognition of the peculiar situation of those excluded and marginalised by decades of centralised development priorities of colonial and independent governments it nonetheless provides strong evidence that undemocratic centralisation hurts even the very aims of such a system. In any case, under such circumstances, unfortunately, women, youth, PWDs, ethnic and religious minorities, and other marginalised groups stood little chance of having their entitlements recognised and their demands for redress accepted.

In this context, District Focus was a welcome change. It brought along a number of important advances. First, unofficials, both politicians and civil society representatives were incorporated into the DDC.<sup>161</sup>

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160 Working Party on Government Expenditures, *Report and recommendations of the Working Party Appointed by His Excellency the President (Chairman, Philip Ndegwa)*, Government Printer, 52-3, cited in Rutten, 'The District Focus Policy for Rural Development in Kenya', 157.

161 The DDC was now composed of: District Commissioner; District Development Officer; Departmental Heads of all ministries represented in the district; Members

While District Focus did not expand resources for development, and neither was the funding of district activities relocated from the operating ministry, Authorities to Incur Expenditures (AIEs) was transferred at the beginning of the financial year to the district. This was done to unblock implementation bottlenecks. It also seems to have been a more prudent management practice compared to the *ad hoc* arrangement from Nairobi, through provincial authorities that was the norm prior to District Focus.<sup>162</sup> Another effect of such far-reaching changes was that District Treasuries were strengthened, with more competent staff and better coordination of Departmental Heads who were the AIEs. Such elements, we contend, were inadvertent preparation for the sudden overnight transition to the devolved government after the 2012 General Elections.

Assessments of the true impact of District Focus are varied. A few broad conclusions can, however be drawn. Identification and priority-setting of development project priorities was not always smooth; the DDC-NGO coordination did not always take place; the availability and quality of local contractors was not always satisfactory; transfer of quality staff (accountants, planners, water engineers, and supplies officers) did not always happen smoothly, and training needs for officers was seemingly elastic and perennially underestimated.<sup>163</sup>

It is noteworthy that more recent scholars bizarrely dismiss the agency<sup>164</sup> of the Kenyan State in the devolution of development planning

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of Parliament; District KANU executive officer (at the time Kenya was a one-party state); Chairmen of local authorities; Chairmen of the Divisional Development Committees (DvDC); Representatives of development-related parastatals; invited representatives of non-governmental organisations (NGOs) and self-help groups. Rutten, 'The District Focus Policy for Rural Development in Kenya', 158.

162 Rutten, 'The District Focus Policy for Rural Development in Kenya', 159.

163 Rutten, 'The District Focus Policy for Rural Development in Kenya', 166.

164 Phrases like 'implementation of reforms in [the] agricultural sector were largely tied to release of donor aid' are casually used as if the Kenyan state had no self interest in the decentralisation of development planning and implementation in agriculture during the material period. Alila and Atieno, *Agricultural policy in Kenya*,<sup>24</sup>

and funds direction. Jones Smith and S Karuga<sup>165</sup> consider donor funding to have driven, not simply facilitated, rural agricultural policy. 'Donors also invested substantially in rural infrastructure, like rural roads, storage facilities, production and marketing facilities like sugar, and coffee.'<sup>166</sup> In this donor prominent worldview of devolution of planning and development funding in Kenya, 'increased political patronage and self-interest of the elite seriously [eroded] interest in policy advice' is the take away from the District Focus policy intervention.<sup>167</sup>

Rutten, writing in 1990, recognises that donor funding for District Focus, and the earlier 1970s efforts, was directed to facilitate capacity-building in human and material resources. Significantly, he presents international price fluctuations of oil and coffee and IMF and World Bank prescriptions in the form of structural adjustment programmes as the key external forces.<sup>168</sup> However, he seems to privilege Kenyan State interests as the prime driver of the policy change.<sup>169</sup> This is in contradistinction to the Afro pessimistic view, which describes the same period thus:

The structural adjustment programs (SAPs) of the 1980s for the agricultural sector focused on market liberalisation and price decontrols, which were expected to reduce opportunities for rent extraction through the marketing chain by the elite.<sup>170</sup>

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165 Jones SL Smith, S Karuga, *Agriculture in Kenya: What shapes the policy environment*, Policy management discussion, Oxford, 2004. Smith and Karuga are widely cited in agricultural policy scholarship and NGO policy brief narratives.

166 Alila and Atieno, *Agricultural policy in Kenya*, 24

167 Alila and Atieno, *Agricultural policy in Kenya*, 24.

168 Rutten, 'The District Focus Policy for Rural Development in Kenya', 156.

169 'Kenya had to turn to economic policy discussions with such international institutions as the IMF and World Bank. Structural adjustments were needed to counterbalance the negative developments. *Kenya reacted to the IMF and World Bank advice* with several sessional papers and development plans.' Primary among these was the 1982 Working Party Report discussed above. Rutten, 'The District Focus Policy for Rural Development in Kenya', 156.

170 Alila and Atieno, *Agricultural policy in Kenya*, 24, also citing, O'Brien and Ryan (2001), which is not presented in full in the references.

What is clear is that between these two worldviews, the demands for justice and duties to the citizenry of women, youth, PWDs, ethnic and religious minorities, and other marginalised groups are *completely ignored!* This despite wide recognition, including by the Government, that District Focus began a policy in Government emphasising ‘the use of participatory methodologies in programme and project implementation’.<sup>171</sup>

Despite these challenges, the addressing of which, we maintain, set the stage for a more successful transition to devolved government, District Focus did achieve something very important for the deconstruction of administrative continuities and policy structures that perpetuated the exclusion of the Article 100 list of marginalised groups.

... recognition grew that deployment of regional ‘planning’ to solve the implementation problem *after* all decisions had been made centrally *offered less chance of success than regional planning proper*, which also includes the regional representatives in the whole planning process. Moreover, national planning normally gives emphasis to homogeneity, and tends to ignore diversity in different physical, geographical and economic regions of the country. [...] There is an increased awareness that local-level decisions are important and that an integrated approach at district level is a far more viable approach than the old top-down system of planning and implementation.<sup>172</sup>

District Focus was no democratisation policy. Instead, it was archetypal of the politics of the President Moi era, where the co-optation of dominant but excluded political and societal players was undertaken to shore up political support for the ruling Government. Indeed, such an approach would not redress the long-term exclusion in question here. However, it set in motion very important progress in decentralising, if not devolving, development planning, establishing trained staff and organs at the district level. Such organisational and institutional developments surely must have contributed to the take-off of devolved government in

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171 Republic of Kenya, *National development plan 2002-2008*, Government Printer, Nairobi, 2002, cited in Alila and Atieno, *Agricultural policy in Kenya*, 28.

172 Rutten, ‘The District Focus Policy for Rural Development in Kenya’, 166-7.

2012. Again, we dare say that the transition into devolved government in 2013 would have been far more difficult had the normalisation of a policy of localised planning and deliberate civil servant capacity-building, the core achievements of District Focus, lacked. Indeed, we contend, and further research ought to confirm, that the counties that have recorded exceptional growth in development change and effective localised planning and governance will also correlate with the counties that had most benefitted from the core achievements of District Focus. In this sense, it may very well be that the lagging counties are those that had little or no effective implementation. Thus, the civil service and administrative continuities they inherited are what need urgent reform – and not necessarily the choice of governor. Having said that, it is patent that the District Focus structures described above would nonetheless have been unlikely to incorporate representatives or views of women, youth, PWDs, ethnic and religious minorities, and other marginalised groups.

### **By way of conclusion: ‘Reverse late constitutionalism’?**

This chapter has attempted to describe the construction and articulation of power from the dusk of the Kenyan pre-colony to date. It has drawn its bases from reflections across various disciplines to interrogate how power, as wielded, has engendered so much exclusion and marginalisation. It has done so in the belief that our agency as citizens and the transformational basis of the 2010 Constitution do not allow for despair as to the injustice and their tenacity. In fact, we only study how exclusion and marginalisation occurred so that we can best uproot them from our present society’s politics, economics, and culture, including religion.

In this journey, we have interrogated our societies from circa 1800 to date. Over this period, we have identified confounding contradictions that refuse to give way to reason. The colonial project created a bifurcated state where some people, racially-defined at the time, had rights and were governed in civility. Their cultures and religions were respected

by and influenced the State.

At independence, personal greed and aggrandisement, administrative continuities and political expediency led to the abortion of the revolutionary change promised by the Independence Constitution, visionary sounding policies like Sessional Paper No 10 of 1965, and the goodwill of a hopeful people. Since independence, attempts to resolve the impasse of the contradictions of the bifurcated state, no matter how well intentioned, have, again and again, been caught up in and strangled by the multitudes of contradictions. Today, we find ourselves torn between a historically authoritarian and extractive central State of a dominating tribal minority, and an archipelago of local decentralised ethnic mini-states, forged through tribal despotism and a politic of grievance.

In the final analysis, it would seem that while the vision of devolved government is the revolutionary moment of the 2010 Constitution, it is the minutiae of slow changes to development planning since the 1980s that contributed more significantly to the administrative transition to devolved government.

In all the continuities and discontinuities discussed above, it is apparent that the exclusionary power structures of the colonial order injected in Kenya in the 1890s are not going to give way easily. As such, to achieve the promise of reinstating the marginalised to the 'peaceable occupation of societal spaces' in the theorised pre-colony, we must approach the overthrowing of such marginalising structures with as much reverse finesse of 'late constitutionalism' as the colonialist did with late colonialism. The Kenyan constitutional order comes late into the game of African constitutional reform. It may very well be that we come with a wealth of experience on how to transform societies into a future of social justice for the excluded and rule of law to control the dominant. So armed, what then is impossible?



## CHAPTER 3

# Decentralisation of power in Kenya in historical perspective

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*Petronella Karimi Mukaindo*

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### **Introduction**

Kenya is run by a devolved system of government. This system was reached through historical processes by which the State itself evolved to become what it is today. An understanding of the origin, structure and effectiveness or otherwise of the extant devolved system demands some history. The purpose of this chapter is to restate this history while reflecting on the implication of the various historical happenings on the question of marginalisation, which is at the core of the research in this publication.

The chapter explores the theme of decentralisation of government in Kenya since the colonial days. In so doing, the chapter captures the various phases through which Kenya's governance structure has evolved; The pre-colonial society, the colonial State, and the post-colonial State.

In each of these epochs, the chapter sets out the key historical, normative, policy, structural and administrative developments. The chapter also examines the dominant ideologies informing the identified developments. It concomitantly reflects on the question of marginalisation as dealt with alongside these key developments, and addresses the historical socio-economic neglect of segments of the

Kenyan society over time. The chapter also lays bare the appurtenant struggles.

The chapter argues that the models of decentralised governance and policies adopted in each of the above epochs are a direct result of the mindset of the leadership at the helm and the politics at play at each time. At the centre of this is the clamour for accumulation of resources and a craving for self and community preservation. Thus, the attitudes and politics of government at the various stages of the evolution of the Kenyan State have influenced the legal framework and structure of decentralised governance.<sup>1</sup> This has also had a ripple effect on the question of inclusion along the various fault lines of women, persons with disabilities (PWDs), youth, ethnic and other minorities and marginalised communities.

A common thread that is discernible throughout this chapter is that of resistance (in fact aversion in some instances) to decentralisation and active attempts by the powers of the day to consolidate power at the centre. Kenya's experience has revealed that control of governance apparatus equals the control of resources and everything that comes with it. This appears to have been the key incentive for the obsession of the political elite with centralised power. However, in the course of time, when it became clear that a totalitarian centre could no longer hold, it had to cave in and allow new forms of governance to be forged. And even then, the forces of resistance persisted and still continue to haunt and influence the pace and scope of implementation of devolved governance under the Constitution of Kenya, 2010 (2010 Constitution).

It will be apparent from historical accounts of decentralised governance that the clamour for real decentralised power in the run up to independence in 1963 and in the run up to the birth of the second Republic in 2010 were driven, initially by the fear of domination of segments of

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1 Ghai Yash P, 'Constitutions and constitutionalism: The fate of the 2010 constitution', in, Godwin R Murunga and others, Kenya: The struggle for a new constitutional order, Zed Books, 2014,127.

the population over other segments, and subsequently by the longing of the people to halt and reverse the pattern of gross historical inequalities that characterised Kenya's political, social and economic environment. Whole regions and communities had been excluded from enjoying the benefits of national development. Also defining this era were cases of unequal development, unequal distribution of national resources, and unequal participation in decision-making and management of public affairs especially by women, PWDs, the youth, pastoralists and minority communities.<sup>2</sup> These decentralisation efforts were characteristically always met with intense opposition and challenges, and when the efforts at decentralisation finally succeeded there would emerge equal or more opposing forces to reel back the gains in practice.

Before delving further into the discussions, it is apposite to briefly reflect on some of the key terms used to describe the various models of decentralisation.

*Delegation* is defined as, '[t]he transfer of responsibility for specifically defined functions to structures that exist outside central government.'<sup>3</sup> Delegation may also be understood to mean the transfer of specific functions from the central government to semi-autonomous agencies in order that they perform certain public functions on behalf of the central government.

*Devolution* is the practice where the authority to make decisions in some sphere of public policy is delegated by law to local authorities.<sup>4</sup> 'Devolution is by all means, a political device for involving lower-level units of government in policy decision-making on matters that affect those levels while deconcentration is its administrative counterpart.'<sup>5</sup>

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2 Constitution of Kenya Review Commission, Final Report Approved for Issue at the 95th Plenary Meeting of the Constitution of Kenya Review Commission held on 11th February 2005, 104.

3 Visser J, 'Developmental local government: A case study of South Africa', Intersentia, 2005, 14.

4 CKRC, Final Report, 11 February 2005, 228.

5 CKRC, Final Report, 11 February 2005, 229.

Distinguishing it with delegation, Jaap de Visser notes that in devolution, sub-national government power is a permanent power and 'original', as opposed to delegation where the same can be withdrawn by the national government.<sup>6</sup> Others like Jean-Paul Faguet describe devolution as, the transfer of specific functions to regional and local governments 'that are independent of the center within given geographic and functional domains'.<sup>7</sup> In the Kenyan context, Mutakha Kangu infers that devolution might be specifically defined as,

[a] system of multi-level government under which the Constitution creates two distinct and interdependent levels of government – the national and county – that are required to conduct their mutual relations in a consultative and cooperative manner.<sup>8</sup>

*Deconcentration* has been defined as 'a pattern of delegated authority that is settled internally within an administration, which can be altered or withdrawn from above'.<sup>9</sup> It has also been described as, 'administrative decentralisation' that involves '[t]he transfer of administrative authority, perhaps coordinated by a representative of the central government in that area, from the centre to the field'.<sup>10</sup> Notably, there are no legal guarantees for this transfer.

*Decentralisation* refers to geographic transfer of authority, whether by deconcentration of administrative authority to field units of one department or level of government, or by political devolution of authority to local government units or special statutory bodies. Underpinning the concept of decentralisation is the idea of distribution

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6 De Visser J, Developmental local government, 15.

7 Jean-Paul F, 'Decentralization and governance' 53 *World Development*, (2014) 3.

8 Kangu Mutakha, 'An interpretation of the constitutional framework for devolution in Kenya: A comparative approach', Unpublished LLD Dissertation, University of the Western Cape, 2014, 32.

9 Mawhood Philip, 'Local government in the third world', in Roger Southall and Geoffrey Wood *Local government and the return to multi-partyism in Kenya*, 95(381) Oxford University Press on behalf of The Royal African Society, October 1996, 501-527 at 508.

10 CKRC, Final Report, 11<sup>th</sup> February 2005, 228.

of state powers between the centre and the periphery.<sup>11</sup> Decentralisation can be in unitary or federal systems, and it takes two major forms: deconcentration and devolution.

*Majimbo* means 'regionalism' or semi-federal states.

*Federalism* refers to a system of government '[w]here all regions enjoy equal powers and have an identical relationship to the central government'.<sup>12</sup> Federalism implies split sovereignty.<sup>13</sup>

### Some cursory remarks on the pre-colonial period

Before the foreign entry of the Europeans in the modern-day Kenya, African communities had an organised way of administering their affairs, 'a simple and relatively informal governmental system, localised and apparently not designed for the modern state'.<sup>14</sup> Some tribal groupings had 'a centralised authority, organised administrative machinery and formal judicial institutions'<sup>15</sup> while others lacked such a centralised, hierarchical administration.<sup>16</sup>

Most communities in the territory of Kenya were communal and leadership vested in a council of elders who made collective decisions.<sup>17</sup> These traditional systems were decentralised, involved popular participation, and arrived at major decisions by consensus.

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11 CKRC, Final Report, 11th February 2005, 227.

12 Yash P Ghai, 'Ethnicity and autonomy: A framework for analysis' in Yash Ghai (ed) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states*, Cambridge University Press, Cambridge, 2000, 8.

13 Yash Ghai, 'Ethnicity and autonomy', 17.

14 Ojwang Jacton B, *Constitutional development in Kenya: Institutional adoption and social change*, Acts Press, African Centre for Technology Studies, Nairobi, 1990, 21.

15 Ojwang Jacton B, 'Constitutional trends in Africa-The Kenya case' 10(2) *Transnational Law & Contemporary Problems* (2000) 517-538, 519.

16 Ojwang, 'Constitutional trends in Africa-The Kenya case', 519.

17 Republic of Kenya, 'Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya' 1995, 5-6.

Noticeable too was the absence of a single cohesive local administration system upon which the British could impose theirs.<sup>18</sup> For instance, the Bukusu community did not constitute one political unit. Their political organisation was based on exogamous clans or clan groupings, which often constituted a large clan or sub clans or families who occupied a distinct territory.<sup>19</sup> The clan was the central social arena where individual roles, groups, status acquisition, corporate action, religious and political authority were carried out. However, the clan-driven structures upon which political authority rested were acephalous given that they were not as formalised, differentiated or centralised.<sup>20</sup> Some communities were nomadic while others were farmers and this affected governance since most pre-colonial communities were concerned primarily with 'the imperatives of securing essential survival needs in a harsh environment'.<sup>21</sup>

Using various means including conquests and agreements, the British Government gained entry into the Kenyan territory causing massive displacement of the native Africans whom they pushed into reserves. The hitherto communal living and decision-making was rudely disrupted by the British administrative system.

### **Governance in the colonial period, 1897-1963**

This section examines the various developments since the British took over the administration of the Kenyan protectorate and colony.

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18 D M Muia, J Ngugi and R Gikuihi, 'Evolution of local authorities in Kenya' in Barasa Tiberius and Eising Wim (eds) *Reforming local authorities for better service delivery in developing countries lessons from RPRLGSP in Kenya*, Institute of Policy Analysis and Research, 2010, 14.

19 Peter Wafula Weseka, 'Politics and nationalism in colonial Kenya: The case of the Babukusu of Bungoma district C 1894-1963', Unpublished PHD Thesis, Kenyatta University, 2000, 41.

20 Weseka, 'Politics and nationalism in colonial Kenya', 42.

21 Ojwang, 'Constitutional trends in Africa-The Kenya case', 519.

The section reveals the various policy and governance models pursued by the foreign administration over the Kenyan natives. From using a company to rule, to the adoption of the various colonial administrative models that are discussed in this chapter, the colonial agenda was well cut out: to retain a neat, hierarchical, separatist administration structure with complete control over the East African Protectorate (EAP), modern day Kenya, transforming it into their image and likeness.

Charles Eliot, who succeeded Arthur Hardinge as the Commissioner of the EAP in December 1900,<sup>22</sup> encouraged an influx of European settlers, mostly from South Africa, whom he saw as a key factor for the economic development of the region.<sup>23</sup> Eliot's administration entrenched the policy of racial exclusion that favoured the white settlers highly in total disregard for the land rights of the African natives.<sup>24</sup> The Commissioner particularly sanctioned the White Highlands Policy, reserving White Highlands only for the white settlers while the Indians were to be allowed to settle in the lowland areas such as near Lake Victoria and along the coastal strip.<sup>25</sup> African natives were to stay away from the activity zone of the railroad.<sup>26</sup> In May 1903, Eliot instructed his Land Officer not to grant rural land in the Highlands to Indians.<sup>27</sup> Thus, through his policies, Eliot set the tone for primacy of European interests over those of the African, Arab and Asian communities.

Eliot envisioned transforming the EAP Highlands into a European's country, along the lines of the South African model.<sup>28</sup> In his words, '[it] is

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22 Fall Makhete, 'Early political discord in Kenya: European settlers' political struggles in the East Africa Protectorate, 1902-1912' PhD dissertation, West Virginia University, 2016, 33.

23 Makhete, 'Early political discord in Kenya', 13.

24 Makhete, 'Early political discord in Kenya', 13.

25 Makhete, 'Early political discord in Kenya', 13.

26 Makhete, 'Early political discord in Kenya', 13.

27 M P K Sorrenson, 'Land policy in Kenya 1895-1945' in Coldham Simon (ed) *Colonial policy and the highlands of Kenya, 1934-1944* 23(1) *Journal of African Law* (1979) 65-83.

28 Sorrenson, 'Land policy in Kenya', in, Makhete 'Early political discord in Kenya',

mere hypocrisy not to admit that white interest must be paramount, and that the main object of our policy and legislation should be to found a white colony'.<sup>29</sup> Eliot's ideology of creating a European's country would play out in successive tenures even after his exit from the EAP in 1904, as settlers continually demanded for political concessions.

After the scramble for and partition of Africa by the European nations, the EAP fell into the hands of the British. But Britain did not intend to govern Kenya by itself immediately. Instead, it contracted a chartered company - the British East Africa Association that would later become the Imperial British East Africa Company (IBEAC) - to manage the territory.<sup>30</sup>

Using the company to govern the Protectorate had its benefits besides providing 'strategic cover'. Githu Muigai observes that the IBEAC provided cheap administration and enabled the Colonial Government to, 'outsource legal liability and bypass legal or administrative disability' and further 'enabled European powers and governments to evade political costs at home and abroad associated with direct imperial control'.<sup>31</sup> The system was highly centralised with elements of delegation since the company administered the territory on behalf of the British. In 1895, the British assumed direct control of Kenya and declared it a Protectorate, administered by a Commissioner,<sup>32</sup> who was appointed by the Queen of England.

The highly centralised and hierarchical system of government was 'designed for control as opposed to participatory and democratic

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29 Sir Charles Eliot, *East Africa Protectorate*, Edward Arnold, London, 1905, 103 in Makhete, 'Early political discord in Kenya', 34.

30 Yash P Ghai and J Patrick W B McAuslan, *Public law and political change in Kenya: Institutional adaptation and social change*, Oxford university Press, Nairobi, 1970, 19.

31 Githu Muigai, *Power, Politics & Law: Dynamics of constitutional change in Kenya, 1887-2022*, Kabarak University Press, 2022, 47.

32 John Kangu Mutakha, *Constitutional law of Kenya on devolution*, Strathmore University Press, 2015, 68.

governance'.<sup>33</sup> The Colonial Government pursued an economic policy of exclusion on the basis of race, resulting in segregated economic development in favour of the White Highlands.<sup>34</sup>

The Commissioner exercised administrative control over all administrative and political institutions and was answerable to the Colonial Office situated in London. This system of governance disorganised the hitherto autonomous traditional societies into administrative local government systems sanctioned through various Ordinances, enacted in exercise of delegated authority from the Queen. The colonial administration was highly centralised with elements of delegation; firstly, to the Commissioner in the first instance and later to a provincial administration. This system continued until the eve of independence negotiations when an attempt was made to decentralise the governance structure, through a semi-federal system known as *majimbo* – the regions. In the run up to independence, the clamour for *majimbo* was a demand meant to secure the interests of the minority ethnic tribes against the larger political tribes, the Kikuyus and Luos.<sup>35</sup> At the time Kenya gained independence, there were three parallel systems of local government: municipalities, white settler areas, and African areas.<sup>36</sup> However, the Government directed more resources into white local authorities than in the African reserves.<sup>37</sup>

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33 Conrad M Bosire, 'Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010' Unpublished PHD Thesis, University of the Western Cape, 2013, 83.

34 Bosire, 'Devolution for development, conflict resolution, and limiting central power', 83.

35 Ghai and McAuslan, *Public law and political change in Kenya*.

36 Mutakha, 'Constitutional law of Kenya on devolution', 71.

37 Oyugi W Ouma, 'Local government and development in Kenya' *Discussion Paper*, Institute of Development Studies at the University of Sussex Brighton, 1978, 1-35, 16-18.

*Indirect colonial rule*

The Colonial Government continued to solidify power through various instruments. Furthermore, the colonial authority established political and administrative structures designed along racial fault-lines. When loud discontent broke across the various races (African, Arab, Asian and European), there were attempts to restructure the administrative systems so as to give a semblance of representation and local leadership; but as shall be seen subsequently, the attempts appear to have been mere 'optics' since the colonial authority reverberated in the running of these institutions, through the colonial administrative officers hence manipulating them, effectively tightening the grip on centralised rule.

The first legal instrument to establish an administrative system in the Protectorate was the East Africa Order in Council of 1897. This enactment empowered the Commissioner to legislate through the Queen's Regulations, and to establish a court for the Protectorate, which was to sit in Mombasa with appeals going to the High Court in Zanzibar. The Commissioner also had powers to regulate the native courts, which exercised exclusive criminal jurisdiction over the Africans, and to establish a constabulary or other force to be employed to maintain law and order, and to deport persons.<sup>38</sup> In exercise of the power delegated by the Queen, the Commissioner developed a system of provincial administration, with the Commissioner having unrestricted powers within the Protectorate. However, they were accountable to the Secretary of State who was based in Britain and who had authority to approve any regulations they made.<sup>39</sup>

Five years later, in 1902, a new Order in Council was enacted granting the Commissioner the discretion to divide the country into provinces and districts for purposes of administration.<sup>40</sup> To give effect to these provisions, the Commissioner appointed provincial and district

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38 Ghai and McAuslan, *Public law and political change in Kenya*, 3.

39 Mutakha, *Constitutional law of Kenya on devolution*, 69.

40 Ghai and McAuslan, *Public law and political change in Kenya*, 41.

commissioners to manage the provinces and districts respectively.<sup>41</sup> Although the autonomy given to the Commissioner was regarded as administrative devolution, they remained under the control of the Colonial Office in Britain and the provinces and districts established by them were just mere administrative outposts under their control. The resultant effect was that the system remained essentially centralised.<sup>42</sup>

In the same year, lower levels of administration were created through the enactment of the 1902 Village Headmen Ordinance. This legal instrument created the position of African village headmen. The provincial commissioners had power to appoint chiefs as agents of the Central Government, and any native to be official headmen or collective headmen of any village(s).<sup>43</sup> The village headmen were to maintain law and order, collect taxes, maintain roads and settle minor disputes among the Africans.<sup>44</sup>

In 1903, the Township Ordinance set in motion a series of subsequent amendments and changes in the local government administration. The 1903 Ordinance was specifically to govern the areas of Nairobi and Mombasa, which were exclusively for the white settlers,<sup>45</sup> and which were to be run by committees.<sup>46</sup> In 1912, the Local Authority Ordinance that set up a native authority system was enacted. However, it failed to be implemented because of disagreements between the Colonial Government and the settler community concerning the actual mechanics, functions and compositions of the authority system.<sup>47</sup> The white settlers made various demands including the

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41 Commission of Inquiry on Local Authorities in Kenya, *Report of the Commission of Inquiry on Local Authorities in Kenya: A Strategy for Local Government Reform in Kenya* (also called the Omamo Report)1995, 6.

42 Ghai and McAuslan, *Public law and political change in Kenya*, 41.

43 Omamo Report, 1995,6.

44 Southall and Wood, *Local government and the return to multi-partyism in Kenya*, 95.

45 Njogu G, *Local government system in Kenya Cap 265, Laws of Kenya: A presentation to the North-South cooperation between Municipal Council of Nyahururu and the Municipalities of Hatulla and Janakal of Finland on the 23<sup>rd</sup> August to 7<sup>th</sup> September* (Unpublished).

46 Omamo Report,1995,6.

47 Njogu, *Local government system in Kenya Cap 265, Laws of Kenya*.

[e]stablishment of legislative and executive councils, the right to vote, no taxation without representation, an important voice in the development of policy directed towards the Colony's African population, and minority rule.<sup>48</sup>

It was clear that the white settlers craved for an exclusive political system disparate from that the Africans and other racial groups and in which they domineered governance. In the meantime, they continued to enjoy domination in political and economic spheres to the exclusion of the other races. This ignited discontent from the Indians as well as the Africans. This agitation would lead to the Indians seeking the intervention of the Colonial Office. Their agitation bore fruits in 1911 partially when the Colonial Government allocated three nominated seats in the Legislative Council (LegCo) to two Indian and one Arab. The seats had been established in 1907. The other persistent demands by the Indians included being allowed to purchase land in the White Highlands, which had been denied to them by the 'Eldgin Pledge' of 1908, and relaxation of immigration rules to allow more Indians to come to Kenya, demands which the white settlers strongly rebuffed. It was not until 1919 that the first local government structures were recognised and formalised following the establishment of the town councils of Nairobi and Mombasa and the recognition of the District Advisory Committees (DACs) for county areas.<sup>49</sup>

In June 1920, the EAP was turned into a colony (with the exception of the ten-mile coastal strip) and renamed Colony and Protectorate of Kenya.<sup>50</sup> Consequently, the Colonial Government began to concern itself with the plight of African peoples. In 1923, the Colonial Secretary issued the Devonshire White Paper<sup>51</sup> in which he indicated that African interests in the Colony had to be paramount. However, it took much longer for the reprieve from this paper to be felt by the Africans.

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48 Makhete, 'Early political discord in Kenya', 6,7.

49 Southall and Wood, 'Local government and the return to Multi-Partyism in Kenya', 503.

50 Kenya (Annexation), Order-in-Council (1920) in Muigai, *Power, politics & law*, 83.

51 Named after the Colonial Secretary- The Duke of Devonshire.

African pressure against colonial rule started mounting, especially with the return of 'enlightened Africans' who served in World War I. As a response to the rising pressure, the Colonial Government amended the 1912 Native Authority Ordinance to create Local Native Councils in (LNCs) in 1924 and encouraged Africans to conduct their political activities through these councils.<sup>52</sup> The Native Councils Ordinance of 1924 thus replaced the DACs with LNCs. As Okoth Ogendo observed, although the LNCs 'were never intended in Kenya to function as political forums in any independent sense', they 'did have a nucleus effect in concentrating African political awareness'.<sup>53</sup> Indeed, the LNCs 'were the first attempt at 'representational' administration in African areas and consequently were closely associated with the emergence of local leadership'.<sup>54</sup> These councils were composed of the district commissioner, the assistant district commissioner, headmen and other Africans appointed at the discretion of the provincial commissioner.<sup>55</sup> The district commissioner acted as chairperson and chief executive authority. The LNCs had power to levy poll rates and began to undertake 'a fairly wide range of services'.<sup>56</sup> Notably, LNCs were established in the districts, which were administrative sub-divisions of the British provinces. All resolutions passed by the LNCs were subject to the approval of the respective provincial commissioner and the Governor of the Colony. Consequently, the LNCs failed to earn respect and recognition among the Africans who viewed them as instruments of indirect colonial rule.

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52 Okoth-Ogendo HWO, 'The politics of constitutional change in Kenya since independence, 1963-69', (Revised version of a paper presented in January 1971 at St. Anthony's College, Oxford, United Kingdom and first published in *African Affairs* 9-34) in *Report of the Constitution of Kenya Review Commission*, (Volume Five Technical Appendices Part I) (2003) 277.

53 Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence 1963-69', 1.

54 Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence 1963-69', 11.

55 CKRC Final Report, 11th February 2005, 22.

56 Report of the Local Government Commission of Inquiry Hardacre Commission Report, 1966.

A Commission of Inquiry was appointed in 1926 headed by Richard Feetham (Feetham Commission) to inquire and report on the system of government in the country with emphasis on what was most suitable for the white-settled areas. The Feetham Commission recommended that a policy of separate development for the Africans and the settlers be pursued; that district councils comprising elected non-officials with full executive authority be established in Kisumu, Laikipia, Londian, Nairobi, Nakuru, Naivasha, Trans-Nzoia, and Uasin Gishu; and that the townships be excluded from the district councils and be administered by the district commissioners.

The 1929 Local District Council Ordinance gave effect to this separated system of local government.<sup>57</sup> It created local district councils comprising members elected by whites to replace the 1919 DACs in the white-settled areas. Some Asians were allowed to vote or be elected to these councils. The Africans were not allowed to contest elections, even if they were residents of these areas.<sup>58</sup>

In 1930, the Revised Township Ordinance was enacted, creating two grades of townships, A and B. The district commissioner was mandated to run the grade B townships exclusively, and grade A townships with the help of an advisory committee.<sup>59</sup> The 1930 Native Tribunals Ordinance created parallel judicial systems for the African natives and Arabs with jurisdiction over civil and certain criminal matters. A member of the tribunal could be suspended or dismissed if such member 'appeared' to have 'abused his power, or to be unworthy or to be incapable of exercising the same justly, or for other sufficient reason'.<sup>60</sup>

The 1937 Native Authority Ordinance was enacted following

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57 Omamo Report, 1995, 7.

58 Mutakha, 'Constitutional law of Kenya on devolution', 70.

59 Njogu, *Local government system in Kenya Cap 265, Laws of Kenya*, 30.

60 See also The Native Tribunals (Amendment) Ordinance, 1935. The Official Gazette of the Colony and Protectorate of Kenya, Vol. XXXVII-No 4 Nairobi 22 January 1935, 58-9.

pressure from the Africans. It permitted the election of Africans by Africans to the LNCs even though the district commissioner retained the power to remove any elected member perceived to be 'inappropriate'.

The World War II, and the attendant political, economic and social changes in Great Britain and British colonies in Africa formed fodder for advocacy for a federal governance structure in the Colony. Robert Maxon explains why the federal model was appealing thus:

[F]ederalism's appeal came forth among a portion of the European community and some of the colonial rulers who were concerned about a post-War world that seemed certain to bring far-reaching changes in Britain's most important East African dependency. This included democratisation, the extension of civil liberties, increased economic opportunities for the African majority, and social integration leading to eventual decolonisation. European anxiety as to the impact of such changes on their privileged political, economic and social status produced advocacy for majimbo or a federal system of governance between 1940 and 1960.<sup>61</sup>

In 1946, the system of LNCs was extended by the introduction, mainly in Nyanza and Central provinces, of locational councils as a second tier of local government below the LNCs. The locational chiefs chaired these locational councils.<sup>62</sup>

In 1950, the Local Government (African District Councils) Ordinance was enacted. It created African District Councils (ADCs) as corporate bodies with increased powers including the authority to appoint their own administrative staff and to set up committees to deal with specific matters and functions. The ADCs replaced the LNCs,<sup>63</sup>

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61 Robert M Maxon, *Majimbo in Kenya's Past: Federalism in the 1940s and 1950s*, Cambria Press, 2017.

62 Hardacre Commission Report, 1966.

63 Omamo Report, 1995, 8.

and were given a number of powers like that to enter into contracts on their own behalf.<sup>64</sup> However, the ADCs relied heavily on Government road grants as their main source of revenue. In 1952 the district councils became county councils, with a slightly wider range of activities, and with a second-tier of local government below them - namely, urban and rural district councils. By the early 1960s all of the county councils had introduced some form of land rating as a second major source of income, and most of them had started to provide health services in their areas with the assistance of Government grants.<sup>65</sup>

The Local Government (County Councils) Ordinance of 1962 drew a distinction between rural and urban local government. In effect, between 1952 and 1963, the country developed three parallel systems of local government to govern the municipalities, white settler areas, and African areas.<sup>66</sup> However, the Government directed more money into white local authorities than in the African reserves.<sup>67</sup> Therefore, the Government became an exclusive property used for the benefit of the Europeans against Africans. The native Africans genuinely hoped that independence would introduce different approaches to governance that would serve the welfare of all the inhabitants of Kenya.<sup>68</sup>

The advent of independence necessitated a uniform system of local government throughout the country that would streamline the three streams of local government. This was attempted through the Local Government Regulations of 1963.<sup>69</sup> The Regulations were designed to bring all the local authorities directly under the control of the Ministry of Local Government, though provision was made for continued liaison with the provincial administration.<sup>70</sup> Under the new regime, two types

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64 African District Councils (Amendment) Ordinance, 1955, Government Notice No 176 p 123 Njogu (n 30).

65 Hardacre Commission Report, 2.

66 Mutakha, 'Constitutional law of Kenya on devolution', 71.

67 Oyugi, 'Local government and development in Kenya'.

68 Mutakha, 'Constitutional law of Kenya on devolution', 71.

69 Hardacre Commission Report, 1966, 3.

70 Hardacre Commission Report (1966) p 3.

of major local authorities were provided for – municipal councils and county councils. Municipal council status was granted to the six already existing municipalities, and the new municipality of Thika was created.<sup>71</sup> The rest of the country was covered by county councils, which replaced the ADCs. The 1963 Local Government Regulations also provided for three types of minor local authorities: Urban councils (which replaced the more developed townships and urban district councils); area councils – which replaced rural district councils and the non-statutory divisional councils, and in some districts these authorities were created by amalgamating several old locational councils. In a few instances in the Rift Valley, the former ADCs became area councils under a new and larger county council and local councils.<sup>72</sup> In the meantime, the regional assemblies of the Independence Constitution were being set up, with full powers over local government in their respective regions. As shall be seen in the following pages, these powers reverted to the Ministry of Local Government in the first few years of the Republic.

### **Governance in independence Kenya**

This section analyses the system of governance just before Kenya got independence up to the advent of the clamour for the 2010 Constitution in the 1990's. It traces the *raison d'être* for the Independence form of governance, how decentralisation was handled by the post-colonial leaders and the impact this had on the question of exclusion and inclusion that had been a thorn in the flesh for the colonial administration. Through piecemeal constitutional amendments, the Independent Government nibbled on the decentralised model to the core. This was followed by the weakening of local authorities and strengthening of the provincial administration; thus, entrenching autocratic rule firmly. With the erosion and capture of the remaining administrative apparatus, the successive post-independence governments (particularly President

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71 Hardacre Commission Report 1966, 2.

72 Hardacre Commission Report 1966, 2.

Jomo Kenyatta's and President Daniel Moi's) comfortably perpetuated and perfected centralised rule and the colonial policy of segregation and marginalisation of certain regions and ethnic communities.

History records that the ruling Kenya African National Union (KANU) Government had clear intentions not to implement the Independence Constitution, which it perceived as an imposition by the outgoing Colonial Government.<sup>73</sup> With the half-hearted acquiescence of the ruling KANU Government to decentralised power, it was unsurprising that within the first anniversary of independence, successive amendments were calculatedly effected on the Independence Constitution to water down majimboism. Indeed, and as is detailed later on in this section, by the end of the 1960s, every trace of majimbo had been obliterated from the Independence Constitution effectively erecting a unitary governance structure. This was supported by administrative arrangements that fortified the recentralisation efforts.

The process of recentralisation involved not only the abandonment of majimbo espoused by the Independence Constitution but also the weakening of local government; the retention of the colonial economic and investment policy; and the mismanagement of the transfer of land from white settlers to the Africans. It has been argued that the leaders of independent Kenya perpetuated the colonial policy of divide and rule, which favoured certain communities over others in development and employment. The Central Government adopted colonial development policies as well as segregationist models of local government that deepened regional disparities for successive years. As Ben Nyabira and Zemelak Ayele rightly observe, 'political exclusion of many ethnic communities in Kenya is the legacy of colonial rule and a decades long centralised, ethnicised, and personalised presidential system'.<sup>74</sup>

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73 Robert Maxon, *Kenya's Independence Constitution: Constitution-making and end of empire*, Fairleigh Dickinson, 2011, 267.

74 Nyabira Ben Christopher and Ayele Zemelak Ayitenew, 'The state of political inclusion of ethnic communities under Kenya's devolved system', 20 *Law, Democracy & Development* (2016) 131 at 132.

A flashback at the pre-independence negotiations around the structure of the independent government, however, does not support contrary results. The constitutional negotiations preceding Kenya's independence were held in Lancaster, and the outcome of those negotiations produced the Independence Constitution.<sup>75</sup> There were deep-heated contestations in the period stretching from August 1961 to March 1963, on the structure of government that would be adopted between the two major political parties: KANU and the Kenya African Democratic Union (KADU). On the one hand, KANU favored a unitary system of government, while on the other, KADU advocated for a federal system, one that would secure the interests of minority ethnic groups from being overrun by the majority Kikuyu and Luo communities.<sup>76</sup> Controversy also revolved around the Senate, an institution that was seen as significant in securing the autonomy of the regions. As aptly captured by Proctor Jr:

KADU desired a federal system in which considerable power would be allocated to regional governments. An upper house was considered necessary to safeguard the autonomy of the regions and to assure sufficient representation of minority interests at the center, for it was recognised that a unicameral legislature elected on the basis of 'one-man, one-vote' might very well be completely controlled by KANU which favored a greater centralisation of power.<sup>77</sup>

Eventually, Kenyatta half-heartedly agreed on a compromise for regionalism for the sake of uhuru (independence), a position backed by the colonialists.<sup>78</sup> Thus, the Independence Constitution created a

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75 Wilson Kamau Muna, 'Towards decentralization: A critical analysis of decentralizing governance in Kenya' Master of Social Science(Policy and Development Studies), University of KwaZulu-Natal, 2012.

76 Robert M Maxon, 'The demise and rise of Majimbo in independent Kenya' in Kithinji Michael Mwendu, Mickie Mwanzia Koster, and Jerome P Rotich, (eds) *Kenya after 50: Reconfiguring historical, political, and policy milestones* 634 Africa Today, 2017, 20.

77 Proctor Jesse Harris, 'The Role of the Senate in the Kenya political system' *Institute for Development Studies University College*, Nairobi, (1965) 390.

78 Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence

majimbo system of government, consisting of the Central Government and seven regions that were further divided into local authorities. The Independence Constitution<sup>79</sup> provided for the position of Prime Minister as Head of Government. The Queen, represented by the Governor General, would serve as Head of State. Each region had a regional assembly, which elected a regional president from amongst its members. The National Legislature was bicameral comprising the Senate and the House of Representatives, the Senate being the Upper House.<sup>80</sup> The Senate, meant to protect the interests of the regions,<sup>81</sup> comprised 41 senators, each representing the 40 colonial administrative districts and the Nairobi area.<sup>82</sup> The executive power of the regions was vested in the respective finance and establishments committee.<sup>83</sup> The Independence Constitution set out a list of areas which regional assemblies had exclusive competence over, and those in which it had concurrent competence with the National Assembly. In order to entrench the place of regions, the Independence Constitution provided that regional boundaries could be altered by Parliament with the approval of the affected regional assembly. Decentralisation was further provided for through the local government system composed of local councilors.<sup>84</sup>

No sooner had the Senate held its inaugural meeting on 7 June 1963 than suspicion from the opposition broke that some ministers had 'a negative attitude towards [the Senate]'.<sup>85</sup> Rumours also had it 'that the Senate may be washed out'.<sup>86</sup> Suffice to say that three years later,

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1963-69,18.

79 Section 71 Independence Constitution.

80 Section 36 Independence Constitution.

81 Section 34(2) Independence Constitution

82 Section 36 Independence Constitution.

83 Section 105(1) Independence Constitution.

84 Patrick LO Lumumba and Luis G Franceschi, *The Constitution of Kenya, 2010: An introductory commentary*, Strathmore University Press, 2014, 512.

85 Kenya Senate, Official Report, July 9, 1963, col 292 (Sen W Wamalwa) cited in Proctor Jesse Harris, 'The role of the Senate in the Kenya political system', *Institute for Development Studies University College*, Nairobi, (1965) 389.

86 Kenya Senate, Official Report, July 9, 1963, col. 292 (Sen. W. Wamalwa) cited in

the rumours were given credence as the Senate was swiftly edged out of the Independence Constitution. Moreover, in 1963, Vice President Jaramogi Oginga Odinga, then Minister for Home Affairs, directed all civil servants down to the district assistants to continue as officers of the Central Government.<sup>87</sup> He directed civil servants to maintain close liaison with the Central Government.<sup>88</sup> This effectively turned the public servants of regional governments into an administration answerable to the Central Government, which used them to frustrate the implementation of the federal arrangements.<sup>89</sup> Also, since the salaries of these officers were drawn from the Central Government, they owed their allegiance to the Central Government, rather than the regions. The regional assemblies were also directed to refer their draft legislations to the Central Government for advice before their introduction in the regional assemblies. Additionally, the Central Government also refused to release funds to the regional governments as they had undertaken to do. Coupled by the 'voluntary liquidation' of KADU, the leaders who crossed over to accept Government appointments in the KANU regime did nothing to remedy the grim state of affairs.<sup>90</sup>

In 1964, Parliament enacted the first two constitutional amendments.<sup>91</sup> The first declared Kenya a Republic and abolished the offices of the Prime Minister and Governor General, and combined their powers into the newly created office of the President.<sup>92</sup> The amendments also deleted Schedule Two, which provided for some of the functions of the regional governments.<sup>93</sup> The provisions for financial arrangements

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Proctor, 'The role of the Senate in the Kenya political system', 389.

87 Jaramogi Oginga Odinga, *Not Yet Uhuru*, Heinemann, London, 1967, 241-242.

88 Odinga, *Not Yet Uhuru*, 241-242.

89 Odinga, *Not Yet Uhuru*, 242-248.

90 Southhall and Wood, *Local government and the return to multi-partyism in Kenya*, 505; Okoth-Ogendo 'The politics of constitutional change in Kenya since independence, 1963-69' 19.

91 Constitution of Kenya (Amendment) No 28 of 1964 and Constitution of Kenya (Amendment) (No 2) 1964 No 38 of 1964.

92 Constitution of Kenya (Amendment) (No 2) 1964 No 28 of 1964.

93 Constitution of Kenya (Amendment) (No 2) 1964 No 38 of 1964.

between the central and regional governments were also repealed, making the latter entirely dependent on grants from the former. The control of the police was centralised to the Central Government and such role by the regional government eliminated. The exclusive legislative function of the regional assemblies was scrapped by redesigning it as a concurrent function, while the executive competence was also abolished.

The 1965 amendment<sup>94</sup> emphasised the inferior status of the regions and regional assemblies by renaming them provinces and provincial councils, which derived their legislative and executive authority from Central Government delegation. More specifically, the amendment watered down the legislative powers of the regional assemblies by amending Part 3 of the Independence Constitution and placing the law-making responsibility on provincial councils. The offices of civil secretaries that were offices in the public service set to perform secretarial and executive functions to the finance and establishments committees of the regions were also scrapped. By a 1966 amendment,<sup>95</sup> the Senate was abolished through merger with the House of Representatives to become the National Assembly in which constituencies were created to absorb the former senators.

Through these amendments, the system of regional government was reduced to something nominal. Notably, the powers that the regional assemblies were meant to wield over local government in their respective regions reverted to the Central Government when Kenya became a Republic at the end of 1964.<sup>96</sup> Although in practice the regional assemblies or provincial councils had ceased to perform any functions or have any significance by early 1965, it was not until 1968<sup>97</sup> that they were legislated out of the Independence Constitution.

The abolition of regional structures resulted in the reinstatement of 'the system of provincial administration which had enabled the

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94 Constitution of Kenya (Amendment) No 14 of 1965.

95 Constitution of Kenya (Amendment) (No 4) Act 1966 (No 40 of 1966).

96 Hardacre Commission Report, 3.

97 Constitution of Kenya (Amendment) Act, 1968 (No 16 of 1968).

central authorities to dominate affairs in all parts of the county - thus power was intensely centralised again'.<sup>98</sup> As such, there was once again consolidation of powers in the presidency thus creating a powerful presidential system.

The centralised rule would be further perfected by a deliberate weakening of the local government, through political and administrative mechanism that included interference in staffing as well as starving them financially. As a result, the local authorities' share of overall Government expenditure declined consistently. Local authority expenditure accounted for a general average of 25% of the overall Government expenditure in the first decade of independence but this figure fell sharply in the subsequent years to a meagre 8-10% between 1975 and 1990.<sup>99</sup>

An in-depth exposition of the interference of local authorities by the independence government and the impact this had in consolidating power at the centre is provided in the succeeding subsection.

### **Reconcentration of power**

Though not completely abolished, local authorities were slowly but surely weakened, further reconcentrating power at the centre. The emasculation took various forms ranging from Central Government interference with local government affairs including hiring of staff, to fiscal policy.

Through political and administrative mechanisms, the Central Government secured representation in the local authorities through the District Commissioner who provided liaison between local and Central Government, interpreted Central Government policies to the local authorities and kept the Ministry of Local Government fully informed

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98 CKRC Final Report, 11 February 2005,31.

99 Omamo Report 1995,71.

on what was happening in the councils.<sup>100</sup> The local government finance officers who had been posted to the regions were required to become the eyes of the Ministry in the regions, ensuring that the local authorities complied with the Central Government's financial guidelines.<sup>101</sup>

The local governments suffered inadequate funding since there was no clear financial policy to ensure adequate finances that matched the functions they performed.<sup>102</sup> Their major sources of revenue were school fees, poll rates and Central Government grants, which could not raise adequate revenue commensurate to the high demands for services and development. 1974 was particularly a hard time for local governments. As a competence of regional government, local government was entitled to funding by the former. When regions were denied funding by the Central Government, they became unable to provide this additional funding to the local authorities. When the regions were eventually abolished and local governments put under the control of the Central Government, contrary to expectation, the Central Government did not seem keen on providing funding and when it did, it did not follow any clear policy for funding.<sup>103</sup>

Even though it was clear that the local authorities had different fiscal capacities, there was no provision for any system of financial equalisation.<sup>104</sup> The initial response by the Central Government was the introduction of the Graduated Personal Tax of 1964 as the main source of revenue for local governments following recommendations by the Fiscal Commission's Report of 1963. For the county councils, this new tax did not make a difference since it virtually replaced the poll

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100 Hardacre Commission.

101 Hardacre Commission, 32-47.

102 Lydia Kanini Muendo, 'Challenges facing local government in development in Kenya: The case of Machakos district, 1950-1974' 33 *Historical Research Letter* (2016) 19.

103 Muendo, 'Challenges facing local government in development in Kenya' 19; Patricia Stamp, 'Local government in Kenya: Ideology and political practice, 1895-1974' 29(4) *African Studies Review* (1986).

104 Hardacre Commission, 6,48.

rates.<sup>105</sup> County councils also faced collection problems due to resistance between the people and the provincial administration.

The Central Government adopted many other measures, which exacerbated the situation of local authorities hastily to the extent that they weakened within a decade of independence tremendously. For instance, in 1964, the Central Government entered into an agreement with employers and trade unions (both public and private) to increase their establishment by 10% by 1965 and employ additional people.<sup>106</sup> Local authorities were thus forced to employ more staff than they needed, thus imposing more financial restraints on them. In 1966, the Central Government decided to provide free outpatient healthcare services in all medical facilities operated by the Central Government and local governments.<sup>107</sup> The Central Government did not consult the local authorities, yet the decision reduced their revenues from fees and charges.<sup>108</sup> In 1967, the Central Government reduced the Graduated Personal Tax rates from Ksh 48 per person per annum, to Ksh 24 per person per annum, which was altogether abolished in less than a year without proposing an alternative source of revenue.<sup>109</sup> Many rural local authorities, which relied heavily on this source, lost about 60% of their income.<sup>110</sup> Between 1963 and 1969, the Central Government increased the salaries of teachers without consulting local authorities, yet the latter were supposed to pay the new salaries as soon as they were agreed

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- 105 Report of the Fiscal Commission, 1963, 27, 28 and 83; JO England, 'Graduated Personal Tax in Kenya' *Public Administration and Development*, (1964) 204-5.
- 106 Jacob Omolo, 'The dynamics and trends of employments in Kenya', *Institute of Economic Affairs - Kenya*, IEA Research Paper Series No.1/2010, 1.
- 107 Germano Mwabu, 'Health care reform in Kenya: a review of the process' 32 *Health Policy* (1995) 248.
- 108 Mwabu, 'Health care reform in Kenya: a review of the process' 248.
- 109 David Bakibinga, Jalia Kangave and Dan Ngabirano, 'What explains the recent calls for reinstatement of a tax considered unpopular? An analysis of Graduated Tax in Uganda' *International Centre for Tax and Development Working Paper* 79, 2018, 7-9.
- 110 Institute of Policy Analysis and Research, 'Reforming local authorities for better service delivery in developing countries: Lessons from RPRLGSP in Kenya', 2010, 18.

upon by the Central Government and the teachers' unions.

The effect of these decisions was that the local authorities were unable to meet their financial obligations, which led to a public outcry. The response by the Central Government was to enact the Transfer of Functions Act, 1970, which transferred a number of functions such as primary education, roads and health from the local governments to the Central Government. While this relieved local authorities of a heavy financial burden, it took from them some of their most important sources of revenue, for instance, school fees, thereby making it impossible for them to deliver on their remaining functions.<sup>111</sup> Furthermore, although the functions were transferred, personnel were not reduced commensurately, forcing the local authorities to continue paying huge salaries to staff they did not require.<sup>112</sup> When the local authorities tried to lay off the workers, the Local County Government Workers' Union intervened and the Central Government directed the local government to retain them.

Legislation increased Central Government control over local government activities. Under the Local Government Act, 1965, the Minister for Local Government acquired absolute control and could do virtually anything in respect of the local government. The local authorities were required to seek the approval of Minister for Local Government for everything they did, and their affairs were closely monitored. This included approval of the standing orders to be followed by all local authorities; approval of all loans made to local authorities; advise on the appointment of certain municipal and county councils' chief officers and approval of their salaries and emoluments; approval of scales of fees and charges levied by local authorities; approval of annual and supplementary estimates of all municipal, county, urban and area councils; power to require local authorities to submit copies of minutes and other records; the power to reduce the Central Government grants

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111 Institute of Policy Analysis and Research, 'Reforming local authorities for better service delivery in developing countries', 18-19.

112 Southall and Wood, *Local government and the return to multi-partyism in Kenya*, 516.

payable to municipal and county councils and even power to require the winding up of any local authority. Thus, it was clear that the local governments existed as merely performing the delegated functions of the Central Government.

### Decentralised planning and development

Having abolished the regions as well as weakened the local authorities, the Central Government was faced with the problem of how to involve the local communities in development. In 1966, the Central Government attempted to put in place a rudimentary system of district planning by establishing the District Development Committees (DDCs) and District Development Advisory Committees (DDACs), which were dominated by Central Government administrators, but with representation from the local authorities and Members of Parliament elected from within the district.<sup>113</sup> This initiative only brought local government under more Central Government control, especially in matters of planning. More details on decentralised development will be discussed under the subheading on fiscal decentralisation.

It is instructive that in March 1966, the President appointed a Commission of Inquiry under the leadership of Walter Hardacre (Hardacre Commission) whose terms of reference were to, *inter alia*,

[i]nquire into and advise on the reforms necessary to make the local government system in Kenya a more effective instrument for the provision of local services and local development within the framework of national policy and national programmes.<sup>114</sup>

The Hardacre Commission was expected to inquire into, amongst other things: the mandatory and permissive functions of local authorities; the extent and nature of Central Government control over

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113 Vide Gazette Notice No 1007 of 22 March 1966.

114 Gazette Notice No 100 of 22nd March 1966 in Report of the Local Government Commission of Inquiry, 1966 (Hardacre Report).

local authorities; the general financial situation of local authorities including their taxation potential and how revenue to meet the cost of services provided by them ought to be raised; the extent and nature of Government contributions to local authorities; the means of strengthening the quality and security of local government staff and the means of improving the local authorities to contribute towards the implementation of the National Development Plan. Notably, some of the recommendations from the Hardacre Commission appeared to favour the status quo. For instance, on the thorny issue of Government controls over local authorities, despite establishing that there were more than a hundred Central Government controls mostly contained in the Local Government Regulations of 1963,<sup>115</sup> the Hardacre Commission did not recommend any variations, instead prescribing that, it was 'desirable' for the Minister for Local Government 'to find ways in which the exercise of those controls [could] be simplified and the implementation speeded up'. In fact, according to the Commission, this could be best achieved as part of the suggested decentralisation scheme whereby senior local government officers [could] be posted to various parts of the country.<sup>116</sup>

On financial health, the Hardacre report revealed that most local authorities, particularly the county councils, were in dire financial constraints due to the huge gaps between their revenue streams and expenditures.<sup>117</sup> In acknowledging that local authorities had limited sources, the Hardacre Commission serendipitously remarked that 'generally speaking there is no prospect of them being increased easily to meet the growing level of expenditure'. According to the Hardacre Commission, the solution was that 'services must be tailored to suit the size of revenues, rather than the size and quality of services setting the pace, and revenues trying to catch up'.<sup>118</sup> The Hardacre Commission, underscored the need for coordination and consultation between the Central Government and the local authorities before new plans or

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115 Hardacre Commission Report 1966, 24.

116 Hardacre Commission Report 1966, 24.

117 Hardacre Commission Report 1966, 32-47.

118 Hardacre Commission Report 1966, 43.

decisions affecting the finances or administration of local authorities were announced.<sup>119</sup> On Central Government support to the local authorities, the Hardacre Commission found the central government grants to be insufficient to cover local government expenditure. Further, that the Central Government allocations neither followed a defined criteria nor took into account the unique situation (including revenue sources) of the various local authorities.<sup>120</sup>

### **The re-entry of colonial economic and investment policies**

The Independence Government adopted development and investment policies that increased regional disparities. This is clear in Sessional Paper No 10 of 1965 on African socialism and its application to Kenya, which entrenched regional disparities. While it set out a vision for organising and developing the nation's resources for the benefit of all who lived in it, it adopted means that did the opposite. Sessional Paper No 10 identified its objectives as political equality, social justice and equal opportunities, amongst others, yet when dealing with the matter, it stated that:

Development money should be invested where it will yield the highest income. This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities and people receptive to and active in development.

The Independence Government did not only adopt colonial development and investment policies, but also perfected those policies by extending the concept of zoning beyond land to the people. It identified high, medium and low potential people in terms of their receptiveness to and activeness in development, and this played a major role in determining where to invest. An even stranger provision in Sessional Paper No 10 was the provision that the Government would

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119 Hardacre Commission Report 1966, 43.

120 Hardacre Commission Report 1966, 48.

invest taxpayers' money in a high potential area in priority over a low potential area, but after the profits have been made in the high potential area, the low potential areas would be aided by the high potential area by way of loans. Furthermore, the Government adopted and perfected the colonial policy of migrating human resources from low to high potential areas. It even invented a weird idea of developing people without necessarily developing the environment where they lived. It noted that if an area is deficient in resources, development could be achieved by investing in the education and training of the people whether in the area or elsewhere.

### **Recentralisation in the Moi era, 1978 to 2002**

Here we discuss at a deeper length how recentralisation evolved during President Moi's era. After ascending to power in 1978, Moi declared that he would follow in the footsteps of President Kenyatta. Essentially, Moi continued to consolidate centralisation of power through the imperial presidency and weakening of local government.

The main form of centralisation of power began with the constitutional amendment of 1982,<sup>121</sup> which turned Kenya into a one-party state. In the same year, Moi issued a directive that all districts were to become centres for development in the rural areas and required all ministries to ensure the implementation of the directive by 1983.<sup>122</sup> This was drawn from President Kenyatta's DDCs and DDACs.

Thus, in 1983, the Moi Government launched the District Focus for Rural Development Strategy (DFRD), which established a DDC for every district. It was envisioned that the DDC would involve the local

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121 Constitution of Kenya (Amendment) Act, 1982 (No7 of 1982). The amendment introduced a new section 2A which stated; "There shall be in Kenya only one political party, the Kenya African National Union".

122 Republic of Kenya (1983,1984, 1985 and 1987) District Focus for Rural Development, Government Printer Nairobi, 1.

people in the identification, design, implementation and management of all developmental projects in the district. The DDC comprised Central Government officials in the district largely. These officials were not necessarily familiar with the local priorities where they were deployed.<sup>123</sup> While it appeared that the system sought to involve the local authorities in local planning, ultimately the authority and autonomy of local government was eroded through closer control by Central Government officials.<sup>124</sup> They could not undertake any development project unless it had been approved by the DDC.<sup>125</sup>

In 1984, local government was further weakened when the Public Service Commission took over the recruitment of the top officials of the councils but not their remuneration.<sup>126</sup> Although this measure had the advantage of protecting local government officers from political victimisation, it reduced the administrative autonomy of local authorities. The result was that senior council officers were transformed into central rather than local government employees.<sup>127</sup>

It was during this era that the Ministers for Local Government used their powers under the Local Government Act extensively, upgrading

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123 Chitere, P and Ileri O, 'District focus for rural development as a decentralized planning strategy: An assessment of its implementation in Kenya' in Thomas N Kibua and Mwabu Germano (eds) *Decentralization and devolution in Kenya: New approaches*, University of Nairobi Press, Nairobi, 2008, 35.

124 Southhall and Wood, *Local government and the return to multi-partyism in Kenya*, 507.

125 Southhall and Wood, *Local government and the return to multi-partyism in Kenya*, 507.

126 Institute of Policy Analysis and Research, *Reforming Local Authorities for Better Service Delivery in Developing Countries: Lessons from RPRLGSP in Kenya*, 19, 20, 2010; Southhall and Wood, *Local government and the return to multi-partyism in Kenya*, 507, 519. The appointment of senior officers such as the Clerk, Treasurer, Engineer and Medical Officer of Health was transferred to the Public Service Commission. This resulted in further heightened control of the local authorities by the centre as in 1964, the Ministry of Local Government only had power to advise councils on their appointment and dismissal.

127 Oyugi, 'Local Government in Kenya' cited in Southhall and Wood, *Local government and the return to multi-partyism in Kenya*, 507.

all manner of townships to municipality status, many of which could not deliver the required services without the financial support of the Central Government. This eroded the autonomy of the local authorities further as the services they provided deteriorated to unacceptable levels. As Southall and Wood wrote, by the end of the 1980's, the local authorities, 'to all intents and purposes, had been rendered impotent'.<sup>128</sup>

The Moi Government also established many new districts, most of them illegally through 'roadside declarations' as a 'reward' for or enticement to loyalty as well as a campaign tool. In *Job Nyasimi Momanyi & 2 others v Attorney-General & another*,<sup>129</sup> the High Court declared 210 districts as illegally created and found that the power to create districts, review or vary their boundaries vested in Parliament exclusively.

In a bid to decentralise development efforts (but also have an influence and patronage over the local development initiatives), the Central Government over time initiated various fiscal decentralisation programs that could be seen as shy bids at deconcentrating power from the centre. These programs, dating back to the Independence government would continue to form important development focus for subsequent governments, as we shall see, even post the 2010 Constitution. Earlier forms of decentralisation programs included the District Development Giant Program (1966) and the Rural Works Programmes Grant (1974), which sought to provide discretionary funds outside ministries' budgets for small labour-intensive local projects.<sup>130</sup> These two were later combined to form the Rural Development

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128 Southall and Wood, *Local government and the return to multi-partyism in Kenya*, 509.

129 *Job Nyasimi Momanyi & 2 others v Attorney-General & another* Ruling of the High Court (2009) eKLR.

130 Sade Owolabi, 'Shifted responsibilities case studies of Kenya's participatory Local Authority Service Delivery Action Plan (Lasdap)' PHD Thesis, Cornell University, 2011,48; Kenya Human Rights Commission and Social and Public Accountability Network (SPAN) , 'Harmonization of decentralized development in Kenya: Towards alignment, citizen engagement and accountability ' KHRC, December 2010, 17.

Fund.<sup>131</sup> The common denominator across the variants of development programs is the central role that the Central/National Government eagerly plays in their implementation. Thus, christened as development packages to spur local development and combat poverty, they become “justified” extensions of national executive control over the local levels and effectively campaign tools for their sponsor.

The persistent disappointment over the performance of the local authorities and service delivery led to the initiation of the Kenya Local Government Reform Programme (KLGRP) under the Ministry of Local Government in 1995 to assist in the transformation of the local authorities. The idea was to transform the local authorities into ‘viable autonomous, accountable and responsive local authorities’.

In 1998, the Moi Government established the Local Authorities Transfer Fund (LATF) through the Local Authorities Transfer Fund Act of 1998. LATF was meant to facilitate the disbursement of funds to local authorities to supplement the financing of the services and facilities they were required to provide under the Local Government Act.<sup>132</sup> An Advisory Committee was established under Section 8 of the LATF Act to advise the Minister for Finance on the running of the Fund. The Advisory Committee comprised appointees of the Minister and those from the Ministry of Local Government. In the first instance, 2% of all tax collected under the Income Tax Act<sup>133</sup> was to be paid into the LATF. In successive years, this percentage could be altered by the Minister for Local Government with the approval of the National Assembly. Monies from LATF were to be expended to local authorities in such manner as the Minister for Finance determined upon the advice of the Advisory Committee.

A policy was developed, the Local Authorities Service Delivery

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131 KHRC and SPAN, ‘Harmonization of decentralized development in Kenya: Towards alignment, citizen engagement and accountability’, 17.

132 See, the repealed Local Government Act, Chapter 265, Laws of Kenya; also, Section 4 of the repealed Local Transfer Fund Act (No 8 of 1998).

133 Chapter 470, Laws of Kenya.

Action Plan (LASDAP), which spelt out the conditions that local authorities were to fulfil before getting allocations under the LATF Act. The LASDAP guidelines detailed how local authorities prepared budget approvals and submission of the plans to the LASDAP secretariat.<sup>134</sup> Notably, '[t]he process involved both administrators and local politicians (councillors), although decisions were made by the full council meetings of the respective local authority'.<sup>135</sup> After compliance, the funds were released in three phases, each with different conditions as provided in the LASDAP.

How did the LASDAP fare? Studies by the World Bank, Ministry of Local Government and scholars agree that there was some progress through LATF/ LASDAP. The LASDAP improved local participation in development programmes, improved financial management by the LAs and enhanced revenue collection.<sup>136</sup> Nonetheless, the LAs experienced many challenges, key among them being the high centralisation and bureaucracy, which led to delays in project rollouts. There was also lack of coordination between the LAs and the provincial administration and inadequate administrative capacity by LAs that hampered their performance further.<sup>137</sup>

It is from the above background that in 2003, following the coming into power of the National Rainbow Coalition (NARC) Government, the Constituencies Development Fund (CDF) was established through the Constituencies Development Fund Act, 2003 (CDF Act),<sup>138</sup> to iron out the

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134 Oyugi Lineth N and Kibua Thomas 'Planning and budgeting at the grassroots level: The case of Local Authority Service Delivery Action Plan' in Kibua and Mwabu (eds) (2008) 202 in Bosire (2013) 136.

135 Oyugi and Kibua, 'Planning and budgeting at the grassroots level: The case of Local Authority Service Delivery Action Plan' 136.

136 Oyugi and Kibua, 'Planning and budgeting at the grassroots level: The case of Local Authority Service Delivery Action Plan' 136.

137 Muia Daniel M, 'Devolution: Which way for local authorities?' in Kibua and Mwabu *Decentralization and Devolution in Kenya- New Approaches*. University of Nairobi Press, Nairobi, 2008, 154-155.

138 Constituencies Development Fund Act, 2003 (No 10 of 2003) was repealed and replaced with the Constituencies Development Fund Act, 2013 (No 30 of 2013).

regional imbalances brought about by patronage politics and address poverty levels at the grassroots.<sup>139</sup> This shifted development focus from the district to the constituency level effectively. The CDF Act required that at least 2.5% of the Central Government ordinary revenue collected in every financial year be channeled to the constituencies for purposes of local development dependent on identified local priorities.<sup>140</sup> A percentage of the funds (about 75%) was distributed equally across all the 210 constituencies while the rest (25%) was shared out based on the poverty index.

When a new constitutional order was inaugurated on 27 August 2010, civil society organisations began to question the constitutional foundations of CDF. In the case of *Institute of Social Accountability & another v National Assembly & 4 others*,<sup>141</sup> the High Court agreed with the civil society position and declared the *CDF Act, 2013, unconstitutional, arguing that its design and implementation ran against the grain of the devolved system of governance contemplated under the 2010 Constitution*. The High Court ruled that the CDF Act created parallel centres of development not anticipated under the 2010 Constitution and that the arrangement violated the doctrine of separation of powers. However, upon appeal, the Court of Appeal (CoA)<sup>142</sup> saved some of the sections of the CDF Act, 2013 finding that the CDF was an intergovernmental transfer and therefore did not violate the division of powers between the two levels of government. In its decision of 24 November 2017, the CoA set aside the specific sections of the Act that were unconstitutional for violating the principle of separation of powers.<sup>143</sup> In the meantime, Parliament

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Following the declaration of the Act as unconstitutional by the High Court, the Act was repealed and replaced with the National Government Constituencies Development Fund Act (No 30 of 2015).

139 Muia, 'Devolution: which way for local authorities?' 137.

140 CDF Act Section 4(2).

141 *Institute of Social Accountability & another v National Assembly & 4 others* [2015] Petition 71 of 2013, Judgement of the High Court (2015) eKLR.

142 *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* [2017] Court of Appeal No. 92 of 2015 Judgment of the Court of Appeal (2017) eKLR

143 Specifically, the Court declared sections 24(3)(c), 24(3)(f) and 37(1)

had enacted the National Government Constituencies Development Fund Act (NG-CDF Act).<sup>144</sup> The NG-CDF Act clarified that it would only apply to projects ‘in respect of works and services falling within the functions of the National Government under the Constitution’.<sup>145</sup> Nonetheless, the Petitioners proceeded to the Supreme Court in the case of *Institute of Social Accountability & another v National Assembly of Kenya & 3 others*,<sup>146</sup> wherein in a judgement delivered on the eve of the 2022 General Elections, the apex court restored the finding of the High Court that the CDF Act 2013 was unconstitutional. The Supreme Court agreed with the trial court finding that the CDF Act infringed on the division of functions between the national and county governments and violated the vertical separation of powers between legislative bodies and the Executive.<sup>147</sup> The Act also offended the constitutional principles on public finance enshrined under Article 201<sup>148</sup> and those relating to the division of revenue under Article 202(1) of the Constitution<sup>149</sup>. Failure to

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(a) of the Constituencies Development Act, 2013 as invalid and unconstitutional.

144 National Government Constituencies Development Fund Act No 30 of 2015.

145 Section 24(a) NG-CDF Act.

146 *Institute of Social Accountability & another v National Assembly of Kenya & 3 others SC Petition No 1 of 2018* Ruling in the Supreme Court (2021) eKLR.

147 The Supreme Court at para 130 was categorical that, “Members of legislative bodies, being Members of the National Assembly, Senators, County Women Representatives, and Members of County Assemblies ought not to be involved in the implementation of any service-based mandates which are a preserve of the Executive branch. This is the only way to respect the constitutional scheme on separation of powers and ensure that the Legislators’ oversight mandate is not compromised through conflict of interest”.

148 At para. 106 the Supreme Court explained the finding in part as follows, “This is because a Member of Parliament cannot oversee the implementation or coordination of the projects and at the same time offer oversight over the same projects. To this end, we find that the CDF as structured under the CDF Act 2013 violates the constitutional principles on public finance, particularly the principle of prudent and responsible management of public funds as enshrined in Article 201(d) of the Constitution”.

149 The Supreme Court at para 99 rendered itself thus: “From the foregoing provisions, we find that Section 4 of the CDF Act 2013 violates the provisions of the Constitution as it seeks to disrupt the revenue sharing formula by directly allocating 2.5% of all

involve the Senate in the enactment of the CDF (Amendment) Bill 2013 compounded the unconstitutionality of the Act further.<sup>150</sup>

Other funds established include the Youth Enterprise Development Fund under the Ministry of ICT, Innovation and Youth Affairs. It was gazetted on 8 December 2006, and transformed into a State Corporation on 11 May 2007.<sup>151</sup> The Youth Fund is meant to

[P]rovide financial and business development support services to youth-owned enterprises... it creates job opportunities for the young people through entrepreneurship and encouraging them to be job creators not job seekers.<sup>152</sup>

Similarly, the Women Enterprise Fund (WEF) was established in August 2007 to empower women economically, by providing 'accessible and affordable credit to support women start and/or expand business for wealth and employment creation'.<sup>153</sup> WEF is a semi-autonomous Government Agency in the Ministry of Public Service, Youth and Gender Affairs.

The idea of devolved funds as a tool for local development would still continue to be relevant post the 2010 Constitution. In 2014, the Uwezo Fund was established under the Public Finance Management (Uwezo Fund) Regulations, 2014.<sup>154</sup> The Uwezo Fund, which is

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the national revenue while the Constitution requires that the revenue raised shall be shared equitably among the national and county governments. It is further our considered opinion that if at all any monies is to be deducted from the national revenue, the money should be granted from the national government revenue as a grant but not directly from the national revenue".

150 At para. 76: "Consequently, we find that the CDF (Amendment) Bill, 2013 involved matters concerning county governments and therefore the Bill should have been tabled before Senate for consideration, debate, and approval in accordance with Article 96 of the Constitution. Failure to involve the Senate in the enacting of the CDF (Amendment) Act, 2013 renders the CDF Act 2013 unconstitutional".

151 Youth Enterprise Fund, 'About Us'.

152 Youth Enterprise Fund.

153 Women Connect, 'Accessing Financing in Kenya'.

154 Public Finance Management (Uwezo Fund) Regulations, 2014 Legal Notice No 21 of 21st February 2014.

administered at the constituency level, was a flagship project of President Uhuru Kenyatta's Jubilee Government when it ascended to power in 2013. The Uwezo Fund was meant to spur economic growth by supporting job creation and the realisation of Vision 2030 goals such as poverty reduction across the 290 constituencies. The Uwezo Fund is a revolving fund housed at the Ministry of Public Service, Gender, Senior Citizen Affairs and Special Programmes meant 'to address the socio-economic empowerment of women, youth and persons with disabilities through expansion of access to finance to facilitate initiation and expansion of their enterprises.'<sup>155</sup> According to the Report of the Auditor-General on Uwezo Fund for the year ended 30 June 2019, a total of Kshs 6 299 400 004 had been disbursed to the 290 constituencies as Loan Fund.<sup>156</sup> According to more recent available sources, Uwezo Fund has disbursed more than **Kshs 6.95 billion** and directly supported 1 088 757 beneficiaries since its inception, of which 69% are female and 31% male.<sup>157</sup> The cumulative loan repayment rate stands at 39%.<sup>158</sup> The running of the fund has however been mired by various challenges including low repayment rate and staffing gaps.<sup>159</sup>

In 2016, the National Government Affirmative Action Fund (NGAAF) was established under the Public Finance Management Regulations, 2016,<sup>160</sup> '[t]o facilitate social-economic empowerment of Affirmative Action Groups through financial and social support for inclusive and sustainable development'.<sup>161</sup> These vulnerable groups include women, youth, PWDs, children and the elderly. The NGAAF is hinged on Vision 2030 under the social pillar and is meant to:

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155 Uwezo Fund, 'Background'.

156 Office of the Auditor-General, 'Report of the Auditor-General on Uwezo Fund for the year ended 30 June, 2019' p xii.

157 Uwezo Fund, Background.

158 Uwezo Fund website.

159 Report of the Auditor-General on Uwezo Fund for the year ended 30 June, 2019' p xii.

160 Legal Notice Nos 24, 52 of 2016.

161 Republic of Kenya, 'National Government Affirmative Action Fund (NGAAF) draft Strategic Document p ii.

[a]ddress the plight of vulnerable groups through enhanced access to financial facilities for socio-economic empowerment among women, youth, persons with disabilities, needy children and elderly persons in the country. It also provides an avenue for promotion of enterprise and value addition initiatives.<sup>162</sup> According to the Kenya National Bureau of Statistics (KNBS), the total amount of grants disbursed by the NGAAF in three of their programmes (Social Economic Empowerment, Value Addition Initiatives and Bursaries Scholarships) for vulnerable students was Ksh 758.9 million in 2019/20 Financial Year (FY) and was expected to rise by 3.8% to KSh 788.0 million in the 2020/21 FY.<sup>163</sup>

However, some of these funds have been politicised. For instance, women representatives also demanded allocations to them akin to their National Assembly counterparts for them to have developmental record to enable them be felt in the grassroots.<sup>164</sup>

Social Protection initiatives were also adopted to cushion the indigent. The National Safety Net Programme (NSNP) commonly referred to as the Inua Jamii Program remains a 'core social assistance program in Kenya'.<sup>165</sup> Its general object is to uplift the livelihoods of the most vulnerable from chronic poverty and hunger. The programme is coordinated by the Social Assistance Unit under the Ministry of Public Service, Gender, Senior Citizen Affairs and Special Programmes. The five cash transfers under this program are the Older Persons Cash Transfer Programme (OPTC), Cash Transfers to Orphans and Vulnerable Children (CT-OVC), Hunger Safety Net Programme (HSNP), Urban Food Subsidy Cash Transfer (UFS-CT) and Persons with Severe Disability Cash Transfer (PWSD-CT). Under this program, enrolled members receive cash transfers on a bi-monthly basis (currently standing at Ksh 4000

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162 The National Government Affirmative Action Fund (NGAAF)

163 Republic of Kenya, Kenya National Bureau of Statistics (2020) "Economic Survey 2021" p 363.

164 See for instance Gitonga Anthony, 'Women reps demand kitty to control' *The Standard* 28 April 2014 and Citizen Reporter, 'Woman Rep aspirants want Ksh. 7 million CDF kitty increased' *Citizen Digital*, 21 April 2022.

165 Republic of Kenya. Ministry of Labour and Social Protection (July 2020) 'Kenya Social Protection Sector Annual Report 2018/19 JULY 2020', 20.

and Ksh 5400 for HSNP).<sup>166</sup> Notably, the Ksh 2,000 monthly allocation falls way below the derived poverty lines.<sup>167</sup> The *Inua Jamii* Programme faces various other challenges including inadequate coverage, delayed disbursements and fraud.<sup>168</sup> Moreover, failure to update records has been a major gap. According to the Report of the Auditor General for the year 2020/2021, in 68 out of a total of 290 sub counties during the month of November 2021, the payroll for payment of older persons' cash transfer OP-CT, CT-OVC and PWSD-CT contained 7,577 deceased beneficiaries resulting in an unexplained payment of Kshs 254,702,000 for the period starting 2017 to 30 June 2021.<sup>169</sup>

While the multiple fiscal programs by the national government are a positive gesture in affirmative action for the most vulnerable population, they are riddled with many challenges, which make them less effective and impactful in closing the gaps as highlighted.

Despite the many fiscal decentralisation initiatives pre-2010, the changes made to the Independence Constitution remained overbearing leading to the clamor for reforms through constitutional review.<sup>170</sup>

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166 State Department for Social Protection Kenya, Social Assistance Unit FAQs.

167 According to the Kenya Integrated Budget Household Survey 2015/16, the derived poverty lines stand at Ksh 3,252 overall expenditure per month per person in the rural areas and Ksh 5,995 in urban areas.

168 Ministry of Labour and Social Protection (July 2020) pp 6,37. According to reports by the Ministry of Labour and Social Protection, a total of 1.3 million households were covered in 2018/19 in the OPTC, CT-OVC, HSNP and PWSD-CT programs. The older person's cash transfer program (OPCT) is the largest scheme with close to 800,000 beneficiaries. Data (2017) indicates that 77% of older persons aged 65 years and above receive an old age pension under Inua Jamii. The data also revealed only 1% coverage exists for PWDs.

169 Report of the Auditor General for the National Government Ministries, Departments and Agencies for the year 2020/2021 p 503-4.

170 Mutakha, 'An interpretation of the constitutional framework for devolution in Kenya: a comparative approach', 84.

*Proposed models of decentralisation during the constitution-making process (1999 to 2010): Multiple drafts, varied interests*

This stage was characterised by the clamour for constitutional reforms. At the centre of this struggle was the need to socio-economic inclusion and political inclusion. The governance model that Kenya should adopt remained one of the most contentious issues and occupied a dominant role in the constitutional debates, that is, how far down and wide across the powers needed to be dispersed. In what would be a throwback of the pre-independence negotiations, there were those factions that disfavoured devolution and vigorously fought it, leaning towards a centralised presidential system. This section expounds on the various draft constitutions, commencing with the Draft Bill of the Constitution Review Commission, 2002 (CKRC or Ghai Draft) to the Draft Constitution of Kenya, 2004 (Bomas Draft), Proposed New Constitution of Kenya, 2005 (Wako Draft), Harmonized Draft Constitution of Kenya, 2009 (Harmonized Draft), Revised Harmonized Draft Constitution of Kenya (Revised Harmonized Draft) to the now 2010 Constitution.

Kenyans had already, in their minds, accepted that a devolved system of government would be the solution to the many problems they were facing way before the legal framework for incorporating devolution in the legal order was launched.<sup>171</sup> As it will become apparent, however, the form and tiers this would take remained controversial throughout the constitutional making process, particularly in 2003/2004 causing sharp divisions along political/ethnic lines, akin to the divisions witnessed in the negotiations for the *majimbo* Constitution.<sup>172</sup>

Similar arguments to those proffered in 1961-63 persisted- as aptly summed up by Maxon thus:<sup>173</sup>

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171 CKRC Final Report, 11 February 2005, 44.

172 See Maxon, 'The demise and rise of Majimbo in Independent Kenya', 19-48.

173 Maxon, 'The demise and rise of Majimbo in Independent Kenya', 43.

[M]ajimbo was too expensive for a Kenya facing severe economic problems at the end of Moi's kleptocratic regime. *Majimbo* would also weaken national unity and promote tribalism through a balkanisation of the country. Not all units to which functions could be devolved had sufficient resources and trained manpower. Critics also pointed to the lack of success that had characterised federal governments in Africa (e.g., Nigeria and Sudan)

*The Constitution of Kenya Review Commission Draft*

The demand for constitutional reform resulted in the formation of the Constitution of Kenya Review Commission (CKRC) under Section 3(2) of the Constitution of Kenya Review Act, 1997 (the Review Act).<sup>174</sup>

The consolidated version of the Review Act (Cap. 3A) empowered the CKRC to spearhead comprehensive review of the Repealed Constitution 'by the people of Kenya'. More specifically, the review was aimed to *inter alia*, 'establish a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity'; ensure accountability of the Government and its officers to the center of Kenya; promoting the people's participation in governance through democratic, free and fair elections and devolution and exercise of power; respecting ethnic and regional diversity and communal rights' and; 'ensuring provision of basic needs of all Kenyans by establishing an equitable framework for economic growth and equitable access to national resources'.

The Review Act further required the review process to examine existing constitutional commissions, institutions and offices and to make recommendations for improvement and for new bodies to 'facilitate constitutional governance and the respect for human rights and gender equity'.<sup>175</sup>

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174 Constitution of Kenya Review Act No 13 of 1997.

175 Review Act section 17(d)(iii).

After travelling all over the country sampling public views, the CKRC came up with a comprehensive **Report** and a **Draft Constitution** which were released on the 19 September 2002, and which is popularly known as the Ghai or CKRC Draft.<sup>176</sup> Upon analysis of the public views, the CKRC reported that, 'both the governance and the economic system exclude[d] a large proportion of the people of Kenya' as evidenced by the high levels of poverty that was estimated to be at over 60% of the total population.<sup>177</sup> The report further noted that women, PWDs and minority communities were worst hit. It was on this basis that the CKRC recommended the need for the Constitution to,

[e]mphasise affirmative action for the historically marginalized and disadvantaged groups and areas including women, people with disability; the youth, pastoralists; older people, and minority communities, in representation, management of public affairs and sharing benefits of development'; and to, 'provide and define criteria for allocating resources to marginalized areas in order to ensure equalization of opportunities and access to development'.<sup>178</sup>

With regard to the principles of devolution, the CKRC Draft recommended the following:

- a model that reflected a cost-benefit analysis of devolution and what devolution was meant to achieve upon adoption;
- enactment of an Act of Parliament to define the levels of devolution and the powers to be exercised by the devolved units;
- a model that reflected the principles of equitable management of resources, participatory governance, cultural diversity and discrete demarcation of functions and powers of the units;
- adoption of a system fashioned in a way that ensures financial autonomy and accountability by the devolved units;

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176 Lumumba and Franceschi, 'The Constitution of Kenya 2010', (n 24) 44.

177 CKRC Final Report 11 February, 2005, 107.

178 CKRC Final Report 2005, 110.

- an ingrained dispute settlement mechanism; and
- the setting up of transitional mechanisms for phasing out the status quo and replacing it with the new order.<sup>179</sup>

The CKRC Draft also recommended a five-tier devolution system involving national, provincial, district, locational and village institutions. The village councils would mobilise residents on local issues as the point of contact between the village and the location/wards, and would be managed and administered by village elders. Locational councils would enable communities to manage their own affairs and exercise some executive functions. They would be run by a council of village elders, two from each village in the location. The location administrator would be elected directly by the people, as prescribed by the district council. The district councils would be the principal level of devolution and would perform both legislative and executive functions. They would be composed of councilors drawn from the number of wards in the then county councils. They would be administered by a district governor who would be the political head of the district after being directly elected by the people. In principle, the district councils would have been the vehicle for the national government to implement policy. The provincial councils would consist of chairpersons of district councils and other stakeholders. They would have had both executive and legislative powers on subjects within their executive responsibilities such as promoting co-operation between districts, coordinating issues that affect districts, dealing with trans-provincial issues, planning the province's development and managing provincial institutions and resources.<sup>180</sup>

The national government would still have been responsible for collecting major sources of revenue and it was to establish a ministry (of devolution or district governments) to deal and liaise with the provincial and district councils. District councils would also have had the discretion to impose taxes or levies which were to be specified in

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179 Constitution of Kenya Review Commission (CKRC), *Final Draft* 2005, 223-224.

180 CKRC, *Final Draft* 2005, 239-240.

an Act of Parliament. The national revenue would be shared equitably with the district councils. Provincial secretariats would be funded from the Consolidated Fund, district contributions and revenue raised from provincial utilities. Districts would be funded by Government grants, Government transfer funds and revenue raised from local utilities. The accounts of devolved funds would be audited by the Auditor General.<sup>181</sup>

The **CKRC Draft** was submitted to the National Constitutional Conference (NCC), which was supposed to debate and adopt it with or without amendments. The NCC was held at the Bomas of Kenya between 2003 and 2004. It adopted the principle of devolution but it directed the CKRC to prepare a special report to improve on the architecture and design of devolution. Consequently, the CKRC presented a special report to the Conference plenary on devolution, which was then committed to the Technical Working Committee of the Conference for improvements to be made on it.<sup>182</sup> It was then negotiated upon, the result being a much-improved draft, which came to be known as the Bomas Draft.<sup>183</sup>

### *Bomas Draft*

As the Review Act required, the CKRC organised constituency constitutional forums and facilitated numerous other fora at which all persons who were so minded gave their views on the review process; it collected and collated the views of Kenyans and compiled a report together with a summary of its recommendations for discussion and adoption by the NCC. It afforded opportunity for intense public discussion and critique of the said report, and it prepared a draft Bill for debate and adoption by the NCC. The CKRC also convened the NCC as required by Parliament. The NCC which acquired the nickname of

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181 CKRC, *Final Draft* 2005, 241.

182 Constitution of Kenya Review Commission 'Special working document for the National Constitutional conference: Report on devolution of powers' (19 August 2003) which was prepared in response to the direction of the conference.

183 Draft Constitution of Kenya (Bomas Draft) (2004).

'Bomas' – the same referring to the location of the venue at a place called 'the Bomas of Kenya' in the Langata area of Nairobi – started its work of debating the CKRC's report and draft Bill in April 2003.<sup>184</sup> It is the Draft Constitution of Kenya that originated from this NCC that is popularly known as the Bomas Draft.

The Bomas Draft provided for four levels of government: the national government, regional government, district government and local government.<sup>185</sup> Essentially, it adopted the structures of the provincial administration as a basis of devolved government.<sup>186</sup> Notably, it borrowed heavily from the South African Constitution. It provided for a better-designed Senate, mechanisms for revenue-sharing, intergovernmental relations and dispute resolution mechanisms.<sup>187</sup> Each region was to have a regional government consisting of a regional legislative assembly and a regional executive. The Bomas Draft also provided that the Nairobi Region would be managed as a metropolitan capital city, as prescribed by an Act of Parliament. The executive authority of the Regional Government would be exercised by the regional executive committee, headed by a regional premier. The members of the regional executive committee would be responsible for the exercise of executive powers in relation to functions and powers assigned to the region. Nairobi would be headed by a mayor, assisted by a deputy mayor. The regional legislative assembly would pass laws for the performance of functions in the region.

The district government would consist a district council and a district executive, which would perform their respective legislative and executive functions in the district. The district governor would be the chief executive of the district. The locational government would consist a locational council and locational executive committee to perform

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184 *Timothy M Njoya & 6 others v Attorney General & 3 others [2004]* Judgment of the High Court, (2004) eKLR.

185 *Timothy M Njoya & 6 others v Attorney General & 3 others [2004]* eKLR.

186 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

187 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

the respective legislative and executive functions in the location. The location administrator would be the chief executive of the location.<sup>188</sup>

However, the Bomas Draft was not accepted by some Government officials, who literally walked out of the NCC in protest. It is this group which sought to make amendments to the Review Act<sup>189</sup> so as to give Parliament the power to amend the Bomas Draft and to provide for a mandatory referendum to pass the draft. Curiously, more than three years after the start of the Bomas process and nearly towards its completion, a constitutional petition was instigated by President Mwai Kibaki and other Government officials who favoured the presidential system.<sup>190</sup> In *Timothy Njoya and others v Attorney General and others* where the High Court ruled that a completely new constitution could not be enacted by Parliament but must be adopted by the people in a referendum.<sup>191</sup>

In the words of Ghai, 'Bomas was killed thus. This enabled the Government to take over the whole process, amend the document to take away the parliamentary system – returning to a largely presidential system'.<sup>192</sup> The Bomas Draft has been described as 'the best Constitution Kenya never had'.<sup>193</sup>

The Parliamentary Select Committee, chaired by Simeon Nyachae, travelled to Kilifi where they made changes to the Bomas Draft, hence the birth of what was to be called the Wako Draft deriving its name from **Amos Wako** the then Attorney General who published the Bill.<sup>194</sup>

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188 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

189 Constitution of Kenya Review (Amendment) Act of 2004.

190 Ghai Y.P. 'A short history of constitutions and what politicians do to them' *The Elephant*, 20 March 2020.

191 *Timothy Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004).

192 Ghai Yash P, 'A short history of Constitutions and what politicians do to them'.

193 Ghai Yash P, 'Why the Bomas Draft is the best constitution we never had' *Daily Nation* 25 August 2020

194 Wako Draft 2005.

*Wako Draft*

The Wako Draft reduced the model of decentralisation in the Bomas Draft to two levels of government: a national government and a district government.<sup>195</sup> The district was to be the principal unit of devolution. The national government's functions would hence include: foreign affairs; the use of international waters; immigration and citizenship; national defense and security; and the courts. The functions of the district governments would include: formulation of district policies; agriculture in the district; district health services; cultural activities; and transport in the district. Each district would have a district government made up of a district assembly and a district council. The district assembly would be the law-making body of the district government whereas the district council, headed by district chairperson, would have been the executive body of the **district government**.<sup>196</sup>

It is important to note that the Wako Draft did not make provisions for Senate. Kangu notes that the changes that were made to the Bomas Draft so as to come up with the Wako Draft went to the heart of devolution that had been adopted at the Bomas Conference.<sup>197</sup> Ghai observes that they 'considerably weakened the devolution chapter'<sup>198</sup> by largely retaining the existing centralised system, which had been strongly criticised and rejected by the people and the NCC participants.<sup>199</sup> The Wako Draft, or what Ghai describes as 'the Government's butchered version of the constitution'<sup>200</sup> was taken to referendum on 21 November 2005, but was rejected by a majority of the Kenyans.<sup>201</sup> This rejection was

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195 Wako Draft 2005, Chapter 14.

196 Wako Draft 2005, Chapter 14.

197 Mutakha, 'An interpretation of the constitutional framework for devolution in Kenya: A comparative approach', 141.

198 Ghai Yash P, 'Devolution: Restructuring the Kenyan State' *Journal of East African Studies*, (2008) 217.

199 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution in Kenya: A Comparative Approach', 117.

200 Ghai Yash P 'A short history of Constitutions and what politicians do to them'.

201 Lumumba and Franceschi, 45. In terms of numbers, 43% of the voters supported

partly because of the weakened devolution system.<sup>202</sup> But there was not much loss to count anyway; thus, as Ghai quips, 'Nevertheless, no-one in the Government mourned this referendum result: it left them with the old, discredited constitution, complete with its imperial presidency'.<sup>203</sup>

The constitution review process lost its momentum in the succeeding years until when the highly contested 2007 General Election was held and the incumbent President, Kibaki, controversially declared the winner. This resulted in post-election violence from late 2007 to early 2008. To resolve the issue, a Coalition Government was formed, with Kibaki as President and Raila Odinga as Prime Minister. One of the agendas of the Coalition Government was to complete the constitutional review process. All the three separate processes the **Phillip Waki Commission**,<sup>204</sup> the **Johann Kriegler Commission**<sup>205</sup> and the Kenya National Dialogue and Reconciliation Committee - established to look into the causes of the post-election violence concluded that there was need to conclude the review process and especially come up with an inclusive governance system, which would entail devolution of power. In accordance with the recommendations of the Kenya National Dialogue and Reconciliation Committee, the Constitution of Kenya Review Act, 2008 (Review Act 2008), was enacted.<sup>206</sup>

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the 'banana' camp by endorsing the document whilst a majority at 57% of the votes cast preferred the 'orange camp' that rejected the document.

202 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 45.

203 Ghai Yash P, 'A Short history of constitutions and what politicians do to them'.

204 Commission of Inquiry to investigate the Post-Election Violence (CIPEV) appointed through Legal Notice No 4473 of 2008.

205 Independent Review Commission on the General Elections held in Kenya on 27th December 2007.

206 Mutakha, 'An interpretation of the Constitutional Framework for Devolution in Kenya: A comparative approach', 118.

*The Harmonized Draft*

The Review Act 2008, established a Committee of Experts (CoE), which came up with the Harmonized Draft Constitution, published on 17 November 2009. The Harmonized Draft was subsequently discussed by the Parliamentary Select Committee and approved by Parliament. However, many contentious issues arose with respect to various aspects of the Harmonized Draft, among them provisions relating to devolution.<sup>207</sup> For instance, the Parliamentary Select Committee made proposals that would have weakened the system and were therefore rejected by the CoE. Such proposals included: that the Senate be referred to as a lower house;<sup>208</sup> that a hierarchical relationship be created between the national and county levels of government by making provision that the national government takes precedence over county governments;<sup>209</sup> that 'checks and balances and the separation of powers' as one of the objects of devolution be deleted;<sup>210</sup> and that the Commission on Revenue Allocation be omitted from the final constitution.<sup>211</sup>

The Harmonized Draft Constitution adopted three levels of government: national, regional and county. It proposed that the basic level of devolution should be the 79 districts agreed at Bomas and that they be referred to as counties to avoid confusion with the districts existing at the time. The county government was to consist of a directly elected county assembly with legislative authority, and an executive committee elected by the county assembly from amongst the members of the assembly. The Harmonized Draft proposed the region as a level of government to coordinate the functions of the county governments and to plan for services that cut across county boundaries, among other reasons. The regional governments would have had legislative and executive functions at the regional level and a representative role at the

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207 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 47.

208 Committee of Experts on Constitutional Review Final Report (2010) 115.

209 Committee of Experts on Constitutional Review Final Report (2010) 125.

210 Committee of Experts on Constitutional Review Final Report (2010) 125.

211 Committee of Experts on Constitutional Review Final Report (2010) 128.

national level. Regional assemblies and executives would be elected by county assemblies within the region. Their principal function would be to coordinate the implementation of the programs and projects that extend across two or more counties within the region. The representative role would be performed through Senate, whose members would be elected from the county assemblies. The Harmonized Draft adopted the original eight provinces as the basis of the regional level government.<sup>212</sup>

### *Revised Harmonized Draft*

The CoE disseminated the Harmonized Draft Constitution for public input. It then reviewed it in light of the views received from the public and submitted the Reviewed Harmonized Draft Constitution to the Parliamentary Select Committee on 8 January 2010. One of the changes made touched on the levels of devolved government. They were reduced to two: national and county. Patrick Lumumba and Louis Francheschi note that the structure adopted in the Revised Harmonized Draft is from the Wako Draft, only that district governments were replaced by county governments.<sup>213</sup> For the units of county governments, the districts enacted in 1992 by the District and Provinces Act were adopted as proposed counties.<sup>214</sup> It also provided for the direct election of senators. Furthermore, an additional provision was made requiring the National Government to ensure that county governments are given

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212 Draft Constitution of Kenya (Harmonised Draft) 2010.

213 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

214 Some scholars have criticized the framework upon which the county governments as modelled- mostly around the 47 districts of colonialism and post-colonialism. For instances Joshua Kivuva summarises this critique thus: [t]hese colonial-era districts were not delineated on the basis of any of the problems that the devolution system was meant to solve or the aspirations of the people at the grassroots" (See Kivuva Joshua M, 'Restructuring the Kenyan State' Society for International development, 1*Constitution Working Paper Series*, (2011) 28).

adequate support and resources.<sup>215</sup> In view of the changes made to the Harmonized Draft by Members of Parliament at Naivasha, the Draft Constitution that Kenyans voted in the referendum of 4 August 2010 was materially different from the Revised Harmonized Draft.<sup>216</sup> This subsequent document was promulgated on 27 August 2010 and is the 2010 Constitution.

### **Decentralisation under the 2010 Constitution: Another half-hearted attempt?**

This section provides a breakdown of the governance brought about by the 2010 Constitution. It also makes a brief assessment of the progress made as well as highlights the challenges in translating the devolution architecture on paper to an operational model meant to realise the objects of devolution under Article 174 of the 2010 Constitution. It will be evident in the ensuing discussion that while attempts were made in the letter of the 2010 Constitution, these were met with reluctance and teething challenges since the first Government under the 2010 Constitution assumed office in 2013. There have been successes, as well as various drawbacks in realising the dream of devolution as evidenced by gaps in the implementation, supremacy wars court battles. It would appear the ghosts of yester-years, of resistance to devolved governance revisited, and continue to haunt the current devolved structure. Little wonder that the 2010 Constitution has witnessed various attempts to undermine it and conspicuous efforts made to delay and derail devolution implementation in more ways than one.

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215 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

216 Franceschi Luis G, 'Where do MPs Fall in the Devolution Chain?' *The Daily Nation Newspaper*, November 29, 2013.

### *The 2010 promise*

On 27<sup>th</sup> August 2010, the 2010 Constitution was promulgated. Hailed as the ‘greatest promise of the new Constitution’,<sup>217</sup> devolution became operational in Kenya in 2013, after the first General Election under the 2010 Constitution. This choice of governance model responds to the repressive history of overtly centralised power structures discussed earlier in this Chapter. As the High Court aptly remarked ‘at the heart of devolution is a recognition that centralised power creates a climate for coercive state power’.<sup>218</sup>

Ghai writes that the CKRC found that Kenyans felt alienated from the Central Government, ‘marginalised’ ‘neglected’ and ‘victimised’ due to their ethnic and political statuses.<sup>219</sup> In one of his lectures, Ghai vividly paints the picture of a disillusioned people, with a resolute craving for a new model of governance for the country thus:

Wherever the CKRC went, it noted widespread feeling among the people of alienation from Central Government because of the concentration of power in the National Government, and to a remarkable extent, in the President. They felt marginalised and neglected, deprived of their resources; and victimised for their political or ethnic affiliations. They considered that their problems arose from Government policies over which they had no control. Decisions were made at places far away from them. These decisions did not reflect the reality under which they lived, the constraints and privations under which they suffered. ... As their poverty deepened, they could see the affluence of others: politicians, senior civil servants, cronies of the regime. They felt that under both presidential regimes, certain ethnic groups had been favoured, and others discriminated against. There was particular resentment against the provincial administration which was

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217 Council of Governors, ‘Devolution Law Report Volume 1’ 2017, v.

218 *Council of Governors & 3 others v Senate & 53 others* [2015] Judgment of the Court of Appeal (2015) eKLR para 107.

219 Ghai Yash P, ‘Devolution: Restructuring the Kenyan State’ 2(2) *Journal of East African Studies*, 2008, 215.

seen as an extension of the President's office, and of the arbitrariness and abuse of power by its officials. Local government had lost its authority...<sup>220</sup>

Therefore, devolution in the 2010 Constitution was not enshrined for its own sake but was meant to be a departure from the historical excesses of power and an aperture towards a more inclusive, unifying and development-oriented government structure. In promulgating the 2010 Constitution, Kenyans expressed their aspiration for a government that was based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law; values which were direly missing in the former regimes. Thus, 'the hitherto unilateral whimsical decision-making was to be replaced by accountable exercise of power'.<sup>221</sup> As the Supreme Court observed *In the Matter of the Speaker of the Senate & another*:

The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial aspects to county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfilment to the concept of *democracy*.<sup>222</sup>

The objects of devolution certainly point towards these thematic goals. These objects include fostering national unity by recognising diversity, self-governance and participation of the people in the exercise of State power and decision-making; promoting the interests and rights of minorities and the marginalised; socio-economic development and

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220 Ghai Yash P 'Devolution: Restructuring the Kenyan State' Lecture at the African Research and Resource Forum KICC Nairobi, 23 November 2007.

221 Kenya National Commission on Human Rights, 'Kenya@ 10: A decade after: The state of human rights post the 2010 promulgation of the Constitution: A human rights scorecard', Press Statement, 27 August 2020.

222 *In the Matter of the Speaker of the Senate & another* (2013) eKLR Supreme Court Advisory Reference 2 of 2013 para 136.

accessible Government services; equitable sharing of resources; and decentralisation of State organs, their functions and services from the capital.<sup>223</sup> The stated principles of county government further buttress these objects and include the requirement that devolution shall be based on democratic principles and separation of powers; that they have reliable sources of revenue to enable them to govern and deliver services effectively; and that no more than two-thirds of the members of each county government should be of the same gender.<sup>224</sup>

### *The model of governance under the 2010 Constitution*

Devolution has entrenched a system of checks and balances to ensure that power was not abused as in the past. The key organs of governance are also responsible for ensuring that the objects of devolution under Article 174 of the 2010 Constitution were met. The composition and very roles of these organs and institutions tell a tale on their intended significance in reversing exclusion and inequitable development across the country.

Governance of the country is shared between two levels of government- the National Government and the County Governments. The two levels exercise delegated sovereign power of the people.<sup>225</sup> The governments at the national and county levels though interdependent are 'distinct'. They are expected to conduct their mutual relations in a spirit of consultation and cooperation.<sup>226</sup> Indeed, Article 189 requires cooperation, assistance, and consultation between the two levels of Government explicitly.<sup>227</sup>

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223 Constitution of Kenya (2010), Article 174.

224 Constitution of Kenya (2010), Article 175.

225 See Article 1(3)(4) Constitution of Kenya 2010.

226 Constitution of Kenya (2010), Article 6(2).

227 Constitution of Kenya (2010), Article 189.

As discussed earlier, a notable barrier to decentralisation in the pre-2010 epochs was the erosion of local government by clawing power back to the centre. Perhaps in recognition of this fact, the 2010 Constitution delineates National Government and County Governments functions in its Fourth Schedule.<sup>228</sup> For instance, among other functions, counties are mandated to provide county transport, disaster management, and planning and development including land survey and mapping.<sup>229</sup> The National Government functions include foreign affairs, national security and the courts.<sup>230</sup>

### *The National Executive*

The national executive function is vested in a Cabinet.<sup>231</sup> The Cabinet comprises the President, Deputy President (DP), the Attorney-General and a minimum of 14 to a maximum of 22 Cabinet Secretaries (CSs).<sup>232</sup> It is a constitutional imperative that the National Executive reflects the regional and ethnic diversity of the people of Kenya.<sup>233</sup> The CSs are nominated and appointed by the President upon approval by the National Assembly.<sup>234</sup> A clear departure from the previous constitutional arrangement, and what is seen as an attempt to underscore the centrality of separation of powers and checks and balances, the 2010 Constitution is categorical that a CS cannot be a Member of Parliament.<sup>235</sup> The DP is the President's running mate in a General Election<sup>236</sup> and deputises the President in execution of the functions of the Office.<sup>237</sup>

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228 Constitution of Kenya (2010), Fourth Schedule.

229 Constitution of Kenya (2010), Fourth Schedule.

230 Constitution of Kenya (2010), Fourth Schedule.

231 Constitution of Kenya (2010), Article 130.

232 Constitution of Kenya (2010), Article 152(1).

233 Constitution of Kenya (2010), Article 130(2).

234 Constitution of Kenya (2010), Article 152(2).

235 Constitution of Kenya (2010), Article 152(3).

236 Constitution of Kenya (2010), Article 148(1)(2)(3).

237 Constitution of Kenya (2010), Article 147.

### *The President*

The President is the Head of State and Government and wields the executive authority of the Republic.<sup>238</sup> The President is responsible for directing and coordinating the functions of the ministries and government.<sup>239</sup> The specific functions of the President are clearly delineated under Article 132 of the 2010 Constitution. Not surprising given the history of the Kenyan nation, the President is expressly mandated to: 'promote and enhance the unity of the nation'; 'promote respect for the diversity of the people and communities of Kenya'; and 'ensure the protection of human rights and fundamental freedoms and the rule of law'.<sup>240</sup>

### *Parliament*

Parliament is the collective term for the National Assembly and the Senate, the two legislative chambers at the national level.<sup>241</sup> It is the legislative arm of the National Government. In what is a cautionary bulwark against usurpation of legislative authority and a gag to whimsical 'roadside declarations' of yester-years, the 2010 Constitution is categorical that only Parliament, to the exception of any other person or body has the authority 'to make provision having the force of law in Kenya' except under authority conferred under the 2010 Constitution or written law.<sup>242</sup>

The National Assembly comprises a total of 350 members: That is to say, 290 members representing single member constituencies; 47 women representatives one from each county; 12 members representing special interest groups (including the youth, PWDs and workers) and the

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238 Constitution of Kenya (2010), Article 131(1).

239 Constitution of Kenya (2010), Article 132(3)(b).

240 Constitution of Kenya (2010), Article 131(2).

241 Constitution of Kenya (2010), Article 93.

242 Constitution of Kenya (2010), Article 94(5).

Speaker who serves as an *ex officio member*. The 12 members representing special interest groups are nominated by political parties according to their proportional representation in the House.<sup>243</sup> The National Assembly represents the people of the constituencies, 'deliberates on and resolves issues of concern to the people', may originate any legislation<sup>244</sup> and 'exercises oversight over national revenue and its expenditure'.<sup>245</sup> The National Assembly is also mandated to oversight State organs and initiate the processes of removal of the President, DP and State Officers and approve declarations and extensions of states of emergency. None of the foregoing roles has elicited fiery controversy and pitted the National Assembly against its sister House -the Senate as much as the legislative and revenue allocation roles; which goes to the very root of devolution.

### *Senate*

Senate is composed of a total of 67 Senators excluding the Speaker. There are 47 members elected from each county; 16 women senators nominated by political parties according to their proportional representation in the Senate; two members representing the youth (one woman and one man); two members representing PWDs (one woman and one man) and the Speaker who is an *ex-officio member*.<sup>246</sup>

The Senate is tasked with representing counties, and protecting their interests as well as those of county governments.<sup>247</sup> In what appears to set the stage for a weakened Senate by design first then further amplified in the actual interpretation of the roles. Senate 'participates in the law-making function of Parliament' by debating and approving Bills concerning counties;<sup>248</sup> determines the allocation of national revenue among counties and exercises oversight over these allocations.<sup>249</sup>

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243 Constitution of Kenya (2010), Article 97.

244 Constitution of Kenya (2010), Article 109(2).

245 Constitution of Kenya (2010), Article 95(4).

246 Constitution of Kenya (2010), Article 98(1).

247 Constitution of Kenya (2010), Article 96(1).

248 Constitution of Kenya (2010), Article 96(2).

249 Constitution of Kenya (2010), Article 96(3).

Perhaps no governance institution under the 2010 Constitution has elicited as much controversy as the Senate. Since its (controversial) installation and subsequent removal from the Independence Constitution, to the pre-2010 constitution-making debates, to the 2010 Constitution, the hallmark of devolution, appears to be under siege perpetually from all quarters and in perpetual defence of its space - from the National Assembly, to the national and county executives. To its credit, the Judiciary has rescued the institution of Senate from functional obliteration severally.

### *County government*

There are 47 counties in Kenya.<sup>250</sup> There is a county government for each county, which consists of a county assembly and a county executive.<sup>251</sup> The county assembly is the legislative arm and the county executive acts as the executive arm.<sup>252</sup> Both institutions represent a departure from previous local governance mechanisms in that the county legislative and executive powers are not derived from the National Government but directly from the supreme law of the land, the 2010 Constitution, which secures the autonomy of the subnational governments. So jealously guarded is the devolved government structure under the 2010 Constitution that amendments to it have to be approved in a referendum.<sup>253</sup> Such anchoring was not in vain but a necessary safeguard recalling the lifespan of the regional structures of the Independence Constitution and the half-hearted embrace of devolution by a section of the politicians as discussed earlier.

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250 Constitution of Kenya (2010), Article 6(1); First Schedule.

251 Constitution of Kenya (2010), Article 176(1).

252 Constitution of Kenya (2010), Article 176.

253 Constitution of Kenya (2010), Article 255(i)(h).

### *County executive*

The executive authority of a county government is vested in a county executive committee (CEC). The CEC comprises the governor (elected one per county) and Deputy Governor, and any members appointed by the Governor with the approval of the County Assembly.<sup>254</sup> Such appointees should not exceed ten in number or more than a third of the members of county assemblies (MCAs).<sup>255</sup>

The governor is required to implement county plans and policies with the cooperation of the county assembly and to generally provide leadership in the county's development and governance.<sup>256</sup> The Council of Governors (CoGs) provides a forum for all the 47 governors to consult and cooperate on matters of common interest.<sup>257</sup>

### *County assemblies*

A county assembly is the legislative arm of every county. It is composed of elected MCAs representing each county ward; six special seat members nominated by political parties to represent marginalised groups and a top up formula to ensure the two-thirds gender rule and representation of members of marginalised groups, including PWDs and the youth, as prescribed by the County Government Act<sup>258</sup> and the Speaker.<sup>259</sup>

The county assembly is charged with making '[a]ny laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth

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254 Constitution of Kenya (2010), Article 179.

255 Constitution of Kenya (2010), Article 179(3).

256 Section 30, *County Governments Act*, 2012.

257 Section 19-23, *Intergovernmental Relations Act*, 2012

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Schedule'.<sup>260</sup> It may also approve plans and policies for the management of county resources, county infrastructure and institutions.<sup>261</sup>

Reading the 2010 Constitution with legislation such as the County Government Act, 2012, reveals that county assemblies have other oversight functions such as approving county budget and expenditure and vetting nominees for county offices.<sup>262</sup> County assemblies also have the power to oversight the County Executive by impeaching the Governor, although the Governor will stand removed only if Senate removes them following their impeachment.<sup>263</sup>

### *Constitutional commissions and independent offices*

Though not part of the devolved governance structures, **constitutional commissions and independent offices are a significant and unique feature of the 2010 Constitution. They are a critical part of the equation to secure devolution. Thus,** during the collection of views by the CKRC, many Kenyans saw constitutional commissions as mechanisms that would rid the country of past ills including 'corruption, discrimination, unfair treatment in access to employment, police brutality and harassment and human rights abuses'.<sup>264</sup>

Chapter 15 of the 2010 Constitution lists ten constitutional commissions<sup>265</sup> although the number comes to 12 given Parliament's subsequent restructuring of the Kenya National Human Rights

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260 Constitution of Kenya (2010), Article 185.

261 Constitution of Kenya (2010), Article 185.

262 County Governments Act, 2012 Section 9.

263 Constitution of Kenya (2010) Article 185, County Government Act, 2012, Section 33.

264 CKRC Final Report 323.

265 Article 248, Constitution of Kenya, 2010. The Repealed Constitution provided for only four constitutional commissions; that is, the Electoral Commission; the Parliamentary Service Commission; the Judicial Service Commission and the Public Service Commission. (CKRC Final Report p 320).

and Equality Commission into three independent commissions.<sup>266</sup> All the constitutional commissions have a common overarching mandate, to protect the sovereignty of the people, secure observance of democratic values and principles and promote constitutionalism.<sup>267</sup> Their independence is constitutionally guaranteed.<sup>268</sup> The underlying philosophy behind the creation of constitutional commissions, as elucidated by the Supreme Court, is to exercise oversight over the primary arms of government<sup>269</sup> and to act as the bulwarks for safeguarding the peoples' sovereignty.<sup>270</sup> Among the institutions involved in the promotion and protection of the rights of the marginalised groups are the National Gender and Equality Commission and the Kenya National Commission on Human Rights.<sup>271</sup>

*The faltering promise: Obstacles to a working devolution*

Since the first Government under the 2010 Constitution assumed office in 2013, devolution implementation has been checkered with power struggles. Similar to the defunct local authorities, the centre still appears keen to use its power of the public purse to control the affairs of county governments. In the ensuing discussion, it will be evident that

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266 Article 59(5)(c) Constitution of Kenya, 2010. The Kenya National Human Rights and Equality Commission was restructures into three independent constitutional commissions: Kenya National Commission on Human Rights; National Gender and Equality Commission and Commission on Administrative Justice (“the Ombudsman”). These

267 Constitution of Kenya (2010), Article 249(1).

268 Constitution of Kenya (2010), Article 249(2).

269 Ndung’u SCJ *In the Matter of the Speaker of the Senate & another* [2013] eKLR [2013] eKLR Supreme Court Advisory Reference 2 of 2013.

270 *In the Matter of the National Land Commission* [2015] eKLR; Advisory Opinion Reference No 2 of 2014) para 172.

271 The establishment and mandate of the constitutional Commissions is provided under Article 59 of the Constitution as read with the respective constitutive Acts i.e National Gender and Equality Commission Act,2011(No 15 of 2011) and the Kenya National Commission on Human Rights Act 2011(No 14 of 2011) respectively.

the unrelenting jostle to define and redefine the governance structures did not settle with the promulgation of the 2010 Constitution.

### *Challenges of transition*

The 2010 Constitution prescribes that Parliament will provide for the phased transfer of Article 185 functions from the National Government to the county governments over a period of not more than three years from the date of the first election of county assemblies.<sup>272</sup> To give effect to this provision, Parliament passed the Transition to Devolved Government Act, 2012 (Transition Act). The Transition Authority (TA) was established by the Transition Act to primarily facilitate the analysis and the phased transfer of the functions provided under the Fourth Schedule to the 2010 Constitution to the national and county governments.<sup>273</sup> It was tasked with evaluating whether counties were ready to assume certain functions. However, the Senate had the final say with regard to the transfer process.<sup>274</sup> Section 37(1) of the Transition Act provided that the TA would be dissolved either three years after the first post-constitutional elections or ‘upon the full transition to county governments’, whichever happened first. The TA formally became defunct in 2016 and its remaining duties were transferred to the Intergovernmental Relations Technical Committee, which was established under Intergovernmental Relations Act.<sup>275</sup>

During its tenure and at the time of its dissolution, the TA was not immune to challenges and controversies. For example, the TA encountered a lack of cooperation from the key offices that would

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272 Para 15, Sixth Schedule, Constitution of Kenya 2010.

273 Section 7, Transition to Devolved Government Act, 2012; Laban Wanambisi, ‘President Names Transition Authority’ *Capital FM*, 19 June 2012.

274 Section 23, Transition to Devolved Government Act, 2012;

275 Wangui Ngechu, ‘Transition Authority to vacate offices as term expires’ *Citizen*, 4 March 2016.

enable it execute its function.<sup>276</sup> In its 2014 report titled, *The progress of transition to the devolved system of governance*, the TA accused CSs of withholding information that would be crucial in transfer of assets and human resources to county governments.<sup>277</sup> But opposition was also not only from within government but also without the government. For instance, in *Republic v Transitional Authority and another, ExParte Medical Practitioners, Pharmacists and Dentist Union*<sup>278</sup>, the High Court dismissed an application by the Kenya Medical Practitioners and Dentist Union (KMPDU) who were opposed to the transfer of the health docket to county governments alleging that the transfer was unlawful for not observing public participation and that it would amount in loss of jobs and/or disadvantageous terms of work.

Incidentally, the TA was also under considerable scrutiny in 2013, over delay in the transfer of funds, functions and poor communication to the Attorney General to gazette the same.<sup>279</sup> Way before its dissolution, the TA faced controversial and political attempts and threats to disband it.<sup>280</sup> Its subsequent dissolution happened amid protests that it was yet to complete its mandate. For instance, it had yet to complete an evaluation and transfer of assets worth Ksh 43 billion.<sup>281</sup>

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276 Jeremiah Kiplang'at, 'Transition Authority faults ministers for withholding information', *Nation*, 14 December 2014.

277 See also case of Council of County Governors v Attorney General and 4 others, Judgment of the High Court (2015) eKLR.

278 *Republic v Transitional Authority and another, ExParte Medical Practitioners, Pharmacists and Dentist Union (KMPDU) and 2 others* Judgment of the High Court (2013) eKLR.

279 Daily Nation, 'Governors want functions transferred by Aug 10' 27 July 2013.

280 Roselyne Obala, 'CIC, governors want Transition Authority disbanded', *The Standard*, 2014.

281 Wangui Ngechu, 'Transition Authority to vacate offices as term expires', *Citizen*, 4 March, 2016.

*Usurpation of power: Turf wars*

Despite the demarcation of National Government and County Government functions, this has not been crisp and has triggered disquiet and disputes over resources and developmental roles. An important case in this regard is *The Institute for Social Accountability (TISA) and another v The National Assembly and three others*, where the High Court declared the CDF unconstitutional partially because it infringed upon county functions. The wording of the CDF Act indicated that CDF would be used for community-based projects and infrastructural developments in constituencies.<sup>282</sup> A similar case was that of *Council of Governors & 3 others v Senate & 53 others*<sup>283</sup> in which the High Court declared the County Governments (Amendment) Act 2014 unconstitutional for establishing county development boards (CDBs) in each of the 47 county governments. The composition of the CDBs included Senators MPs, MCAs, as well as members of the Executive operating within the counties. The CBDs were to be chaired by the Senator of the respective county. The High Court found such arrangements to run against the grain of a devolved government structure. The Court also found the composition and mandate of the CDBs violated the Constitution on three fundamental respects: a) the law compromised the oversight functions of the legislative organs over revenue allocated to the counties; b) it undermined devolution and c) the arrangement ran afoul the principle of separation of powers.<sup>284</sup> Courts have upheld this delineation of functions.<sup>285</sup> In *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others*, the High Court affirmed the County Government of Nairobi decision to raise parking fees arguing

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282 Section 3, Constituency Development Fund Act, 2013.

283 *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR

284 See *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR para 102, 103 & 105.

285 See generally Bosire Conrad, 'The emerging approach of Kenyan Courts to interpretation of national and county powers and functions' in Conrad Bosire and Wanjiru Gikonyo (eds), *Animating devolution in Kenya: The role of the judiciary in Kenya: Commentary and analysis on Kenya's emerging jurisprudence under the new*

that the County has such revenue-raising powers under the 2010 Constitution.<sup>286</sup>

Perhaps the most audacious National Government action yet at undermining devolution was the arbitrary transformation of Nairobi City County to Nairobi Metropolitan Services (NMS).<sup>287</sup> The NMS followed Executive Order No 1 of 2020, which paved way for President Uhuru Kenyatta and the then Nairobi Governor, Gideon Mbuvi Sonko, to agree to transfer some of the County services to the National Government under the administration of the NMS. Despite lack of legal backing, the Employment and Labour Relations Court vindicated the NMS on the grounds that it was created in good faith and would benefit the public.<sup>288</sup>

The 2010 Constitution provides that in the event of removal, the Governor is to be replaced by the Deputy Governor and in the event the Deputy's office is vacant or the Deputy cannot perform the gubernatorial functions, then the Speaker of the County Assembly is to step in until a gubernatorial election is held within 60 days of assumption of office.<sup>289</sup> However, in the curious case of the impeachment of the Nairobi Governor, Sonko, no such replacement procedure was followed.<sup>290</sup> At the time of his impeachment, Sonko had no deputy. The then Speaker, Benson Mutura, assumed office pending a gubernatorial election. However, Sonko sought to bar the gubernatorial election, and the High Court granted his request.<sup>291</sup> Thereafter, Anne Kananu was appointed as Deputy Governor and hurriedly sworn in as the Acting Governor, amid petitions challenging her appointment as Deputy Governor. Despite

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286 2014 eKLR.

287 Executive Order No 1 of 2020 (revised).

288 *Okiya Omtatah Okoiti v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others* (Interested Parties) Judgments of the Employment and Labour Relations Court (2020) eKLR.

289 Constitution of Kenya (2010, Article 182).

290 *Law Society of Kenya v Anne Kananu Mwenda & 5 others; I.E.B.C.* (Interested Party) Ruling of the High Court (2021) eKLR.

291 Nairobi High Court Petition No. E425 of 2020.

having no legal backing, the High Court in *Law Society of Kenya v Anne Kananu Mwenda* declined to quash the controversial replacement in a bid to avoid creating 'a constitutional crisis'.<sup>292</sup> The pattern of impeachments further shows that impeachments are as much political as they are legal. The case of Governor Martin Nyaga Wambora of Embu County is most outstanding for being the first governor to be ousted, having been impeached twice, and both times, he was reinstated by the courts. The case attracted as much political attention as it did legal chats and chants.<sup>293</sup>

*Power struggles: The 'big man' syndrome*

The well intentioned and sacred principle of checks and balances meant to check power abuses characteristic of the dark era has itself been subject of abuse and a cradle of conflicts within and across the devolution structures, threatening to halt County Governments' operations. Notably, the tension between Senate and County Governments, particularly in instances where Senate is required to 'check' County Governments as per its revenue oversight role, has manifested itself in the courts. In *International Legal Consultancy Group v Senate and another*, the most significant issue before the High Court was whether the Senate acted unconstitutionally by summoning the governors and the county executive members of finance.<sup>294</sup> The High Court observed that Senate was a key organ in implementing devolution as it represented the interests of counties and played a direct part in many matters affecting county governments. In this case, the High Court upheld Senate's power to summon *any person to appear before it for the purpose of giving evidence or providing information under Article 125 of the 2010 Constitution.*

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292 *Law Society of Kenya v Anne KananuMwenda & 5 others*; I.E.B.C. (Interested Party) (2021) eKLR.

293 See *Martin NyagaWambora v County Assembly of Embu & 37 others* Judgment of the Court of Appeal (2015) eKLR, *Justus Kariuki Mate & another v Martin NyagaWambora & another* Judgment of the Supreme Court (2017) eKLR.

294 2014 eKLR.

*The power to summon was however politicised and used as a show of might between the county chiefs and the Senate. The former often failed to honour summonses to appear before the latter under claims that this was a ploy to undermine the stature of the governors. The Senate on the other hand was adamant that county governors had to personally appear before the House to answer to questions on use of county funds. The House would turn away chief finance officers and CECs in charge of finance sent by the governors.<sup>295</sup> The chairperson of the Senate's Committee on Devolution, in what would betray the long-drawn 'war', is reported as having remarked as follows:<sup>296</sup>*

We have told the governors you can go to court, call for a referendum, hide in the forest, you can fly high or even run to your relatives but ultimately you must appear before the Senate to answer questions of accountability.

Impeachment processes was yet another arena that elicited heated battles between the Senate and governors on the one hand, and the governors and County Assemblies on the other. On the latter, many County Assemblies were accused of holding governors ransom and refusing to approve county development plans and budgets until their demands for trips and other allowances were met. One such case was that of Makueni County whereby MCAs failed to approve county budgets for the 2014/2015 financial year paralysing service delivery. The Governor, citing 'irreconcilable differences' and a section of residents petitioned for the suspension of the County Assembly in line with Article 192 of the 2010 Constitution and section 123 of the County Governments Act, 2012.<sup>297</sup>

As if the vertical turf wars are not enough, the Senate has also had to wrestle for relevance in the bicameral House particularly in matters

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295 Mukaindo, 'Kenya's Devolution Implementation'.

296 Kibor F 'Governors should appear before Senate, insist Kithure Kindiki and Kipchumba Murkomen', *The Standard*, 25 October 2014 cited in Mukaindo, 'Kenya's devolution implementation,' 40.

297 See Kenya Law, 'Petition for suspension of the Government of Makueni County' *Kenya Law Blog*, 29 April 2015; Francis Gachuri, 'Commission Report shows Makueni County headed for dissolution' *Citizen Digital*, 3 September 2015.

of law making and revenue allocations. In what could appear to be a deliberate move to emasculate the Senate, the National Assembly was severally accused of passing laws without seeking concurrence of the Senate as required by the Constitution and in some cases, 'sitting on' Senate Bills and failing to consider them, sometimes on the pretext that they were money bills, thus effectively 'killing' them. On 29 October 2020, the High Court in *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)*<sup>298</sup> nullified 23 Acts of Parliament enacted by the National Assembly without reference to and input of the Senate as required under Article 110(3) of the 2010 Constitution. Others were laws concerning county governments and which therefore required substantive consideration by the Senate pursuant to Articles 96, and 109 to 113 of the 2010 Constitution. In bypassing the Senate, 'the National Assembly's conduct [was] a threat to the devolution system of governance enshrined in [the] Constitution'.<sup>299</sup> Relying on the *Supreme Court Advisory Reference No 2 of 2013*,<sup>300</sup> **the High Court reaffirmed the role of the Senate in the legislative process and declared as unconstitutional the laws that the National Assembly passed without involving the Senate. The decision was partially upheld by the CoA in *Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others*.**<sup>301</sup>

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298 *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)* Judgment of the High Court (2020) eKLR, Petition 284 & 353 of 2019 (Consolidated).

299 *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others* Para19.

300 *In the Matter of the Speaker of the Senate & another*, Advisory Opinion Reference 2 of 2013, Advisory Opinion of the Supreme Court (2013) eKLR.

301 *Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others*, Civil Appeal E084 of 2021 [2021] KECA 282 (KLR) 19 November 2021 Judgment of the Court of Appeal, (2021) eKLR. In reversing the High Court decision to nullify the 23 Acts, the appellate court ruled that the concurrence process in article 110(3) only applied to all Bills concerning counties within the meaning of articles 109 to 114 of the Constitution. The Appellate Court

The ensuing bitter rivalry and supremacy wars between the two legislative chambers at the national level has seen the National Assembly threaten to disband the Senate.<sup>302</sup> Yet such a move would require an elaborate constitutional process including a referendum as contemplated under Article 255 of the 2010 Constitution.

When it comes to revenue allocations, the Senate has often felt edged out of the cake-sharing table, causing the House to seek the intervention of the highest court in the land. The Supreme Court has variously upheld the centrality of the Senate in the revenue sharing processes. One such matter was that of the *Speaker of the Senate and another v Attorney General and others*.<sup>303</sup> The matter arose out to the lack of involvement of the Senate in passing of the Division of Revenue Bill, 2013. In its majority analysis, the Supreme Court held that the Division of Revenue Bill, and revenue collected at the national level, is essential to the operations of county governments, as contemplated under the 2010 Constitution, and so it was a matter requiring Senate's legislative contribution. The then Chief Justice of Kenya, Willy Mutunga, explained that the relationship between the two parliamentary chambers should be reinforced by the principle that the more checks and balances the better for good governance.

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nonetheless declared the following Acts to be unconstitutional for failing to adhere to articles 96, 109, 110, 111, 112 and 113 of the Constitution: Equalization Fund Appropriation Act (No 3 of 2018), the Sacco Societies (Amendment) Act (No 16 of 2018) and amendments made to section 3 and 4 of the Kenya Medical Supplies Authority Act by the Health Laws (Amendment) Act (No of 5 of 2019). The Court of Appeal further upheld the High Court position that "any Bill or delegated legislation that provides for, or touches on, mandate or powers of Parliamentary Service Commission must be considered by the Senate" and further that Standing Order 121(2) of the National Assembly Standing Orders was unconstitutional for being inconsistent with articles 109(4) and 110 to 113 of the Constitution.

302 Julius Otieno and Moses Odhiambo, 'MPs threaten to abolish Senate as supremacy row deepens' *The Star*, 4 July 2019.

303 *Speaker of the Senate and another v Attorney General and others*, 2013 eKLR.

*Challenges in revenue-generation and sharing*

In what appears to be a throwback of the post-independent era wherein Central Government controlled local authorities through the power of the public purse, tensions persist post-2010 Constitution in the manner in which monies from the national kitty reach the devolved units.

The 2010 Constitution specifies that revenue raised nationally shall be divided between and among national and county governments on equitable terms.<sup>304</sup> A number of criteria are provided as to what should be taken into account to determine an equitable division. This includes the national interest, provisions as to public debt, the needs of the National Government, the needs of county governments, among others.<sup>305</sup> Additionally, the 'equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the National Government'.<sup>306</sup>

Delays in disbursement of the equitable share from national to County Governments has been one of the main complaints that has threatened to shut down county operations. In *Council of Governors & 47 others v Attorney General & 6 others* [2019] eKLR,<sup>307</sup> the Supreme Court was tasked to superintend over an impasse between the rivaling houses of Parliament over the passing of the 2019 Division of Revenue Bill. Notably, the impasse had taken three months (July 2019 to September 2019), which impacted on the county budget implementation cycles. Similarly, the disbursement to counties for the 2020/221 financial year was hampered following a stalemate at the Senate that lasted three months from July 2020 over the third basis for revenue allocation among county government. The opponents felt that the formula disfavoured marginalised counties and that about 19 counties, mostly

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304 Constitution of Kenya (2010), Article 202.

305 Constitution of Kenya (2010), Article 203.

306 Constitution of Kenya (2010), Article 203.

307 Advisory opinion reference no 2 of 2013.

those perceived as historically marginalised stood to lose. A mediation committee had to be set up to foster consensus-building. Consequently, the CoGs reported an impending shutdown of counties since they were yet to receive their equitable share of revenue by 17 September.<sup>308</sup>

The CoGs, on 14 June 2021, again protested non-disbursement of 102.6 billion for the 2020/21 financial year to the 47 counties with only two weeks to the end of the financial year. As a result of this, the CoGs threatened to shut down counties citing lack of funds to run operations.<sup>309</sup> The perennial delays in disbursement of funds to counties has had various repercussions including negative impact on service delivery, accumulated pending bills to suppliers, delays in implementation of development projects and under absorption of budgets thus interfering with the counties' work plans for the ensuing financial year.<sup>310</sup>

The matter of *Council of Governors and 47 others v Attorney General & 3 others*<sup>311</sup> involved an impasse between Senate and National Assembly over the equitable share of revenue between counties and the National Government after the National Assembly and Treasury departed from the Commission of Revenue Allocations' (CRA) recommendations for the Division of Revenue Bill.<sup>312</sup> The important *question before the Supreme Court was*: What happens when the National Assembly and Senate fail to agree on the Division of Revenue Bill thereby triggering an impasse? *The Supreme Court adopted a purposive interpretation, as Article 259 of the 2010 Constitution demands, to conclude that Article 222 also allows withdrawals*

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308 Kenya National Commission on Human Rights, 'An Alternative Report of The State Compliance On Obligations Under Article 132 (C) (I) & (Iii), Constitution of Kenya on Realization of Article 10' (2018-2020) citing Council of Governors, Press Statement on the Shutdown of County Governments 17th September 2020.

309 Julius Otieno, 'Governors threaten to shut down counties for lack of funds', *The Star*, 14 June 2021

310 Speech by H E Hon Martin Wambora, Chairman Council of Governors 'Council of Governors state of devolution address,' 7th July 2022.

311 *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* (2020) eKLR.

312 The CRA is constitutionally tasked with recommending appropriate provisions for the equitable share.

from the Consolidated Fund for the sake of county government business. The Supreme Court was mindful of the spirit of Article 222 and stated that the money to be withdrawn for county government business shall be 50% of the total equitable share allocated to the counties in the Division of Revenue Act in the preceding year. Where this amount exceeds the total equitable share proposed in the Division of Revenue Bill for the current financial year, the Supreme Court referred to Article 203 of the 2010 Constitution to conclude that the percentage to be withdrawn from the Consolidated Fund should not be less than 15% of all revenue collected by the National Government.

#### *Own-source revenue*

The situation is not made any better by the failure of County Governments to raise sufficient funding on their own, a situation that has been described as a significant danger for devolution due to the overreliance on national revenue sources.<sup>313</sup> This is a cause for alarm because, from the history explored earlier, the restriction of revenue sources was a way through which the Central Government controlled local governance. Another audit by the Government has showed that revenue collection was a major challenge with some counties collecting less than what the 'defunct local authorities, municipal and/or country councils used to collect when combined'.<sup>314</sup> While this may in part be due to the limited sources of revenue available to County Governments,<sup>315</sup> there has been a lack of urgency and strategy in revenue mobilisation initiatives.<sup>316</sup> Indeed, a more recent audit by the Controller of Budget

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313 Mueller Susanne, 'The devolution paradigm: theoretical critiques and the case of Kenya', *6 Conflict, Politics, and Human Rights in Africa*, 2019, 12.

314 Office of the Auditor General, *Report of the Working Group on the Socio-Economic Audit of the Constitution of Kenya*, 2010, September 2016, 28.

315 Steeves Jeffrey, 'Devolution in Kenya: Derailed or on track?', 53(4) *Commonwealth & Comparative Politics*, 2015, 461-462.

316 See generally Wanjiru R, 'Local revenue mobilization at the country level: Experiences and challenges' in Conference Proceedings No 2, *Swedish International*

confirms that, “under-performance in own-source revenue collection, low expenditure on development budget, high expenditure on personnel emoluments, and high level of pending bills”<sup>317</sup> remain key challenges affecting implementation in the counties.



Figure 1: Above Equitable Share Allocation to Counties for the FYs 2013/14 to 2021/22(Kshs. Billion). Source of data: Commission on Revenue Allocation, County Fact Sheets (2022) p 7.

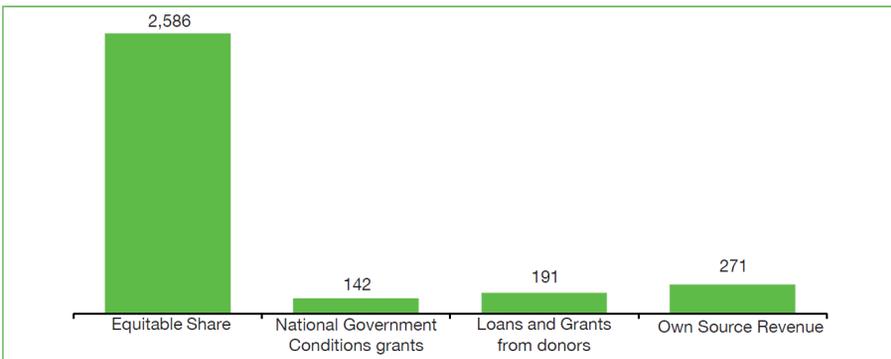


Figure 2: Figure showing total county revenues for the FYs 2013/14 to 2021/22(Kshs. Billion). Source of data: CRA County Fact Sheets (2022) page 7.

Centre for Local Development, Nairobi Safari Club, June 2014, 42-50.

317 Office of the Controller of Budget, ‘County Governments Budget Implementation Review Report For The First Half FY 2021/22’, February 2022, 429-431.

Notably, and as Figure 1 above indicates, the equitable share to county governments appears to have been increasing over the years. Worryingly though, Figure 2 reveals that own generated revenue forms a tiny fraction of county revenue streams, leaving the County Governments at the mercy of National Government disbursements.

Similar to the equitable share, the equalisation fund has also been flouted with delays and piece-meal disbursements, which has shrunk its intended impact. The equalisation fund is set up under Article 204 of the 2010 Constitution. It is meant to provide basic services to marginalised areas such as water, roads, health facilities and electricity to marginalised areas 'to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible'.<sup>318</sup> Thus, the Equalisation Fund aims to address

[h]istorical marginalisation in the country, accelerate development in the marginalised areas and ensure as far as possible those areas are at par with the rest of the country. It is intended to address the fair distribution of resources in order to bridge the gap of poverty in Kenya.<sup>319</sup>

Despite the express provisions of the law, the Equalisation Fund has not been without hiccups in its application. In the case of *Council of County Governors v Attorney General & 2 others* (above) the High Court in its decision of 5 November 2019 quashed the **Guidelines on the Administration of the Equalisation Fund published on 13 March 2015**<sup>320</sup> for being in contravention of the 2010 Constitution and the provisions of the Public Finance Management Act. The High Court made an important declaration that,

[t]he Equalisation Fund, being for the benefit of marginalised counties can only be disbursed by the National Government through the respective and

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318 Constitution of Kenya (2010), Article 204(2).

319 *Council of County Governors v Attorney General & 2 others*; Commission on Revenue Allocation & 15 others (Interested Parties) [2019] eKLR para 4.

320 Kenya Gazette Vol CXVII-No 26 as Gazette Notice No 1711.

affected county governments, and in accordance with the recommendations made by the CRA as approved by Parliament.<sup>321</sup>

The CRA identified the criteria to be used for classifying counties as marginalised. These include: legislated discrimination; geographical location; culture and lifestyles; external domination; land legislation and administration; minority recognition groups; ineffectual political participation; and inequitable government policies.<sup>322</sup> The CRA initially classified 14 counties under this category for the benefit of the fund: Garissa, Isiolo, Kilifi, Kwale, Lamu, Mandera, Marsabit, Narok, Samburu, Taita Taveta, Tana River, Turkana, Wajir and West Pokot.<sup>323</sup> It later included Baringo and Kitui, making the total number of counties 16.<sup>324</sup> However, there have been few hurdles with respect to the Fund including delays and piecemeal disbursements. Table 1 below shows the first distribution of the Equalisation Fund from Treasury. CRA's First Policy and Criteria for Sharing Revenue Among Marginalised Areas which lapsed in 2016/17 was replaced by the Second Policy whose duration runs up to 2020/21. By the time CRA concluded the Second Policy, Narok, Samburu, Taita Taveta, Turkana and Wajir, still had not commenced projects under the Equalisation Fund due to delayed allocations from Treasury.<sup>325</sup> The Public Service Commission identifies this delay as one of the main performance challenges for these counties, and recommended the Treasury to fast-track the disbursement of the funds.<sup>326</sup>

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321 *Council of County Governors v Attorney General & 2 others*, para 155.

322 Commission on Revenue Allocation, First Policy and Criteria for Sharing Revenue Among Marginalised Area, vii.

323 Commission on Revenue Allocation, First Policy and Criteria for Sharing Revenue Among Marginalised Area, viii.

324 Public Service Commission, 'Evaluation Report for the Year 2016/2017 on Public Service Compliance with the Values and Principles in Articles 10 and 232 of the Constitution', 57.

325 Commission on Revenue Allocation, Second Policy and Criteria for Sharing Revenue Among Marginalised Area, 3, 18 & 25.

326 PSC, 'Evaluation Report for the Year 2016/2017 on Public Service Compliance with the Values and Principles in Articles 10 and 232 of the Constitution', 58.

**Disbursement of Equalization Fund to marginalised counties<sup>327</sup>**

Marginalised county	Year of disbursement (2010/11-2016/17 FY)	Total allocations (Ksh) 2013/14-2015/16FY	Amount disbursed (Ksh)
Marsabit	2016/2017	886,200,000	16,000,000.00
Mandera	2016/2017	967,600,000	27,000,000.00
Garissa	2016/2017	783,500,000	167,816,106.00
Isiolo	2016/2017	746,900,000	66,600,000.00
Lamu	2016/2017	722,200,000	60,000,000.00
West Pokot	2016/2017	866,100,000	103,782,138.00
Tana River	2016/2017	859,000,000	15,000,000.00
Kilifi	2016/2017	763,500,000	5,750,000.00
Kwale	2016/2017	795,300,000	2,000,000.00
Taita Taveta	2016/2017	751,700,000	
Narok	2016/2017	809,500,000	
Wajir	2016/2017	929,800,000	
Turkana	2016/2017	1,050,200,000	
Samburu	2016/2017	869,700,000	
<b>TOTAL</b>		<b>11,801,200,000</b>	<b>481,948,244</b>

Thus, the issue of funding for the devolved units, both in quantity and manner/frequency and its management remains major concerns in the 2010 Constitution as was the case after independence, a situation that could hamper realisation of the promise of devolution at the local levels.

*Conclusion*

Kenya has toyed with variations of decentralised governance in the colonial and post-colonial periods. The entrenchment of regionalism (*majimbo*) in the Independence Constitution promised sharing of power. However, regionalism was killed at its infancy, unmasking the true intentions of the country's founding President Kenyatta and his allies setting the stage for rapid recentralisation in succeeding years. The

327 PSC, 'Evaluation Report for the Year 2016/2017 on Public Service Compliance with the Values and Principles in Articles 10 and 232 of the Constitution', 57.

demise of regionalism ushered in a calculated ploy to consolidate power at the centre incrementally through the provincial administration and local authorities resulting in highly centralised governance. The engendering of a one-party state (whether *de jure* or *de facto*) was an important facilitative piece of puzzle in the scheme of things.

Attempts to mitigate overly-centralised governance and spur local development were made through the various administrative and fiscal decentralisation efforts such as the DFRD and similar piecemeal reforms proved inadequate - too little, too late to bridge the widening rifts and quench the escalating demands for a meaningful revamp of the Kenya's governance structure.

Throughout Kenya's history, decentralisation has witnessed its fair share of controversy with growing intensity in the post-independence era. From the Lancaster Constitutional Conference to the Bomas Constitutional Conference and beyond, this chapter has traced a thread of resistance towards devolution by the powers of the day. The common denominator running through the chapter being the half-hearted acquiesces to devolved governance, to outright politics of resistance to shared power and proactive attempts by the ruling elite to claw back and consolidate power at the centre at the slightest opportunity. It is discernible that the form of decentralisation remained a hot potato throughout the constitution-making process. Taking into account the 'perks' that a centralised governance portended to the political cronies and the 'aligned' ethnic groups, decentralised governance would mean more accountability (read scrutiny), shared power and resources, a 'peril' that certain quarters were unwilling to entertain.

The waves of resistance continue to reverberate post-2010, in overt ways such as non-cooperation by the National Government officials to relinquish power to County Governments during the transition phase, outright calls to disband Senate, delays in disbursement of funds to the County Governments and denying the Senate involvement in relevant legislative and revenue sharing processes, and sometimes not so overt ways such as national development initiatives directed to counties but

with strings to the centre and insistence on retaining the provincial administration, all demonstrations of colonial relics. A glimpse at the history suggests that while the players may change, the tune remains intact. *A déjà vu.*

Whereas notable gains have been witnessed under the 2010 Constitution particularly for the marginalised groups through various affirmative action programs as will be elaborated in the subsequent chapter in more details, more remains to realise the objects of devolution etched in Article 174 of the 2010 Constitution. This is amidst constant threats to devolution – the ghosts of yester-years that constantly revisit, threatening to reel the country back to the dark days of imperial rule. With the foregoing, one would be justified to conclude that successful devolution is one that pervades the written paper on which it is articulated to the mindsets of the leaders, and more significantly, accompanied by what has PLO Lumumba has termed as (the lack of) ‘political hygiene’.



## CHAPTER 4

# Marginalisation in Kenya in historical perspective (1963-2021): The starts, false starts and the last promise

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*Lucianna Thuo and Caroline Kioko*

### Introduction

The African Peer Review Mechanism Country Review Mission (CRM) observed as follows in relation to marginalisation in Kenya:

There exists in Kenya an asymmetric exclusion of different social groups, i.e., various groups have been excluded for different reasons and face different structural problems. It is not appropriate to paint with very broad-brush strokes when designing appropriate intervention or advocacy measures for affected populations. The major problem for disadvantaged groups seems to be the inadequacy of government resources required to bolster service delivery efforts. The inequitable allocation of resources to certain areas and sectors of society has also spawned systemic marginalisation and discrimination, which affects vulnerable groups disproportionately. Affirmative action is more appropriate for those groups that require the removal of structural barriers and the strengthening of policy tools and development inputs for those whose problems stem from inaccessibility of resources and infrastructure.<sup>1</sup>

In carrying out its work, the Truth, Justice and Reconciliation Commission (TJRC) noted that while it was mandated to look into economic marginalisation, the term 'marginalisation' was not defined.

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1 African Peer Review Mechanism (APRM), *Country review report of the Republic of Kenya, 2014*, 14.

Therefore, it adopted the following definition of marginalisation:

Marginalisation is the social process of becoming or being made marginal (especially as a group within the larger society). 'Marginality' is seen in two dimensions: societal and spatial. While spatial marginality relates to geography – existence at the fringes, or at a distance from the centre – societal marginality 'focuses on human dimensions such as demography, religion, culture, social structure (e.g. caste, hierarchy, class, ethnicity, and gender), economics and politics in connection with access to resources by individuals and groups.'<sup>2</sup>

This chapter adopts the Commission for Revenue Allocation (CRA) definition of marginalisation, which states as follows:

Marginalisation is a multifaceted condition in which a group, a community or an area is excluded from active participation in economic, social, and political affairs. In the case of groups or communities, marginalised individuals do not usually have access to a wide range of basic services such as food, water, health care, energy, education, and security. They also have limited political participation.<sup>3</sup>

As will be seen in the ensuing discussion, marginalisation in Kenya is attributed to a combination of colonial policies, post-colonial government exclusionary policies<sup>4</sup> and the privileging of ethnicity in political and economic power struggles. In its approach, the CRA identified, *inter alia*, the following factors as having fuelled marginalisation in Kenya: 'legislated discrimination, geographical factors, culture and lifestyles, domination by non-indigenous people, land legislation and administration, non-recognition of minority groups, ineffective political participation, and inequitable government policies'.<sup>5</sup>

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2 Truth, Justice and Reconciliation Commission Report, (2013) Vol IIB, 12 citing G Gurung and M Kollmair 'Marginality: Concepts and their limitations' IP6 Working Paper No 4 (2005).

3 Commission for Revenue Allocation 'Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund' 2013, 7.

4 See 'African socialism and its application to planning in Kenya' *Sessional Paper No 10 (1965)*.

5 CRA 'Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund' 2013, 7.

This chapter reviews the history of marginalisation in Kenya, its causes, and the constitutional, legislative and policy attempts to bridge the gap between the privileged and those on the margins. It does so by assessing the factors that led to marginalisation from the colonial era and post-independence era and how the constitutional review process grappled with addressing historical marginalisation and injustices. The chapter also identifies the various groups categorised during the constitution-making process as needing remedial measures to bring them to the same level as those who have enjoyed the provision of basic services from the National Government without discrimination. It focuses on women, youth and persons with disabilities.

It argues that Kenya's story of marginalisation has its antecedents in the colonial era but that these facets of marginalisation did not end with colonialism. Rather, the culture of exclusion merely changed form, spurred by ethnicity and class rather than race. The flame lit by the promise of decentralisation as a panacea for domination by dominant ethnic groups was quickly extinguished in the post-independence state before the inclusion process had a chance to start. While attempts were later made to redress this culture of exclusion, pre-2010 attempts at inclusion were false starts and did not have a lasting impact on reducing marginalisation. Finally, adopting the devolved government structure in the 2010 Constitution heralded another promise of inclusion. One of the objects of devolution is protecting and promoting the rights and interests of minorities and marginalised communities.

This chapter concludes by exploring this promise of devolution to evaluate the effectiveness of constitutional and policy measures aimed at redressing political, social and economic exclusion. It reaches the conclusion that whereas an evaluation of the first decade of devolution reveals a mixed bag of results, the promise of the 2010 Constitution still holds, and gains made in the first ten years of implementation can be consolidated in successive cycles to make the promise a lasting one.

## A history of marginalisation

The start of segregated development in Kenya can be traced back to the introduction of colonial rule. The British Government declared a protectorate over Kenya in 1895, and Kenya was developed into the Colony and Protectorate in 1920. The mode of rulership adopted by the colonisers was indirect rule or, as Mamdani refers to it, 'decentralised despotism'. It served as a state-supported separation of rural and urban populations and ethnicities and incorporated the native populations into a state-enforced customary order.<sup>6</sup> Mahmood Mamdani asserts that there was no difference between *apartheid* as it was applied in South Africa and colonial rule as it was applied in other colonies.<sup>7</sup> To effectively rule, the colonial government had to formulate separate institutions for Europeans and Africans. This differentiation led to the creation of institutions, referred to as native authorities, through which to rule the subjects.

Mamdani further asserts that these institutions were ethnic or tribal, which resulted in a situation of 'racial dualism' whose anchor was in a 'politically enforced ethnic pluralism'.<sup>8</sup> The presence of two sets of laws: received law for citizens and customary law to govern personal relations of the native population, according to Mamdani, 'signified a mediated – decentralised – despotism',<sup>9</sup> a system that deprived the majority native population of its rights as citizens by treating them as 'uncivilised' and therefore unworthy of the privileges of citizenship.<sup>10</sup> Rights were the preserve of citizens under direct rule, not of subjects under customarily structured native (read tribal) authority. However, the working and middle-class native populations living in urban areas were exempt from customary law and civil law applied to the settlers,

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6 Mahmood Mamdani *Citizen and subject* Princeton University Press, Princeton, 1996, 8.

7 Mamdani *Citizen and subject* 8.

8 Mamdani *Citizen and subject* 7.

9 Mamdani *Citizen and subject* 17.

10 Mamdani *Citizen and subject* 17.

causing them to exist in a 'juridical limbo'.<sup>11</sup> Nevertheless, even the African traditions were also not homogenous, and customary law was not a standard law for all Africans as there were as many customary laws as there were tribes.<sup>12</sup> Colonialism was thus a system of racial domination 'mediated through a variety of ethnically organised local powers'.<sup>13</sup> Local authorities were crucial in maintaining control of the natives, and native authorities were organised along ethnic (or tribal) or religious lines.<sup>14</sup> As such, ethnic leadership was either selectively reconstituted as an institution accountable to the local state or imposed by the colonial state where none existed.<sup>15</sup>

From an administrative standpoint, indirect rule had been introduced as a means of using compliant traditional leaders to get the African population to tow the colonial line and 'thereby broaden its social base'.<sup>16</sup> A lot of power was exercised by native authorities or local councils, which had directly elected members but were coordinated by a district commissioner appointed by the Colonial Government. Nevertheless, Dominic Burbidge notes that there was 'something of a more participatory history to local government where the "unintegrated, prefectorial system" of Britain's indirect rule had native authorities decide on a great deal of social issues locally as well as arbitrate over civil disputes'.<sup>17</sup>

In Kenya, the colonial system was responsible for discriminatory development. The primary goal of the segregated development was to

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11 Mamdani *Citizen and subject* 19.

12 Mamdani *Citizen and subject* 22.

13 Mamdani *Citizen and subject* 8.

14 Mamdani *Citizen and subject* 24.

15 Mamdani *Citizen and subject* 22. Berman also asserts that in Kenya chiefs were created where none existed. See B Berman, *Control and crisis in colonial Kenya: The dialectic of domination* James Currey London 1990.

16 Mamdani *Citizen and Subject* 102.

17 Dominic Burbidge *An experiment in devolution: National unity and the deconstruction of the Kenyan state* Strathmore University Press, Nairobi 2019, 9-10, citing KJ Davey, 'Local bureaucrats and politicians in East Africa' 10(4) *Journal of Administration Overseas* (1971) 268-279, 268.

prioritise the interests of the white minority over those of the African majority. On the one hand, the State regulated the rights-bearing racially-defined citizenry; on the other, it was a 'regime of extra-economic coercion and administratively driven justice'.<sup>18</sup> The Colonial Government exercised economic and political dominance over the state, centralising power on the governor. He exercised control over the Judiciary and the Legislature, supported by a powerful provincial administration.<sup>19</sup>

However, following the world wars and the capacity of nationalist movements to unite rural and urban populations against colonial rule, indirect rule was compelled by the increased tension between the settlers and native population to change forms to factor in opposition both to colonial rule broadly, but also to the powers of Native Authority chiefs.<sup>20</sup> The independence struggle was informed by the need to redress issues of forced labour, communal punishment, extrajudicial killings of opponents of colonial rule, detention without trial, and the grabbing of African land for white settlement, among other violations. As a result of increased hostilities between the British and the Mau Mau between 1952 and 1960, there were centralised interventions, particularly in the districts north of Nairobi, done with the aim of reasserting colonial authority. With detention camps set up to address illegal movement between districts and torture of suspected dissidents,<sup>21</sup> this period demonstrated how a centralised Kenyan state could quickly shift from tolerance for local diversities to unilateral enforcement of administrative policies, ostensibly as a means of enforcement of law and order.<sup>22</sup> As will be seen in subsequent sections of this chapter, this same *modus operandi*

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18 Mamdani *Citizen and subject* 19.

19 Republic of Kenya, Final Report of the Task Force on Devolved Government (2011) 12.

20 Mamdani *Citizen and subject* 103.

21 DM Anderson, *Histories of the hanged: Britain's dirty war in Kenya and the end of empire* Phoenix, London 2005 cited in Burbidge, *An experiment in devolution* 10.

22 Burbidge, *An experiment in devolution* 10.

was adopted by successive post-colonial governments to repress dissent and centralise power in the presidency.

The colonial era was characterised by historical and legislative discrimination. Marginalisation was occasioned by legislative discrimination, land legislation and administration, inequitable government policies, geographical factors, religion, and ineffective political participation. By the end of the period, marginalisation had occurred along class, racial lines, and along ethnic lines.

The following section examines how the story of marginalisation evolved in the post-independence State. It makes the argument that while the bifurcated state was deracialised at independence, it was not democratised, with the effect that marginalisation never ended; it merely changed forms. The section expounds on how land, political and economic participation, regional disparities, religion, and education occasioned marginalisation.

### *Land and marginalisation*

Under colonial rule, land was considered a communal possession, with customary access defined by State-appointed customary authorities.<sup>23</sup> Because the colonial state was organised differently in rural and urban areas, Mamdani referred to it as a 'bifurcated state'.<sup>24</sup> The colonial economy was also organised along racial lines and with the aim of exploiting the African population for the benefit of the colonial state. Such feat was achieved through legislation such as the Indian Land Acquisition Ordinance of 1894 (which facilitated the compulsory acquisition of land for construction of the railway), the Crown Lands Ordinances of 1912 and 1915 and the Kenya Native Areas Ordinance of 1926 whose aim was to reallocate productive land from Africans to white settlers. The effect of the ordinances was to declare all land as

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23 Mamdani *Citizen and subject* 22.

24 Mamdani *Citizen and subject* 18.

belonging to the colonial state, with the impact that customary land rights were extinguished, and individual freehold titles introduced as a means of land ownership.<sup>25</sup>

For the Maasai, the Anglo-Maasai Agreement of 1904 saw the loss of Maasai land to the Colonial Government and their subsequent displacement from Suswa, Ol Kalou, and Ol Jororok to Laikipia and the 1911 Agreement resulted in a subsequent displacement to Narok and Kajiado. Attempts to challenge these agreements in court in 1913 were unsuccessful.<sup>26</sup> The creation of chiefs where none had previously existed also impacted the creation of territorial boundaries.<sup>27</sup> Successive land regimes during the colonial period, for instance, the Swynnerton Plan 1954 and the Native Land Registration Ordinance of 1959, all promoted farming along the lines established by the Europeans and confined Africans to fortified villages to contain the Mau Mau rebellion particularly in Central Kenya. This was concretised by adopting the Registered Land Act in 1963, which created absolute land ownership and extinguished the rights of third parties, including those emanating from customary law, such as women's rights to use and access land.<sup>28</sup>

The result was the relegation of Africans to African reserves, which provided the settlers with cheap labour for settler farms obtained coercively through legislation and the taxation system. In some instances, communities were brought into settlement areas where they were not indigenous to work the farms. These communities, such as the Luhya in regions occupied by the Taita, displaced indigenous communities. It was argued that this was a more sustainable source of labour as they did not have to go back to their homes frequently.<sup>29</sup> The Colonial

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25 HWO Okoth-Ogendo, 'Some issues of theory in the study of tenure relations in African agriculture' 59(1) *Africa: Journal of the International African Institute* (1989) 1-16.

26 Githinji, 'Colonial practices and land injustices in Kenya' *Afrocave* 1 January 2021.

27 Berman, *Control and crisis in colonial Kenya*.

28 Philip Onguny and Taylor Gillies 'Land conflict in Kenya: A comprehensive overview of literature' 53 *The East African Review* (2019).

29 Githinji, 'Colonial practices and land injustices in Kenya' *Afrocave* 1 January 2021.

Government also acknowledged that many indigenous communities had rights in the coastal strip before the 1895 Agreement between the British Government and the Sultan of Zanzibar. Still, it maintained that the occupation of the land by such groups was not disturbed by the Agreement and that the Land Titles Ordinance recognised individual freehold titles to such land.<sup>30</sup> These land occupations to the detriment of indigenous populations are considered the precursor to the persistent squatter problem in the country.<sup>31</sup>

In the post-independence era, the distribution of land taken from the outgoing settlers using funding from the UK Government, the World Bank and Colonial Development Fund, intended to settle African families in the 1960s, was transferred to smallholders and other wealthy Africans, members of the Kenyan elite.<sup>32</sup> This resulted in a land policy based on class rather than race.<sup>33</sup> At the coast, Mazrui Arabs claimed ownership of the 10-mile coastal strip without reference to the rights of indigenous communities that had lived there before the Arabs took the land in the 19<sup>th</sup> Century.<sup>34</sup> Despite the sharp economic growth witnessed within the decade of independence, with an annual GDP rise of 6% per year in the 1960s and 6.5% in the 1970s, there was a wide disparity between the (often) urban rich and rural poor. The land transfer did not alleviate rural poverty as most of the population packed into less than 20% of Kenya's arable land.<sup>35</sup>

Former Mau Mau leader Bildad Kaggia began to agitate for land redistribution to the landless and ex-Mau Mau fighters rather than

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30 'Land tenure and control outside the native lands' Sessional Paper No 10 of 1958/9, 1.

31 Final Report of the Task Force on Devolved Government (2011) 11.

32 Martin Meredith, *The state of Africa: A history of the continent since independence* (3<sup>rd</sup> edition) Simon & Schuster, London, 2011, 265.

33 BA Ogot, 'The decisive years: 1956-63' in BA Ogot, and William Ochieng' (eds) *Decolonization and independence in Kenya 1940-1993* East African Educational Publishers, 1995, Nairobi, 64, cited in FES *Regional disparities and marginalization in Kenya*, 2012, 6.

34 Githinji, 'Colonial practices and land injustices in Kenya' *Afrocave* 1 January 2021.

35 Meredith, *The state of Africa* 266.

allowing land to pass into the new class of African landholders who were replacing the white settlers.<sup>36</sup> Jaramogi Oginga Odinga also advocated for free distribution of white-owned land, a programme of nationalisation of foreign-owned enterprises, and a shift in policy from close alliances with the West in favour of new ties with the East. The response of President Kenyatta was to portray opposition to his Government as subversive and tribalistic.<sup>37</sup> Odinga's opposition party, the Kenya People's Union (KPU), was banned, he was placed under house arrest.<sup>38</sup> JM Kariuki, who also took on a role as the champion of the poor, called for 'a complete overhaul of existing social, economic and political systems in Kenya' on the basis that 'a small but powerful group of greedy, self-seeking elite in the form of politicians, civil servants and businessmen had steadily but very surely monopolised the fruits of independence to the exclusion of the majority of our people'.<sup>39</sup> His killing in 1975 is considered to have removed the threat that he posed to the elite and inner circle of the Kenyatta Government, to whom he was assumed to be targeting his criticism.

### *Political participation and marginalisation*

The colonial era in Kenya was characterised by the politics of exclusion. Representation was based on race, with the minority white population dominating political and public life until independence. Between 1920 and 1931, only the white settler population and Arabs were directly represented in the Legislative Council.<sup>40</sup> Africans did not have

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36 Meredith, *The state of Africa* 266.

37 Meredith, *The state of Africa*, 266-267.

38 'Kenya: 1963-present' <<https://uca.edu/politicalscience/dadm-project/sub-saharan-africa-region/kenya-1963-present/>> accessed 27 July 2022. Githu Muigai, *Power, politics and law*, 202, 224-6.

39 Meredith, *The state of Africa*, 267-268.

40 Indians were allowed to have representation in 1924 but protested the lack of equality with the white population and therefore did not take up their two seats until 1931. See Parliament of Kenya, 'Historical background' <http://www.parliament.kenya/>

seats in the Legislative Council; their representatives were nominated by the Colonial Government.<sup>41</sup> The Kenya African Study Union (KASU) was formed to provide a forum for the views of the educated Africans to be expressed and the representative of Africans in Parliament could consult them. This party was renamed the Kenya African Union (KAU) in 1946.

KAU attempted to use lawful means to increase the share of Africans in the Government.<sup>42</sup> However, KAU did not have much success in pressing for representation of Africans by Africans in the Legislative Council. Extremism began to take root at the end of World War II and extremist groups sought to gain by violent means what they thought the politicians were not gaining by political means.<sup>43</sup> Violent attacks on European settlers led to a declaration of a state of emergency in 1952. The state of emergency prompted constitutional reform. Moreover, following the ban of KAU in 1952, Africans were not allowed to form national political parties, which created a vacuum in their political life. The restriction was lightened in 1955 to permit Africans to only form political parties along 'district lines' (with the exception of Central Province) and shifted political activity to transfer of power.<sup>44</sup> In 1954 the Lyttleton Constitution made an attempt at reorganising the

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[go.ke/Parliament\\_Historical\\_Background](https://www.go.ke/Parliament_Historical_Background) accessed 27 July 2022.

- 41 John William Arthur was nominated in this capacity between 1924 and 1926; Eliud Mathu was nominated in 1944 and was joined by BA Ohanga in 1946, Walter Odede in 1947 and Jeremiah Nyaga in 1948. Other nominees before 1957 when elections were allowed were WWW Awori, Jimmy Jeremiah, FK arap Chumah, James Muimi and Daniel arap Moi.
- 42 GS Were and DA Wilson *East Africa through a thousand years: AD 1000 to the present day* 2<sup>nd</sup> edition, Evans Brothers, 1972, 298.
- 43 Were & Wilson *East Africa through a thousand years*, 297.
- 44 HWO Okoth-Ogendo 'The politics of constitutional change in Kenya since independence, 1963-69' *African Affairs* (1972) 9, 11. This ban was eventually lifted in 1960, but not before cementing ethnic mobilisation as part of Kenya's political party culture, a phenomenon that continues to beset entrenchment of democratic culture within political parties to date. See also Committee of Eminent Persons 'Report of the Committee of Eminent Persons on the Constitution Review Process' (2006) 10.

racial structure in the government. This reorganisation was through reforms such as the inclusion of one African in the Council of Ministers, appointment of two Africans in the undersecretary office, of significance was the provision of .... elected African members of the Legislative Council.

The number of elected African representatives was increased from eight to fourteen in 1958 through the Lennox-Boyd Constitution.<sup>45</sup> Provision was also made for 12 Specially Elected Members – four from each racial group – to be chosen by the Legislative Council. While these seats were initially rejected by the Africans, they were accepted as a compromise during the Lancaster Conference since they were assured of a majority in the Legislative Council.<sup>46</sup>

Since the electoral process did not allow Africans direct representation until the 1940s, and excluded them from participating in elections until 1957, political rights were not recognised and neither was the principle of universal suffrage founded on the aspiration for fair representation and equality of the vote. The pre-independence era saw progress from complete exclusion of the majority to tokenistic representation and finally concession to full participation at independence.

However, by 1960, African political activities could no longer be contained. The Africans had not only earned the right to form political parties; they had developed significant political differences sufficient to support two major ideology-based political parties. During negotiations for the Independence Constitution, there was a split between the two dominant political parties. The Kenya African National Union (KANU) was considered too 'radical', 'town-centred' and 'Kikuyu and Luo dominated' by the group representing the Kalenjin, Maasai, Northern Nyanza and coastal populations, which formed the Kenya African Democratic Union (KADU). The latter group

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45 Were & Wilson *East Africa through a thousand years* 301.

46 Were and Wilson *East Africa through a thousand years* 303.

pressed for a federal constitution to counter the former's economic, political and educational dominance, which represented the dominant ethnic groups.<sup>47</sup> KANU made a concession to accept decentralisation to expedite the independence process, with the intention of revisiting this structure once independence was obtained.<sup>48</sup> However, Jomo Kenyatta disparaged calls for local government and economic redistribution as 'self-interested, ethnic-based demands',<sup>49</sup> calling *majimbo* unworkable and inviting opposition members to join the KANU Government to form a government 'of national unity'.<sup>50</sup>

The Independence Constitution provided for extensive decentralisation, creating eight regional assemblies led by governors to align with the eight provinces. It gave these regions considerable autonomy, which was aimed at allowing citizen participation in government processes, and the Senate existed to safeguard them.<sup>51</sup> The regional governments enjoyed financial and taxation powers, which reduced their dependence on the Central Government.<sup>52</sup> As will be seen in the ensuing discussion, the amendments to the Independence Constitution had both political and economic ramifications, ultimately affecting how development occurred in the country.

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47 Were and Wilson *East Africa through a thousand years*, 303; D Anderson, 'Yours in struggle for Majimbo: Nationalism and the party politics of decolonisation in Kenya, 1955-64' 40(3) *Journal of Contemporary History* (2005) 547, 552. Burbidge, citing the KADU manifesto, asserts that despite this push for majimboism, KADU was not insensitive to the need for national unity and in fact advocated for *majimboism* in the quest for national unity; it was only when people had control of the matters which were vital to them that they would be willing to cooperate in the pursuit of national interest, resulting in a spirit of national identity. Burbidge, *An experiment in devolution*, 80.

48 Gabrielle Lynch, *I say to you: Ethnic politics and the Kalenjin in Kenya* University of Chicago Press, Chicago 2011, 67, cited in Nic Cheeseman, Gabrielle Lynch and Justin Willis 'Decentralization in Kenya: The governance of governors' 54(1) *The Journal of Modern African Studies* (2016), 1-35, 7.

49 Burbidge, *An experiment in devolution* 20.

50 D Anderson, 'Yours in struggle for Majimbo' 561.

51 Robert Mudida, 'The erosion of constitutionalism and underdevelopment: The Kenyan experience' 35-40 *Eastern African Law Review* (Dec 2009) 1-23, 6.

52 Mudida, 'The erosion of constitutionalism and underdevelopment' 7.

Within a year of independence, there was a shift from party pluralism to a single-party regime following the merger of the two main political parties – KANU and KADU – in what was touted as a means to enhance the unity among the ethnically fragmented young nation.<sup>53</sup> The next few years (between 1963 and 1969) were characterised by preoccupation with ‘political survival, public participation and succession to the presidency’, and dismantling regionalism was critical to allowing the monopolisation of political power.<sup>54</sup>

Decentralisation was eliminated with before it had a chance to become operational,<sup>55</sup> with the executive powers of regional assemblies transferred to the national level and centralisation of public service and central administration of all land, except trust land.<sup>56</sup> Authority over issues of education, agriculture, health, economic and social development and land was transferred to the Central Government.<sup>57</sup> Some of the arguments in favour of centralisation included that *majimbo* was too expensive to implement, would result in national disintegration and

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53 Isaiah Oduor Otieno ‘Dynamics in party politics in Kenya, 1963-2013: Beyond the neoliberal paradigm’ PhD Thesis, Kenyatta University 2016, 95-96. Oduor notes that there were other reasons for this merger, including intimidation by President Kenyatta and clientelism, with former KADU leaders being awarded cabinet positions after the merger.

54 HWO Okoth-Ogendo ‘The politics of constitutional change in Kenya since independence, 1963-69’ *African Affairs* (1972) 9, 21; Isaiah Oduor Otieno ‘Dynamics in party politics in Kenya, 1963-2013’ 95. It is reported by Okoth-Ogendo that KANU officials had asserted during independence negotiations that the Independence Constitution was negotiated to transition to self-government and would therefore be altered; regionalism was also considered unsuitable, due to its ethnocentric character, for addressing certain critical issues such as security as highlighted by the failure of KANU to secure at first vote KADU support for a declaration of emergency in the Northern Frontier District in December 1963. The dismantling of regionalism was effected through a series of constitutional amendments between 1964 and 1965 which reduced regional governments to merely nominal entities. These amendments had the effect of vesting legislative and executive competence squarely in the central government.

55 Burbidge, *An experiment in devolution* 10.

56 Burbidge, *An experiment in devolution* 10.

57 Mudida, ‘The erosion of constitutionalism and underdevelopment’ 7.

that development was unlikely to occur without strong centralisation to mediate interregional conflicts for resources.<sup>58</sup> Others included the argument that central planning led to more rapid development and that the rapid growth of local service demands in the 1960s created financial pressures and performance issues that justified more significant central intervention.<sup>59</sup>

Africanisation as a policy for redressing racial exclusion in the post-independence state saw initial success in dismantling racial privilege. This was because the majority of the population, who saw themselves as victims of colonial racism, were united in this quest for Africanisation.<sup>60</sup> However, the second process of Africanisation – the redistribution of resources – created fault-lines along regional, religious, ethnic and familial lines. It is argued that this process restored an urban-rural link in the bifurcation process, which allowed the middle class to strengthen and replicate their leadership.<sup>61</sup> Thus, the distribution of economic benefits expected to occur through regional governments and other measures was curtailed by the application of the Africanisation policy in a manner that saw businesses transfer to the African elite and their cronies.<sup>62</sup> However, the creation of these elites was compounded by the economic disparities between the regions. It was not long before disquiet began to mount concerning the redistribution of land and foreign-owned enterprises.

Furthermore, in 1966, through an amendment to the Independence Constitution, the then bicameral Parliament consisting of the Senate and

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58 Mudida, 'The erosion of constitutionalism and underdevelopment' 7.

59 P Smoke 'Local governments in fiscal reform in developing countries: Lessons from Kenya' 21(6) *World Development* (1993) 901-923, 902.

60 This was true, not only of Kenya but across the continent. See Mamdani, *Citizen and subject* 20.

61 Mamdani, *Citizen and subject* 20. Again, this trend is common across the African post-colonial experience.

62 According to Meredith, the share of African companies formed in Kenya after independence rose from 19% in 1964 to 46% in 1973. See Meredith, *The state of Africa* 265.

the House of Representatives merged to form the National Assembly.<sup>63</sup> With Senate and regional governments abolished, the seeds of a highly centralised and unaccountable executive were planted.<sup>64</sup> The central command and control system that had begun with colonialism was carried forward by the African elite, who exercised unlimited power over the State and its resources through monopolisation and centralisation. HWO Okoth-Ogendo asserts that the post-independence constitutional order was characterised by its labyrinthine bureaucracy and coercive orientation, the two pillars on which the constitutional administration and policy had rested.<sup>65</sup>

Moreover, in 1966, the President appointed the Local Government Commission of Inquiry to study the future of local authorities with a view to strengthening them. While the Government, in Sessional Paper No 12 of 1967,<sup>66</sup> accepted the Local Government Commission's recommendations, these recommendations were disregarded by Parliament, and the Transfer of Functions Act passed a few years later instead. With the Transfer of Functions Act of 1969, most of the grants provided to local authorities for local revenue collection and provision of public services were transferred to the provincial administration and Central Government instead,<sup>67</sup> making local authorities dependent on the Central Government and subsuming their power under provincial commissioners who directly reported to the President.<sup>68</sup>

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63 Constitution of Kenya (Amendment) (No 4) Act No 40 of 1966.

64 Isaack Oduor 'Kenya's quest for a new constitution: The key constitutional moments' *Polity* (Institute for Security Studies) 29 July 2010.

65 HWO Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African political paradox' in Issa G Shivji, (ed) *State and constitutionalism: An African debate on democracy*, in Southern African Political Economy Series. *SAPES Trust, Harare* 1, 4.

66 Sessional Paper No 12 of 1967 on Proposed Action by the Government of Kenya on the Report of the Local Government Commission of Inquiry.

67 P Smoke 'Local governments in fiscal reform in developing countries: Lessons from Kenya' 21(6) *World Development* (1993) 901-923, 902.

68 Burbidge *An experiment in devolution* 10-11.

Following the ascension to the presidency of President Moi in 1978, the leading ethno-regional associations, particularly those of the Abaluhya, Luo and the Gikuyu, Embu, Meru Association (GEMA), were proscribed. GEMA was particularly targeted to destroy the socio-political influence that the Kikuyu had.<sup>69</sup> Key posts in government were handed to Kalenjin members, and state power was used to undermine the patronage networks of the Kikuyu elite established during the Kenyatta regime and to cripple the business interests of those considered to be opposed to him.<sup>70</sup> A new group of loyalists was created, and ironically, this included Kikuyu senior politicians who were neither influential during the Kenyatta regime nor enjoyed wide support within their community. Other ethnic groups, such as the Luhya and Luo, were also brought into the political fold and appointed to influential positions and the Cabinet. However, the co-opting of elites from different communities did not, in the broader sense, translate into the economic inclusion of their regions, especially where social amenities and infrastructure were assessed.<sup>71</sup> For example, Nyanza Province had the highest absolute poverty rate at 63.1% by 2010.<sup>72</sup> It is asserted that the deliberate strategy of creating disparities through the distribution of public positions gave rise to the mobilisation of dissent.<sup>73</sup>

The oppressive nature of the single-party regime, coupled with global changes occurring due to the collapse of communism, gave impetus to the push for constitutional and governance reforms. However, the campaign for democracy and multi-partyism did little to reverse the weakening of local government. While Section 2A of the Repealed Constitution was repealed to give way to political pluralism,<sup>74</sup> repressive laws such as the Public Order Act<sup>75</sup> remained in place. Other

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69 FES 'Regional disparities and marginalization in Kenya' (2012) 38-39.

70 Meredith, *The state of Africa*, 384.

71 TJRC Report, Vol II B, 82-85.

72 TJRC Report, Vol II B, 84.

73 FES 'Regional disparities and marginalization in Kenya' (2012) 38.

74 Constitution of Kenya (Amendment) Act No 2 of 1991.

75 Cap 56 of the Laws of Kenya.

constitutional amendments were introduced in 1992. Among these was the two five-year presidential term limit.<sup>76</sup> Section 5 of the Repealed Constitution was also amended to require the winning presidential candidate to garner at least 25% of the vote in five of the eight provinces.<sup>77</sup> This paved way for the multi-party elections of December 1992.

However, the constitutional reforms introduced in 1991 were not sufficient to entrench democracy, and the desired inclusion, because they did not alter the legal framework, nor did they change the underlying undemocratic political culture.<sup>78</sup> The basis for local government had been eroded for years, and the winner-takes-all nature of multiparty elections only served to highlight the centralised nature of the State.<sup>79</sup> Democracy post-1992 was aimed at ensuring access to Parliament and ministries based in Nairobi as avenues for pursuing graft. This meant that opposition leaders had little impact on governance due to the centralisation that undergirded the corruption.<sup>80</sup> The Government remained politically, economically and culturally distant from the people it was meant to serve.

Following the reintroduction of multiparty politics, majimboism was revived by the KANU leadership as a way of mobilising ethnonationalist sentiments among those who considered themselves 'locals' against more recent 'migrants' in the cosmopolitan Rift Valley and Coast provinces.<sup>81</sup> This saw a surge of politically instigated ethnic clashes. Violence was used in areas of potential opposition support to intimidate some communities and keep them from voting in the 1992 and 1997 elections. It is believed that the ruling party took advantage of land disputes in these regions to incite tribal hostilities. Organised

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76 Secs 9 (1) and 9 (2), as enacted by Constitutional Amendment Act No 6 of 1992.

77 Constitutional Amendment Act No 6 of 1992, sec 3.

78 Makau Mutua *Kenya's quest for democracy: Taming Leviathan* Lynne Rienner Publishers, 2008, 26.

79 Burbidge, *An experiment in devolution* 11.

80 Burbidge, *An experiment in devolution*, 11.

81 Lynch, *Ethnic politics and the Kalenjin in Kenya*, cited in Cheeseman, Lynch and Willis 'Decentralization in Kenya: The governance of governors', 7.

violence was targeted at groups that were not considered 'indigenous' to the coastal, Eastern, Nyanza, Rift Valley, and Western provinces.<sup>82</sup> Gangs were hired to kill and displace individuals from their areas so that KANU could be assured of victory.<sup>83</sup> Despite the divisive ethnic politics that characterised the 1990s, there was no actual decentralisation of power.<sup>84</sup>

The Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) established in 1998 to look into the causes of the violence attributed it to 'extreme levels of marginalisation of communities in political, economic and social structures and processes'.<sup>85</sup> It also found that the Government took part in fuelling the violence but failed to take adequate steps to prevent it from spiralling out of control.<sup>86</sup> The APRM Country Review Report decried the lack of political will by the State in addressing marginalisation, which further polarised communities and increased the feeling of marginalisation.<sup>87</sup>

However, it was not until 2008, in the wake of post-election violence triggered by the disputed 2007 elections that the state came to terms with ethnic bias and its disastrous effects on the country.<sup>88</sup> The presidency had become so highly coveted by every ethnic community as the only

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82 APRM, *Country review report of the Republic of Kenya*, 13.

83 Report of the Commission of Inquiry into Post-Election Violence' (hereinafter CIPEV Report) (2008) 26-27.

84 Lynch, *Ethnic politics and the Kalenjin in Kenya*, cited in Cheeseman, Lynch and Willis 'Decentralization in Kenya: The governance of governors', 7.

85 The Akiwumi Commission of Inquiry was established to look into ethnic violence in 1998 and its report was released in 2002.

86 Human Rights Watch 'Kenya Report: Politicians fueled ethnic violence' 31 October 2002.

87 APRM, *Country review report of the Republic of Kenya*, 65.

88 Branch and Cheeseman argue that Kibaki failed to recognise the impact of 'elite fragmentation, political liberalization and state informalization' on national unity and state power, which contributed to the post-poll violence. Daniel Branch and Nic Cheeseman 'Democratization, sequencing, and state failure in Africa: Lessons from Kenya' 108(430) *African Affairs* (2009), 1-26. See also Lynch, *Ethnic politics and the Kalenjin in Kenya*, cited in Cheeseman, Lynch and Willis 'Decentralization in Kenya: The governance of governors', 7.

path to accessing state resources that its loss through elections was almost unbearable.<sup>89</sup> A writer captured this issue in the following terms:

The argument is that a centralised state has failed to sooth Kenya's burning anxieties over democratic unity. The history of the government in its treatment of secessionist movements is one of a deep failure to achieve political progress: a reliance on a bureaucratic centralised state to establish a modicum of law and order in lieu of genuine politics. It amounted to a repeat deployment of the colonial administrative structure, despite strong calls for decentralisation at independence, and went on to create a winner-takes-all-presidency that ignored the periphery and divided the centre. In its bitter dregs came the realisation that decentralisation must be attempted afresh.<sup>90</sup>

The fresh attempt at decentralisation, which in Kenya takes the form of devolution, is discussed in greater detail later in this chapter.

### *Economic marginalisation*

The colonial project was very much an economic exploitation project. In order to make colonies financially self-supporting, the Colonial Government focused on raising taxation and building infrastructure but left education in the hands of missionaries and economic activity to commercial companies.<sup>91</sup> The establishment of infrastructure such as the Kenya-Uganda Railway opened up new patterns of economic activity within the colonies, including exportation of minerals and agricultural produce such as cocoa, coffee, cotton, sisal and tea.<sup>92</sup> To facilitate large-scale commercial agriculture, acquisition of huge land holdings was pursued. The acquisition of lands by white settlers was facilitated by the concomitant loss of land and livestock by

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89 Morris Mbondenyi, 'Human rights and democratic governance in post-2007 Kenya: An introductory appraisal' in MK Mbondenyi *et al* (eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal*, 2015, 3.

90 Burbidge, *An experiment in devolution* 67.

91 Meredith, *The state of Africa*, 5.

92 Meredith, *The state of Africa*, 7.

Africans, pursued through predatory legislation (land ordinances), with the result that the Africans experienced widespread destitution.<sup>93</sup> Moreover, the Colonial Government encouraged European settlers to come into the country to support agricultural production; and these settlers preferred to live in areas in the Rift Valley, Western, Nyanza and Central provinces that appeared favourable due to their fertile soil, relative freedom from disease and temperate climates. These areas became known as the White Highlands.<sup>94</sup> The railway was the main determinant of which areas became White Highlands as well as the usefulness of the land.<sup>95</sup> Proximity to the capital and the White Highlands provided opportunities for investment and capital accumulation that other regions did not have.<sup>96</sup>

At independence, the nation's founding fathers chose to focus resource allocation and development in areas where infrastructure was already existent. This post-independence policy of prioritising high-potential areas at the expense of low-potential ones privileged some regions over others, hence institutionalising the economic marginalisation of some areas.<sup>97</sup> The first national economic policy, Sessional Paper No 10 of 1965, *African socialism and its application to planning in Kenya*, divided the country into high, medium and low potential areas and prioritised development and investment in high potential areas on the understanding that the economy would experience rapid growth due to the higher returns on investment in those areas. The zoning was based primarily on the needs of the settler economy, which were anchored on the British needs at the time. The policy provided in part:<sup>98</sup>

133. One of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where

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93 TJRC Report, Vol IIB, 171-179.

94 TJRC Report, Vol IIB, 179.

95 TJRC Report, Vol IIB, 179.

96 FES 'Regional disparities and marginalization in Kenya' (2012) 33.

97 Sessional Paper Number 10.

98 Sessional Paper Number 10, 46-47.

it will yield the largest increase in net output. This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development. A million pounds invested in one area may raise net output by £20,000 while its use in another may yield an increase of £100,000. This is a clear case in which investment in the second area is the wise decision because the country is £80,000 per annum better off by so doing and is therefore in a position to aid the first area by making grants or subsidised loans.<sup>99</sup>

The definition of 'high potential' areas was considered too narrow as it was based on having 'abundant resources, good land and rainfall, transport and power facilities and people receptive to and active in development'.<sup>100</sup> The idea was to prioritise the growing of cash crops, and this caused the State to disregard any areas that could not grow certain cash crops. Therefore, considering the limited human and financial resources, the post-colonial state prioritised the speedy development of already developed areas over realigning the imbalances caused by the skewed development practices adopted by the Colonial Government. While the policy was well-intentioned, centralised planning exacerbated the marginalisation of areas that had been neglected during the colonial era, such as the Northern Frontier District (NFD), where livestock farming is the main economic activity. Successive post-colonial governments did not make much effort to equalise development through resource allocation or prioritising underdeveloped regions. The NFD, other nomadic areas and the Coast, had in common two marginalising factors: distance from the centre and harsh climatic conditions, especially drought, high temperatures, and poor soil, which militated against the prioritisation of development in those regions.

Corruption also became entrenched in Government, with foreign businesses being compelled to pay kickbacks to get contracts and connected individuals obtaining loans from banks and pension funds

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99 Sessional Paper Number 10, 46-47.

100 Sessional Paper Number 10, 46.

that they never intended to pay.<sup>101</sup> Corruption ‘percolated deep into the civil service’ and affected the Judiciary, district commissioners, the prosecution, and the directorate of motor vehicles, among others.<sup>102</sup> Francisco described Kenya’s economy as an ‘economy of affection’<sup>103</sup> because a tiny political elite captured the state. Political and economic power vested in the hands of a few. According to the Task Force on Devolved Government:

Elective and appointive positions became, not the means to serve the people, but rather, avenues for amassing personal wealth. The notion of servant leadership disappeared as personal aggrandisement, corruption, mismanagement, and plunder of public resources nursed by political patronage became the norm. Allocation of resources and development opportunities was done on the basis of political patronage instead of objective criteria and the most important person in this process was the President. This excluded people from government services creating a feeling of marginalisation in many parts of the country. *Centralisation led to strong feeling of exclusion, birthing and sustaining the perception that one had to have one of their own in a key political public office to access government services and opportunities. Because of this, political and public service office became intensely valued prizes. Indeed, the presidency became the ultimate prize.*<sup>104</sup>

Political patronage and exclusionary policies pursued by successive post-colonial governments caused skewed distribution of state resources, which benefited areas connected with state officials or those who supported them. The regime distributed land for political purposes, and the land regimes became connected to post-colonial national politics. The successive governments were therefore unwilling to address irregular land allocations that had been done over the years.<sup>105</sup>

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101 Meredith, *The state of Africa*, 384-385

102 Meredith, *The state of Africa*, 385.

103 Ana Huertas Francisco ‘Neopatrimonialism in contemporary African politics’ *E-International Relations* 24 January 2020.

104 Final Report of the Task Force on Devolved Government (2011) 14. [emphasis added]

105 Philip Onguny and Taylor Gillies ‘Land conflict in Kenya: A comprehensive overview of literature’ 53 *The East African Review* (2019).

With the coming into power of Mwai Kibaki in 2002, there was a surge of hope for better governance as the regime rose to power on the wave of democratic reforms. The Kibaki Government had promised a new constitution within 100 days of ascending to power. However, the Kibaki Government proved even more adept at corruption.<sup>106</sup> Moreover, the constitutional review process – which had begun as a people-centric process with the National Constitutional Conference at Bomas proposing constitutional amendments that watered down the powers of the President – suffered political interference as Parliament altered the Bomas Draft.<sup>107</sup> This would result in the reinstatement of the strong presidential powers. The Proposed New Constitution of Kenya that went to the referendum in 2005, also known as the Wako Draft,<sup>108</sup> thus proposed an powerful presidency. The rejection of the Wako Draft indicated that the citizenry could not stomach further concentration of power in the presidency.<sup>109</sup> The split in government with the Raila Odinga faction rejecting the draft and the Kibaki-led National Alliance of Kenya proposing it set the country on a dangerously divisive path. This polarisation rolled over into the campaigns for the 2007 General Elections.<sup>110</sup>

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106 Marc Lacey 'A corruption fighter-in-exile rocks Kenya from afar' *New York Times* 11 February 2006.

107 The Draft Constitution of Kenya, 2004, was prepared by the Constitution of Kenya Review Commission (CKRC) and endorsed by the National Constitution Conference held at the Bomas of Kenya, hence the term 'Bomas Draft'.

108 This was the draft that the Attorney-General and the Parliamentary Select Committee on Constitution Review prepared through adjustment of the Bomas Draft after the meetings at Naivasha (the Naivasha Accord) and Kilifi (the Kilifi Accord).

109 Francis Ngige 'How 2005 referendum divided a feeble nation' *The Standard* 2020.

110 Ngige, 'How 2005 referendum divided a feeble nation'.

### *Regional disparities*

To perpetuate the economic advantage of settlers over Africans during the colonial period, laws and policies were used to prohibit Africans from growing certain crops such as coffee and to control the marketing of such products, which were grown predominantly for export.

Segregated development did not just separate white settlers from Africans, it also separated the Africans in the reserves from one another. Communities that collaborated with the Colonial Government received preferential treatment, particularly in the Rift Valley and Central provinces, while those that were critical of the Colonial Government such as those that were involved in Mau Mau were punished through loss of their ancestral land.<sup>111</sup>

In some instances, these regional disparities were formalised through discriminatory legislation such as the Outlying District Ordinance Act of 1902, which created a 'closed districts' policy. The Act demarcated the Northern Frontier District (NFD) (comprising modern-day Garissa, Isiolo, Mandera, Marsabit, Samburu, Turkana, and Wajir) as a closed area requiring a special pass to enter. The idea was that these areas would be given British protection or left on their own as they were uneconomical to administer.<sup>112</sup> According to one colonial District Officer:

Kenya, as we used to call it, is divided roughly into two halves, the southern half of which consists of what we call the settled area where the white people had their farms and the agricultural natives ... and the northern area which extends from Lake Rudolf to the Somali border.... The administrators in the southern half of Kenya thought we were mad to live in the northern area at all...<sup>113</sup>

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111 FES 'Regional disparities and marginalization in Kenya' (2012) 8; Philip Onguny and Taylor Gillies 'Land conflict in Kenya: A comprehensive overview of literature'.

112 CRA 'Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund' 2013, 7-8.

113 Sir Geoffrey Archer, officer in charge of the NFD in 1920, cited in B Harden *Africa*:

This unfavourable disposition towards the NFD compared to the white highlands caused the region to be excluded from the rest of Kenya. This exclusion was bolstered by legislation that was discriminatory and punitive to the NFD such as the Northern Frontier Province Poll Tax, the Special Districts (Administration) Act and the Vagrancy Act. The low socio-economic development of the region was attributed to these exclusionist policies.<sup>114</sup> These were made worse by the *Shifita* war of 1963-1967 by which the Somali community, backed by the Orma, pressed for secession from Kenya.<sup>115</sup> In response to this uprising, the Independence Government amended the Independence Constitution and passed legislation allowing the NFD to be ruled by decree.<sup>116</sup> This was a precursor to the region's marginalisation by successive governments.

Concurrently with the quest for independence, Somalis in the NFD appealed to the British authorities to assign the NFD to Somalia before granting independence to Kenya or allow a referendum for the Somali people to determine whether they wanted to secede from Kenya.<sup>117</sup> The Colonial Government grappled with the impact of a harmful secessionist call but was also concerned that if power was placed in the hands of the dominant ethnic groups that were out of touch with the NFD communities, the resultant exclusion would be a recipe for unrest and disorder. Therefore, the Colonial Government endorsed the regionalism model proposed by KADU to appease both sides, even though neither the NFD nor the Kenyatta-led KANU endorsed it.<sup>118</sup> The colonial period consequently ended with the adoption of *majimboism* and an apparent win for the ethnic groups in the margins.

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*Dispatches from a fragile continent*, 1st edition WW Norton & Co Inc, 1990, 193.

114 CRA 'Policy on the criteria for identifying Marginalised areas and sharing of the Equalisation Fund' 2013, 8.

115 C Hornsby *Kenya: A history since independence* IB Tauris, London, 2012, 96 cited in Burbidge, *An experiment in devolution* 52-53.

116 See Acts Nos 14, 16, and 18 of 1965.

117 Burbidge, *An experiment in devolution* 52.

118 Burbidge, *An experiment in devolution* 52.

The post-independence era was politically turbulent and was pre-occupied with political security and survival. This was attributed to a lack of ideological orientation, common values among the new elite, and the new ruling elite adoption of the political legacy of exclusion that had characterised the colonial period. Land and economic marginalisation characterised the post-independence state. According to Mamdani, post-independence reform in African states reproduced the urban-rural separation and ethnic inequalities, thereby creating a variety of despotism.<sup>119</sup> The result was entrenched regional disparities that existed during the colonial period.

Regional disparities were exacerbated by the fact that a region had access to public goods depending on the extent to which it supported the political leadership.<sup>120</sup> Therefore, little socio-economic development took place where there was no support for the political leadership in power.<sup>121</sup> There was also a widely held perception that the composition of the public service or higher levels of government were directly correlated to the region from where the President hailed.<sup>122</sup> As President Moi would say, '*siasa mbaya, maisha mbaya*'.<sup>123</sup> This approach mirrored the colonial policy of favouring African communities that cooperated with the Colonial Government, and was exacerbated by the fact that the recruitment and appointment of public officers favoured certain ethnic groups and regions, with the result that disparities between regions took an ethnic inclination.<sup>124</sup> Chief Justice Willy Mutunga (as he then was) captured it thus in his concurring opinion *In the Matter of the Speaker of the Senate & Another*:

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119 Mamdani *Citizen and subject* 8.

120 TJRC Report, Vol IIB, 35.

121 Makau Mutua *Kenya's quest for democracy*, 26.

122 TJRC Report, Vol IIB, 35.

123 This is a Swahili phrase which may be translated to mean that bad political decisions would result in poor living or material conditions for the people of a particular region. See for example reference to the socio-economic benefits derived for Bungoma and Vihiga districts compared to others in Western province under the Moi regime due to co-option. TJRC Report, Vol IIB, 4.

124 FES 'Regional disparities and marginalization in Kenya' (2012) 7.

[167] Kenya has been a highly centralised political and economic entity. The fusion of political and economic power has led to the emergence of state-made rather than market-created economic elites. Indeed, Kenya's socio-economic character is a product of public-policy choices made and pursued by the government. State behaviour, flowing from this politico-economic fusion, and expressed mainly through official policy, markedly shape the specific character of Kenya's development outlook. Additionally, the colossal ethnic mobilisation in the acquisition and retention of state power has led to an illiberal and undemocratic practice, whereby the allocation of development resources tends to favour the ethnic base, to the exclusion of other factors of merit. Thus, the burden of taxation is shared and remains political-choice-neutral, but the benefit of public expenditure is skewed, and remains politically partisan.<sup>125</sup>

The terse engagement with the NFD also continued during the Moi regime, and the feelings of disunity and disenfranchisement that resulted from the military subjugation of the region festered. The clampdown of the region that had begun with the Kenyatta regime was carried forward, and it is alleged that in 1980, state authorities massacred at least 3000 Somalis in Bulla Karatasi in retaliatory attacks against the killing government officials in Liboi. Similarly, 5000 members of the Degodia sub-clan of the Somali were killed at the Wagalla Airstrip in 1984.<sup>126</sup> The government would also screen the residents from the northeast to differentiate between Kenyans and those who ought to be repatriated to Somalia. Those who could not produce identification documents and recite their genealogy satisfactorily or answer any arbitrary questions such as naming administrative officials or detailing the geographical locations of their birth would be deported.<sup>127</sup>

Lochery asserts that the screening was not just about demarcating between insiders and outsiders, or as Mamdani posits, 'settlers' versus 'natives',<sup>128</sup> but it was also intra-ethnic, about making differences among

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125 Advisory Opinion Reference No 2 of 2013.

126 TJRC Report Vol IIA (2013) 193-366.

127 E Lochery 'Rendering difference visible: The Kenyan state and its Somali citizens' III(445) *African Affairs* (2012) 615-639, 616.

128 Mahmood Mamdani 'Beyond settler and native as political identities: Overcoming

the Somali more visible. Therefore, while the story of the NFD might at first glance appear to be a story of the persecution of the Somali minority group, Lochery posits that it reveals nuances about the bureaucratic management of identity, the ever-changing meaning of ethnic markers and how social structures can be inbuilt into the structures of the state.<sup>129</sup> Lochery further analyses how screening cards were used by the few high-ranking Somali military and provincial administration officials in the 1980s to solve intra-ethnic conflicts by deporting economic and political rivals, a situation which mirrors the 'graduated' way citizenship has played out in Kenya broadly.<sup>130</sup>

Therefore, depending on the ranking of an ethnic group on the 'citizenship' ladder, ethnic groups in Kenya have, since colonial times, had varying rights and protection, with groups like the Somali, other communities in Northern Kenya, and the Nubians, which are at the bottom of the citizenship ladder, being more vulnerable to persecution and neglect.<sup>131</sup> Ranking at the bottom of the citizenship ladder also means that access to the rights and protections of citizenship is mediated by personalised relationships which run through state structures.<sup>132</sup> Therefore, just as it was during the colonial period, citizenship and its attendant benefits would be shaped by the imperatives of the state and the interests of elites. Screening caused discrimination along ethnic and clan lines and would be used to legitimate police harassment, forming the bedrock for quasi-illegal processes. A 2007 KNCHR study<sup>133</sup> showed that when it came time for the issuance of identity cards for Kenyan Somalis who had attained the age of majority, they would have to face a

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the political legacy of colonialism' 43 *Comparative Studies in Society and History* (2001) 651-664, cited in Burbidge, *An experiment in devolution* 55.

129 Lochery 'Rendering difference visible', 116.

130 For an analysis of the question of 'graduated citizenship' see Samson Bezabeh, 'Citizenship and the logic of sovereignty in Djibouti', 110(441) *African Affairs* (2011) 587-606.

131 Lochery 'Rendering difference invisible', 117.

132 Samson Bezabeh, 'Citizenship and the logic of sovereignty in Djibouti', 587-606.

133 Kenya National Human Rights Commission (KNCHR), 'An identity crisis? A study on the issuance of national identity cards in Kenya' KNCHR, Nairobi, 2007, 16.

vetting committee comprising elders, the local chief and often members of the security services, a process reminiscent of the screenings carried out in 1989-90.<sup>134</sup> Similar discriminatory practices were carried out against Nubians, Kenyan Arabs, Maasais and Tesos.<sup>135</sup> Events in Somalia and the resultant refugee crisis have made the question of citizenship even more tenuous for many Somalis. According to Lochery

Relying on personal connections remains a much more reliable path to secure citizenship than officially sanctioned processes alone, for both Kenyan Somalis and refugees from Somalia seeking increased security and an escape from the camps.<sup>136</sup>

Burbidge asserts that because the state has historically had little understanding of the pastoral communities, there was a skewed collection of population information, which directly impacted revenue allocation.<sup>137</sup> However, geographical marginalisation and related secessionist calls were not limited to the NFD. The animosity between the Kenyan state and coastal communities, where land lost by indigenous communities during the colonial period was not returned upon independence but was instead taken over by new owners, fuelled calls for separatism.<sup>138</sup> Many minority groups and marginalised

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134 KNCHR, 'An identity crisis?' 16.

135 KNCHR, 'An identity crisis? A study on the issuance of national identity cards in Kenya' vi. The Nubians have sought redress in the violation of their citizenship rights in the case of *Nubian Community in Kenya v Kenya* Communication 317/2006 where the African Commission found that restricting access of Nubians to identity documents based on the religious or ethnic identity of the group was a violation of the African Charter on Human and Peoples' Rights. In *Institute for Human Rights and Development in Africa (IHRDA), and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* Communication no. Com/ 002/2009 (2011), the African Committee of Experts on the Rights and Welfare of the Child found that every child was entitled to the nationality of the territory where they were born and the obligation of the state to accord nationality to every child born in the state, given that they do not lay claim to another nationality, was applicable to Kenya.

136 Lochery 'Rendering identity invisible' 637.

137 Burbidge, *An experiment in devolution* 55.

138 Commission for Revenue Allocation 'Policy on the criteria for identifying

communities became squatters on their own land.<sup>139</sup> The NFD and the coastal communities also had in common the challenge of distance from the centre, Nairobi, which impeded their socio-economic integration, and unfavourable climatic conditions, which meant that they were not prioritised for development initiatives.<sup>140</sup> The Mombasa Republican Council (MRC), formed in 1999, became the forum for advocating for the separation of the coastal region from the rest of the country, to which the state responded with the same military subjugation tactics deployed during the *Shifta* wars.<sup>141</sup> According to Burbidge

Instead of getting to know local situations and responding to local needs, the central administration has, time and again, applied the logic of brute force combined with piece-meal political engagement during campaign periods. Community leaders who understand local context find themselves at the periphery of decision-making. In their stead, the state turns to its administrative personnel in the region, hoping that a continuation of divide and rule policies compromise dissent.<sup>142</sup>

With centralisation, local people were removed from decision-making on issues that affected their daily lives and deprived of the opportunity to fashion their solutions to local problems. The result was that the Central Government priorities were misguided and development resources were wasted.<sup>143</sup> Elections for local government representatives became meaningless due to the overreach of the President's network through the provincial administration. It was

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marginalised areas and sharing of the Equalisation Fund' 2013 10.

139 International Crisis Group 'Kenya's coast: Devolution disappointed' Briefing No 121, Nairobi 13 July 2016, 3.

140 CRA 'Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund' 11.

141 The MRC asserted that coastal territory had been leased to the state for a period of 50 years and was therefore due to be returned to the coastal peoples, a move which was seen to appeal to a separate Arab identity in the Coast connected to the land disputes in the area. See International Crisis Group, 'Kenya's coast: Devolution disappointed' 3.

142 Burbidge, *An experiment in devolution* 59-60.

143 Final Report of the Task Force on Devolved Government (2011) 14; TJRC Report Vol IIB, 38.

difficult to justify the existence of local authorities in light of the over-centralisation of power and their inability to offer the services the people desired.<sup>144</sup> Moreover, there was an interlocking of political, economic and ethnic marginalisation since the exclusion of some regions locked out the ethnic communities found in those regions.<sup>145</sup>

Regional and ethnic disparities were exacerbated by an unfair system of political representation where the creation of electoral units was not based on the population size but on the arbitrary decision-making of the President that may have been a form of gerrymandering.<sup>146</sup> Even though the Repealed Constitution laid down criteria to guide delimitation, the requirements were not always followed, and some regions were denied effective representation.<sup>147</sup> Moreover, the Electoral Commission of Kenya's lack of independence ensured that gerrymandering by the Executive went unchecked. In 1963, 117 constituencies were instituted based on recommendations of the Kenya Constituencies Delimitation Commission chaired by Foster-Sutton.<sup>148</sup> In 1966, 41 new ones were created before going up to 188 in 1986, and they finally increased to 210 before the 1997 elections.<sup>149</sup> However, it is argued that at least 12 of the last constituencies were created for political reasons – to increase

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144 SK Akiyaga and others, *Local authorities in Kenya* Heinemann Educational Books, Nairobi, 1985, 4, cited in Burbidge, *An experiment in devolution* 11.

145 B Cooksey, David Court, and Ben Makau, 'Education for self-reliance and harambee' in J Barkan (ed) *Beyond capitalism v socialism in Kenya and Tanzania* EAEP, Nairobi 1995, 201, cited in FES 'Regional disparities and marginalization in Kenya' 5.

146 FES 'Regional disparities and marginalization in Kenya' 7.

147 See critique of the delimitation process by Nyamu J in *Rangal Lemeiguran and others v Attorney-General and others*, Misc Civil Application 305 of 2004, judgment of the High Court at Milimani of 18 December 2006, eKLR, 39.

148 Anne Cussac, 'Institutional shortfalls and a political crisis', (38) *The East African Review* (2008) 4.

149 AF Anywa and F Grignon, 'As biased as ever? The Electoral Commission's performance prior to polling day' in Marcel Rutten *et al*, *Out for the count: The 1997 General Elections and prospects for democracy in Kenya*, Fountain Publishers, Kampala, 2001, 116-117.

KANU's chances in Parliament without considering the principle of equal representation for all citizens.<sup>150</sup>

Due to the haphazard creation of constituencies, there was disproportionate representation within constituencies. For example, before the 2010 Constitution, Embakasi had a population of over 925,000 people, about 19 times that of Lamu East Constituency, yet one member of Parliament represented each constituency.<sup>151</sup> Despite this being brought to the attention of Parliament in the run-up to the 2007 elections, Parliament declined to create 60 new constituencies as proposed by the ECK due to concerns that the process would be used to create constituencies in areas where the incumbent President could leverage them to get support and assure themselves of more seats in Parliament.<sup>152</sup> The result was that the equality of the vote was undermined, which formed the subject of the Independent Review Commission (Kriegler Commission) recommendations following the post-election violence of 2007/8.<sup>153</sup>

The post-independence period demonstrated that while the colonial era ended with the transfer of political power to Africans, the culture of exclusion did not end. It merely changed forms. Although the bifurcated state introduced by colonialism was deracialised after independence, it was not democratised.<sup>154</sup> The relationship between individual citizens and ethnic communities with the elite was one of patronage, and inevitably, those in power abused it immensely.<sup>155</sup> This led to the personalisation of the presidency, the perpetual exclusion of

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150 These 12 constituencies were Mwingi South, Kaiti, Kuresoi, Eldama Ravine, Gwasi, Uriri, Gatundu North, Mathioya, Khwisero, Sotik, Bura and Wajir North constituencies.

151 The Office of the AU Panel of Eminent African Personalities, *Back from the brink: The 2008 mediation process and reforms in Kenya*, African Union, 2014, 96.

152 Cussac, 'Institutional shortfalls and a political crisis', 4.

153 Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (2008) 8 (hereinafter Kriegler Commission Report).

154 Mamdani, *Citizen and subject*, 7.

155 Final Report of the Task Force on Devolved Government (2011) 14-15.

certain groups and the belief that access to presidential power was the only way to access state resources and services for one's community.<sup>156</sup>

According to Kangu

The centralised system in Kenya has been perceived as using some of these diversities as discriminating factors in the allocation of resources, development opportunities and other social services. Arising out of these exclusions, national unity and cohesion have been compromised by feelings of inequity, inequality, social justice, regional disparities, and marginalisation.<sup>157</sup>

However, some attempts were made to decentralise and move some ethnic communities, particularly those from Nyanza, the former NFD, and North Rift, from the margins to the centre during the Moi era. Nonetheless, the overall structure of exclusion remained. The TJRC report noted that any measures taken in these regions were both inadequate and, in some cases, inappropriate, and the structures put in place did not always translate into results on the ground.<sup>158</sup> One-party-rule did not help attempts at decentralisation and inclusion. Therefore, the clamour for genuine democratic participation began with the outcry for dismantling the one-party rule and demands for a new constitutional order.

### *The civilising mission*

Alongside racial, ethnic, regional, and economic marginalisation, the civilising mission advanced by Christian missionaries created disparities between the regions of the country. The priority given to Christian missions by granting the Royal Charter to the Imperial British

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156 M Mbondenyei, 'Human rights and democratic governance in post-2007 Kenya: An introductory appraisal' in MK Mbondenyei *et al* (eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2015) 3.

157 J Mutakha Kangu, *Constitutional law of Kenya on devolution*, Strathmore University Press, Nairobi, 2015, 117.

158 TJRC Report Vol II B, 38.

East Africa Company (IBEAC) occasioned the expansion of protestant missionary activities and the downplaying of other religions during the colonial period. The director of the IBEAC encouraged missionaries to extend their work into the hinterlands and assured the missions of their safety. The construction of the railway also facilitated the movement of missionaries from the coast to the interior as it provided a cheap and safe route to traverse the regions inhabited by the Akamba and the Maasai communities, who were considered warlike.<sup>159</sup>

Introducing a colonial religion created a dichotomy between minority and dominant religions. The state embraced Catholicism and Protestantism. Most of the excluded groups were traditional religious groups and African independent churches. Through religion, western culture assumed a level of universality that rejected diversity. This assumption occasioned the marginalisation of the 'others' who did not fit in the 'universal culture' dictated by the European discourses. Therefore, the missionary agenda on Christianity systemically worked to denigrate African cultural values and traditional spiritual and religious beliefs in Kenya. The 'universal' cultural assumption and the marginalisation of traditional cultural practices continued post-independence. Colonial churches created a social stratification that was non-existent in the pre-colonial period. Social stratification was conceptualised through the introduction of western education, colonial employment, racial segregation, and ethnic divisions, among others. Social stratification created minority identities that were on the periphery. Being at the periphery meant not only social and cultural isolation but also loss, and limited access to the state's political, social and economic commodities and services.<sup>160</sup> The colonial othering discourse can be linked to the current discourses in Kenya on empowerment and marginalisation.

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159 Zablon Nthamburi, 'The beginning and development of Christianity in Kenya: A survey' *Dictionary of African Christian Biography*, 2 July 2022.

160 AJ Mildred Ndeda, 'The struggle for space: minority religious identities in post-independence Kenya' 41 *The East African Review* (2009), 3.

The Colonial Government used Christianity as a tool for cultural imperialism under the banner of ‘civilizing natives’.<sup>161</sup> The missionary enterprise has been documented to have operated parallel to colonialism. The two were intricately linked.<sup>162</sup>

According to Martin Munyao and Philemon Kipruto Tanui:

... mainstream Christianity did the bidding of the colonial project. In fact, during the colonial period in East Africa at large, the two were part and parcel of the same project. Christianity gave the colonial agenda spiritual wings to succeed, while colonialism energised Christianity’s expansionist movement and mission to the unreached people groups. The missionaries’ approach to sharing the gospel was to educate the Africans on how to read the scriptures and write, making it easy for the colonialists to introduce their governance and policies. To this effect, the missionary societies received considerable material support from governments. The Roman Catholic Church and the Anglican Church (formerly the Church Province of Kenya) are the biggest beneficiaries of the material from the Colonial Government.<sup>163</sup>

The missionary agenda formed a core part of colonialism. It was essential to setting up colonial structures and entrenching European cultural practices as Christian teachings and labelling African practices as pagan.<sup>164</sup> The Colonial Government would then ban the ‘pagan’ practices as declared by the church, structurally eroding and suppressing traditional practices and beliefs. In some instances, the colonial authorities used force to get the natives to abandon their religion

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161 Ndirangu Mwaura, *Kenya today: Challenges in post-colonial Africa*, Algora Publishing, 2004, 161-162.

162 Martin Munyao and Philemon Kipruto Tanui ‘Whiteness in Christianity and decoloniality of the African experience: Developing a political theology for ‘Shalom’ in Kenya’ 12 *Religions* (2021) 1006. <https://doi.org/10.3390/rel12111006>.

163 Munyao and Tanui ‘Whiteness in Christianity and decoloniality of the African experience’ 2.

164 Munyao and Tanui ‘Whiteness in Christianity and decoloniality of the African experience’ 3.

and treat practitioners of traditional religion as seditious and a threat to 'national security'.<sup>165</sup>

In the treatment of native communities, the questions of land and education determined the relationship between and among the missionaries, settlers, colonial churches and authority.<sup>166</sup> Mildred Ndeda argues that the missionaries influenced the Colonial Government significantly because they were the bearers of western knowledge and led in providing medical services, education, social welfare and economic development.<sup>167</sup>

With the influence Christian missionaries had on education, and as key financiers of education given that the British Government was unable to fund education for all its 47 colonies around the world, it became easy for the missionaries to use education as a tool for control.<sup>168</sup> Education was then anchored on a discrimination model, reinforced through segregation, and used to perpetuate inequalities. It was designed to be racially stratified with varying curricula and facilities for the Africans, Asians and Europeans. As David Kamar Imana stated:

A number of measures formed early British education policies: 1) the Kenyan society was categorized into three racial categories, namely Africans, Asians (mainly Indians), and Europeans; 2) national values were organised along racial ideology that became the ruling ethic; and 3) resources allocated to the education sector were distributed. While all Kenyans were taxed, more revenue to the education sector was allocated to European followed by Asian (Indian) schools even though these were the minority. European schools

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165 Julius Gathogo, 'The quest for religious freedom in Kenya (1887-1963)' School of Religion and Theology, University of KwaZulu-Natal, Pietermaritzburg, South Africa(2008), 3.

166 Mildred AJ Ndeda, 'The struggle for space: minority religious identities in post-independence Kenya', 41 *Les Cahiers d'Afrique de l'Est / The East African Review* (2009), 9

167 Ndeda, 'The struggle for space: minority religious identities in post-independence Kenya' 9.

168 David Kamar Imana, 'The politics of education reforms in Kenya: Critical assessment of the education system from 1963-2020', 20(2) *Journal of Community Positive Practices*, (2020) 11-30. 2; DOI: 10.35782/jcpp.2020.2.02.

used a different curriculum, which was defined as superior to the one used in African schools. The colonial education system was based on a model of discrimination, which saw the establishment of separate educational systems for Africans, Asians and Europeans, a factor that perpetuated inequalities in accessing education more so for the African population.<sup>169</sup>

In addition to using western education for cultural imperialism, the education offered by the missionaries also aimed at creating a pool of 'semi-literate' and skilled natives who would be engaged as labourers by the colonial administration. With the colonial tax system in place, there was need for wage-earning jobs offered by the Colonial Government hence an increase in the interest in western education. The natives valued western education for the skills, prospects of employment and social mobility. The approach by Christian missionaries shifted from basic colonial indoctrination to actively suppressing traditional norms and cultures deemed incompatible with the Christian way of life. Christian missionaries frowned upon traditional norms like bride wealth, female circumcision, or matrilineality but held a special grudge against polygamy, as stated in the World Missionary Conference Records, 1910 document.<sup>170</sup> Mission schools promoted monogamy, and it often served as a requirement for enrolment,<sup>171</sup> which hindered access to western education as well as access to colonial jobs for many. This would precipitate inequalities among the natives further.

As occasioned by the western religious indoctrination, the othering discourse brings to light the conversation on ableism through the lens of disability and religion. In the religious context, disability theology, as conceptualised by Eiesland in her idea of a disabled God, has explored ways in which religion has engaged or failed to engage with the notion

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169 David K Imana, 'The politics of education reforms in Kenya', 21.

170 The World Missionary Conference, Edinburgh, 1910, *Finding aid for World Missionary Conference Record* (The Burke Library Union Theological Seminary, New York, 2006), 244-270.

171 Bastian Becker 'The colonial struggle over polygamy: Consequences for educational expansion in sub-Saharan Africa,' 37(1) *Economic History of Developing Regions* (2022), 27-49, DOI: 10.1080/20780389.2021.1940946

of disability.<sup>172</sup> Eiesland brings out the conflation of disability as sin, a punishment for wrongdoing. The conflation explains the stigmatisation and lack of support from religious groups as disability is considered disfavour by God.<sup>173</sup> The second conceptualisation by Eiesland associates disability with virtuous suffering, emphasising social barriers as the will of God and preaching perseverance and passive acceptance as obedience to God. Lastly, Eiesland conceptualises disability as a case of charity.<sup>174</sup> Education was a preserve of the colonial church in the early colonial period, and the approach to charity for PWDs was through segregation. This concept did not necessarily offer help but resulted in demeaning attitudes, inequality, and exclusion from participation. Eiesland referred to the approach by religion on disability as the 'disabling theology' due to the harm and injustice it occasioned to people with disability through the three listed approaches.

As a continuity of the religious practices espoused by Kenyans, the approach to people with disability post-independence was not any different from the colonial period. As an illustration of religious continuity in the marginalisation of PWDs, a 2020 study noted that:

Religion has also served as an impediment to the success of PWDs by limiting their participation in its activities. Whereas some churches for instance, often discouraged some persons with disability from playing prominent roles in their activities or even taking up significant positions of responsibility among its laity, others are involved in practices that more or less promote stigma among believers living with disability.<sup>175</sup>

Even within missionary engagements, there was a fight for control of territory, especially in parts of Central Kenya. These conflicts were

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172 Nancy L Eiesland, *The disabled God: Toward a liberatory theology of disability* Abingdon Press Nashville 1994, 73-74.

173 Eiesland 'The disabled God', 27.

174 Eiesland 'The disabled God', 99-100.

175 Anthony Buyinza Mugeere, Julius Omona, Andrew Ellias State and Tom Shakespeare "'Oh God! Why did you let me have this disability?'" Religion, spirituality and disability in three African countries', 24 *Journal of Disability and Religion* (2020) 64-81, DOI: 10.1080/23312521.2019.1698387, 74.

resolved by creating boundary lines dividing the country into spheres of influence of the various religions denominations, without consulting the African community.<sup>176</sup> The result of the uneven missionary spread and segregated regions' development were clear regional disparities. The establishment of schools, health facilities, vocational training and special schools was predominant in areas that experienced missionary activity.<sup>177</sup> The TJRC assessed that the regions that benefited the most from missionary investment in education were Nyanza and Central provinces.<sup>178</sup>

However, the relationship between the missionaries and Africans was complex. In some instances, the missionaries were at the forefront in protesting forced labour for its cruelty to Africans. Through the protest of the Alliance of Protestant Missions on the subservience of the Africans in the colony, the Devonshire White Paper was issued in 1923, declaring the paramountcy of 'native' interests.<sup>179</sup> However, where the protest would jeopardise their interests, for instance, in education, the missionaries were unwilling to side with the African population.<sup>180</sup> Their privileged position also allowed them to represent African interests in the Legislative Council.<sup>181</sup> Still, during the Mau Mau revolt, missionaries sided with the Colonial Government, thereby identifying themselves with the status quo.<sup>182</sup> The missionaries were often caught between colonial interests and protecting Africans.

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176 *Dictionary of Christian Biography* (accessed 5 July 2022).

177 Zablun Nthamburi 'The beginning and development of Christianity in Kenya: A survey' *Dictionary of Christian Biography* (accessed 6 July 2022).

178 TJRC Report Vol II B (2013) 89.

179 Zablun Nthamburi 'The beginning and development of Christianity in Kenya: A survey' *Dictionary of Christian Biography* (accessed 6 July 2022).

180 Nthamburi 'The beginning and development of Christianity in Kenya'.

181 John William Arthur was nominated in this capacity between 1924 and 1926. GS Were and DA Wilson *East Africa through a thousand years*, 298.

182 Nthamburi 'The beginning and development of Christianity in Kenya'.

## *Education*

As illustrated in the previous sections of the chapter, regional disparities that resulted from the colonial era were carried forward by successive post-colonial governments. These regional disparities were also exacerbated by the fact that there was an uneven distribution of western educational institutions in the colonial era. Prioritising some regions over others in the development agenda resulted in low literacy rates in some regions, particularly the Coast, NFD and other nomadic areas. At the same time, Central and Nyanza provinces had the highest concentration of secondary schools.<sup>183</sup> The concentration of schools in those areas also reflected the uneven spread of Christian missionaries and coincided with areas where they had made their bases.

Areas that had benefited from the early penetration of Christian missionaries had early access to education which was reflected in the higher western literacy levels. Conversely, the Coast and the NFD did not have a high spread of missionary activity and had lower western literacy rates. It is asserted that in respect of the NFD, the Colonial Government created a buffer zone to prevent the islamisation of the traditionalist Africans.<sup>184</sup> Further, in the post-independence State, there was a lack of integration of religious minority groups, with the prioritisation of the mainline Christian churches and some brotherhoods of Islam, thus subordinating minority religious identities.<sup>185</sup>

With the introduction of the Africanisation policy, which emphasised eradicating poverty, illiteracy and ignorance through education,<sup>186</sup> access to primary education became inextricably tied to development, which was reflected in the First National Development Plan 1964-1969. Education was also one of the strategies listed in

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183 TJRC Report Vol II B (2013) 89.

184 TJRC Report Vol II B, (2013) 56.

185 Ndeda 'The struggle for space: minority religious identities in post-independence Kenya' 3.

186 Sessional Paper No 10 of 1965, 1.

Sessional Paper No 10 of 1965 as instrumental to the development and 'the principal means of relieving the shortage of skilled manpower and equalising economic opportunities among all citizens'.<sup>187</sup> However, the Kenyatta I Government prioritised secondary education to meet the immediate workforce needs of the nation, which privileged Central and Nyanza provinces where the missionaries had already made great inroads in establishing schools.<sup>188</sup>

Disparities in development resulted in perpetual poor performance in schools, poor infrastructure, and absence of Government services in some regions.<sup>189</sup> According to one study:

Differences between urban and rural conditions are similarly striking, with urban households much more likely to have access to health care, schools and piped water than those in rural areas. At the national level, the 10 per cent of the richest households in Kenya control about 36 per cent of national wealth, while the poorest 10 per cent control less than 2 per cent. Regional disparities are also vast. About 74 per cent of people living in North Eastern Province are poor, against only 30 per cent of those in Central Province. The high poverty rate of people of North Eastern Province makes them exceptionally vulnerable to weather and price shocks. Women are much less likely than men to have completed secondary school education and to be employed in the formal sector... Within the same context, gender disparities in employment opportunities and economic investment patterns in Kenya have continued to widen across all sectors of the economy and at various levels of development intervention.<sup>190</sup>

Following the death of Jomo Kenyatta, the state adopted an 'ethnically-blind' approach to politics. It gave the impression of ethnic neutrality under the guise of promoting national unity, all the while privileging some ethnic communities over others.<sup>191</sup> Marginalisation,

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187 Sessional Paper No 10 of 1965, 38-39.

188 TJRC Report (2013) 89.

189 CRA 'Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund' 2013, 9.

190 FES 'Regional disparities and marginalization in Kenya' (2012) 2.

191 Jill Ghai, Yash Ghai, Korir Sing'oei and Waikwa Wanyoike, 'Taking diversity seriously: Minorities and political participation in Kenya' (2013) 2.

inequalities and other forms of disparities were therefore also the result of ethnicity and ethnic-based politics, which became a central basis for discrimination.<sup>192</sup>

However, one of the benefits of the Moi regime was a focus on alleviating marginalisation in education.<sup>193</sup> While the Kenyatta I Government prioritised secondary education to meet immediate human resources needs and only made a rhetorical commitment to primary education, the Moi regime shifted focus to primary education as the foundation of economic and national development.<sup>194</sup> Universal primary education (UPE) was introduced alongside feeding programmes in semi-arid areas to attract students to school.<sup>195</sup> The investment in UPE allowed development to shift away from Nyanza and Central provinces, which had benefited the most from investment in education. UPE was sustained until the economic downturn of the early 1990s, and reintroduced during the Kibaki era in the early 2000s.<sup>196</sup>

### **Privilege and marginalisation**

From the foregoing discussion, it is clear that since independence, there have been those privileged by laws and policies and those at the periphery, the marginalised, for whom there has been an interlocking of political, economic and ethnic marginalisation. The groups that needed remedial measures to address their political inclusion were women, PWDs and youth. The Committee of Experts identified these groups as lacking fair representation in national decision-making institutions.<sup>197</sup> These groups will form the focus of this section of the study.

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192 FES 'Regional disparities and marginalization in Kenya' (2012) 7.

193 TJRC Report, (2013) Vol IIB, 89-90.

194 TJRC Report, Vol IIB, 89.

195 TJRC Report, Vol IIB, 89.

196 TJRC Report, Vol IIB, 89-90.

197 Committee of Experts on Constitutional Review 'Final Report of the Committee of Experts on Constitutional Review' (2010) 53.

A 2014 study by the National Gender and Equality Commission (NGEC) revealed that women and PWDs were affected by marginalisation, exclusion and discrimination across sectors more than men and the youth. As a result, women and persons with disabilities were the least involved in the design, planning and implementation of development programmes at the national and county levels.<sup>198</sup> The study attributed the greater involvement of men and youth to their social and physical mobility and greater exposure to opportunities at the social, political, economic, and cultural levels.<sup>199</sup>

This following section traces the struggles faced by women, youth and PWDs as they attempt to move from the margins to the centre, from marginalisation to privilege. It makes the point that while each of these groups has made strides in seeking inclusion, these efforts have had limited success. Although women's advocacy and vigilance saw their agenda take centre-stage in the constitution review process, at best, women can be categorised as having achieved 'advanced marginalisation' without the structural reforms necessary for lasting change.<sup>200</sup> Nevertheless, a review of the strategic litigation efforts, attempts at legislation and inclusion in national and county legislative bodies, demonstrates that women may be faring better than the other two groups in their inclusion efforts. That said, political will could play a vital role in fully realising equality as mandated by the 2010 Constitution.<sup>201</sup> This will be discussed in greater detail below.

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198 National Gender and Equality Commission 'Flares of marginalization among selected minority communities of Kenya: Results of public education and information forums held in Coast, Rift Valley and Eastern regions: 12-19 May 2013' (2014) 19.

199 NGEC 'Flares of marginalization' 19.

200 Advanced marginalisation is a stage where *de jure* injustice is forbidden but the system of stratification is kept in place by informal patterns of prejudice and discrimination. See Cathy J Cohen *The boundaries of blackness* University of Chicago Press, Chicago, 1999, cited in Ange-Marie Hancock 'Intersectionality approach and identity politics: When multiplication does not equal quick addition' March 2007, 70.

201 Lucianna Thuo, 'Is the two-thirds gender rule engendering double invisibility in public life for other vulnerable groups in Kenya?' *Oxford Human Rights Hub OxHRH*

## Women

The current problem for gender inequality originated from the colonial imposition of the Victorian era gender order that provided a sharp contrast between the role of men and women.<sup>202</sup> Women were consigned to the domestic sphere where their rights were limited.<sup>203</sup> At a time when the rudiments of contemporary capitalism were taking root, the view of women as private and domestic beings distanced them from any real power and influence.<sup>204</sup> The colonial imposition was further infused with indigenous interactions. These two influences worked to control and define Kenyan womanhood through legal and cultural practices, particularly regarding control over sexuality, reproduction and access to formal education. This diminished women's personhood by the consequences, intended and unintended, of the colonial rule administered by both the colonisers and colonised.<sup>205</sup>

Debates over womanhood were central to the colonial and post-colonial experience. Control over women, particularly their options and responsibilities, formed part of the construction of colonial and

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Blog 19 August 2016. Khobe also notes that the representation in Parliament falls below the 33 1/3% threshold established by Articles 27 (5) and 81 of the Constitution; Walter Khobe, 'The quest for a more perfect democracy: Is mixed member proportional representation the answer?' in MK Mbondenyei *et al* (eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal*, 2015, 121, at 127.

202 Fredeline O Anunobi, 'Women and development in Africa: From marginalization to gender inequality' 2(1) *African Social Science Review*, 41-63, 45; see also, SE Charlton *Women, the state and development*, Albany State University of New York Press 1989.

203 Sylvia Tamale *Decolonisation and afrofeminism*, Daraja Press, 2020, 218; See also, Furaha-Joy Sekai Saungweme 'A critique of Africa's post-colonial freedoms through a feminist lens: Challenging patriarchy and assessing the gains' Heinrich Boll Stiftung Cape Town, 7 July 2021.

204 E Owuor, 'Women and political inclusion in Kenya: A historical overview, 1963-2016', in Japhet Biegon (ed) *Gender equality and political processes in Kenya*, Strathmore University Press, Nairobi, 2016, 8.

205 Tabitha Kanogo, *African womanhood in colonial Kenya, 1900-1950* East Africa Educational Publishers, Nairobi, 2005,1.

post-colonial structures. Kenyan women were not passive bystanders; despite the attempts at control and subservience, some women were finding employment, taking up spaces, and fleeing to the missions to obtain an education.<sup>206</sup> However, these options were not available to all women. The majority remained at home without prospects for inclusion in the capitalist developments, socially, politically and economically, which widened the inequalities between women and men.

The persistence of political, social, and economic inequalities in region, ethnicity and religion worked hand in hand with gender inequalities. Despite having actively resisted the British colonial administration, as is the case with Wangi wa Makeri, Moraa Ngiti, Siotune wa Kathake, Mekatilili wa Menza and Nyanjiru, among others, women were not included in decision-making in the British colonial administration. This was also the case post-independence when very few women were in the Kenyan Parliament from the 1960s to 2002. The first Parliament had only one woman, while subsequent parliaments had between two to six women, dropping to two women between 1983 and 1992.<sup>207</sup> While the Independence Constitution provided for 12 members to be nominated to Parliament, Jomo Kenyatta did not nominate any women during his tenure. Between 1978 and 1997, only two women were nominated by President Moi.<sup>208</sup> The 1997 Inter Parties Parliamentary Group (IPPG) amendments, which allowed political parties to be involved in nominations and mandated consideration of gender equality, boosted women's participation in Parliament. In the 9<sup>th</sup> Parliament, the representation of women was at its highest, with eight out of 12 nominated members being women.<sup>209</sup>

With such limited recognition of the role of women in society, there was need for women to organise and amplify their voices in demanding

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206 Kanogo, *African womanhood in colonial Kenya*, 9.

207 Maloiy Lanoi, 'Tracing Kenyan women's involvement in elections and political leadership from 1963-2002' in Nanjala Nyabola and Marie-Emmanuelle Pommerolle (eds) *Where women are* Twaweza Communications, 2018, 28.

208 FES 'Regional disparities and marginalization in Kenya' (2012) 22.

209 FES 'Regional disparities and marginalization in Kenya' (2012) 22.

for their rights and for social justice. This occasioned the formation of several non-governmental organisations, including Maendeleo ya Wanawake (MYWO), which was on the front line in speaking against the inequalities and injustices that women were experiencing. In the early days, MYWO was known for being paternalistic and apolitical, focusing its agenda only on the domestic front. European women and men ran it for African women.<sup>210</sup> Nevertheless, MYWO became a voice of consequence, particularly in the political space. According to Effie Owuor:

No other organisation could mobilise rural women like MYWO. It also became the training ground for a generation of women who would go on to play a critical role in Kenyan politics. Initially, the leadership of MYWO was a strictly European affair, with officials from the Department of Community Development responsible for the planning and execution of all activities. By the early 1960s, the process of Africanisation was in full swing. European officials and civil servants were being retired from their posts to be replaced with Africans. It was during this process that Phoebe Asiyo became the first African woman to head MYWO in 1961.<sup>211</sup>

The absence of women in political and decision-making spaces generally became a point of contention and focus for the few women leaders and non-governmental organisations. This led to an almost singular focus on increasing the number of women in Parliament and grooming the few women politicians who had been side-lined during the one-party rule.<sup>212</sup> The prioritisation of political empowerment meant that the other injustices in the social space did not receive as much spotlight and hence continued to occur despite the progressive, albeit slow, increase in the number of women in decision-making spaces. The move to involve more grassroots women in the multi-party elections of

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210 Effie Owuor, 'Women and political inclusion in Kenya: A historical overview, 1963-2016', in Japhet Biegog (ed) *Gender equality and political processes in Kenya* Strathmore University Press, Nairobi, 2016, 18.

211 Owuor 'Women and political inclusion in Kenya: A historical overview, 1963-2016', 18.

212 F Kihiu, *Women as agents of democratization: The role of women's organizations in Kenya (1990-2007)*, Transaction Publishers, 2010, 63.

1997 and 2002 created space for active participation in the constitutional reform processes. These efforts coincided with regional and global campaigns for gender parity, which awakened consciousness to demand parity in all spheres of public life.<sup>213</sup>

Legally, attempts were also made to include women in political and public life, particularly in the wake of global action and international discourses on the status of women. One of the most notable influences on the discourse of women was the World Conference on Women held in Nairobi to review the UN Decade on Women 1976-1985 proclaimed by the UN General Assembly in 1975.<sup>214</sup> While acknowledging that women were making some progress towards inclusion, the Conference encouraged new approaches to overcoming obstacles to achieve equality, development and peace. To measure progress, three categories were established to appraise progress: constitutional and legal measures, equality in social participation, and equality in political participation and decision-making.<sup>215</sup> A decade later, the Beijing Platform for Action of 1995 built on the 1985 Conference and demanded accountability and government commitment to women's rights.<sup>216</sup>

The 1993 Task Force for the Review of Laws Relating to Women appointed to review all laws relating to women in Kenya produced a report that gave clear recommendations.<sup>217</sup> These reforms began with the

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213 Ruth Aura-Odhiambo 'Gender equality: Integration of women in the Judiciary in Kenya' in Wanjiku Kabira *et al* (eds) *Changing the mainstream: Celebrating women's resilience* Africa Women Studies Centre, Nairobi, 2018, 93, 103.

214 United Nations Conferences – Women and gender equality, 'World Conference to Review and Appraise the Achievements of the United Nations Decade for Women 15-26 July 1985, Nairobi, Kenya' Background <https://www.un.org/en/conferences/women/nairobi1985> (accessed 28 July 2022).

215 'World Conference to Review and Appraise the Achievements of the United Nations Decade for Women 15-26 July 1985, Nairobi, Kenya'.

216 Aura attributes the progress in the women's rights movement made in Kenya to the 1985 Global Women's Conference and the Beijing Platform of Action held a decade later. Aura-Odhiambo 'Gender equality: Integration of women in the Judiciary in Kenya' 103.

217 Owuor, 'Women and political inclusion in Kenya: A historical overview, 1963-2016',

introduction of a motion for implementation by Parliament, of the Beijing Platform for Action, which flopped.<sup>218</sup> In 1997, Phoebe Asiyo tabled the first Kenya specific Affirmative Action (AA) Bill in Parliament. The AA Bill, which proposed the reservation of at least a third of the nominated Member of Parliament positions for women, the establishment of two constituencies for women candidates only, and linking party funding to compliance with quotas for nominated women was unsuccessful.<sup>219</sup>

In 2000, Beth Mugo sponsored another Affirmative Action bill that sought to reserve 33% of all seats in Parliament and local assemblies for women as an entry-point for decision-making in all sectors.<sup>220</sup> However, the Bill was shelved after President Moi expressed his opposition for the Bill which promoted affirmative action for women only, asserting that he believed in equality of all people irrespective of gender.<sup>221</sup>

In 2007, there were two proposed legislations on affirmative action: the Constitution of Kenya (Amendment) Bill which proposed the creation of 40 seats for women in the Tenth Parliament, and an additional 40 constituencies. The Bill was unsuccessful for failure to seek broad consensus within the ruling party and failure to include other marginalised groups. Secondly, the Equal Opportunities Bill of 2007 attempted to give effect to a Presidential directive in 2006 that 30% of all public service appointments should be made up of women.<sup>222</sup> The

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218 Maria Nzomo 'Impacts of women in political leadership in Kenya: Struggle for participation in governance through affirmative action' Heinrich Böll Foundation, 2014, 2 (accessed 5 June 2022).

219 The Bill, also known as the Phoebe Asiyo Bill did not pass due to lack of support in a male dominated Parliament. Nzomo 'Impacts of women in political leadership in Kenya' 2.

220 Lucianna Thuo 'Ending the oppression olympics: Promoting the concomitant political participation of marginalised groups in Kenya' 5(1) *Strathmore Law Journal* (2021) 49, 55.

221 Nzomo 'Impacts of women in political leadership in Kenya' 2.

222 This directive, circulated by the Secretary to the Cabinet, is sometimes referred to as the Muthaura circular. See Aura-Odhiambo 'Gender equality: Integration of women in the Judiciary in Kenya' 105.

Bill was not passed.<sup>223</sup> Women therefore remained in the periphery, with their inclusion being tokenistic rather than impactful.

The various attempts at Affirmative Action provisions were finally rewarded in the 2010 Constitution. Women's prominence in the adoption of the 2010 Constitution was notable. Steadfast advocacy and vigilance ensured that women's issues were included in the constitution review process, and a specific or hard quota for their inclusion was captured in the constitutional document.<sup>224</sup>

### *Youth*

Although the youth form the largest segment of the population, they play a minimal role in developing policies, legislation, and public decision-making. In many cases, they are treated as pawns by political parties during elections.<sup>225</sup>

Historically, the youth were at the centre of society. In communities such as the Maasai, the Morans, responsible for making wartime decisions, were youthful.<sup>226</sup> This is one example that shows how pivotal the youth were in the social order of the Kenyan communities. Thomas Burgess and Andrew Burton, argue that the positive participation of youth in society degenerated due to various aspects.<sup>227</sup> These include the high affinity to violence by the youth, which created a perception among

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223 Thuo 'Ending the oppression olympics', 55.

224 Aura-Odhiambo 'Gender equality: Integration of women in the Judiciary in Kenya' 105.

225 National Democratic Institute for International Affairs (NDI) *Engaging young people in politics in conflict and post-conflict settings: A toolkit* 2007, 4.

226 Mshai Mwangola, 'Leaders of tomorrow? The youth and democratisation in Kenya,' Godwin Murunga and Shadrack Nasong'o (eds) *Kenya: The struggle for democracy*, Zed Books, London, New York; CODESRIA, Dakar, 2007, 129-163, 133.

227 G Thomas Burgess and Andrew Burton 'Introduction' in Andrew Burton, Helene Charton-Bigot, *Generations past: Youth in East African history*, Ohio University Press, 2010, 9.

the elders that they were not fit for national or any other societal roles.<sup>228</sup> It is noteworthy that the said propensity to violence can be attributed to the social-political and socio-economic upheavals of the 19<sup>th</sup> Century.<sup>229</sup> The entry of colonialism upset the traditional systems of control, societal morals, authority and economic organisation, systems that included the youth in the various age sets.<sup>230</sup> The result of colonialism was the systemic exclusion of the youth from the socio-political and economic spheres.

Paul Ocobock highlights the attitude of the colonial administration in dealing with unemployed youth.<sup>231</sup> He notes that the attitude reflected the position in London at the time, a position that favoured the detention of unemployed and underemployed youth under the label of vagrancy.<sup>232</sup> The vagrancy laws did little to address the issue. As Ocobock rightly notes, the problem of vagrancy among the youth did not begin and end in Nairobi. The cause was the hostile conditions in the reserves, particularly those that were not identified by the white settlers as economically viable, which led the youth to step out and seek opportunities for themselves in the affluent parts of the country, mostly Nairobi.<sup>233</sup> It is noteworthy that even as young as 16, the youth were required to pay tax. This is evidenced by the hut and poll tax which required every able male person above the age of 16 to pay taxes.<sup>234</sup> This led to an influx of young men seeking income in urban centres.<sup>235</sup> The movement to urban centres did not guarantee employment, but increased the number of unemployed youth in urban centres, particularly Nairobi.

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228 Burton, Charton-Bigot, *Generations past: Youth in East African history*, 14

229 Burton, Charton-Bigot, *Generations past: Youth in East African history*, 18.

230 Burton, Charton-Bigot, *Generations past: Youth in East African history*, 18.

231 Paul Ocobock, 'Joy rides for juveniles: Vagrant youth and colonial control in Nairobi, Kenya 1901-52', 31(1) *African History* (2006), 56.

232 Ocobock, 'Joy rides for juveniles', 41.

233 Ocobock, 'Joy rides for juveniles', 41.

234 Ocobock, 'Joy rides for juveniles', 42, fn 16, citing RMA van Zwanenberg, *An economic history of Kenya and Uganda, 1800-1970*, London, 1975, 4-5.

235 Ocobock, 'Joy rides for juveniles', 46.

This necessitated the enactment of vagrancy laws as administered in the colonial era.<sup>236</sup>

Mshai Mwangola notes that the period of the second liberation, 1990-2003, brought to the fore 'aggressive' youth discourse that challenged the existing stereotypes on youthful leadership and participation. Mwangola states that while the notion of democracy was previously limited to participation in elections, true democracy is more than voting.<sup>237</sup> The 2003 National Youth Policy Steering Committee reported that the youth were excluded from planning, designing and implementing programmes that affect them.<sup>238</sup> The National Youth Policy was the first document that considered the physical, cultural, social and political definitions of youth and their participation in political, economic and social spaces.<sup>239</sup> This consideration and the discourse from the report helped counter the many misconceptions about the youth and their needs and the assumption that the youth were too young and immature to participate in politics. It is against this backdrop that the definition of the term youth was included in the 2010 Constitution as persons between 18 and 35 years old.

According to the Committee of Experts on Constitutional Review, 2010, Kenya's history was replete with struggles for fair representation of women, youth and PWDs at the national decision-making level.<sup>240</sup> Their exclusion on these bases was reinforced by the fact that these groups faced exclusion just like other Kenyans based on their regional and ethnic identities. In other words, multiple forms of exclusion intersected to marginalise women, youth and PWDs further, thus creating intersectional invisibility. In the words of the CoE:

Discrimination occurs at multiple levels. For example, women in

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236 Ocobock, 'Joy rides for juveniles', 50.

237 Mwangola, 'Leaders of tomorrow? The youth and democratisation in Kenya,' 131.

238 National Youth Policy Steering Committee, National Youth Policy, 2003, 25.

239 National Youth Policy Steering Committee, National Youth Policy, 2003, 136.

240 Committee of Experts on Constitutional Review 'Final Report of the Committee of Experts on Constitutional Review' (2010) 53-54.

marginalised groups experience ethnic discrimination from other women, whilst women with disabilities and young women experience sexism in addition to discrimination on the basis of their disability. People from smaller ethnic communities are discriminated against by those from larger communities. And so on. Thus, an acceptable system of representation needed to ensure that these intersecting forms of exclusion were addressed – so that for example not all women representatives entering Parliament through an affirmative measure are from one region or that all disabled MPs are men.<sup>241</sup>

While political parties courted the votes of these marginalised groups to win elections, pre-election promises were consistently renege upon and historically excluded. Marginalised peoples did not have their interests represented in decision-making, and parties did not support their candidatures in elections.<sup>242</sup>

Margaret Muthee asserts that the purpose of youth empowerment as understood by the government was threefold, to: i) build their capacity to realise their aspirations and boost their self-motivation and awareness; ii) facilitate the youth to forge partnerships with other groups in society and; iii) instil a sense of ownership in the efforts to improve their wellbeing.<sup>243</sup> Based on these and towards a meaningful inclusion of the youth, Muthee recommends that the ideal youth policy should have the following prerequisites for youth empowerment; i) stable economic and social base; ii) political will; iii) adequate resources and; iv) a supportive legal and administrative framework.<sup>244</sup> Muthee agrees with the National Youth Policy that to improve youth empowerment, the youth should be involved in all levels of governance and decision-

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241 Committee of Experts on Constitutional Review 'Final Report of the Committee of Experts on Constitutional Review' (2010) 54.

242 CoE 'Final Report of the Committee of Experts on Constitutional Review' (2010) 53-54.

243 Margaret Wamuyu Muthee, 'Hitting the target, missing the point: Youth policies and programmes in Kenya', Woodrow Wilson International Center for Scholars, Washington DC, 2010, 27.

244 Muthee, 'Hitting the target' 2010, 27.

making processes and economic, political and social discussions.<sup>245</sup> However, as this chapter has shown, the youth are yet to attain such inclusion levels.

### *Persons with disabilities*

PWDs are part of the marginalised groups that have experienced double invisibility.<sup>246</sup> They are identified as having been marginalised historically and denied access to economic and political resources to better their lives.<sup>247</sup> Little data exists on PWDs in public life because of the lack of data disaggregation by the Kenya National Bureau of Statistics and related institutions.<sup>248</sup> However, it is reported that poverty and disability are fundamentally interlinked due to unequal access to education, employment, healthcare and food<sup>249</sup> and exacerbated by

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245 Muthee, 'Hitting the target' 2010, 27.

246 Double invisibility has been used by disability rights advocates to highlight the fact that certain categories of persons with disabilities such as women and children with disabilities are seen as less worthy of social investment (e.g., through education) which results in their making less progress than other persons with disabilities. See G Quinn and T Degener, 'Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability' United Nations, Geneva, 2002, 23. Purdie-Vaughns and Eibach refer to the double marginalisation among marginalised groups as 'intersectional invisibility'. See Valerie Purdie-Vaughns, Richard P Eibach 'Intersectional invisibility: The distinctive advantages and disadvantages of multiple subordinate-group identities' 58 *Sex Roles* (2008) 377. In the context of gender equality, Kameri-Mbote, citing Lombardo and Mieke, concedes that strategies for gender inclusion, while they have been in place longer, do not easily take on board other inequalities. See E Lombardo and Vierloo Mieke 'Institutionalising intersectionality in the European Union?' *International Feminist Journal of Politics* (2009) 481, cited in Patricia Kameri-Mbote, 'Fallacies of equality and inequality: Multiple exclusions in law and legal discourses' Inaugural Lecture, University of Nairobi, 24 January 2013, 13.

247 FES 'Regional disparities and marginalization in Kenya' (2012) 31.

248 Phitalis Were Masakhwe 'Disability discrimination: A personal reflection' in George Gona, Mbugua wa Mungai (eds) *(Re)membering Kenya: Interrogating marginalization and governance, Vol 2*, Twaweza Communications, 2013, 60.

249 Peter Moyi 'School participation for children with disabilities in Kenya' 12(4)

institutional, environmental and attitudinal barriers.<sup>250</sup> Poverty affects not just PWDs but also their families, especially the women who bear the greatest burden of caring for them within the family.<sup>251</sup>

The societal definition of disability has evolved with time. The international discourse on disability postulates the evolution of disability in various models. The medical model of disability defines disability as an impairment that leads to a restricted or limited performance considered 'normal' by society. The medical model focuses on providing sustained medical care to individual PWDs through professional treatment.<sup>252</sup> The developmental or social model focuses on how environmental restrictions or inhibitions, rather than physical impairments, impede societal participation. This necessitates social action and collective social responsibility to make environmental modifications necessary for the full participation of PWDs in all areas of social life.<sup>253</sup> The charity model, which treats PWDs as different and in need of special attention and programmes, focuses on secluding them in 'special' institutions and treating them as persons 'less fortunate', 'vulnerable' or 'disadvantaged'.<sup>254</sup> The church applied both the developmental and charity models of disability in the colonial and post-colonial states.

Due to the negative portrayal of disability in some interpretations of the Bible to denote sin, disobedience and unbelief, a discriminatory attitude towards disability developed.<sup>255</sup> Conversely, it was also the church that pioneered special schools for children. The Presbyterian

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*Research in Comparative & International Education* (2017) 497-511, 497.

250 Masakhwe 'Disability discrimination: A personal reflection' 58, 61.

251 Masakhwe 'Disability discrimination: A personal reflection' 61.

252 'Models of disability: Types and definitions' *Disabled World* <https://www.disabled-world.com/definitions/disability-models.php> (accessed 2 July 2022).

253 'Models of disability: Types and definitions' *Disabled World* 10 September 2010.

254 Masakhwe 'Disability discrimination: A personal reflection' 63.

255 Pauline A Otieno 'Biblical and theological perspectives on disability: Implications on the rights of persons with disability in Kenya' 29(4) *Disabilities Studies Quarterly* (2009).

Church of East Africa, Salvation Army, Anglican Church of Kenya, Catholic Church and Methodist Church are all credited with setting up schools to cater for children with different categories of disability.<sup>256</sup> Some studies also credit civil society organisations for advancing special education in Kenya.<sup>257</sup> However, segregated education did not facilitate PWDs to compete on an equal level with other persons in society due to inadequate funding for special needs schools at the primary and secondary levels.

In the post-independence State, one area targeted for redressing marginalisation was education. The Kenya Education Commission of 1964, the first post-independence education commission, proposed inclusive education and the establishment of more special schools for children with disabilities to make schools responsive to the needs of such children. In the same year, the Committee of the Care and Rehabilitation of the Disabled (CCRD) was tasked with developing guidelines on special needs education. The CCRD Report, also called the Ngala Report, made wide-ranging recommendations on inclusive education, transport provision for children with physical disabilities, increased funding for all special schools, and affirmative action to promote the hiring of PWDs and their training in vocational centres. To ensure effective implementation of the Ngala Report recommendations, Sessional Paper No 5 of 1968 recommended a survey of the PWDs, which the State never carried out.<sup>258</sup>

The 2003 Task Force on Special Needs Education (Kochung Taskforce) noted that there was limited progress towards universal education, which hampers the uptake of higher education and work opportunities for PWDs. Moreover, the limited funding of special schools continues to plague inclusive education.<sup>259</sup> The lack of clear guidelines on inclusive

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256 Otieno 'Biblical and theological perspectives on disability'.

257 Moyi 'School participation for children with disabilities in Kenya' 498.

258 Moyi 'School participation for children with disabilities in Kenya' 498.

259 Development Initiatives, 'Government funding to support disability inclusion in Kenya - Report' August 2020.

education, reliable data on the number of children with special needs and lack of financial and technical resources for special schools, are all attributable to the needs of PWDs being ignored by the state.<sup>260</sup>

While attempts were made to address the marginalisation of PWDs in the education and health sectors, their political participation needs were ignored.<sup>261</sup> The exclusion of PWDs from political and public life has resulted from social, economic, and political factors. Attempts at inclusion by PWDs in the political and economic spheres were ameliorated by the Persons with Disabilities Act (PWDA) 2003, which included 5% employment quotas in public bodies, tax exemptions and legal assistance for the provision of sign language interpretation for the PWDs affected,<sup>262</sup> and the establishment of the National Disability Development Fund (NDDF).<sup>263</sup> However, the NDDF has not been established, partly due to the low priority of disability matters in Kenya and partly because of concerns that such adaptations would be too costly.<sup>264</sup> As will be discussed in the ensuing sections, even in the area of political participation, PWDs managed to secure constitutional protection through a 5% quota in elective and appointive positions,<sup>265</sup> but this has scarcely resulted in tangible outcomes in these positions. Assumed homogeneity of disability has also resulted in the predominance of persons with physical disabilities in the nomination slots availed for PWDs, thus marginalising persons with other categories of disability including mental, intellectual or sensory impairments.<sup>266</sup>

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260 Moyi 'School participation for children with disabilities in Kenya' 499 cites the Kenya Education Sector Support Programme (KESSP) 2005-2010 which acknowledged that the government had ignored children with disabilities.

261 APRM Report, 111.

262 Persons with Disability Act, Section 38.

263 Persons with Disability Act, Section 32.

264 Masakhwe 'Disability discrimination: A personal reflection' 65.

265 Constitution of Kenya, Article 54(2).

266 Convention on the Rights of Persons with Disability, Article 1.

## Measures to redress marginalisation

### *Pre-2010: The false starts*

By the end of the Kenyatta I tenure, a significant number of Kenyans remained on the sidelines of development. 'Kenyans who were already enjoying the fruits of independence were reluctant or even opposed to sharing their fortunes with the disadvantaged groups'.<sup>267</sup> Despite Kenya's long history of centralisation as the basis of development, some decentralisation initiatives were pursued after independence with varied success. These initiatives took the form of deconcentration, delegation, and privatisation.<sup>268</sup> Due to design flaws and continued centralisation efforts, none of these measures were entrenched, thus limiting their effectiveness. These measures, which we refer to as 'false starts', are discussed below.

First among these false starts was the District Focus for Rural Development Strategy of 1983 (District Focus), which some commentators have argued that it was an attempt by President Moi to legitimise and strengthen power through deconcentration rather than a genuinely reformative strategy.<sup>269</sup> District Focus gave district administrators the power to initiate and administer development projects.<sup>270</sup> Other

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267 W Ochieng', 'Structural and political changes', in BA Ogot and William Ochieng' (eds) *Decolonization and independence in Kenya 1940-1993* East African Education Publishers, Nairobi, 1995.

268 Ministry of Devolution and Planning 'Policy on devolved system of government' (2016) 2.

269 R Southall and G Wood 'Local government and the return to multipartyism in Kenya' 95(381) *African Affairs* (1996) 501-527, 508-9; Gabrielle Lynch, *I say to you: Ethnic politics and the Kalenjin in Kenya* University of Chicago Press, Chicago, 2011, 118, cited in Nic Cheeseman, Gabrielle Lynch and Justin Willis 'Decentralization in Kenya: The governance of governors' 54(1) *The Journal of Modern African Studies* (2016) 1-35, 7.

270 Cheeseman, Lynch and Willis 'Decentralization in Kenya: The governance of governors' 7.

measures adopted in this era include the establishment of regional development authorities (RDAs) such as the Tana and Athi River Development Authority (TARDA), Kerio Valley Development Authority (KVDA), Lake Basin Development Authority (LBDA), Ewaso Ng'iro North Development Authority (ENNDA), Ewaso Ng'iro South Development Authority (ENSDA) and Coast Development Authority (CDA).<sup>271</sup> Further, Sessional Paper No 1 of 1986 on Economic Management for Renewed Economic Growth, which proposed raising the productivity and income of farmers, herders and informal sector workers to address income gaps shifted the locus of development from the state to the private sector. However, the Policy did not have much effect on reversing regional disparities because the state continued to be involved in determining where private capital and investment were directed, which retained the centralised state at the heart of development.<sup>272</sup>

In the 1990s, the focus shifted from administrative and political decentralisation to what has been termed fiscal decentralisation initiatives, including the Road Maintenance Fuel Levy (RMFL) of 1994, the Rural Electrification Programme Levy of 1998 and the Local Authorities Transfer Fund of 1999, which sought to transfer 5% of all income tax to local authorities. During the Kibaki presidency (2003-2013), other decentralised were established, including the Constituency Development Fund (CDF) established in 2003, under which 2.5% of the national revenue would be directed at developing constituencies,<sup>273</sup> the Community Development Trust Fund (CDTF) that supported sustainable community-based development projects,<sup>274</sup> focusing mainly

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271 Ministry of Devolution and Planning 'Policy on devolved system of government' (2016) 3.

272 *In the Matter of the Speaker of the Senate & Another* Advisory Opinion Reference No 2 of 2013.

273 Established through Constituency Development Fund Act 10 of 2003.

274 Government of Kenya, 'Community Development Trust Fund: Guidelines for grant applicants' Restricted Call for Proposals 2011, Reference: EuropeAid/130926/M/ACI/KE 'The Community Development Trust Fund (CDTF) was established in 1996 through a Financing Agreement between the Government of Kenya (GoK) and the European Union (EU), and gazetted under Legal Notice No. 3030

on vulnerable ASAL groups, and the Constituency Bursary Fund (CBF), a decentralisation initiative meant to enhance access, ensure retention and reduce inequalities in accessing secondary school education.<sup>275</sup> Critics of CDF have argued that it was turned into a political instrument for allocating funds to politically correct allies rather than those who needed it the most.<sup>276</sup> The CDF has since been declared unconstitutional by the Supreme Court.<sup>277</sup>

During President Kibaki's tenure, several policy initiatives were attempted, some of which were carried over into President Uhuru Kenyatta's tenure. The Kenya Vision 2030, adopted in 2008, was designed as a national economic blueprint to change Kenya into 'a newly industrialising, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment'. The Second Medium Term of the Vision 2013-2017 (MTP2), whose theme was 'Transforming Kenya: Pathway to devolution, socio-economic development, equity and national unity' emphasised decentralisation of decision-making and equitable distribution of resources. Some of the projects proposed to improve the lives of the marginalised communities included education in arid and semi-arid lands (ASALs), school health

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dated 26<sup>th</sup> March 1996. This was repealed through legal notice No. 172, dated 20<sup>th</sup> September 2007, thus allowing CDTF to be multi-donor funded. Since 1996, the Community Development Trust Fund, as part of the Ministry of State for Planning, National Development and Vision 2030, has over the years implemented some 800 community-based socio-economic and environmental projects in rural and peri-urban areas in Kenya. Funding of CDTF and of the projects has been provided by the European Union and the Government of Denmark. Overall the community-based environmental projects contribute to the Government of Kenya's decentralised agenda, especially improved livelihood systems and conservation of community natural resources.'

275 Shadrack Kiprotich Saina 'Modalities of Constituency Bursary Fund Allocation and their effect on access and retention in Nairobi County' 1(1) *Journal of Administrative Sciences and Policy Studies* (2013) 49, 50.

276 Saina 'Modalities of Constituency Bursary Fund allocation' 50.

277 *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* (Petition 1 of 2018) [2022] KESC 39 (KLR) (Civ) (8 August 2022) (Judgment).

and school feeding programmes.<sup>278</sup> The Uwezo Fund, targeted at women, youth and PWDs was established under Vision 2030 with the goal of promoting business and enterprise at the constituency levels. The overall goal of the Uwezo Fund was to eradicate extreme poverty and hunger and promote gender equality and women empowerment in line with the Sustainable Development Goals.<sup>279</sup>

The National Policy Framework for Nomadic Education 2010<sup>280</sup> was adopted not to supplant existing national policies on education, but rather to address the gaps where existing policy approaches do not meet the needs of nomadic communities. The Policy was informed by the fact that despite the enrolment rate being increased to 107.4% in 2006 with the introduction of free primary education, enrolment rates for ASALs remained below 50%, with counties such as Wajir recording rates as low as 20.6%. The Policy targeted school-going children drawn from nomadic communities as well as their parents, teachers and youth to coordinate and harmonise efforts to deliver quality education services to nomadic communities. It was hoped that the Policy would bring about community empowerment, poverty reduction and improved opportunities for girls and children with special needs to access education and job opportunities.<sup>281</sup> The Policy was revised in 2016 to include the constitutional protection of the right of every child to free and compulsory basic education and the provision in Article 56 (b) that '[t]he state shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided with special opportunities in educational and economic fields.' Due to the design of these initiatives, the wider political environment<sup>282</sup> as well as continued centralisation efforts, most of them failed.

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278 Vision 2030 'Second Medium Term Plan (2013-2017)'.

279 Uwezo Fund official website <https://www.uwezo.go.ke/> (accessed 12 June 2022).

280 Ministry of Education, 'Policy Framework on Nomadic Education in Kenya 2010' Ministry of Education / UNICEF available on <https://repository.kippra.or.ke/handle/123456789/1120> accessed on 1 June 2022.

281 Revised Policy Framework for Nomadic Education in Kenya (2016) 10.

282 Ministry of Devolution and Planning 'Policy on devolved system of government' (2016) 3.

Despite the promises of reform by the Kibaki Government, the impact of 'elite fragmentation, political liberalisation and state informalisation' was underestimated,<sup>283</sup> and little progress was made towards inclusion. As seen earlier in the chapter, colonialism and the policies of post-independence governments created opportunities for a few Kenyans, depending on geographical location, sex, class, ethnicity, religion, physical ability and proximity to power.

Thus, constitution reform regained momentum following the peace talks that ended the post-election violence of 2007/8. While there was consensus on the need to employ affirmative action and inclusion principles in all draft constitutions, there was no consensus on how affirmative action and inclusion would be achieved in respect of the elective offices. The interlocking nature of exclusion was cited as one of the barriers to effective inclusion strategies.

Exclusion on the basis of gender, disability and age are further reinforced by the fact that people who face discrimination on these bases, like all other Kenyans may also face exclusion on the basis of their ethnic and regional identities – i.e. multiple forms of exclusion intersect to further marginalise people who may already belong to marginalised groups.<sup>284</sup>

*Post-2010 constitutional protection: The last promise*

The 2010 Constitution gives juridical recognition to marginalised communities and groups. It contains an expanded Bill of Rights that specifically provides for the rights of women, children, youth, PWDs, minorities and marginalised groups, and older members of society. Moreover, the introduction of devolution is both 'a decentralisation

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283 Daniel Branch and Nic Cheeseman 'Democratization, sequencing, and state failure in Africa: Lessons from Kenya' 2009 108(430) *African Affairs* 1-26. See also Lynch, *Ethnic politics and the Kalenjin in Kenya*, cited in Cheeseman, Lynch and Willis 'Decentralisation in Kenya', 7.

284 Committee of Experts on Constitutional Review 'Final Report of the Committee of Experts on Constitutional Review' (2010) 53-54.

and a democratisation' as it seeks to redress historical imbalances by creating distinct yet interdependent county governments with local representatives carrying out governmental functions.<sup>285</sup> Devolution is a stronger form of decentralisation (compared to deconcentration and delegation) because it creates local governments that are elected by the citizens and make autonomous decisions on service delivery.<sup>286</sup> Devolution in Kenya is considered radical as the 2010 Constitution restructures the state by repelling a long history of 'centralisation as the basis of political development'.<sup>287</sup> One of the objects of devolution is to 'foster national unity by recognising diversity',<sup>288</sup> and the exclusion of any group is, therefore, thought to undermine national unity.<sup>289</sup>

Article 174 of the 2010 Constitution sets out the objects of Kenya's devolution. According to Jill Cottrell and Yash Pal Ghai

These objectives are elaborations of the national values and principles and show the importance of devolution to the new system of government. An essential purpose of devolution is to spread the power of the state throughout the country; and reduce the centralisation of power which is the root of our problems of authoritarianism, marginalisation of various communities, disregard of minority cultures, lack of accountability, failure to provide services to people outside urban areas and even within them.<sup>290</sup>

This section reviews the constitutional protection of marginalised groups in political representation to assess the extent to which the 2010 charter has transformed their lives. It argues that while the 2010 Constitution is progressive in its mandate of inclusion at both the national and devolved governance levels, progress towards political inclusion

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285 CoE 'Final Report' 53-54.

286 County Governance Toolkit, 'Basics of devolution' <https://countytoolkit.devolution.go.ke/basics-of-devolution> (accessed 29 July 2022).

287 Burbidge, *An experiment in devolution* 4.

288 Constitution of Kenya 2010, Article 174 (b).

289 J Mutakha Kangu *Constitutional law of Kenya on devolution* Strathmore University Press, Nairobi, 2015, 117.

290 YP Ghai and JC Ghai, *Kenya's Constitution: An instrument for change*, Katiba Institute, 2011, 119 cited in *In the Matter of the Speaker of the Senate & Another* Advisory Opinion Reference No 2 of 2013, para 194.

has been hampered by inadequate implementation mechanisms, lack of incentives for implementing inclusion initiatives, assumed homogeneity of disability and other marginalised groups, anchoring of nomination within the political party structure, and tokenism. Within the constitutional structure, several mechanisms have been adopted to support inclusion efforts and reverse the marginalisation experienced in the colonial and post-colonial period. These measures are also appraised below.

### *Political representation*

Kenya's devolution system does not only focus on economic development. Devolution in Kenya is pre-occupied with 'national unity, democratic inclusion and the sharing of resources',<sup>291</sup> pursuing 'ground-up democratic unity',<sup>292</sup> thus making it a 'political initiative' aimed at changing the way collective action is done, rather than a 'policy initiative' seeking optimal provision of public services.<sup>293</sup> For these values to be realised, the Understandably, therefore, this section focuses on the issue of political representation.

#### **a. Representation at the national level**

The system of devolved government in Kenya involves representation at the local level through county assemblies as well as giving each county a voice at the national level through the representation by one woman in the National Assembly per county as well as a Senator to represent each county in the Senate. In addition to elected members, slots are allocated to nominated members to ensure

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291 Burbidge, *An experiment in devolution* 5.

292 Burbidge, *An experiment in devolution* 8.

293 Burbidge, *An experiment in devolution* 5.

representation of special interest groups at both levels.<sup>294</sup> While the National Constitutional Conference proposed electoral colleges to select members of marginalised groups who would represent their interests in Parliament thus avoiding the political party route, the 2010 Constitution did not carry this suggestion. According to the CoE, because of the history of political parties declining to support their candidatures and using them as pawns but never representing their interests:

Women, persons with disabilities, youth and other marginalised peoples were therefore unwilling to entrust the matter of their access to elective office purely in the hands of political parties. Further it was felt that if political parties were to be entitled to public funds, they must also be required to ensure the representation of all Kenyan peoples (as all citizens pay taxes) at all levels.<sup>295</sup>

The CoE adopted the Bomas approach of having 14 representatives of marginalised groups in the National Assembly divided into two: seven PWDs and seven representatives of other marginalised groups; while in the county assemblies and Senate, party lists and other proportional representation mechanisms and electoral colleges would be used as an affirmative action measure. This would be in addition to provision for independent candidates and participation through political parties, which was meant to provide flexibility to ensure equitable access to electoral offices by all.<sup>296</sup> However, the 2010 Constitution did not carry these proposals, as the Parliamentary Select Committee's (PSC) proposal, which was in the Repealed Constitution, of 12 nominated seats in the National Assembly to be filled by persons representing special interests, including youth, PWDs and workers carried the day.<sup>297</sup>

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294 Constitution of Kenya, 2010, Articles 97, 98 and 177.

295 Committee of Experts on Constitutional Review 'Final Report of the Committee of Experts on Constitutional Review' (2010) 54.

296 Committee of Experts on Constitutional Review 'Final Report of the Committee of Experts on Constitutional Review' (2010) 54.

297 Constitution of Kenya 2010, Article 97(1)(c). This was vastly different from the provision in the Revised Harmonized Draft Constitution which had provided for a 5% affirmative action measure for persons with disabilities to be realized through designated seats, ensuring that all other marginalised groups were represented

For Senate, while the PSC draft had omitted representation of youth and PWDs, the CoE reinstated four seats in the Revised Harmonised Draft, two for the youth and two for PWDs – one male and one female in each of the cases.<sup>298</sup> This means that party lists prepared by political parties are required to ensure that the regional and ethnic diversity of the country is represented and alternate between male and female candidates.<sup>299</sup>

The 2010 Constitution additionally provides for equality between men and women in all spheres of public life and requires that not more than two-thirds of any elective or appointive positions may be held by persons belonging to one gender.<sup>300</sup> Moreover, political parties are required to promote and respect gender equality and equity.<sup>301</sup> Article 100 also requires Parliament to enact legislation to promote the representation of women, youth, PWDs, ethnic minorities and marginalised communities in Parliament. This legislation is yet to be enacted and has been the subject of protracted litigation. In September 2020, the then Chief Justice, David Maraga, advised the then President, Uhuru Kenyatta, to dissolve Parliament for failure to comply with the constitutional directive to pass legislation to provide for the representation of women in Parliament pursuant to Article 100.<sup>302</sup> This advice by the Chief Justice, issued in accordance with Article 261(7) of the Constitution, remains the subject of litigation in the High Court, but a court order suspended its implementation.<sup>303</sup>

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and that one-third of the seats for women were properly filled. See Committee of Experts on Constitutional Review 'Final Report of the Committee of Experts on Constitutional Review' (2010) 116.

298 Constitution of Kenya, 2010, Article 98(1)(b).

299 Constitution of Kenya, 2010, Article 90(2)(b) & (c).

300 Constitution of Kenya, 2010, Article 27(3) & (8).

301 Constitution of Kenya, 2010, Article 91(1)(f).

302 Office of the Chief Justice, 'Chief Justice's advice to the President on dissolution of parliament for failure to enact the gender rule' 22 September 2020 *KenyaLaw.org*. Githu Muigai *Power, politics and law*, 369.

303 *Leila Konchellah & anor v Chief Justice and President of the Supreme Court & Anor* Petition E291 of 202 (consolidated with Petitions E300 of 2020, E302 of 2020, E305

While there is no hard quota for the representation of the youth in elective and appointive offices, the 2010 Constitution provides for quotas for women and PWDs. The two-thirds gender rule requires compliance in elections and all appointive positions, including the Executive. For persons with disabilities, Article 54(2) requires the progressive realisation of the principle that at least 5% of all elective and appointive positions be reserved for PWDs. However, the requirement for this measure to be realised progressively could have limited the progress of the inclusion of PWDs.

## b. Representation in counties

Article 175(c) of the 2010 Constitution mandates that no more than two-thirds of members of representative bodies in each county government shall be of the same gender. This is reinforced by Article 197, which states that no more than two-thirds of any county assembly or county executive committee shall be of the same gender. The membership of the county assemblies is detailed by Article 177 of the 2010 Constitution as read with Section 7 of the County Governments Act. Article 177 stipulates that county assemblies comprise three kinds of representatives: those elected in the first-past-the-post elections, such number of nominated persons as are necessary to ensure compliance with the two-thirds gender rule (often referred to as gender top-up) and persons nominated to represent persons with disabilities and youth.<sup>304</sup> The nominated MCAs are elected via two sets of party lists: one for the

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of 2020, E314 of 2020, E314 of 2020, E317 of 2020, e337 of 2020, 228 of 2020, 229 of 2020, and JR E1108 of 2020). Following a suspension of the implementation of the advisory, a five-judge bench was appointed by the Deputy Chief Justice to hear the consolidated petitions. The Court of Appeal in *National Assembly and anor v Chief Justice of the Republic of Kenya and Anor, Deputy Chief Justice and 12 others - interested parties*, Civil Appeal E097 of 2021, Ruling of 28 May 2021, stayed the proceedings of the High Court and the matter therefore is yet to proceed to hearing (as at September 2022).

304 Elections Act, Section 36(1)(f); County Governments Act, Section 7.

representation of youth and persons with disabilities and another for fair gender representation.<sup>305</sup> Both lists alternate between male and female candidates. The number of special interest seat nominees is eight.<sup>306</sup> In contrast, the number of nominees required to ensure that the two-thirds rule is met is assessed after the General Election to determine how many representatives of the underrepresented gender are necessary to ensure compliance with the two-thirds gender rule. In nominating persons to the county assemblies, political parties are required to ensure that their party lists reflect the community and cultural diversity of the county as an adequate representation of minorities following Article 197 of the 2010 Constitution.<sup>307</sup>

### *Policy measures*

In addition to the above constitutional provisions, some policy measures have been adopted since 2010 as discussed below.

#### **a. Equalisation Fund**

The 2010 Constitution provides for the sharing of revenue between the National Government and county governments equitably. It establishes a framework for using state resources to promote the equitable development of the country while making special provision

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305 At present, this is the only mechanism that exists to ensure implementation of the two-thirds gender quota.

306 While the Elections Act and the County Governments Act conflict on the exact number of this third category, with Section 36(1)(f) of the Elections Act providing for eight candidates representing disability, youth and marginalised groups and Section 7 of the County Governments Act providing for six nominated members, the Elections Act is considered the *lex specialis* and parties therefore present a list of eight persons in accordance with the Elections Act.

307 County Governments Act 17 of 2012, Section 7(2).

for the marginalised groups and areas.<sup>308</sup> In addition, the 2010 Constitution establishes the Equalisation Fund into which is to be paid 0.5% of all revenue collected by the National Government each year. The Equalisation Fund is intended ‘to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible’.<sup>309</sup> The establishment of the Equalisation Fund is one of the strategies for strengthening the management of fiscal decentralisation.<sup>310</sup>

The law requires the Commission for Revenue Allocation (CRA) to be consulted and its recommendations considered before any Bill appropriating money out of the Equalisation Fund is passed.<sup>311</sup> The CRA has developed the Marginalisation Policy, which stipulates the criteria for identifying marginalised areas for purposes of allocation and utilisation of the Equalisation Fund. 14 counties were identified as marginalised areas for purposes of the Equalisation Fund: Garissa, Isiolo, Kilifi, Kwale, Lamu, Mandera, Marsabit, Narok, Samburu, Taita Taveta, Tana River, Turkana, Wajir, and West Pokot. The criteria used to settle on these counties include legislated discrimination, geographical context, culture and lifestyles, external domination, land legislation and administration, minority groups, ineffectual political participation and inequitable government policies.<sup>312</sup>

The NGEC has expressed concern that the amount allocated to the Equalisation Fund is rather small compared to the scale of work the Equalisation Fund is meant to cover in terms of addressing decades of historical marginalisation and unequal development across Kenya.<sup>313</sup>

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308 Constitution of Kenya, 2010, Article 202.

309 Constitution of Kenya, 2010, Article 204(1) and (2).

310 Ministry of Devolution and Planning ‘Policy on devolved system of government’ (2016) 29.

311 Constitution of Kenya, 2010, Article 204(4).

312 CRA ‘Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund’ 2013, vii.

313 National Gender and Equality Commission ‘The Equalisation Fund: Audit of the

To this, the CRA has recommended that the Equalisation Fund should prioritise a few initiatives with transformational impact on the marginalised areas such as projects on water, health and education.<sup>314</sup> The Equalisation Fund lacks a legislative framework.

### **b. Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund 2011**

The CRA has developed the Marginalisation Policy in February 2013, which stipulates the criteria by which to identify marginalised areas for purposes of allocation and use of the Equalisation Fund. The Policy sets out objective criteria for identifying marginalised areas and provides a reference point for administering the Equalisation Fund.

The CRA defines a marginalised area as ‘a region where access to food, water, healthcare, energy, education, security, communication and transport is substantially below the level generally enjoyed by the rest of the nation.’<sup>315</sup> In addition to determining the criteria for identifying marginalised areas, the CRA is also obligated to review the Policy regularly for purposes of ensuring that the enjoyment of basic services in marginalised areas is brought to the level generally enjoyed by other areas of the nation as far as possible.<sup>316</sup> The first Policy was designed to be operational for three years.<sup>317</sup>

The Second Policy, adopted in 2018, reviewed the challenges with the first cycle of implementation of the Equalisation Fund before setting out the criteria for its distribution. Focus shifted from identification

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status of water, health and road sectors in 8 marginalized counties’ (2017) 18.

314 ‘Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund’ 2013, vi.

315 Commission for Revenue Allocation ‘Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund’ 2013, 7.

316 Constitution of Kenya, 2010, Article 204(2).

317 CRA ‘Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund’ 2013, 19.

of marginalised counties to identification of marginalised areas for the smallest unit in respect of which data was available. This would allow deprived areas in otherwise well-developed counties to benefit while simultaneously facilitating the exclusion of developed areas in marginalised counties from consideration.<sup>318</sup>

**c. Arid and Semi-Arid Lands Policy 2012<sup>319</sup>**

The Arid and Semi-Arid Lands Policy (ASAL Policy) seeks to facilitate and accelerate sustainable development in Northern Kenya to reverse decades of limited investment in the region by increasing the investment of resources and ensuring that the realities of pastoral life are factored in resource use. It seeks to ensure that the development gap between the NFD and the rest of the country is reduced thereby strengthening national cohesion, ensuring food and nutrition security in ASALs in light of the deepening impact of climate change, and protecting and promoting mobility, which is essential to productive pastoralist lifestyles.<sup>320</sup>

**d. The Devolution Policy 2016<sup>321</sup>**

The Devolution Policy was adopted by the Ministry of Devolution and Planning with the aim of addressing the issues that had emerged from the devolved system of government and to optimise service

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318 CRA 'Second policy and criteria for sharing revenue among marginalised areas' (2018) 6.

319 Formal title: Sessional Paper No 8 of 2012 on National Policy for the Sustainable Development of Northern Kenya and other Arid Lands 'Releasing our full potential', 11 October 2012.

320 National Policy for the Sustainable Development of Northern Kenya and other Arid Lands 'Releasing our full potential'.

321 Ministry of Devolution and Planning 'Policy on devolved system of government' (2016).

delivery. The Policy is designed to guide both the National Government and the county governments in aligning their devolution policies. Following the roll out of devolved governments in 2013, some challenges which had not been foreseen by the Taskforce on Devolved Government arose, and the Policy sought to address them. The Policy also proposed to enhance collaboration and coordination of the various actors involved in implementing devolution.<sup>322</sup> While the Policy is not detailed, it is anchored on the principles of Article 10 of the 2010 Constitution namely: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Moreover, one of the strategies for achieving stronger management of fiscal decentralisation is the establishment of the Equalisation Fund.<sup>323</sup>

### *Challenges to political inclusion*

After the promulgation of the 2010 Constitution, optimism of women's concerted efforts towards the Affirmative Action provisions quickly dwindled with the realisation that the guarantee of equal gender representation would not be implemented immediately.<sup>324</sup> Despite the various attempts at legislative measures towards the implementation of the two-thirds gender rule, Parliament is yet to pass a law that effects the principle.<sup>325</sup> So far, the Affirmative Action principle has been violated

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322 Ministry of Devolution and Planning 'Policy on devolved system of government' (2016) 6.

323 Ministry of Devolution and Planning 'Policy on devolved system of government' (2016) 29.

324 *In the Matter of Gender Representation in the National Assembly and the Senate* (Supreme Court Advisory Opinion 2 of 2012) the Supreme Court by a majority decision ruled that Article 27(8) was not immediately realisable but was to be implemented progressively and legislation was to be adopted to guide its implementation by August 2015.

325 For the history of litigation on the two-thirds gender rule under the 2010 Constitution, see *In the Matter of Gender Representation in the National Assembly and the Senate* (Supreme Court Advisory Opinion 2 of 2012) on whether Article 27(8) was immediately realisable or subject to progressive realisation. *FIDA Kenya & others v*

in Parliament and Cabinet's composition<sup>326</sup> since the promulgation of the 2010 Constitution, and women remain on the periphery, with their inclusion being tokenistic rather than impactful.

For all the three groups, the constitutional provisions on political inclusion of marginalised groups have not resulted in significant representation, as several factors have impeded the progress towards inclusion. First, while the 2010 Constitution has progressive provisions

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*Attorney General and another* [2011] eKLR which challenged the gender composition of the Supreme Court. *Milka Adhiambo Otieno & another v Attorney General & 2 others*, Kisumu High Court Petition No 44 of 2012 eKLR which challenged elections to the Kenya Sugar Board for non-compliance with the two-thirds gender principle. *CREAW v Attorney General*, Petition Nos 207 & 208 of 2012 eKLR which sought to nullify the appointment of county commissioners for non-compliance with the two-thirds gender principle. *National Gender and Equality Commission v IEBC*, High Court Petition 147 of 2013, which challenged the process of allocation of party list seats under Article 90 of the Constitution for, inter alia, the exclusion of youths, persons with disabilities and women. *Centre for Rights Education and Awareness (CREAW) v Attorney General & another* [2015] eKLR which challenged the non-publication of a bill to give effect to Article 100 of the Constitution on representation of marginalised groups in Parliament. *CREAW & others v Speaker of the National Assembly & others*, Constitutional Petition 411 of 2016 which sought to implement Article 261 of the Constitution to compel Parliament to pass legislation seeking to implement Article 100, otherwise it would stand dissolved. An appeal against the decision of the High Court in this matter was dismissed, see *Speaker of the National Assembly v CREAW & others*, Civil Appeal 148 of 2017. Following several petitions to the Chief Justice to advise the President to dissolve Parliament under Article 261(7) of the Constitution for failure to pass the required legislation under Article 100, the Chief Justice issued an advisory to the President on 22 September 2020 on 21 December 2020. The case of *Marilyn Kamuru and two others vs Attorney General and another*, Constitutional Petition 552 of 2012 and successfully challenged the violation of the two-thirds gender rule in the appointment of cabinet secretaries but the declaration of invalidity was suspended. In *Katiba Institute v IEBC* [2017] eKLR, the Court also asserted the obligation of the IEBC to ensure implementation of the two-thirds gender rule by political parties in the nomination process, with the attendant power to reject non-compliant lists, but the implementation was deferred to the 2022 elections.

326 The case of *Marilyn Kamuru and two others vs Attorney General and another*, Constitutional Petition 552 of 2012 successfully challenged the violation of the two-thirds gender rule in the appointment of cabinet secretaries but the declaration of invalidity was suspended in the run-up to the 2017 elections.

to ensure the hitherto marginalised groups (women, youth and PWDs) and regions are empowered, it does not entrench adequate mechanisms for achieving this.<sup>327</sup> Deference to Parliament to provide legislation on the inclusion of marginalised groups in Parliament has not yielded much fruit, despite extensive strategic litigation. Moreover, while it was held in 2012 by a majority opinion of the Supreme Court that the 2/3 gender principle was to be progressively realised,<sup>328</sup> the High Court ruled in 2017 that the 2/3 gender rule binds political parties in the process of nominating candidates. It ruled further that the IEBC has the power to reject nomination lists that do not comply with the 2/3 gender rule.<sup>329</sup> However, the 2/3 gender rule was suspended in respect of the 2022 elections in the case of *Adrian Kamotho v IEBC*<sup>330</sup> and confirmed in *Cliff Ombeta & Another v IEBC*<sup>331</sup>, thus clawing back on the gains made in 2017.

Second, the 2010 Constitution has placed the obligation of implementing inclusive measures on groups and institutions that may not have an incentive to implement such provisions. This is exacerbated by ‘movement backlash’,<sup>332</sup> which turns inclusion into a zero-sum game where the inclusion of one group signals the concomitant loss

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327 FES ‘Regional disparities and marginalization in Kenya’ (2012) 21.

328 *In the Matter of Gender Representation in the National Assembly and the Senate*, Advisory Opinion 2 of 2012 (also known as 2/3 gender rule advisory opinion) declared that women’s representation in elective positions, a civil and political right, was to be realized progressively rather than immediately. The former Chief Justice Mutunga in his dissenting opinion found that a look at the history of the country, the constitutional provisions on non-discrimination and national values revealed that civil and political rights required immediate realisation.

329 *Katiba Institute v IEBC* Constitutional Petition 19 of 2017.

330 JR 071 of 2022.

331 Constitutional Petition E211 of 2022 (consolidated).

332 Movement backlash refers to opposition to gains made by a marginalised group on the assumption that the gains have the collateral effect of creating ‘a new class of formerly privileged victims who are now unfairly disadvantaged’. Ange-Marie Hancock, ‘Solidarity politics for millennials: A guide to ending the oppression olympics,’ Palgrave Macmillan, 2011, 13.

of another.<sup>333</sup> For example, Gerface Ochieng asserts that the provisions on gender equity in the 2010 Constitution have entrenched reverse discrimination against men.<sup>334</sup> Strategic litigation to secure the inclusion of PWDs in the County Executive of Garissa has also not yielded much fruit ten years on.<sup>335</sup>

Third, whereas the 2010 Constitution has created opportunities for representation at national and county levels, the nomination process is left to political parties, which subject the special interest groups to the political party structure. Due to the weak institutionalisation of political parties in Kenya, parties are beholden to those who form them, with little regard for special interest groups. As the Political Parties Disputes Tribunal noted:

... the Respondent's party list to the Kiambu County Assembly does not attempt in any way to reflect the ethnic or cultural diversity of the people of Kiambu County. The list is almost exclusively composed of party members identified as belonging to the Kikuyu majority community within the cosmopolitan Kiambu County. Ironically, even the nominees representing marginalized ethnicities are uniformly declared to be of Kikuyu ethnicity. The Respondent's party list is unlawful and cannot stand scrutiny.<sup>336</sup>

The result is that representation of these groups at both the national and county levels remains marginal. Locating the nomination process within the party structure, rather than electoral colleges as proposed in the Bomas Draft, also subjugates special interest groups with political interests to the party interests thus compromising the needs of the special interest groups.<sup>337</sup> Additionally, it also means that the loyalty of

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333 Hancock, 'Solidarity politics for millennials', 8.

334 Gerface Ochieng', 'Philosophical analysis of gender-based affirmative action policy in Kenya with respect to theory of justice' Master of Arts in Philosophy Thesis, Kenyatta University, 2010, 125.

335 See *Northern Nomadic Disabled Persons Organization (NONDO) v Governor County Government of Garissa & another* [2013] eKLR discussed in detail in the next chapter.

336 *Henry Wanyoike Wahu v Jubilee Party* (PPDT Complaint No 424 of 2017), para 7.

337 United Disabled Persons of Kenya 'Katiba@10: An audit on the nature and extent of a decade of implementation of the 2010 Constitution of Kenya on persons with disabilities (2021)', 19.

those nominated to these special seats will be to their political party and not the interests of the group that the special member is a part.<sup>338</sup>

Fourth, there has also been a tendency to use party lists to reward party cronies who have failed to secure elections in first-past-the post system (FPTP) elections, thus denying representation to members of the marginalised groups.<sup>339</sup> In some instances, women candidates who had won the primaries had their certificates issued to other aspirants and promises of inclusion in the party list were used to obviate court battles challenging the party's decision.<sup>340</sup>

Prioritising party interests over those of special interest groups has also manifested in attempts to amend legislation to allow persons who do not succeed in the presidential race to get nominated to Parliament automatically. In the *Commission for Implementation of the Constitution v AG & Another*,<sup>341</sup> the CIC challenged a proposed amendment to Section 34(9) Elections Act to include President and Deputy President candidates in party lists and to prioritise them on the list. While the High Court ruled that it was up to parties to define what amounted to special interests, the Court of Appeal in *Commission for the Implementation of the Constitution v Attorney General & 2 others*<sup>342</sup> ruled the amendment unconstitutional. The Court of Appeal argued that the inclusion of presidential and deputy presidential candidates amounted to an 'irrational superimposition of well-heeled individuals on a list of the disadvantaged and marginalised to the detriment of the protected classes or interests'.<sup>343</sup> This did not stop further attempts to reintroduce the amendment.<sup>344</sup>

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338 FES 'Regional disparities and marginalization in Kenya' (2012) 22.

339 Purity Wangui 'UDA gifts Nyamu, Waruguru with parliamentary nominations' *The Star* 27 July 2022; Moses Nyamori 'Parties fail diversity test in lists of nominees to three legislatures' *Nation* 16 July 2022.

340 NDI & FIDA 'A gender analysis of the 2017 Kenya General Elections' (2018) 37.

341 Petition No 389 of 2012.

342 [2013] eKLR.

343 Centre for Multiparty Democracy 'Institutionalizing political parties in Kenya' (2010) 23.

344 There was an attempt to reintroduce the amendment in the Jeremiah Kioni Constitutional Amendment (No 5) Bill of 2019 which did not sail through

Fifth, when it comes to the inclusion of PWDs, it would appear that there is a homogenisation of disability to mean physical disability. While data on the 2017 elections was not disaggregated, data from the 2013 elections showed that save for one member with albinism, all the persons elected or nominated to the national legislative institutions were persons with a physical disability.<sup>345</sup> More must be done to include persons with other types of disability in representation slots.

For both women and youth, some reasons for the low levels of participation cited included exclusion from negotiated democracy and clannism, particularly in regions such as Garissa, where clan ties are strong.<sup>346</sup> Where negotiations are needed to settle the question of candidature, women and youth are often not invited to discussions, favouring older male candidates as village elders often facilitate the talks.<sup>347</sup>

### *Challenges with implementation of policy measures*

The Equalisation Fund attempts to address decades of historical injustices. However, the impact of the Fund has been affected by several factors. First, the amount of money allocated to the Fund is too little compared to the scope of work it is intended to facilitate. According to the CRA:

Marginalisation is a multifaceted concept that needs a much broader framework beyond the provisions of Article 204 to be effectively addressed. A master plan is required to provide a framework for ridding the Kenyan society off social and economic exclusion. Given the size of the Equalisation Fund, it should be considered as 'seed money' to be used to

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Parliament.

345 Handicap International 'Baseline survey report: Participation of persons with disabilities in the electoral and political processes in Kenya' 119-121.

346 Carter Center 'Youth and women's consultations on political participation in Kenya: Findings and recommendations' (2018) 17.

347 NDI & FIDA 'A gender analysis of the 2017 Kenya General Elections' (2018) 37-38.

stimulate mobilisation of more funds to provide comprehensive services in marginalised areas. Beyond the Fund, the Master Plan should be designed to mobilise resources capable of covering sectors that have not been considered for funding from the Equalisation kitty. As presently designed, the Fund remains a catch-up fund.<sup>348</sup>

The Fund and its implementation policy have therefore been focused on addressing only the most extreme forms of marginalisation in relation to water, education, electricity, health and roads. This is what has formed the basis for evaluation of the effectiveness of the Fund in the identified counties.<sup>349</sup>

Second, the interpretation of the scope of projects which could be funded had been considered as limited to the four listed in Article 204, that is, water, health services, electricity and roads. According to a 2017 study by the National Gender and Equality Commission (NGEC), pastoralist communities are among the most politically marginalised groups in the region.<sup>350</sup> Some of the problems that pastoral communities grapple with include conflicts and insecurity, marketing of livestock, land rights, insufficient infrastructure and inadequate provision of services, and persistent drought and correlated dependence on food aid.<sup>351</sup>

These problems remain unresolved due to imbalanced power relations between the state and civil society, long-standing government policy failures, non-responsive and unaccountable institutions and lack of political will and incentive to include pastoralists' interests in national policy formulation.<sup>352</sup> However, the CRA clarified in the Second Policy that the use of the word 'including' meant that projects were not

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348 CRA 'Second policy and criteria for sharing revenue among marginalised areas' (2018) 25.

349 NGEC 'The Equalisation Fund: Audit of the status of water, health and road sectors in 8 marginalized counties' (2017).

350 NGEC 'The Equalisation Fund' 17.

351 Abraham Korir Sing'oei 'Kenya at 50: Unrealized rights of minorities and indigenous peoples' (2012) 23.

352 NGEC 'The Equalisation Fund' 16.

limited to these four sectors and a marginalised area did not have to select projects in all four areas. Third, the use of the county as the unit of analysis excluded marginalised areas and communities found within relatively developed counties. The second Policy redressed this by allowing identification marginalised areas at lower levels than counties so long as the selection is supported by credible data.<sup>353</sup>

Fourth, the distribution of funds at the county level has been done equally among constituencies, rather than equitably, despite the level of service provision not being homogenous among communities. This has undermined the principle of equity which underlies the Fund.<sup>354</sup>

Moreover, there has not been sufficient public participation on the projects undertaken under the Fund due to the fact that these measures tend to be undertaken at the county level, without factoring in how broad a county is. Furthermore, for the first phase of the Fund, focus was placed on incomplete/stalled projects, fiscally viable projects, projects that address extreme poverty, projects that promote growth and job creation and those contained in the County Integrated Development Plan (CIDP). There was no socio-economic assessment for identifying target communities. Nevertheless, there was a slow uptake of the Funds, with more than 11B shillings still unutilised by the second cycle.<sup>355</sup>

Finally, the traditional lifestyles of hunter-gatherer communities and nomadic pastoralists pose a challenge to the implementation of the Fund, especially when coupled with the resource conflicts that often accompany nomadic lifestyles. The Fund cannot be effective without finding ways of factoring the nomadic lifestyles into planning and addressing conflicts that prevent the integration of the needs of these communities in the national agenda.<sup>356</sup>

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353 CRA 'Second policy and criteria for sharing revenue among marginalised areas' (2018) 17.

354 CRA 'Second policy and criteria for sharing revenue among marginalised areas' 17.

355 CRA 'Second policy and criteria for sharing revenue among marginalised areas' 18.

356 CRA 'Second policy and criteria for sharing revenue among marginalised areas'

For the ASAL and Devolution Policies, it is recommended that there be proper management of established funds, to ensure that corruption does not hamper effective implementation of development programmes. Secondly, without streamlining the policies on devolution to avoid duplication and overlapping mandates of the national and county governments, lack of coordination continues to water down implementation. Thirdly, there ought to be continued participation of people in development projects to encourage ownership of the projects by the intended beneficiaries, thus increasing the chances of the objectives of the policies being implemented.<sup>357</sup>

## Conclusion

This chapter has traced the story of marginalisation in Kenya from the colonial period to the first decade of devolution. In so doing, it has discussed how the constitution-making process grappled with reversing decades of exclusion. It traced how land legislation and administration, political marginalisation, economic marginalisation, regional disparities caused by the colonial development policies, Christian missionaries and the impact of segregated education all worked to create an interlocking of political, economic and ethnic marginalisation. It then zeroed in on how women, youth and persons with disabilities experienced marginalisation across epochs, resulting in specific attempts at inclusion in the 2010 Constitution. It makes the case that while successive post-independence governments had attempted to redress marginalisation prior to 2010, limited progress was made towards inclusion due to the design of these mechanisms as well as continued centralisation of power.

The last section of the chapter has evaluated devolution as the

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357 Thomas E Akuja and Jacqueline Kandagor 'A review of policies and agricultural productivity in the arid and semi-arid lands (ASALs), Kenya: The case of Turkana County' *Journal of Applied Biosciences* (2019) 14312-14313.

last promise of inclusion, by reviewing the political representation provisions in the Constitution as well as policy measures mandated both by the Constitution, statutes, and separate policies. It appraises the extent to which these measures have succeeded in repelling a long history of 'centralisation as the basis of political development'.<sup>358</sup> Of the three groups, women appear to have made greater traction than the other groups in achieving inclusion, what is referred to as 'advanced marginalisation'. However, all the groups have a long way to go before the mandate of inclusion can be said to have been realised. There is also need for harmonisation of policies that are aimed at redressing marginalisation and addressing corruption to ensure that the intended beneficiaries of the established mechanisms benefit from them, ensure proper management of funds and increase public participation of beneficiary communities to ensure ownership of development projects.

This chapter therefore reaches the conclusion that whereas an evaluation of the first decade of devolution reveals a mixed bag of results, the promise of the 2010 Constitution still holds, and gains made in the first ten years of implementation can be consolidated in successive cycles to make the promise a lasting one.

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358 Burbidge, *An experiment in devolution* 4.



## CHAPTER 5

# **Devolution and the promise of democracy and inclusion: An evaluation of the first decade of county governments, 2013-2022**

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*Lucianna Thuo and J Osogo Ambani*

### **Introduction**

Two variables preoccupy this entire study – decentralisation and inclusion. We hypothesise that there is a positive relationship between decentralisation and the inclusion of various groups; that the more we decentralise the more we attain inclusion. That the converse is also true: the more we centralise the more we marginalise.

The conceptual basis for the historical relationship between decentralisation and inclusion in Kenya was addressed in Chapter 2 of this study. Chapter 3 discussed the first variable (decentralisation) in historical perspective, while Chapter 4 reviewed the second variable (inclusion) also historically. All the chapters above cover the trajectory of the respective variables from pre-colonial times to the first decade of devolution under the Constitution of Kenya, 2010 (2010 Constitution).

What emerges clearly from the expositions are the struggles for decentralisation and inclusion by those on the outside, and efforts to congest more powers at the centre and to exclude the others by those on the inside. However, the clamour for decentralisation and inclusion won a major battlefield when the 2010 Constitution, which entrenched devolution as one of the overarching principles, was promulgated.

The 2010 Constitution associates devolution with democratic and accountable exercise of power; national unity; self-governance; public participation; social and economic development; provision of proximate services; equitable sharing of national and local resources; the rights and interests of minorities and marginalised communities; decentralisation; and separation of powers.<sup>1</sup> Kenya's devolution promises democracy and accountability, and equality and inclusivity, which ideals are critical for the marginalised groups. But has devolution delivered on these fronts? This chapter explores this question after a decade of its career. It evaluates the objectives of devolution both to democratise governance and include the marginalised groups. More specifically, the chapter reviews the extent to which the first decade of devolution, 2013-2022, realised democratic inclusion for three marginalised groups - women, youth, and PWDs.<sup>2</sup> It does so by responding to three main questions, whether: i) the institutions of county governance incorporated members of the marginalised groups; ii) the counties enacted laws and policies that are responsive to the rights and welfare of the marginalised groups; and iii) the counties initiated projects that resonate with the needs of the marginalised groups.

The study deployed a number of research methodologies. First, we reviewed literature on the subjects of devolution and inclusion in Kenya. Most of the literature review was carried in the first four chapters of this book. Second, we selected five county government case studies - Garissa, Kakamega, Mombasa, Nakuru and Narok - and three marginalised groups - women, youth and PWDs - to enable an in-depth analysis of the specific counties and marginalised groups

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1 Constitution of Kenya (2010), Article 174; Article 10 also introduces the values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised as national values and principles that undergird the Constitution.

2 While Article 100 includes ethnic communities and marginalised communities among the groups in need of legislation to address their inclusion, diversities in definition of ethnic minorities and variances in ethnic composition within counties makes it difficult to evaluate their representation at the national level and also across counties.

and to provide diverse contexts for the research as the cases selected have an urban<sup>3</sup> and rural<sup>4</sup> feel, a nomadic<sup>5</sup> and sedentary<sup>6</sup> context, and African<sup>7</sup>, Christian<sup>8</sup> and Islamic<sup>9</sup> religious backgrounds as well as diverse demographics of gender, sex, age and disability. Third, using very loose questionnaires, we interviewed knowledgeable persons in the study counties in our quest for answers to questions i), ii), and iii) above. Fourth, we presented our research findings before the Kabarak University Annual Law Conference, held on 15 and 16 June 2022, at Kabarak University, where representatives of the study counties and the marginalised groups and other participants validated our research findings. Finally, we analysed the findings of the field research and reduced them into the following exposition; organised thematically along the lines of the selected marginalised groups.

## County institutions and the inclusion of the marginalised

### *Women, devolution and inclusion*

For reasons such as its grassroots reach and potential for higher levels of self-determination, it was not naïve to expect that devolution would afford women more opportunities for participation through elective positions (such as the seats of member of county assembly, governor and deputy governor), appointive positions (such as membership of the county executive committees), and leadership positions in the county assemblies. However, the first decade of devolution, 2013-2022, presented

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3 Mombasa and Nakuru.

4 Garissa, Kakamega and Narok.

5 Garissa and Narok.

6 Kakamega, Mombasa and Nakuru.

7 Narok.

8 Kakamega and Nakuru.

9 Garissa and Mombasa.

a very different reality. Considering the constitutional 2/3 gender rule, the overall performance of women in elective and appointive positions at the national level, and the success of the youth in electoral politics at the county assembly level, women's political participation at devolved governance level in the first decade of devolution was dismal.

Much as the above deduction is accurate, the global report requires some nuance. Through the county case studies, it was possible to highlight the difficult areas as well as see the possibilities. For instance, in both electoral circles, Garissa and Narok did not elect any woman to their assemblies through the ballot, which might point to a cultural challenge. On the other hand, Kakamega County, which by 2022 had never elected a woman to Parliament since independence, had four women enter its County Assembly through ballot both in 2013 and 2017, which might signal a new beginning for women. Another positive change is that the gender top-up formula applied to county assemblies nationally proved to be an effective tool for reducing the shortfalls of competitive electoral politics and ensuring adequate representation of women as per the constitutional threshold. But it was also the basis for some county assemblies denying women committee leadership positions, and the new pretence for advancing the view that because women joined the county legislative institutions predominantly through the nomination process, they are lesser beings.<sup>10</sup>

Our study counties also accentuate that although most counties barely met the 2/3 gender rule in the appointment of county executive committee members, the few women appointed were entrusted with both the ministries that are thought to be important and those considered inferior. Another discovery is that on rare occasions, women occupied the offices of Speaker and Deputy Speaker, and sometimes chaired the committees of county assemblies. Like in the case of the County

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10 See the case of *National Gender and Equality Commission (NGEC) v Majority Leader, County Assembly of Nakuru & 4 others* High Court Petition 1 of 2019, Judgement of the High Court (2019) eKLR discussed later in this chapter where this distinction was in issue.

Executive Committee Member (CECM) positions, women chaired important county assembly committees such as Education, Science and Technology, Justice and Legal Affairs, Roads and Infrastructure, among others.

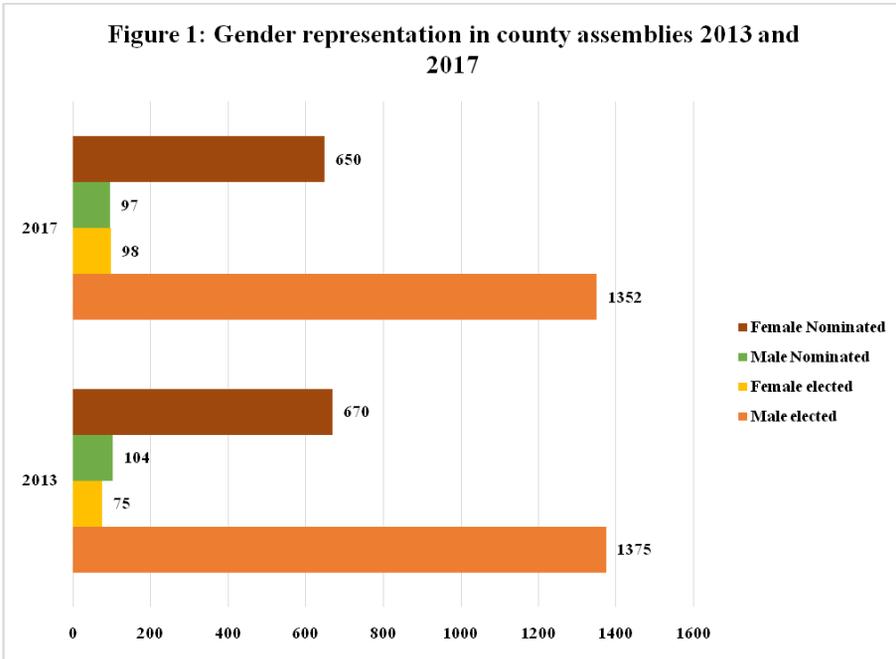
### *Women's participation through election by ballot*

The performance of women in the electoral contests for the MCA positions was far below the overall range for women in most of the elective positions, was dismal in comparison with the performance of the youth, and could cast doubt on the impact of devolution in its first decade on the participation of women in electoral politics.

As a result of the Independent Electoral and Boundaries Commission (IEBC) failing to disaggregate electoral results statistics on the basis of sex in 2013, available literature offers five different sets of data regarding the number of women elected to the county assemblies nationally; being 75,<sup>11</sup> 82,<sup>12</sup> 84,<sup>13</sup> 88<sup>14</sup> and 91.<sup>15</sup> While this complicates

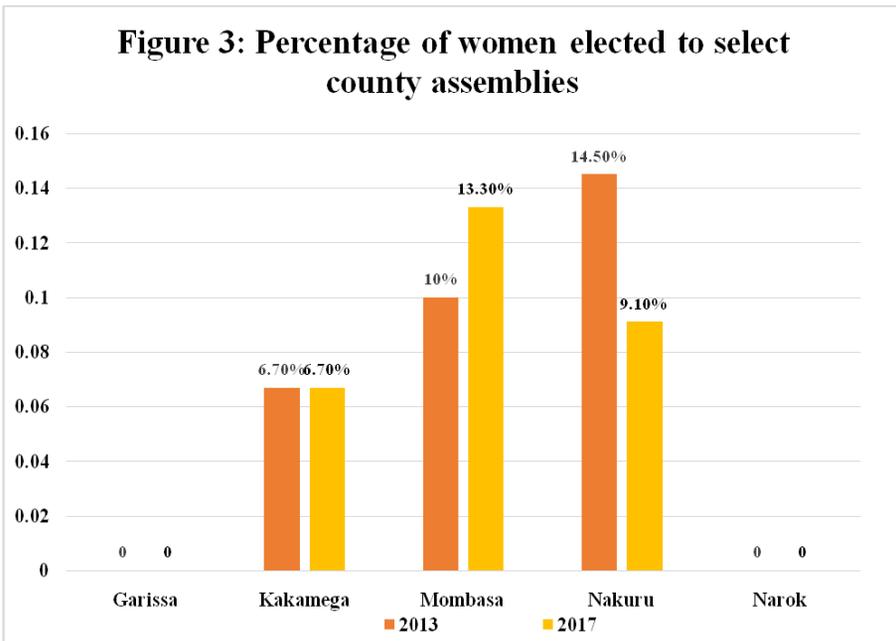
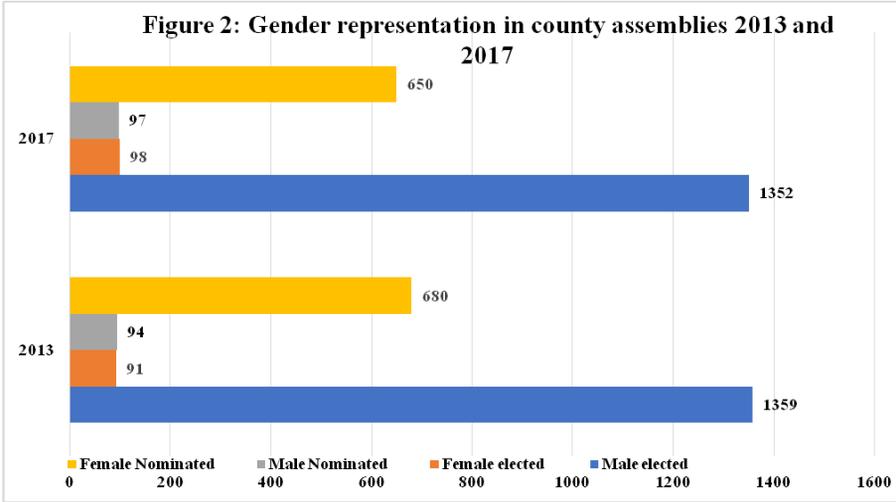
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- 11 Rift Valley Institute, 'Taking stock of Kenya's gender principle: The representation of women in politics in Kenya, 2013-2017', Policy Brief, June 2017, 1.
  - 12 Federation of Women Lawyers (FIDA) Kenya and National Democratic Institute (NDI), 'Key gains and challenges: A gender audit of Kenya's 2013 election process', FIDA Kenya, 2013, 47 and 50; National Democratic Institute (NDI) and Federation of Women Lawyers (FIDA) Kenya, 'A gender analysis of the 2017 Kenya general elections' FIDA Kenya, 2018, 6.
  - 13 Jill C Ghai, 'Women's gains under the New Constitution' in Yash Pal Ghai, Emily Kinama and Jill Cottrell-Ghai (eds) *Ten years on assessing the achievements of the Constitution of Kenya 2010*, Katiba Institute, 2021, 263, 265; Jill Cottrell Ghai, 'Women's gains under the New Constitution,' *The Youth Café*, 2 August 2019; Jacinta Muinde, 'Winning women's hearts: Women, patriarchy and electoral politics in Kenya's south coast' *Africae*, 2018; Fred Oluoch, 'More women elected in Kenya' *The East African*, 12 August 2017; Maureen Kinyanjui, 'Nairobi's only five elected female MCAs', *The Star*, 23 February 2022; Ibrahim Oruko, 'Only 96 out of 1,450 wards elected women on August 8' *The Daily Nation*, 23 August 2017.
  - 14 Machel Waikenda, 'Let us soberly seek a solution to the two-thirds dilemma', *The Star*, 23 May 2015.
  - 15 FIDA Kenya and NDI, 'Key gains and challenges: A gender audit of Kenya's 2013

matters, it does not completely bar analysis. Taking the lowest or highest figure, the number of women elected to the county assemblies went up from 75 or 91 in 2013 to 98 in 2017, a leap from 5.1% or 6.3% to 6.8%. It is a story of marginal improvement.




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election process' (2013), 50.



**Table 1: Women elected to the county assemblies of the study counties**

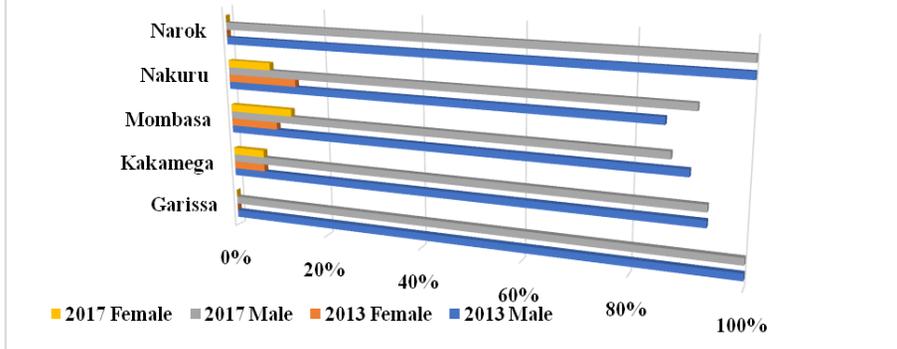
Counties (MCA)	Women elected	
	2013 <sup>16</sup>	2017 <sup>17</sup>
	Number	Number
Garissa	0 out of 29	0 out of 29
Kakamega	4 out of 60	4 out of 60
Mombasa	3 out of 30	4 out of 30
Nakuru	8 out of 55	5 out of 55
Narok	0 out of 30	0 out of 30

Regarding the five study counties specifically, the averages for the MCA positions shown in Figure 3 exhibit mixed results. One, and on a positive note for the movement for gender equality, Mombasa County elected through ballot one more woman in 2017 making it four out of 30 (13%). Two, and on a neutral note, Kakamega maintained four women out of 60 in both electoral circles, but there is a bigger story to be told: Women set a new record through the MCA positions for none of the Kakamega County constituencies had elected a woman since independence, and no woman was elected Governor, Deputy Governor or Senator in the first decade of devolution. Three, and on a negative note, Nakuru County, which elected eight women out of 55 (15%) in 2013, regressed to only 5 (9%) in 2017. Finally, and on a very negative note, as at the end of the 2017-2022 term, Garissa and Narok counties had not elected a female MCA through the ballot.

16 Kenya Gazette, CXV (54) 25 March 2013, 3901.

17 Kenya Gazette, CXIX (121) 22 August 2017, 8230; Kenya Gazette, CXIX (123) 25 August 2017, 8378.

**Figure 4: Study county analysis of gender representation in county assemblies 2013-2022**

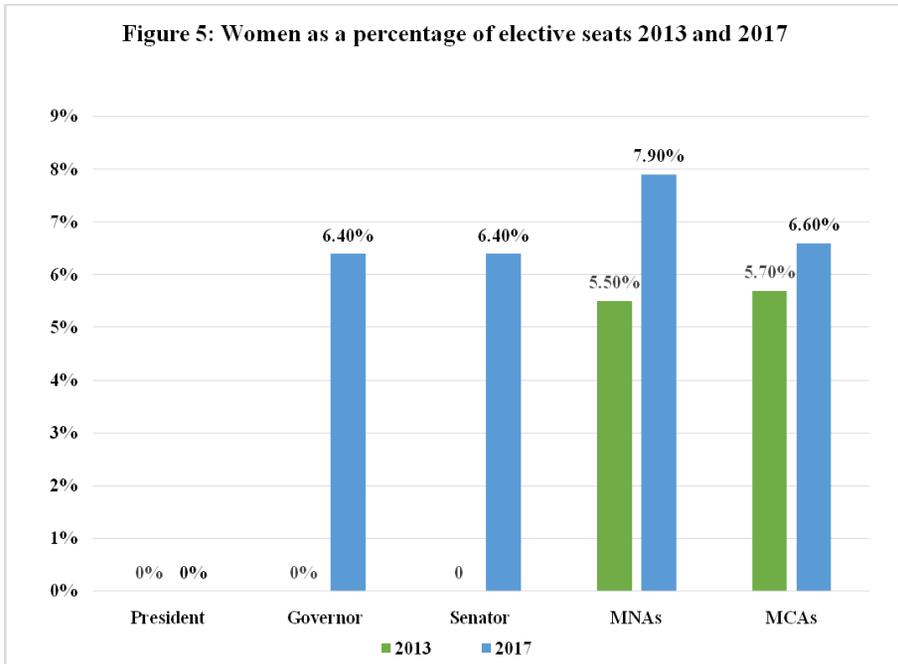


Curious as the performance of Garissa and Narok may be, it was expected given that the two cases were selected based on the assumption that Islamic and Somali culture, as practiced in Garissa, and the Maasai culture, as practiced in Narok, may be obstructing women's political participation including at the devolved governance levels. The failure of Wajir County, with similar ethnic, religious, and cultural demographics as Garissa, to elect any female MCA during the same period may corroborate the view that the combination of Somali and Islamic culture as practiced by the people of the region may be hindering women's political participation. Compounding the women's political crisis in Garissa and Wajir is the culture of negotiated democracy that defers to the clans and their male-dominated leadership.<sup>18</sup>

By showing that counties like Mombasa were above the national average, and others like Garissa and Narok did badly, and by revealing certain context-specific barriers to women's political representation like culture, religion, and political traditions, our study counties gave a practical feel to the national statistics beyond merely demonstrating that such global data could be misleading.

18 See Muna Ahmed, 'Patriarchy and negotiated democracy knock Wajir women off the ballot', *The Elephant*, 1 October 2021; NDI and FIDA 'A gender analysis of the 2017 Kenya general elections', 37.

Although the participation of women improved in 2017 overall, there are glaring difficulties with the MCA positions. First, given that 145 women (7.7%) were elected by ballot to the various positions in 2013 and 172 (9.2%) in 2017 out of the 1882 total elective positions,<sup>19</sup> the above percentages for the MCA positions [(5.1% or 6.3%) in 2013 and 6.8% in 2017] were below the national average for women's leadership for both cycles.



Source: NDI and FIDA Kenya 'A gender analysis of the 2017 Kenya general elections' (2018).

Second, the rate of improvement for the MCA position was lower than for all the other positions with the exception of the offices of President and Deputy President (where the male incumbents were re-elected) and to a very limited extent deputy governors as discussed below. While no woman was elected as governor or senator in 2013,

<sup>19</sup> The total number of elective seats if the positions of Deputy President and deputy governor are included is 1930.

both institutions recorded an improvement of 6.4% when three women were elected in each one of them in 2017.<sup>20</sup> Depending on which data one goes by for the 2013 General Elections, women's performance in the MCA positions may be slightly below, slightly above or within the range of the average for the National Assembly where 16 women (5.5%) were elected by ballot out of the possible 290 constituencies.<sup>21</sup> However, in 2017, the performance of women in the MCA positions was below the National Assembly performance of 23 elected women (7.9%).<sup>22</sup> The performance of women in National Assembly elections improved from 5.5% in 2013 to 7.9% in 2017, an increase of 2.4%. For the MCA positions, the improvement was marginal at 1.7% or 0.5% depending on which data is used for 2013.

Third, if it is taken into account that 73% of the women who contested in the 2017 primaries vied for the MCA positions, the rate of conversion from candidature to election was quite low,<sup>23</sup> especially when compared to the National Assembly constituencies where women got far more seats in 2017 yet fewer women contested. Women's improved performance in the National Assembly was realised despite a very slight increment in the women candidates (131) in 2017, compared to the 129 who contested in 2013.<sup>24</sup> As Table 2 shows, a possible explanation for this clinical performance by women in 2017 could be the fact they had had the opportunity to occupy the 47 special seats reserved for women in the National Assembly, other affirmative action positions in the Senate and National Assembly, MCA positions and other public roles, which vantage points empowered them in terms of reputation and visibility, in addition to availing the resources and strategies required for electoral success. Thus, given their grassroots reach and the potential of the MCA positions to catapult women to other county-level and national political

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20 See Figure 5.

21 FIDA and NDI, 'A gender audit of Kenya's 2013 election process', 47.

22 IEBC 'Data report of 2017 elections', April 2022, 12.

23 NDI and FIDA 'A gender analysis of the 2017 Kenya general elections', 27.

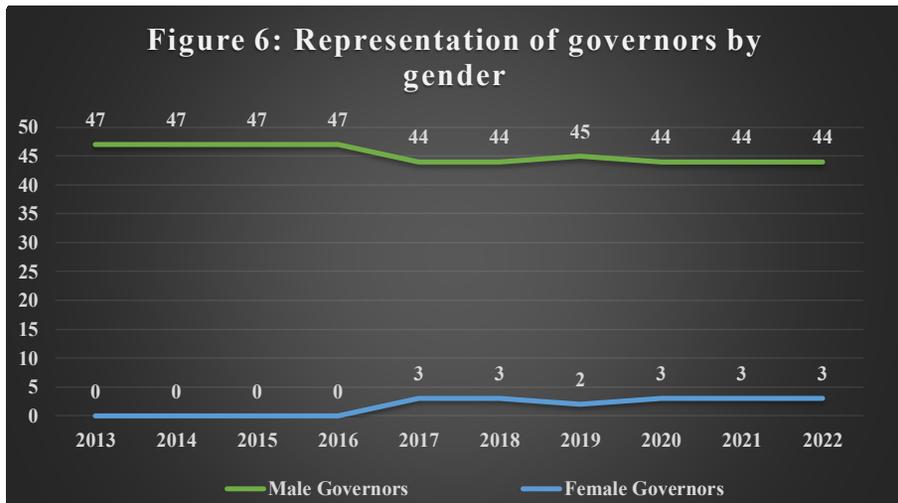
24 IEBC 'Data report of 2017 elections', 11; NDI and FIDA, 'A gender audit of Kenya's 2013 election process', 50.

offices, concerted efforts will be needed to ensure a higher success rate for women at the county assembly levels.

**Table 2: Women MPs and their previous roles**

	NAME	Electoral Area
	Mary Emase	2013-Elected MNA Teso South 2017-Vied for MNA Teso South
	Wanjiku Muhia	2013- WMNA Nyandarua County 2017-Nominated East African Legislative Assembly (EALA) MP
	Millie Odhiambo	2013-Elected MNA Suba North 2017-Re-Elected
	Naisula Lesuuda	2013-Nominated Senator 2017-Elected MNA Samburu West
	Mishi Mboko	2013-WMNA Mombasa County 2017-Elected MNA Likoni
	Beatrice Elachi	2013-Nominated Senator 2017-Vied for Dagoretti North MNA 2017-2020- Elected Speaker of Nairobi County Assembly
	Lilian Gogo	Lecturer Egerton University 2017-Elected MNA Rangwe
	Rachel Nyamai	2013-Elected MNA Kitui South 2017-Re-Elected
	Eve Obara	MD Kenya Literature Bureau 2017-Elected MNA Kabondo Kasipul
	Gathoni Wamuchomba	Journalist 2017-Elected WMNA Kiambu county
	Rozaah Buyu	2007-Vied for Kisumu West MP 2013-Vied for Kisumu West MNA 2017-WMNA Kisumu
	Martha Wangari	2013- Nominated Senator 2017-Elected MNA Gilgil

Jayne Kihara	2003-Elected MP Naivasha 2007-Vied for Naivasha MP 2013-Vied for Senate, Nakuru County 2017-Elected Naivasha MNA
Charity Kathambi	2013-Vied for Njoro MNA 2016-Appointed National Director, Kenya National Library 2016 2017-Elected Njoro MNA
Alice Wahome	2007-Vied for MP Kandara 2013-Elected MNA Kandara 2017-Re-Elected MNA Kandara



On one hand, the number of female governors went up from zero in 2013 to three in 2017; on the other, the number of deputy governors of the same gender went down from nine in 2013 [including Mombasa County’s (Hazel Katana) and Narok County’s (Evelyn Chepkirui)] to seven in 2017. Although no woman was elected in 2013 to the positions of governor, nine women were elected as running mates in the positions of deputy governor, which in mathematical terms amounted to 19% of the available positions. After the 2017 General Elections, five

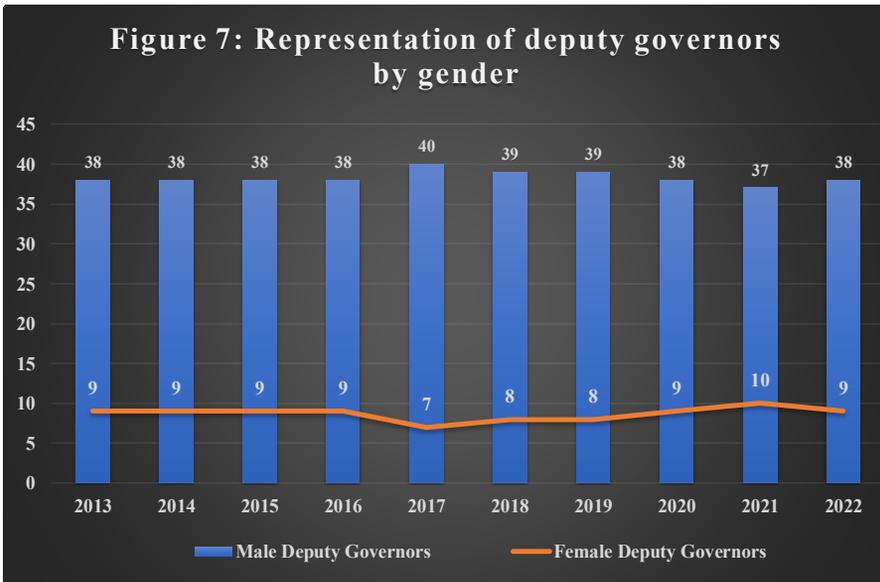
governors, including one woman, exited office either through death or impeachment.<sup>25</sup>

Governors Dr Joyce Laboso (Bomet), John Nyagarama (Nyamira), and Wahome Gakuru (Nyeri) died while in office, while Ferdinand Waititu (Kiambu) and Mike Mbuvi Sonko (Nairobi) were impeached. Laboso's death in July 2019, about two years after elections, reduced the count of women governors by one, but Ann Kananu was elevated to the position of Governor in 2020 after the impeachment of Sonko. Through death, a woman Governor was lost, through impeachment a woman Governor rose to power keeping the women's total tally in the same place. Compared to 2013, the number of elected women deputy governors went down by two to seven in 2017, making it 15% of the elective positions. However, the number of female deputy governors increased to as high as ten in 2021 and ended with nine in 2022 due to the above vicissitudes of politics as Figure 7 shows. With the deaths and impeachments discussed above, Kiambu and Nyeri counties had women taking over as deputy governors. In Nairobi, the female Deputy Governor served briefly before finally being sworn in as Governor and appointing a male Deputy Governor.<sup>26</sup>

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25 Governors John Nyagarama (Nyamira), Wahome Gakuru (Nyeri) and Dr Joyce Laboso died while in office, while Ferdinand Waititu (Kiambu) and Mike Mbuvi Sonko (Nairobi) were impeached. See Kenya: Moraa Obiria, 'The growing list of female Deputy Governors' *All Africa*, 19 January 2021.

26 Jael Mboga, 'Ann Kananu sworn in becomes third Nairobi Governor', *The Standard*, August 2021.



As Figure 7 shows, at the end of the 2017-2022 term, the number of female deputy governors was the same as that of the 2013-2017 cycle – nine. The second cycle of devolution was better for the gubernatorial level as it brought in three female governors while keeping the number of female deputy governors intact after the dust had settled. Although the gender inclusion agenda came out better ultimately, it is important to learn the lesson to be vigilant throughout the electoral season as gains could suffer midway because of death and impeachment.

Arguably, the increase in female contestants and especially those who had held State or public office contributed to the higher impact of women in the gubernatorial elections of 2017. Charity Ngilu of Kitui, Ann Waiguru of Kirinyaga and Joyce Laboso had occupied high-level national positions – Cabinet Secretary for Land, Housing and Urban Development; Cabinet Secretary for Devolution; and Deputy Speaker for the National Assembly, respectively – which could mean that the visibility, influence and resources that come with holding prominent appointive or elective positions are useful factors for realising success for women in subsequent electoral contests. This point should be an important motivation for appointing or nominating women to strategic

positions with the understanding of the potential of such locations to catapult them to even higher political heights. However, it is necessary to point out that the conversion rate from nomination to election for female deputy governors was zero in the first decade of devolution. Some studies have attributed this deficiency to the lack of clear guidance on the role and authority of the offices of deputy governor, which tends to render most of them invisible.<sup>27</sup>

When compared to the percentage of youth elected to the MCA positions, women performed dismally, at best; at worst, it is a situation that demands an enquiry. For, while this study concludes later on that county assemblies are the places for youth political redemption, such cannot be said about women; not even youthful women since out of the 287 youth that were elected to MCA positions in 2017, only 13 were female.<sup>28</sup> This below-average performance of women calls for urgent interventions of which the beginning point should be to inspire women to take a serious interest in the politics of the county assemblies because of their strategic location at the grassroots, and the fact that the MCA positions account for 77% of all open elective seats.<sup>29</sup>

Comparisons between national and county averages may be good for academic analysis but are certainly bad yardsticks in the current study because both levels operated below the new constitutional standard of the 2/3 gender rule, and the national averages were yet to show marked improvement from the pre-2010 performance. Despite the establishment of opportunities for the 47 women representatives, women only accounted for 20.77% of elected representatives in the National Assembly in 2017.<sup>30</sup> Additionally, the representation of women in elective positions in the first decade of devolution only improved marginally from the pre-2010 era. For example, while in 2017, 7.9% of

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27 NDI and FIDA, 'A gender analysis of the 2017 Kenya general elections', 32.

28 IEBC, 'Data report of 2017 elections', 15.

29 NDI and FIDA, 'A gender analysis of the 2017 Kenya general elections', 27.

30 Cottrell Ghai, 'Women's gains under the new Constitution', 263.

the elected members of the National Assembly were women,<sup>31</sup> in 2007, the figure stood at 7.27%.<sup>32</sup> Nevertheless, if the upward variances in representation through election, indicated in Table 3, are anything to go by, with sustained inclusion efforts, there will be an increase in women's representation in elective positions.

**Table 3: Variance in percentages of elected women between 2013 and 2017**

Position	2013	2017	Variance
Governor	0%	6.4%	+6.4
Deputy Governor	19.1%	14.9%	-4.2% <sup>33</sup>
Senator	0%	6.4%	+6.4%
Member of National Assembly	5.5%	7.9%	+2.4%
Member of County Assembly	5.1%, 5.7%, 5.8%, 6.1%, or 6.3% depending on which source of data is used.	6.6%	High of +1.7%. low of 0.5% - depending on which data is used for 2013.

### *Women's participation through nomination*

Had the 2010 Constitution not entrenched affirmative action measures, substantial gender representation in the institutions of devolved governance would have been unfathomable. For it was the

31 This percentage excludes the women representative seats.

32 Cottrell Ghai, 'Women's gains under the new Constitution', 265.

33 While in 2017 the number of deputy governors was lower than in 2013, due to changes in the leadership of five counties, the number of deputy governors by the end of the term was the same for both terms.

county assemblies<sup>34</sup> gender top-up formula that helped the legislative institutions to achieve the 2/3 gender threshold. Such a feat remained beyond Parliament – Senate and National Assembly – throughout the first decade of devolution.

After the 2017 General Elections, only 98 women were elected to the county assemblies country-wide through ballot causing 650 women to be nominated. Consequently, nominated MCAs accounted for 87% of all female MCAs countrywide.<sup>35</sup> 670 female MCAs had been elected through nomination following the 2013 General Elections.<sup>36</sup> Since not a single woman was elected by ballot to 12 county assemblies in 2017, including Garissa and Narok,<sup>37</sup> all the female MCAs in those county assemblies were elected through nomination. As Table 5 shows, women comprised 34.00%, 34.83%, 38.10%, 33.33% and 31.91% of the county assemblies of Garissa, Kakamega, Mombasa, Narok and Nakuru, respectively, after the 2017 General Elections. Following both the 2013 and 2017 General Elections, women constituted between 80.0% and 94.1% of the MCAs elected through nomination in the study county assemblies, as seen in Table 4. Clearly, the gender top-up formula enabled all the study county assemblies to comply with the constitutional threshold including Garissa where no single woman was elected through ballot.

Despite the above strengths of the county assembly top-up formula, the conversion rate from nomination to election through ballot at the county assembly level is low, attributed by some studies to the fact that unlike their elected counterparts, nominated MCAs do not represent any specific geographic constituency, thus making it difficult for them

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34 Constitution of Kenya (2010), Article 177(1)(b).

35 Rift Valley Institute, 'Taking stock of Kenya's gender principle', 1. As shown above, the data for the 2013 General Elections varies depending on the source.

36 Rift Valley Institute, 'Taking stock of Kenya's gender principle', 1.

37 Kwale, Garissa, Wajir, Mandera, Isiolo, Embu, Kirinyaga, West Pokot, Samburu, Elgeyo Marakwet, Narok and Kajiado did not have a single woman elected to the county assembly. See NDI and FIDA 'A gender analysis of the 2017 Kenya general elections', 31.

to serve effectively in politics and make their mark.<sup>38</sup> The lack of a ward fund or kitty for nominated MCAs, which elected members use for bursaries and infrastructure projects, also creates the impression that elected members are more effective than their nominated counterparts. This affects women disproportionately since they constitute the majority of nominated members.<sup>39</sup>

**Table 4: Election of women by nomination to the study county assemblies**

County	Women			
	2013		2017	
Garissa	16 out of 18	89.9%	16 out of 18	88.9%
Kakamega	25 out of 27	92.6%	25 out of 27	92.6%
Mombasa	12 out of 15	80%	12 out of 15	80%
Nakuru	17 out of 19	89.5%	17 out of 19	89.5%
Narok	16 out of 17	94.1%	16 out of 17	94.1%

**Table 5: Composition of the study counties by gender<sup>40</sup>**

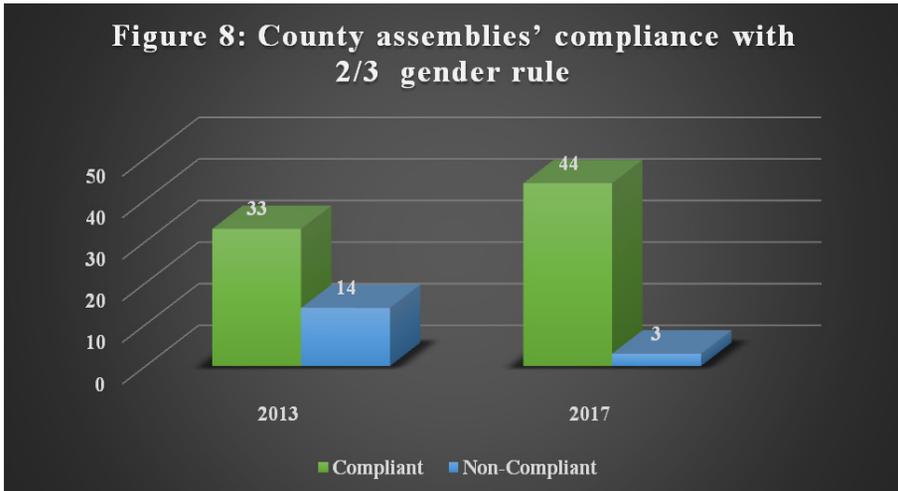
County	2013		2017	
	Garissa	16 out of 48	33.33%	17 out of 50
Kakamega	29 out of 87	33.33%	31 out of 89	34.83%
Mombasa	25 out of 64	35.56%	16 out of 42	38.10%
Nakuru	25 out of 74	33.78%	26 out of 78	33.33%
Narok	16 out of 47	34.04%	15 out of 47	31.91%

38 Marie E Berry, Yolande Bouka and Marilyn Kamuru, 'Implementing inclusion: Gender quotas, inequality, and backlash in Kenya' 17(4) *Politics and Gender* (2021) 640-664; 650-1.

39 Berry and others, 'Implementing inclusion', 651-652.

40 For elected members in 2013 see the Kenya Gazette, CXV (54) 25 March 2013, 3901. For the elected in 2017 members see, Kenya Gazette, CXIX (121) 22 August 2017, 8230; Kenya Gazette, CXIX (123) 25 August 2017, 8378. For the nominated members, in 2013, see the Kenya Gazette, CXV (105) 17 July 2013, 9793. For the nominated members in 2017 see, the Kenya Gazette, CXIX (124) 28 August 2017, 8380 and the corrigenda in the Kenya Gazette, CXIX (13), 16 September 2017, 8752.

Crucial as the gender top-up formula proved to be in enhancing the participation of women in county politics, and despite clear supporting legislations, a number of county assemblies continued to experience challenges of compliance although the problem appeared to be subsiding.<sup>41</sup> The National Democratic Institute and the Federation of Women Lawyers listed 14 county assemblies<sup>42</sup> that did not comply with the gender top-up formula in 2013 fully, which anomaly reduced markedly to three in 2017 as seen in Figure 8.<sup>43</sup> These notwithstanding, the adage that nomination is the main route to women's political inclusion remains, with 87% of women in the county assemblies in 2017 being elected by nomination (both through the gender top-up and marginalised groups lists).

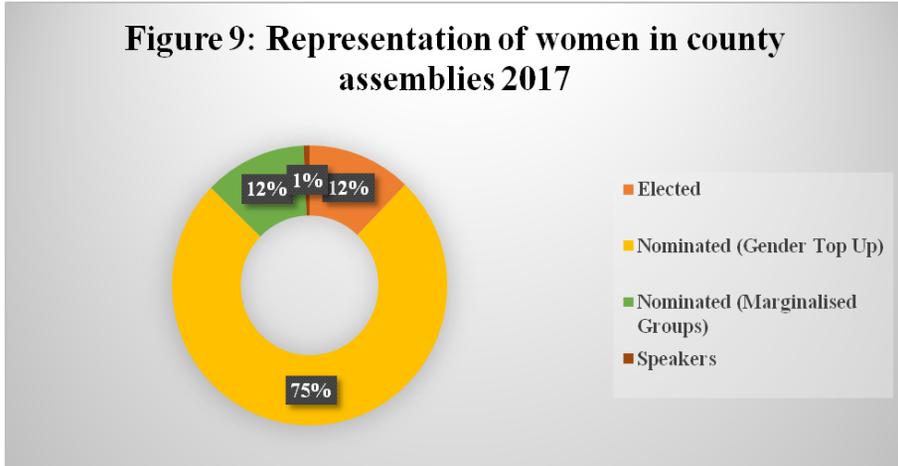


41 NDI and FIDA, 'A gender analysis of the 2017 Kenya general elections', 30.

42 See NDI and FIDA, 'A gender analysis of the 2017 Kenya general elections', 31.

43 Narok, Taita Taveta and Trans Nzoia. NDI and FIDA, 'A gender analysis of the 2017 Kenya general elections', 31.

**Figure 9: Representation of women in county assemblies 2017**



In one sense, the top-up formula could be praised for ensuring that the counties either met the 2/3 gender threshold or missed the mark only slightly. On the contrary, the large numbers of women elected through nomination could imply that public confidence in women's leadership is still lacking,<sup>44</sup> and may entrench the narrative that nominated women are not 'real' members or are mere 'bonga points'<sup>45</sup> or 'flower girls' as is usually said in ordinary political parlance.<sup>46</sup> Thus, despite enabling the majority of county assemblies to meet the 2/3 gender threshold, the fact that women constitute the bulk of nominated MCAs across the country may aggravate an emerging negative narrative.

Compared to the percentage of women in the National Assembly (22%)<sup>47</sup> and in Senate (28%)<sup>48</sup> in the 2017-2022 term, counties realised the 2/3 gender rule nearly fully, which should make the county assemblies' top-up formula part of the conversation as the country seeks compliance

44 Cottrell-Ghai, 'Women's gains under the New Constitution', 265.

45 Cottrell-Ghai, 'Women's gains under the New Constitution', 265. 'Bonga points' are bonus points granted to customers for mobile phone use by one telecom provider.

46 For anecdotal evidence on this see Berry and others, 'Implementing inclusion', 640-664; 650.

47 There was a total of 76 women-23 elected MNAs, 47 WMNAs and 6 nominated MNAs.

48 There were 3 women elected and 16 women nominated bringing the total to 19 women senators.

with the 2/3 gender threshold in Parliament. Our findings here affirm the significance of affirmative action measures in the quest for gender equality in Kenya, and hopefully such ideas will inspire future legislators as they consider the measures contemplated under Article 100 of the 2010 Constitution.

Parliament's failure to enact the 2/3 gender rule legislation above was the basis for the advice by the then Chief Justice, David Maraga, for the President to dissolve Parliament.<sup>49</sup> The advisory by the Chief Justice, which was issued in accordance with Article 261(7) of the 2010 Constitution, remains the subject of litigation in the High Court, although a separate court order suspended its implementation.<sup>50</sup>

To increase the number of elected women in 2017, strategic litigation by Katiba Institute sought to compel the IEBC to ensure that the political parties complied with the 2/3 gender rule when nominating candidates for the General Elections.<sup>51</sup> This would move the locus of interpretation of the rule from Parliament to political parties. The High Court found that political parties were obligated to adhere to the 2/3 gender rule, including in nominations and asserted that it was the role of the IEBC to reject nomination lists that did not comply with this rule. However, the implementation of this judgment was deferred to the 2022 General Elections, and suspended further in the cases of *Adrian Kamotho v IEBC*<sup>52</sup>

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49 Kenya Law, 'Chief Justice's advice to the President on dissolution of Parliament', *Kenya Law Blog*, 22 September 2020.

50 *Leila Konchellah & Anor v Chief Justice and President of the Supreme Court & Anor* Petition E291 of 2020 (consolidated with Petitions E300 of 2020, E302 of 2020, E305 of 2020, E314 of 2020, E317 of 2020, E337 of 2020, 228 of 2020, 229 of 2020 & JR E1108 of 2020) Judgment of the High Court, (2021) eKLR. Following a suspension of the implementation of the advisory, a five-judge bench was appointed by the Deputy Chief Justice to hear the consolidated petitions.

51 *Katiba Institute v IEBC* Constitutional Petition 19 of 2017, Judgment of the High Court, (2017) eKLR.

52 *Republic v Public Procurement & Administrative Review Board & 2 others Ex parte Applicant Dar-Yuksel-Ama (A consortium of Dar-Al-Handasah in joint venture with Yukelproje AS & AMA Consulting Engineers Ltd; Korea Express Corporation (KEC) Korea Consultants International Company Limited (KIC) & Apec Consortium Limited &*

and *Cliff Ombeta & Another v IEBC*,<sup>53</sup> thus clawing back on the gains made in 2017.

The Building Bridges Initiative (BBI) and the consequential Constitution of Kenya (Amendment) Bill 2020 (BBI Bill) had proposed to address the limited representation of women in Parliament. The BBI Bill sought to amend Articles 89 and 97 of the 2010 Constitution to expand the number of constituencies in the National Assembly from 290 to 360.<sup>54</sup> It further proposed to do away with the 47 seats allocated to women representatives in the National Assembly and introduce a top-up system that would create as many special seats as would be necessary to ensure that ‘not more than two-thirds of the members of the National Assembly are of the same gender’.<sup>55</sup> The number of slots available to political parties for nomination of members of special interests groups, including youth, PWDs, and workers, would have reduced from 12 to 6. With regard to the Senate, the proposal was to do away with the 20 slots available for women, youth and PWDs and reconstitute the Senate to comprise of 94 members, with one man and one woman being elected from every county.<sup>56</sup> While the proposed amendments were capable of facilitating the realisation of the 2/3 gender rule, other marginalised groups did not feature in the inclusion discourse prominently, which would have created the danger of double invisibility for the members of these constituent groups.<sup>57</sup> With the decision of the Supreme Court

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2 others (*interested parties*) Judicial Review Miscellaneous Application No E071 of 2022, Judgment of the High Court (2022) eKLR.

53 *Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates & Judges Association & 2 others* Constitutional Petition E128 of 2022, Ruling of the High Court, (2022) eKLR.

54 Building Bridges Initiative Bill, Clauses 10 and 13(a)(i).

55 BBI Bill, Clause 13 (a)(iii).

56 BBI Bill, Clause 14 (a)(i).

57 Purdie-Vaughns and Eibach refer to the double marginalisation among marginalised groups as ‘intersectional invisibility’. See VP Vaughns and RP Eibach, ‘Intersectional invisibility: The distinctive advantages and disadvantages of multiple subordinate-group identities’ 58 *Sex Roles* (2008) 377. In the context of gender equality, Mbote, citing Lombardo and Mieke, concedes that strategies for gender inclusion, while they have been in place longer, do not easily take on

upholding the finding of the High Court and Court of Appeal that the BBI Bill was unconstitutional,<sup>58</sup> Article 100 of the 2010 Constitution continues to lack a practical implementation mechanism.

This scenario lends credence to the words of Kenya's former Chief Justice and President of the Supreme Court, Willy Mutunga, in his concurring opinion in *In the Matter of the Speaker of the Senate & Another* that 'constitution-making does not end with its *promulgation*; it continues with its *interpretation*'.<sup>59</sup> Mutunga's further observation that the success of the devolution project to restructure and reorder the State was not guaranteed, and that it had to be 'nurtured, aided, assisted and supported by citizens and institutions' has also been vindicated.<sup>60</sup> Indeed, vigilance through strategic litigation has helped to clarify the extent of the State's obligations in relation to marginalised groups. Strategic litigation on the 2/3 gender rule, specifically on the requirement of legislation by Article 100 to promote the representation of women, youth, PWDs, ethnic and other minorities and marginalised communities, has provided a basis for holding State actors accountable.<sup>61</sup> But again, the struggle continues.

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board other inequalities. See E Lombardo and Mieke Vierloo 'Institutionalising intersectionality in the European Union?' *International Feminist Journal of Politics* (2009) 481; cited in Patricia Kameri-Mbote, 'Fallacies of equality and inequality: Multiple exclusions in law and legal discourses' 2013 published in Inaugural lecture, University of Nairobi, 24 January 2013, 13.

58 *AG & 2 Others v David Ndi & 79 Others*, Supreme Court Petition 12 of 2021, Ruling of the Supreme Court (2022) eKLR.

59 *In the matter of the Speaker of the Senate & another* Advisory Opinion, Reference No 2 of 2013, [2013] eKLR para 156.

60 *In the Matter of the Speaker of the Senate & another* Advisory Opinion, Reference No 2 of 2013, [2013] eKLR, para 160.

61 For the history of litigation on the two-thirds gender rule under the 2010 Constitution, see *In the Matter of Gender Representation in the National Assembly and the Senate* (Supreme Court Advisory Opinion 2 of 2012) on whether article 27(8) was immediately realisable or subject to progressive realisation; *FIDA Kenya & others v Attorney General and another* [2011] eKLR which challenged the gender composition of the Supreme Court; *Milka Adhiambo Otieno & another v Attorney General & 2 others*, Kisumu High Court Petition No 44 of 2012 eKLR which challenged elections to the Kenya Sugar Board for non-compliance with the two-thirds gender principle; *CREAW v Attorney General*, Petition Nos 207 & 208 of 2012 eKLR which sought

### Women's participation through appointive positions

A negative and positive conclusion can be entered regarding women's participation in the Executive during the first decade of devolution. On the negative note, the appointing authorities aimed unambitiously at the 2/3 gender rule rather than at the optimal inclusion of women, with the result that the composition of key Executive institutions wobbled dangerously at the margins of the constitutional threshold both at the

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to nullify the appointment of county commissioners for non-compliance with the two-thirds gender principle; *National Gender and Equality Commission v IEBC*, High Court Petition 147 of 2013, which challenged the process of allocation of party list seats under Article 90 of the Constitution for, *inter alia*, the exclusion of youths, persons with disabilities and women; *Centre for Rights Education and Awareness (CREAW) v Attorney General & another* [2015] eKLR which challenged the non-publication of a bill to give effect to Article 100 of the Constitution on representation of marginalised groups in Parliament; *CREAW & others v Speaker of the National Assembly & others*, Constitutional Petition 411 of 2016 which sought to implement Article 261 of the Constitution to compel Parliament to pass legislation seeking to implement Article 100, otherwise it would stand dissolved. An appeal against the decision of the High Court in this matter was dismissed, (see *Speaker of the National Assembly v CREAW & others*, Civil Appeal 148 of 2017). Following several petitions to the Chief Justice to advise the President to dissolve Parliament under Article 261 (7) of the Constitution for failure to pass the required legislation under Article 100, the Chief Justice issued an advisory to the President on 22 September 2020 on 21 December 2020. That advisory was challenged in several cases: *Leila Konchellah & Anor v Chief Justice and President of the Supreme Court & Anor* Petition E291 of 2020 (consolidated with Petitions E300 of 2020, E302 of 2020, E305 of 2020, E314 of 2020, E317 of 2020, E337 of 2020, 228 of 2020, 229 of 2020 & JR E1108 of 2020). Following a suspension of the implementation of the advisory, a five-judge bench was appointed by the Deputy Chief Justice to hear the consolidated petitions. The case of *Marilyn Kamuru and two others vs Attorney General and another*, Constitutional Petition 552 of 2012 successfully challenged the violation of the two-thirds gender rule in the appointment of cabinet secretaries but the declaration of invalidity was suspended. In *Katiba Institute v IEBC* [2017] eKLR, the court also asserted the obligation of the IEBC to ensure implementation of the two-thirds gender rule by political parties in the nomination process, with the attendant power to reject non-compliant lists, but the implementation was deferred to the 2022 elections. This decision was later stayed in *Adrian Kamocho v IEBC* JR Misc No E071 of 2022 and the stay upheld in *Cliff Ombeta & Another v IEBC* Constitutional Petition E211 of 2022 (consolidated).

national and county levels – invariably. On the positive note, women were appointed to both ‘important’ and ‘inferior’ Executive positions contrary to an entrenched view in feminist literature that the important portfolios are usually reserved for the men.

It is arguable that the inclusion of women in the CECs was perfunctory – attempted more because it is a constitutional requirement rather than out of belief in gender equality and women’s political leadership. Indeed, most counties operated at the margins of the 2/3 gender rule with the appointment of women dovetailing at around 30% and sometimes falling below the threshold. Women’s inclusion averaged at 24% between 2013 and 2017, and 31% between 2017 and 2022 for the county executives nationally. Only 16 counties (about 1/3) complied with the 2/3 gender rule in the composition of their CECs in 2013.<sup>62</sup> Of those counties that satisfied the 2/3 gender rule, women comprised the bare constitutional minimum.<sup>63</sup> However, Kiambu County had the highest representation of women in the County Executive in 2013 at an impressive 86%.<sup>64</sup>

The study counties returned very mixed results with two counties, Mombasa and Narok, showing improvement in the second cycle, Garissa and Nakuru maintaining their initial score, and Kakamega declining.<sup>65</sup> Mombasa distinguished itself between 2017 and 2022, when women accounted for 43% of the CECM positions, up from (30%) between 2013 and 2017. Narok had fallen below par in 2013, when women comprised only 22.2% of the CEC (two out of nine), but rose marginally to three out

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62 See FIDA and NDI, ‘A gender audit of Kenya’s 2013 election process’, 57-58.

63 See FIDA and NDI, ‘A gender audit of Kenya’s 2013 election process’, 57-58.

64 See FIDA and NDI, ‘A gender audit of Kenya’s 2013 election process’, 57-58.

65 There is a slight variance in some studies depending on how the figure is computed. For instance, where the Governor and Deputy Governor or County Secretary are included in the tally of CECMs, a different math may arise altogether. However, these differences in approach do not alter the figures and argument fundamentally. For slightly different statistics, please see FIDA and NDI, ‘A gender audit of Kenya’s 2013 election process’, 57-58. Also, Cottrell-Ghai ‘Women’s gains under the New Constitution’ 268.

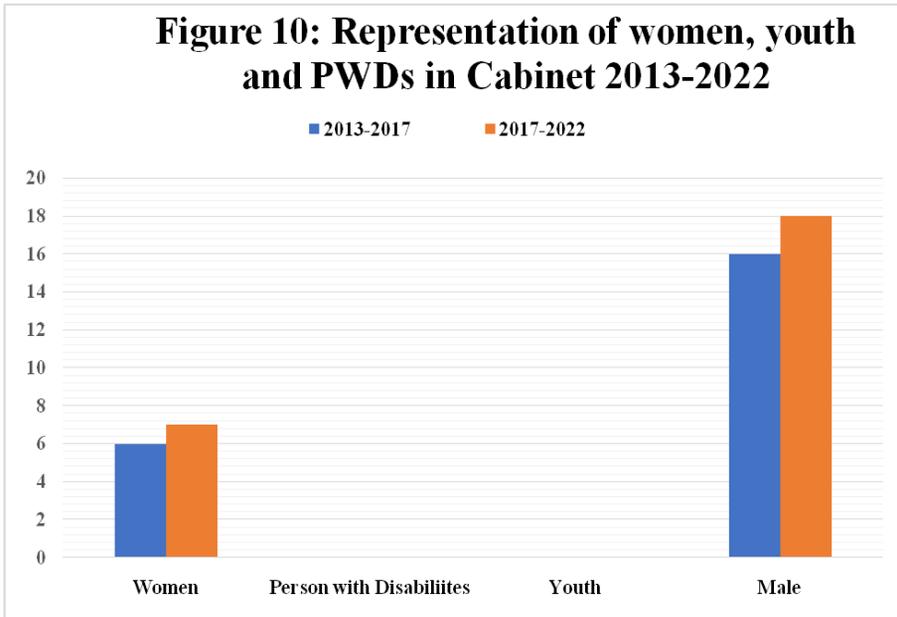
of ten (30%) in 2017. Garissa kept the women at three out of a maximum of ten – 30% – in both electoral cycles. Nakuru County trod along the margins of the 2/3 gender rule, nominating three women out of ten (30%) in 2013 and maintaining the same number in 2017. Kakamega complied with the 2/3 gender rule in 2013, when women comprised 44.4% of the CECMs, plus a female County Secretary, Dr Makanga Savana. This went down in 2017 to a paltry two women (20%). However, after a reshuffle in 2020, the number of women increased to three, at the margins of the 2/3 gender rule, and a woman, Jacinta Adhiambo, was appointed County Secretary.

At the National Executive, compliance with the 2/3 gender rule was low, with only 27% and 28% of appointees to the Cabinet being female between 2013 and 2017, and 2017 and 2022 respectively.<sup>66</sup> The above county and national statistics support our deduction that the President and the governors accepted the 2/3 gender rule as their general compass for Cabinet and CECMs appointments (respectively) although this did not prevent them from missing the mark sometimes.<sup>67</sup>

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66 See Cottrell-Ghai 'Women's gains under the New Constitution' 268. Due to a cabinet reshuffle in 2015, the Devolution and Planning docket was taken over by a man and again in 2021, the Ministry of Defence changed from being headed by a woman to being headed by a man. Some ministries were also reconstituted e.g., the Ministry of Gender and Public Affairs became the Ministry of Public Service, Gender, Senior Citizens Affairs & Special Programmes. See Derrick Okubasu, 'Reshuffle: Full list of Uhuru Kenyatta's new 2020 cabinet', 16 January 2022 and The presidency, 'reassignments changes in Cabinet, 29 September 2021.

67 This was the finding in similar studies such as FIDA and NDI, 'A gender audit of Kenya's 2013 election process' 57; NDI and FIDA 'A gender analysis of the 2017 Kenya general elections' (2018) 33. Cottrell Ghai 'Women's gains under the new Constitution' 268.



The ministries or departments women managed at both the national and county levels were diverse, ranging from those considered inferior to those thought to be important.<sup>68</sup> According to feminist studies, women tend to be assigned inferior or powerless portfolios, which are often dichotomised along the gender roles. Thus, since women are thought to be ‘caregivers’, they are likely to be assignment departments like social services, which are arguably less significant either by the importance assigned to them or the budgets allotted to them.<sup>69</sup> This feminist hypothesis holds that highly regarded portfolios such as finance and infrastructure are usually the privilege of men.<sup>70</sup> Without belittling feminist literature on gender roles, there is a place in

68 For a similar finding, see NDI and FIDA, ‘A gender analysis of the 2017 Kenya general elections,’ 32.

69 Rift Valley Institute, ‘Taking stock of Kenya’s gender principle,’ 3; For a deeper analysis of such literature see, Mona Lena Krook and Diana Z O’Brien. ‘All the President’s men? The appointment of female cabinet ministers worldwide’ 74(3) *Journal of Politics* (2012) 840-55.

70 Krook and O’Brien. ‘All the President’s men? The appointment of female cabinet ministers worldwide’. 840; 846, 840, 841.

our study for challenging the supposed gender roles and their effect on the positions women occupy. For instance, women are usually seen as the goddesses of water, queens of fire (forestry), lords of the environment (environment), farm magicians (agriculture), and family caregivers (health), among others, which might mean that no field is beyond their reach realistically speaking. Indeed, contrary to the feminist view on gender roles, as table 6 shows, the women cabinet secretaries were assigned influential ministries like Energy, Devolution and Planning, Lands and Housing, Foreign Affairs, Health, and even Defence, which are usually considered the exclusive province of men.

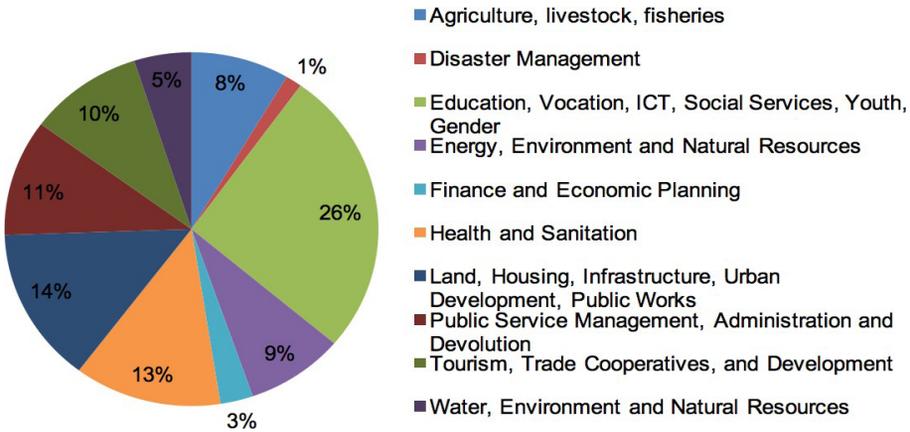
**Table 6: National Cabinet positions occupied by women 2013-2022<sup>71</sup>**

2013-2017	2017-2022
Foreign Affairs	Water and Sanitation and Irrigation
East African Affairs, Commerce and Tourism	Sports and Heritage
Environment, Water and Natural Resources	Lands
Lands, Housing and Urban Development	Energy
Defence	Public Service and Gender Affairs
Devolution and Planning	Foreign Affairs
Public Service, Youth and Gender Affairs	Industrialisation, Trade and Enterprise Development

**Figure 11: Portfolios held by women in CECs, 2013-2017<sup>72</sup>**

71 Due to cabinet reshuffle in 2015 the Devolution and Planning docket was taken over by a man and again in 2021, the Ministry of Defence changed from being headed by a woman to being headed by a man. Some ministries were also reconstituted e.g., the Ministry of Gender and Public Affairs became the Ministry of Public Service, Gender, Senior Citizens Affairs & Special Programmes, see, 'President Uhuru Kenyatta makes cabinet changes' *The Saturday Standard*, 28 September 2021.

72 Rift Valley Institute, 'Taking stock of Kenya's Gender Principle', 3.



Like at the national level, in the study counties, women took up roles that have traditionally been assumed to be important, and set aside for men. Both in 2013 and 2017, women occupied three ministerial positions per study county on average, and the positions included both the ‘important’ and ‘inferior’ portfolios. The ‘important’ dockets in this regard were: Education and Labour; Environment, Forestry and Tourism; and Agriculture, Livestock and Fisheries. The ‘inferior’ ones included Gender, Social Services and Sports; Children Affairs, Social Welfare and Women Empowerment; and Culture and Intercommunity Affairs.

Health is one of the main devolved functions under the Fourth Schedule of the 2010 Constitution. In Kakamega County, a lot of emphasis was placed on this mandate, going by the annual budget of the County and the projects realised.<sup>73</sup> Agriculture is another major county function

73 The health docket houses Kakamega’s ‘most innovative’ project, the *Oparanya Care*. See <https://kakamega.go.ke/county-re-launches-imarisha-afya-ya-mama-na-mtoto-programme/> accessed 1 October 2022; <https://oparanyacare.com/our-work/>; Kakamega County, County annual development plan (CADP) financial year 2022/2023, 60; the health docket also has a higher development expenditure budgetary allocations compared to other dockets, ranging from 12.1% (Ksh 624,340,000) in 2014/2015, 19.4% (Ksh 1,139,430,000) in 2015/2016, 20.2% (Ksh 1,273,250,000) in 2016/2017, (Ksh

and special focus of Kakamega County. Kakamega County's Integrated Development Plan (CIDP), 2018-2022, prioritised food security, road network, universal health care and education, access to clean and safe water and manufacturing. Science and technology are also usually seen as a male domain. That Kakamega County assigned women these responsibilities could imply a new understanding of gender roles. Similarly, that Garissa and Narok, both with a significant population of pastoralists who regard livestock highly and as a male affair,<sup>74</sup> entrusted women to head the agricultural docket is a major achievement for the gender inclusivity discourse.

**Table 7: Gender representation in the County Executive Committee Kakamega County**

POSITION	2013	2017
Governor	M	M
Deputy Governor	M	M

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1,709,570,000), in 2017/2018 and 19.7% (1,339,000,000) in 2018/2019. See the Office of the Controller of Budget's County Governments Annual Budget Implementation Review Reports for each financial year available at <https://cob.go.ke/reports/consolidated-county-budget-implementation-review-reports/> (accessed 1 October 2022).

74 Narok County Integrated Development Plan (2018-2022), 19; PM Mwanyumba and others, 'Livestock herd structures and dynamics in Garissa County, 5(26) *Kenya Pastoralism* (2015); See also <https://resilience.go.ke/> on 1 October 2022, where Narok and Garissa are among the counties listed as project areas for the national government's 'Regional Pastoral Livelihoods Resilience Project (RPLRP-Kenya), which is a World Bank aided Project, with the objective of enhancing livelihoods resilience of pastoral and agro pastoral communities in cross border drought prone areas. See also Edwin Ambani Ameso and others, 'Pastoral resilience among the Maasai pastoralists of Laikipia County, Kenya', 7(2) *Land*, 6; Naomi Kipuri and Andrew Ridgewell, 'A double bind: The exclusion of pastoralist women in the East and Horn of Africa' *Minority Rights Group International* (2008) 3.

Committee	2013 <sup>75</sup>	2017/2018 <sup>76</sup>	2020 <sup>77</sup>
Office of the Governor, Public Service and Administration	F	F	F
Health Services	F	F	M
Environment, Natural Resources, Water and Forestry	F	M	M
Education, Science and Technology and ICT	F	N/A <sup>78</sup>	N/A <sup>79</sup>
County Treasury and Economic Planning	M	N/A <sup>80</sup>	N/A <sup>81</sup>

75 Kenya Gazette, CXV (108) 23 July 2013, 10159.

76 Country Government of Kakamega, 'List of county executive members(CEC), chief officers (CO) and other senior officers as announced by H E Governor Wycliffe Ambetsa Oparanya', 31 January 2018.

77 Kenya Gazette Notice CXXII (150) 7 August 2020, 5478.

78 The Education, Science and Technology and ICT Committee didnot exist as named after 2017. In 2017-2022, ICT was placed under the Committee on Finance, Economic Planning, ICT, e-Government and Communication. Education, Science and Technology was constituted under its own docket named the Committee on Education, Science and Technology. See, Country Government of Kakamega, 'List of county executive members (CEC), chief officers (CO) and other senior officers as announced by H E Governor Wycliffe Ambetsa Oparanya', 31 January 2018 and Kenya Gazette Notice CXXII (150), 7 August 2020, 5478.

79 The Education, Science and Technology and ICT Committee did not exist as named after 2017. In 2017-2022, ICT was placed under the Committee on Finance, Economic Planning, ICT, e-Government and Communication. Education, Science and Technology was constituted under its own docket named the Committee on Education, Science and Technology. See Country Government of Kakamega, 'List of county executive members (CEC), chief officers (CO) and other senior officers as announced by HE Governor Wycliffe Ambetsa Oparanya', and Kenya Gazette Notice CXXII (150) 7 August 2020, 5478.

80 The 'County Treasury and Economic Planning' Committee was reconstituted in the period 2017-2022 as the Committee on Finance, Economic Planning, ICT, e-Government and Communication. See Country Government of Kakamega, 'List of county executive members (CEC), chief officers (CO) and other senior officers as announced by HE Governor Wycliffe Ambetsa Oparanya', and Kenya Gazette Notice CXXII (150) 7 August 2020, 5478.

81 The County Treasury and Economic Planning Committee was reconstituted in 2017 as the Committee on Finance, Economic Planning, ICT, e-Government and Communication. See Country Government of Kakamega, 'List of county executive members (CEC), chief officers (CO) and other senior officers as announced by HE

Transport, Infrastructure and Public Works	M	N/A <sup>82</sup>	N/A <sup>83</sup>
Labor, Social Services, Culture, Youth and Sports	M	N/A <sup>84</sup>	N/A <sup>85</sup>
Industrialisation, Trade and Tourism	M	M	M
Lands, Housing, Urban Areas and Physical Planning	M	M	M
Finance, Economic Planning, ICT, e-Government and Communication	N/A <sup>86</sup>	M	F

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Governor Wycliffe Ambetsa Oparanya', and the Kenya Gazette Notice CXXII (150) 7 August 2020, 5478.

- 82 The Transport, Infrastructure and Public Works Committee was reconstituted as the Committee on Roads, Energy and Public Works. See 'List of county executive members (CEC), chief officers (CO) and other senior officers as announced by HE Governor Wycliffe Ambetsa Oparanya', and the Kenya Gazette Notice CXXII (150) 7 August 2020, 5478.
- 83 The Transport, Infrastructure and Public Works Committee was reconstituted as the Committee on Roads, Energy and Public Works. See 'List of county executive members (CEC), chief officers (CO) and other senior officers as announced by HE Governor Wycliffe Ambetsa Oparanya', and Kenya Gazette Notice CXXII (150) 7 August 2020, 5478.
- 84 The Labour, Social Services, Culture, Youth and Sports Committee was reconstituted in 2017. In 2017-2022, labour was scrapped, women empowerment included, to constitute the Committee on 'Social Services, Sports, Youth, Women Empowerment and Culture'. See 'List of county executive members (CEC), chief officers (CO) and other senior officers as announced by HE Governor Wycliffe Ambetsa Oparanya', and Kenya Gazette Notice CXXII (150) 7 August 2020, 5478.
- 85 The Labour, Social Services, Culture, Youth and Sports Committee did not exist as named after 2017. In 2017-2022, labour was scrapped, women empowerment included, to constitute the Committee on Social Services, Sports, Youth, Women Empowerment and Culture. See 'List of county executive members (CEC), chief officers (CO) and other senior officers as announced by HE Governor Wycliffe Ambetsa Oparanya', and Kenya Gazette Notice CXXII (150) 7 August 2020, 5478.
- 86 The docket as named, did not exist as of 2013. In 2013, there was the Committee on County Treasury and Economic Planning. See Kenya Gazette, Gazette Notice, CXV (108) 23 July 2013, 10159.

ICT, e-Government and Communication	N/A <sup>87</sup>		M		N/A <sup>88</sup>	
Roads, Energy and Public Works	N/A <sup>89</sup>		M		M	
Education, Science and Technology	N/A <sup>90</sup>		M		M	
Social Services, Sports, Youth, Women Empowerment and Culture	N/A <sup>91</sup>		M		M	
Agriculture, Irrigation, Co-operatives, Livestock, Veterinary Services and Fisheries	M <sup>92</sup>		M		F	
<b>TOTAL MALES</b>	<b>4</b>	<b>40%</b>	<b>9</b>	<b>82%</b>	<b>7</b>	<b>70%</b>
<b>TOTAL FEMALES</b>	<b>6</b>	<b>60%</b>	<b>2</b>	<b>18%</b>	<b>3</b>	<b>30%</b>
<b>SUM TOTAL</b>	<b>10</b>		<b>11</b>		<b>10</b>	

**Table 8: Gender representation in the County Executive Committee of Garissa County**

<b>POSITION</b>	<b>2013</b>	<b>2017</b>
Governor	M	M

87 The docket as named, did not exist in 2013. In 2013, ICT was under the Committee on Education, Science and| Technology and ICT. See Kenya Gazette, Gazette Notice, CXV (108) 23 July 2013, 10159.

88 The ICT, e-Government and Communication Committee did not exist as of 2020. See the Kenya Gazette Notice, CXXI (150), 7 August 2020, 5478.

89 The docket as named did not exist in 2013. In 2013, there was the Committee on Transport, Infrastructure and Public Works. See the Kenya Gazette, Gazette Notice, CXV (108) 23 July 2013, 10159.

90 The docket as named, did not exist in 2013. In 2013, the docket included ICT, and was called the Committee on Education, Science and Technology and ICT. See the Kenya Gazette, Gazette Notice, CXV (108) 23 July 2013, 10159.

91 The docket as named, did not exist as of 2013. In 2013, there was a committee on Labour, Social Services, Culture, Youth and Sports. See the Kenya Gazette, CXV (108) 23 July 2013, 10159.

92 Kenya Gazette, CXVII ( 20) 27 February 2015, 1236.

Deputy Governor	M	M
Committee	2013 <sup>93</sup>	2017 <sup>94</sup>
Environment, Forestry and Tourism	M	N/A <sup>95</sup>
Environment, Energy and Natural Resources	N/A <sup>96</sup>	F
Commerce and Co-operative Development	M	N/A <sup>97</sup>
Trade, Enterprise Development and Tourism	N/A <sup>98</sup>	M
Health, Water Services and Sanitation	M	N/A <sup>99</sup>
Health and Sanitation Services	N/A <sup>100</sup>	M
Water and Irrigation	N/A <sup>101</sup>	M
Finance and Economic Planning	M	M
Children Affairs, Social Welfare and Women Empowerment	F	N/A <sup>102</sup>
Gender, Social Services and Sports	N/A <sup>103</sup>	F
Education, Youth Polytechnic and Sports	M	N/A <sup>104</sup>

93 Kenya Gazette CXV (85) 7 June 2013, 7502.

94 Kenya Gazette, CXIX (169) 13 November 2017, 5884; Kenya Gazette, CXIX (194) 29 December 2017, 12719.

95 The Tourism docket was moved to Trade, Enterprise Development and Tourism, a committee formed in 2017.

96 A Natural Resources docket was introduced to the Committee on Environment, Energy and Natural Resources.

97 This docket was scrapped in 2017.

98 Trade, Enterprise Development and Tourism was created after merging Tourism docket and Commerce and Co-operative Development Committee.

99 In 2017, the Health, Water Services and Sanitation docket was split into Health and Sanitation Services and Water and Irrigation Services.

100 Health and Sanitation Services was under the bigger docket, Health, Water Services and Sanitation in 2013.

101 The Committee of Water and Irrigation was formed in 2017. The Water docket was formerly under Health, Water Services and Sanitation.

102 Children Affairs, Social Welfare and Women Empowerment and the Sports docket which was under the Committee on Education, Youth Polytechnic and Sports were merged to create the Committee on Gender Social Services and Sports in 2017.

103 Gender, Social Services and Sports were under Children Affairs, Social Welfare and Women Empowerment and the Committee on Education, Youth Affairs and Sports.

104 The docket was changed in 2017. Committees introduced to replace them were Education and Labour and Gender, Social Services and Sports.

Education and Labour	N/A <sup>105</sup>		F	
Land, Housing Development and e-Government	M		M	
Agriculture, Livestock and Fisheries	F		M	
Culture and Intercommunity Affairs	F		N/A <sup>106</sup>	
Infrastructure and Public Works	M		N/A <sup>107</sup>	
Roads and Transport	N/A <sup>108</sup>		M	
<b>TOTAL MALES</b>	<b>7</b>	<b>70%</b>	<b>7</b>	<b>70%</b>
<b>TOTAL FEMALES</b>	<b>3</b>	<b>30%</b>	<b>3</b>	<b>30%</b>
<b>SUM TOTAL</b>	<b>10</b>		<b>10</b>	

Between 2013 and 2017, the portfolios assigned to women in Mombasa County were two ‘less important’ ones and an important one given the urban and coastal context of the County and going by the above discussion on gender roles. The ‘less important’ ones were Agriculture, Livestock and Marketing, and Sports, Youth and Culture; while the important one was Water, Environment and Natural Resources. However, after the 2017 General Elections, women were assigned more ‘important’ portfolios like Finance and Economic Planning, and Health, although, as we have already argued, the Health docket could also be seen as a typical feminine role of caregivers despite being a key devolution mandate.

**Table 9: Gender representation in the County Executive Committee of Mombasa County**

POSITION	2013	2017
Governor	M	M
Deputy Governor	F	M

105 This docket was derived from Education, Youth Services and Sports which existed in 2013.

106 This docket was scrapped in 2017.

107 The Committee of Infrastructure and Public Works was reduced into Roads and Transport.

108 This Committee was under the Infrastructure and Public Works in 2013.

Committee	2013 <sup>109</sup>		2017 <sup>110</sup>	
Tourism Development	M		N/A <sup>111</sup>	
Transport and Infrastructure	M		M	
Finance and Economic Planning	M		F	
Health	M		F	
Education	M		N/A <sup>112</sup>	
Agriculture, Livestock and Marketing	F		N/A <sup>113</sup>	
Trade, Energy and Industry	M		N/A <sup>114</sup>	
County Planning, Land and Housing	M		M	
Sports, Youth and Gender	F		M	
Water, Environment and Natural Resources	F		N/A <sup>115</sup>	
Environment, Waste Management and Energy	N/A <sup>116</sup>		M	
Water, Sanitation and Natural Resources	N/A <sup>117</sup>		F	
<b>TOTAL MALES</b>	<b>7</b>	<b>70%</b>	<b>4</b>	<b>57%</b>
<b>TOTAL FEMALES</b>	<b>3</b>	<b>30%</b>	<b>3</b>	<b>43%</b>
<b>SUM TOTAL</b>	<b>10</b>		<b>7</b>	

Nakuru also presents a mixture, having assigned women the traditional 'women departments' like Culture, Youth and Social Services in 2013, and Youth, Culture and Social Services in 2017, while at the same time also entrusting them with important dockets such as Land,

109 Kenya Gazette, CXV (78) 24 May 2013,7087; Kenya Gazette, CXV (108) 23 July 2013, 10156; Kenya Gazette, CXV (99) 5 July 2013; Kenya Gazette, CXV (99) 5 July 2013, 9087.

110 Kenya Gazette, CXIX (171) 17 November 2017, 5926.

111 This Committee did not exist in 2017.

112 The Education Committee did not exist in 2017.

113 This Committee did not exist in 2017.

114 This Committee did not exist in 2017: the Energy docket was merged into the Environment, Waste Management and Energy Committee.

115 Merged into the Water, Sanitation and Natural Resources Committee in 2017.

116 This docket was non-existent in 2013. It was reconstituted with the Energy docket of the Trade, Energy and Industry Committee from 2013 as well as the Environment aspect of the Water, Environment and Natural Resources.

117 This Committee did not exist in 2013. In its place was the Water, Environment and Natural Resources Committee.

Physical Planning and Housing (in both 2013 and 2017), and Agriculture and Fisheries in 2013.

**Table 10: Gender representation in the County Executive Committee of Nakuru County**

POSITION	2013	2017
Governor	M	M
Deputy Governor	M	M
Committee	2013 <sup>118</sup>	2017 <sup>119</sup>
Finance and Planning	M	M
Roads, Public Works and Transport	M	N/A <sup>120</sup>
Natural Resource, Environment, Water and Wildlife Management	M	M
Trade, Industrialisation, Tourism and Wildlife Management	M	M
Lands, Physical Planning and Housing	F	F
Agriculture, Livestock and Fisheries	M	F
Education, Culture, Youth and Social Services	F	N/A <sup>121</sup>
Information Communication Technology and e-Government	M	N/A <sup>122</sup>
Infrastructure	N/A <sup>123</sup>	M
Public Service	F	N/A <sup>124</sup>
Public Service and Devolution	N/A <sup>125</sup>	M

118 Kenya Gazette, CXV (82) 31 May 2013, 2949; Kenya Gazette, CXV (167) 29 November 2013, 14932.

119 Kenya Gazette, CXIX (190) 22 December 2017, 6570.

120 This Committee did not exist in 2017. Its functions were merged into the Committee on Infrastructure in 2017.

121 This Committee was reconstituted into the Youth, Gender, Culture, Sports and Social Services Committee in 2017.

122 This Committee was reconstituted into the Education, ICT and E-Government Committee in 2017.

123 The Infrastructure Committee did not exist in 2013. The functions of this Committee in 2013 were performed by the Roads, Public Works and Transport Committee.

124 This Committee was reconstituted in 2017 to include the devolution docket under its mandate.

125 This Committee existed purely to cater for public service matters in 2013. It was

Health Services	M <sup>126</sup>		M	
Youth, Gender, Culture, Sports and Social Services	N/A <sup>127</sup>		F	
Education, ICT and e-Government	N/A <sup>128</sup>		M	
<b>TOTAL MALES</b>	<b>7</b>	<b>70%</b>	<b>7</b>	<b>70%</b>
<b>TOTAL FEMALES</b>	<b>3</b>	<b>30%</b>	<b>3</b>	<b>30%</b>
<b>SUM TOTAL</b>	<b>10</b>		<b>10</b>	

In Narok as well, the assigned roles overlapped on both sides of the gender roles divide. While women held important ministries like Finance and Economic Planning, and Information, Communication and e-Government (in 2013), Agriculture, Livestock and Fisheries, in a predominantly pastoralist community, and Lands, Physical Planning and Urban Development in a county where significant acreage of land has been rated (in 2017). Education, Youth Affairs, Gender, Culture and Social Services, which a woman held between 2017 and 2022, combines important departments like Education and inferior ones like Youth Affairs, Gender, Culture and Social Services.

**Table 11: Gender representation in the County Executive Committee of Narok County**

POSITION	2013	2017	
Governor	M	M	
Deputy Governor	M	F	
Committee		2013 <sup>129</sup>	2017 <sup>130</sup>
Finance and Economic Planning		F	M
Agriculture, Livestock and Fisheries		M	F

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reconstituted in 2017 to include devolution under its mandate.

126 Kenya Gazette, CXVI (112) 19 September 2014.

127 The education docket was removed after the committee was reconstituted from the 2013 Education, Culture, Youth and Social Services Committee and moved to Education, ICT and e-Government.

128 This Committee was reconstituted from the 2013 Information Communication Technology and E-Government Committee after the education docket was added.

129 Kenya Gazette, CXV (147) 11 October 2013, 4944.

130 Office of the auditor general, 'Report of the Auditor General on county executive of Narok' 30 June 2019.

Trade, Industrialisation, Co-operative Development, Tourism and Wildlife	M	N/A <sup>131</sup>
Trade, Industrialisation and Cooperative Development	N/A <sup>132</sup>	M
Tourism and Wildlife	N/A <sup>133</sup>	M
Health and Sanitation	M	M
Education, Youth Affairs, Gender, Culture and Social Service	M	F
Lands, Physical Planning and Urban Development	M	F
Public Works, Roads and Transport	M	M
Public Service Management	M	M
Information, Communication and E-Government	F	N/A <sup>134</sup>
Water, Energy, Environment and Natural Resources	N/A <sup>135</sup>	M

It is possible to criticise the President and the governors for appointing fewer women to the Cabinet and CECs (respectively) than constitutionally required; however, these appointing authorities cannot be accused of assigning women only the lesser important ministries or departments. It would also be wilful blindness<sup>136</sup> to fail to acknowledge that the number of women in the Executive has grown incrementally

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131 This docket was non-existent as the name of the committee at the time was reconstituted to Trade, Tourism and Industry Committee. See also Office of the Auditor General, 'Report of the Auditor General on county executive of Narok' 30 June 2019.

132 This docket was non-existent as the name of the committee at the time was reconstituted to Trade, Industrialization and Cooperative Development, Tourism and Wildlife Committee. See also Kenya Gazette, CXV-(147) 11 October 2013.

133 This docket was non-existent as the Committee at the time was reconstituted to Trade, Industrialisation and Cooperative Development, Tourism and Wildlife Committee. See also Kenya Gazette, CXV (147) 11 October 2013, 4944.

134 This docket was non-existent in 2013 but was introduced in 2017. See Office of the Auditor-General, 'Report of the Auditor-General on county executive of Narok' 30 June 2019, iii.

135 This docket was introduced in 2017. See the Kenya Gazette CXV (147) 11 October 2013.

136 Wilful blindness causes an excluded group to persistently view itself as solely victims, without acknowledging areas where the group experiences privilege or where it has agency. According to Hancock, the proponent of this theory, wilful blindness ignores the fact that membership to a marginalised or privileged group does not remain static over time. See Ange-Marie Hancock *Solidarity politics for millennials: A guide to ending the Oppression Olympics*, Palgrave Macmillan, 2011, 3.

since the first woman was appointed in 1974, and that the dockets held have increasingly moved from the traditional gender roles to more important roles.<sup>137</sup>

### *Women's participation through leadership of legislative institutions*

The first decade of devolution saw women take up influential leadership roles in legislative institutions at both the county and national levels albeit rarely as the cases of the offices of speaker and deputy speaker illustrate. The study county assemblies did not fare well in having women at the helm. As table 12 indicates, with the exception of Nakuru County Assembly, which elected a female Speaker in 2013, all the other speakers and deputy speakers of the study county assemblies were male in both cycles under study. Nationally, the number of women county assembly speakers increased from only three (6.4%) in 2013 (Kirinyaga, Kisumu and Nakuru) to five (10.6%) in 2017 (Homa Bay, Machakos, Nairobi, Vihiga, and West Pokot)<sup>138</sup> as figures 12 and 13 demonstrate.

Similarly, at the national level, besides Dr Laboso who served as the Deputy Speaker of the National Assembly between 2013 and 2017,

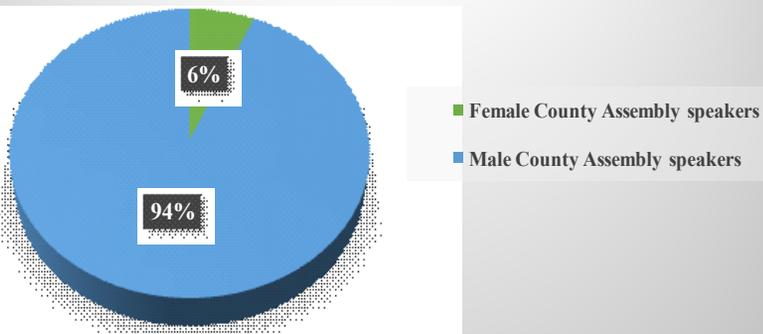
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137 When the first woman, Dr Julia Ojiambo was appointed in 1974, she served as an Assistant Minister for Housing and Social Services; between 1995 and 1998, Hon Nyiva Mwendwa became the first woman appointed Minister of Culture and Social Services. When the NARC government came to power in 2002, seven women to cabinet positions: three cabinet ministers and four assistant ministers. The Grand Coalition cabinet of 2008 fared poorly on gender with only 7 out of 44 cabinet secretaries being women. However, in 2013, Uhuru Kenyatta appointed seven women out of a cabinet of 22 members – the highest proportion since independence, and a number representing almost one-third of the total cabinet seats. The same number was appointed in 2017. The appointments were even more remarkable considering that the women were appointed to dockets that were previously considered the preserve of men. See Figure 15 above; see also FIDA Kenya and NDI, 'Key gains and challenges: A gender audit of Kenya's 2013 election process', 2.

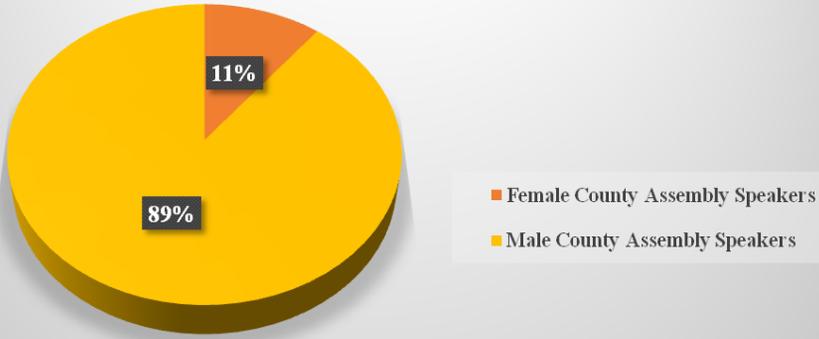
138 NDI and FIDA 'A gender analysis of the 2017 Kenya general elections' (2018) 33.

no other woman rose to the rank of Speaker and Deputy Speaker in Parliament. However, Naomi Shabaan served as Deputy Majority Leader of the National Assembly while Hon Beatrice Elachi served as Majority Chief Whip in the Senate between 2013 and 2017. Additionally, Aisha Jumwa and Susan Kihika served as Deputy Minority Whip in the National Assembly and Majority Whip of the Senate, respectively, between 2017 and 2020. Therefore, although women are getting into the legislative institutions increasingly, their influence at the top levels is only beginning to be felt.

**Figure 12: Percentage representation of county assembly speakers by gender 2013**



**Figure 13: Percentage representation of county assembly speakers by gender 2017**



**Table 12: Speakership of county assemblies by gender, 2013-2022**

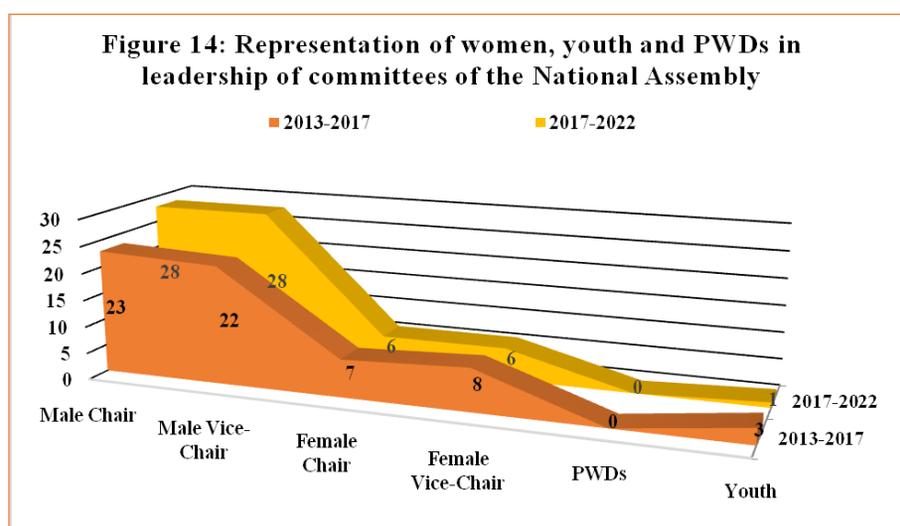
COUNTY	2013		2017	
	Speaker	Deputy Speaker	Speaker	Deputy Speaker
Garissa	M	M	M	M
Kakamega	M	M	M	M
Mombasa	M	M	M	M
Nakuru	F	M	M	M
Narok	M	M	M	M
<b>TOTAL MALES</b>	4	5	5	5
<b>TOTAL FEMALES</b>	1	0	0	0
<b>SUM TOTAL</b>	5	5	5	5

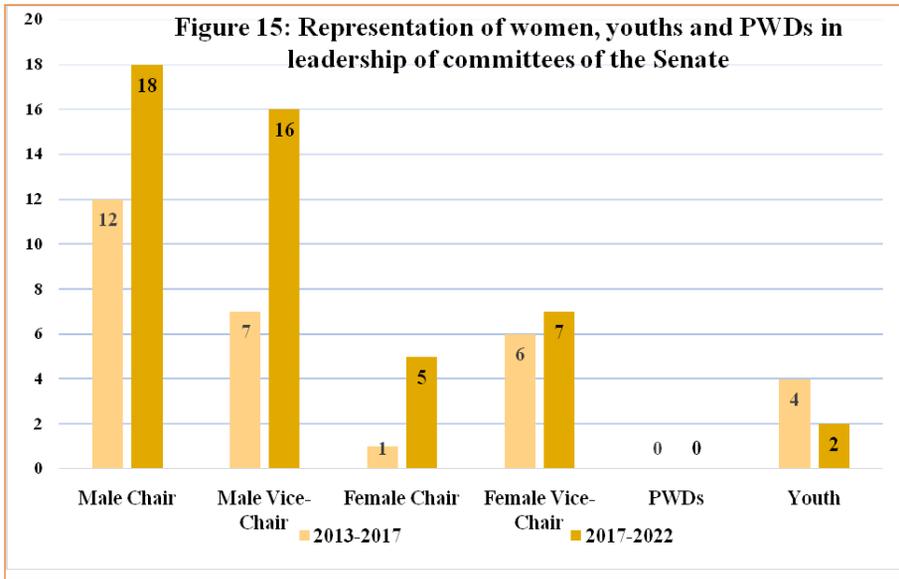
Table 13: County assembly leadership in the study counties (2013)

County	Position				
	Majority Leader	Minority Leader	Majority Whip	Minority Whip	Clerk
Kakamega	M	M	M	M	M
Garissa	M	M	M	M	M
Nakuru	M	M	M	M	M
Narok	M	M	M	M	M
Mombasa	M	M	M	F	F

Table 14: County assembly leadership in the study counties (2017)

County	Position				
	Majority Leader	Minority Leader	Majority Whip	Minority Whip	Clerk
Kakamega	M	M	M	M	M
Garissa	M	M	M	F	M
Nakuru	M	M	M	F	M
Narok	M	M	M	M	M
Mombasa	M	F	F	M	M





*Legislative committees*

With respect to the leadership of legislative committees, women actually took charge of committees and in fact chaired important committees such as Education, Science and Technology; Justice and Legal Affairs; Roads and Infrastructure, among others. However, their participation was minimal numerically as the case studies show.

In Garissa, women chaired four committees post-2017, initially, although they lost the leadership of three of them with the reconstitution of committees in 2019. Yet again mid-way transition was critical and this time women lost. Still, the high number of four committee chairs was curious for Garissa in light of the fact that throughout the study period all the women in the County Assembly were nominated. The failure to elect women in Garissa painted a picture of an electorate that was reluctant to accept the leadership of women; however, the fact that once nominated the women could be entrusted with the leadership of critical assembly committees wrote a different image on that canvas.

In Mombasa, women chaired three committees post-2017 - Water; Transport; and Sanitation and Natural Resources. In Kakamega, both post-2013 and 2017, women chaired three committees - Education; Health; and Delegated Legislation (2013); and Environment; Education; and Procedure and Regulation in 2017. In Nakuru, post-2013, eight women chaired committees, while 25% of the committees in 2017 were chaired by women.<sup>139</sup> It is noteworthy that women MCAs in Nakuru held the positions of Deputy Leader of Majority, Minority Whip and Deputy Minority Whip.<sup>140</sup> In Narok, only one woman chaired a committee, the Culture Committee, post-2013. Again, between 2017 and 2022, only one woman chaired a committee - the Powers and Privileges Committee.

**Table 15: 2017 Women-led committees in the county assemblies of the study counties**

County	Committee	Names	Designation
Garissa <sup>141</sup>	Roads, Transport and Public Works	Marian Mohamed	Chair
	Trade, Enterprise Development and Tourism	Asli Ibrahim	Chair
	Labour, Gender, Social Services and Sports Committee	Fatuma Abdi Sanweiyana	Chair
	Land, Housing and Urban Development Committee	Shindes Mohamud	Chair

139 It is noteworthy that 4 women also served as vice-chairs of committees including ICT, Justice and Legal Affairs, Finance and Planning and Trade, Tourism and Cooperatives.

140 <https://assembly.nakuru.go.ke/web/about-assembly/county-assembly-members/> accessed on 5 September 2022.

141 These women did not serve a full term as the committees were reconstituted during the term and all women lost leadership roles in the committees of the assembly.

<b>Kakamega</b>	Labour, Social Services, Culture, Youth and Sports	Winny Musungu <sup>142</sup>	Chair
<b>Mombasa</b>	Justice and Legal Affairs Committee	Amriya Boy Juma	Chair
	Committee on County Delegated Legislation	Lucy Chizi Chireri	Chair
	Transport Committee	Joyce Muthoni	Chair
	Water, Sanitation and Natural Resources Committee	Prischillah Mema Mumbua/Hamida Noor Sheikh <sup>143</sup>	Chair
<b>Nakuru</b>	County Assembly – Powers and Privileges	Mary Wanjiru Waiganjo	Chair
	ICT & e-Governance	Susan Njuguna	Chair
	Security & Governance	Rose Chepkoech	Chair
	Labour and Social Welfare	Catherine Kamau	Chair

The case of *National Gender and Equality Commission v Majority Leader, County Assembly of Nakuru & 4 others*<sup>144</sup> illustrates that there could be an understanding among some MCAs that committee leadership is a preserve of elected MCAs, which could have reduced the percentage of women in committee leadership significantly since most women were in the county assemblies on the basis of the nomination process. In the case under review, NGEC challenged the constitutionality of the Nakuru County Assembly's Report of the Selection Committee on the Harmonisation of Membership of Sectoral and Select Committees on the

142 Hon Winny Musungu was replaced by a man, Hon Jason Lutomia in 2020.

143 The leadership of this committee appears to have changed during the term but a woman MCA replaced another as chair.

144 *National Gender and Equality Commission v Majority Leader, County Assembly of Nakuru & 4 others; Jubilee Party & another* (Interested Parties) High Court, Petition 1 of 2019, Judgment of the High Court (2019) eKLR.

basis that it barred nominated members from occupying the positions of chairpersons and vice-chairpersons of the different sectoral committees of the County Assembly. The result was that the Chair and Vice-Chair of the Information Communication Technology (ICT) Committee, both nominated women, and the vice chairs of the Justice and Legal Affairs; Finance and Planning; and Trade, Tourism and Cooperatives committees, who were also nominated women, were removed. Elected members (male and female) and nominated male members were not affected by the resolution whose effect was to reduce the percentage of nominated women in committee leadership from 25% to 0%, and the total number of women leading committees from 35% to 10%.

After considering both the process and the result, the High Court ruled that this drastic reduction was impermissible constitutionally. The High Court found instructive the fact that the decision to re-organise the County Assembly committees was informed by the view taken by the Leader of Majority that nominated MCAs should not occupy any leadership positions in the County Assembly. While making reference to Article 27 of the 2010 Constitution, the High Court ruled that the County Assembly and Leader of Majority and other County Assembly leaders were obligated to ensure non-regression of the goal of achieving substantive equality between the genders but also to take positive steps to ensure forward progress towards substantive gender parity and equity. Whether reduced into policy or not, the 'elected only' policy appears to be entrenched in some county assemblies with serious impact on the leadership of legislative committees by women. The position taken by the Nakuru County Assembly Leader of Majority can certainly not be generalised for all county assemblies. However, the hint should not be lost. It may as well be possible that nominated MCAs may be missing out of leadership positions because of a silent 'elected only' policy.

## Youth, devolution and inclusion

Not much disaggregated data exists on the political participation of the youth in capacities such as CECM, Speaker, Deputy Speaker and committee leadership of the county assemblies. More importantly, hardly any comprehensive data exists on the performance of the youth in the 2013 General Elections except at the National Legislature. Without such data, informed analysis and requisite policy interventions are difficult, which is bad for the youth empowerment agenda sanctioned by the 2010 Constitution. That said, the youth performed much better than the women and PWDs at the ballot at the county assembly level in the first decade of devolution; although, like these marginalised groups, their election through nomination did not always meet the constitutional muster.

### *Youth's participation through elections by ballot*

The youth lost at ballot in the largest constituency (the nation or the presidency), they struggled in parliamentary elections, and realised their best performance in the smallest constituency – the county assembly ward. Since the promulgation of the 2010 Constitution, no youth has not been elected as President or Deputy President. In 2013, the youth accounted for 27% of the elected MCAs, 6.9% of elected MNAs, 17% of the WMNAs and 6.4% of elected senators, while in 2017, the figures stood at 19.8%, 5.9%, 6.4% and 12.8%, respectively, as shown in Figure 16.

**Table 16: Nominated and elected youth in the 2013 elections**

Position	Male	Female	Total
Governor	1	-	1
Senator (elected)	3	-	3
Senator (nominated)	1	7	8
Members of National Assembly (elected)	19	1	20
Members of National Assembly (nominated)	3	2	5
Women Representatives (elected)	-	8	8
County Assembly Representatives	19	375	394
<b>Total Candidates</b>	<b>46</b>	<b>393</b>	<b>439</b>

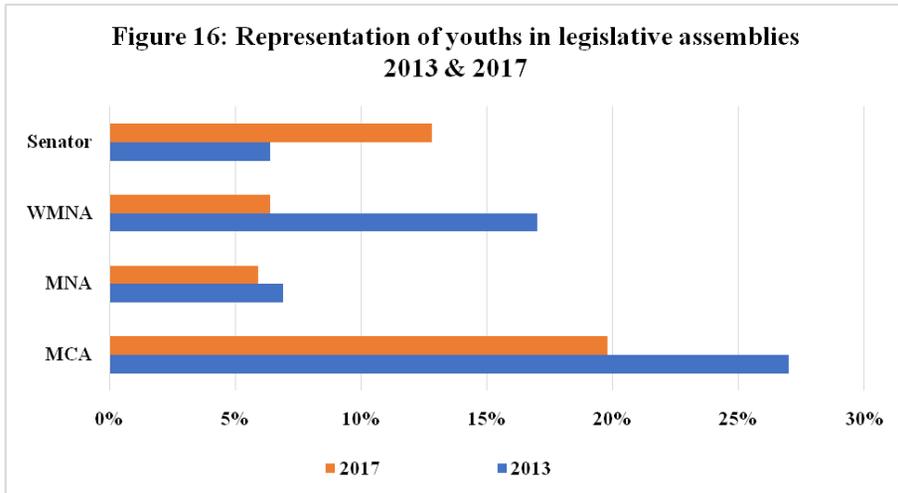
Source: Youth Agenda: Youth situation analysis 2014

**Table 17: Youths elected during the 2017 General Elections**

No.	Elective position	Gender		Total
		Male	Female	
1	Presidential	0	0	0
2	Senatorial	6	0	6
3	Member of National Assembly	14	3	17
4	Woman Member to the National Assembly	0	3	3
5	Gubernatorial	1	0	1
6	Member of County Assembly	274	13	287 <sup>145</sup>
<b>Total</b>		<b>295</b>	<b>19</b>	<b>314</b>

Source: IEBC data report on 2017 elections

145 A different report puts this figure at 303. See Youth Agenda, 'Youth electoral participation' 7. However, we opted to work with the IEBC figure as they are the primary responsibility bearer when it comes to conduct of elections and therefore presumed to have authoritative figures on the results.



Unlike women and PWDs, the youth thrived at the MCA level, which might signal possibilities of their redemption through devolution. In 2017, 287 youth were elected to county assemblies (19.8%), a stellar performance when compared to 98 women (6.8%) or two PWDs<sup>146</sup> (0.14%) or even their own average in the national legislative institutions – Senate (12%) and National Assembly (5.9%). However, this figure still represents a dip from 27% in 2013; although, as Nakuru County demonstrates, there are counties where the performance of the youth increased in 2017, where they did far better than the national average for the MCA positions above. In this case study, 13 youth were elected through ballot in 2013 (23.6%), which performance increased to 14 in 2017 (24.5%), hence reinforcing further the conclusion that devolution, especially the ward, is the place for optimal youth representation.

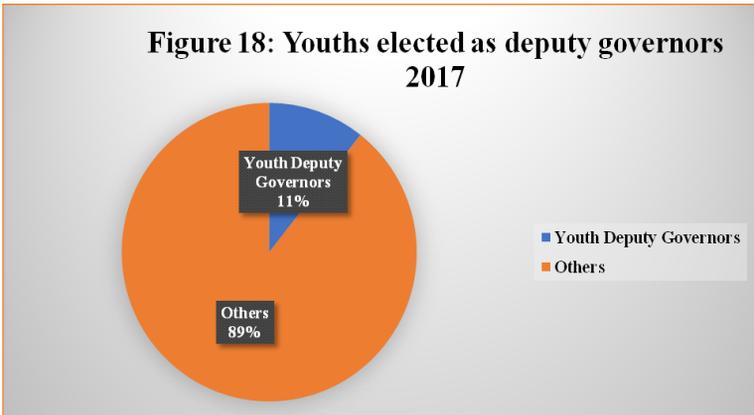
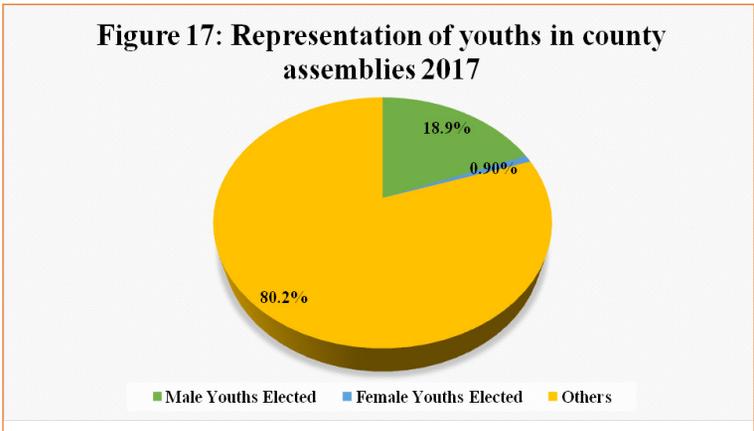
Matters were not that easy for the youth in the gubernatorial positions. Only one youth – Stephen Sang (Nandi County) – was elected to the position governor nationwide in 2017,<sup>147</sup> while three women were

146 United Disabled Persons of Kenya, 'Post-audit survey level of inclusivity in the 2017 general elections' (2018) 26. One of these persons (Philip Kipng'etich Rotich) was elected to the County Assembly of Nakuru, one of our study counties.

147 One youth was elected out of 7 who had contested gubernatorial elections. See IEBC, 'Data report on 2017 elections,' 15. However, Youth Agenda puts the

elected. Youthful deputy governors were elected in five counties (Elgeyo Marakwet, Kajiado, Nakuru, Taita Taveta, and Wajir), which accounted for 10.6% of all deputy governors in 2017.<sup>148</sup>

A possible deduction from this data is that the youth are far more likely to be elected through ballot to the county legislative institutions rather than the county executive positions or the national offices.



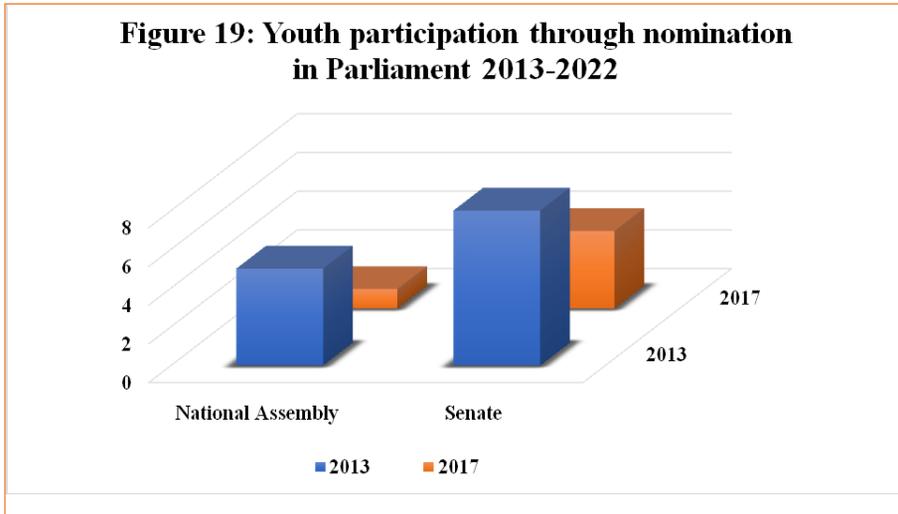

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number of candidates as slightly higher, at 11. See Youth Agenda, 'Youth electoral participation: Quick facts' (2017), 6.

148 Youth Agenda 'Youth electoral participation' 6.

### Youth participation through nomination

Like in the case of women and PWDs, the affirmative action measures that the 2010 Constitution articulates guarantee the representation of the youth through nomination to Parliament<sup>149</sup> as well as to the county assemblies as part of the marginalised groups.



As was the case with elections by ballot, the youth did not fare well in election by nomination in 2017. As can be seen from Figure 19, the number of youth nominated to the National Assembly dipped from five in 2013, to one in 2017, and from eight in 2013 to four in 2017 in nominations to Senate.<sup>150</sup>

At the county assembly level, the 2010 Constitution requires every county assembly to include 'the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.'<sup>151</sup> While the County Governments Act provides

149 Constitution of Kenya (2010), Article 97(1)(c) and 98(1)(c).

150 Youth Agenda 'Youth electoral participation' 7.

151 Constitution of Kenya (2010), Article 177(1)(c).

for six nominees,<sup>152</sup> the Elections Act has interpreted this constitutional dictate to mean that each county assembly shall have eight persons nominated to represent the marginalised groups – at least two of whom shall represent the youth.<sup>153</sup> Since the Elections Act is considered the *lex specialis*, therefore, political parties usually present a list of eight persons in accordance with the Elections Act. Thus, despite performing well at the ballot comparatively, it is expected that the youth would still be entitled to at least two slots in every county assembly through the nomination process.

However, a review of the party lists published by the IEBC in respect of the 2013 and 2017 elections demonstrates that this requirement was not always met.<sup>154</sup> In 2013, one county assembly (Wajir) did not have a youth nominated, 26 county assemblies only nominated one, and only 19 were compliant.<sup>155</sup> In 2017, the party lists from five counties did not list any person as representing the youth,<sup>156</sup> while 15 counties only had one youth nominee. This meant that 27 counties were compliant, up from 19 in 2013. These findings are reflected in the study county assemblies. As Table 18 and Table 19 show, with the exception of Narok in 2013 (where three youth were nominated), and Garissa and Nakuru in 2017 (where two and three youth were nominated, respectively), only one youth was nominated to each county assembly for both seasons notwithstanding the above clear constitutional threshold of two.

**Table 18: Youth nominated to the study county assemblies in 2013**

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152 County Governments Act, Section 7.

153 Elections Act, Section 36(1)(f).

154 In *National Gender and Equality Commission & others (NGEC) v IEBC & others* Petition 147 of 2013, where the exclusion of the youth, women, ethnic minorities and PWDs from party lists for Parliament and county assemblies in 2013 was challenged, parties were directed conduct fresh party list nominations under the supervision of IEBC. A similar challenge by NGEC in 2017 was dismissed by the court for want of jurisdiction as will be discussed in the section on PWDs below.

155 It was not clear what the situation was in Embu County as the party list did not indicate who was nominated to represent the youth.

156 These were Marsabit, Kilifi, Nyandarua, Laikipia and Vihiga.

COUNTY	NOMINATED		TOTAL IN ASSEMBLY	
	No		No	%
Mombasa	1		15	7%
Garissa	1		18	6%
Nakuru	1		19	5%
Narok	3		17	18%
Kakamega	1		26	4%

**Table 19: Youth nominated to the study county assemblies in 2017**

COUNTY	NOMINATED		TOTAL IN ASSEMBLY	
	No		No	%
Mombasa	1		12	8%
Garissa	2		20	10%
Nakuru	3		23	13%
Narok	1		17	6%
Kakamega	1		29	3%

Counties could learn an important lesson from Parliament, which has a longer history, about the potential of affirmative action measures. In the repealed constitutional order, between 1992 and 2013, only one youth (2%) was nominated to Parliament out of about 50 nomination slots.<sup>157</sup> The Repealed Constitution itself did not refer to the youth and neither did it reserve any of the 12 seats meant for nomination of persons to serve special interests in Parliament to the youth specifically.<sup>158</sup>

157 Mzalendo Trust 'Claiming the space: Youth inclusion and participation in Kenya's Parliament', (2019) 10.

158 1963 Constitution, Section 39.

Just as they were neglected at constitutional level, so was their participation in politics.<sup>159</sup> But once affirmative action was embraced and 10 youth nominated to the 11<sup>th</sup> Parliament, the gains were clear as evidenced by the success of some of the beneficiaries of such measures at the ballot in 2017.<sup>160</sup> For instance, Johnson Sakaja, who was nominated to the National Assembly to represent the youth in the 11<sup>th</sup> Parliament, was elected to the 12<sup>th</sup> Parliament as the Senator for Nairobi.<sup>161</sup> Naisula Lesuuda and Martha Wangari who were nominated to Senate during the 11<sup>th</sup> Parliament were elected to the National Assembly in 2017 to represent Samburu West and Gilgil constituencies respectively.<sup>162</sup> Although the nomination of the youth in Parliament went down by more than 50% to five in 2017,<sup>163</sup> affirmative action has proven to be capable of offering the visibility, networks, and resources required for the youth to contest competitive electoral positions effectively subsequently.

#### *Youth participation through appointive positions*

As indicated in Figure 10, no youth or PWD held a Cabinet position at the national level between 2013 and 2022. While gender disaggregated data was easily available in relation to CECs, the same could not be said of age disaggregation. Therefore, we were unable to establish the number of the youth who had served as CECMs in the period under study.

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159 Media Development Association and Konrad Adenauer Stiftung, 'History of constitution making in Kenya,' 124; Constitution of Kenya Review Commission (CKRC) 'The Final Report of the Constitution of Kenya Review Commission', Approved for Issue at the 95 Plenary Meeting of the CKRC held on 10 February 2005, 104, 107, 175.

160 Mzalendo Trust, 'Claiming the space', 10.

161 Mzalendo Trust, 'Claiming the space', 10.

162 Mzalendo Trust, 'Claiming the space', 10.

163 One study puts the figure as 10 nominated members in 2013 and 5 in 2017-see Mzalendo Trust 'Claiming the space', 10; while another puts the figure at 13 in 2013 and 5 in 2017; Youth Agenda 'Youth Electoral Participation' 7.

### *Youth participation through leadership of legislative institutions*

The youth held key leadership roles at the national legislative institutions. During the period under review, a youthful person served as Deputy Majority Leader in Senate in 2013<sup>164</sup> and another served as Deputy Minority Whip in Senate in 2017.<sup>165</sup> Both in Senate and National Assembly, and in both 2013 and 2017, youthful MPs chaired crucial committees as Table 20 and Table 21 show.

**Table 20: Committees of Parliament led by youth, 2013**

Member	House	Committee
Soipan Tuya	National Assembly	Implementation
Sabina Chege	National Assembly	Education, Research and Technology
Priscilla Nyokabi	National Assembly	Justice and Legal Affairs
Kipchumba Murkomen	Senate	Devolved Government
Stephen Sang	Senate	Delegated Legislation
Johnson Sakaja	Senate	Joint Committee, National Cohesion and Equal Opportunity
Naisula Lesuuda	Senate	Joint Committee, Parliamentary Broadcast and Library

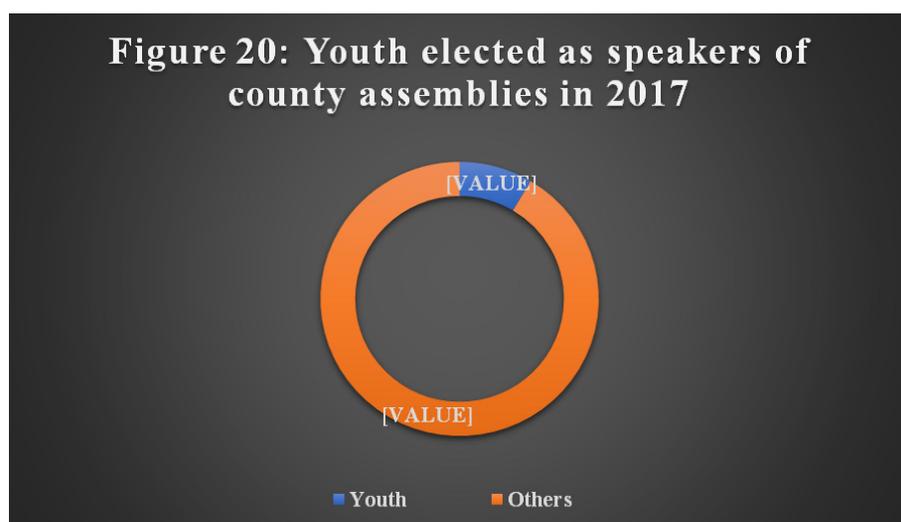
164 Eleventh parliament, Order paper No 103, 3 December 2015: Senator Kipchumba Murkomen was elected Senate Deputy Majority Leader in 2015 following the nomination of Charles Keter to the Cabinet. See Eleventh Parliament, Special Sitting No 131 16 December 2015.

165 Beatrice Kwamboka replaced Petronila Were Lokorio as Deputy Minority Whip in <http://www.parliament.go.ke/sites/default/files/2018-10/Senate%20Votes%2011.10.2018.pdf> (accessed on October 2022).

**Table 21: Committees of Parliament chaired by youth, 2017**

Member	House	Committee
Samson Cherarkey	Senate	Committee on Justice, Legal Affairs and Human Rights
Johnson Sakaja	Senate	Committee on Labour and Social Welfare Vice-Chair of the Senate Committee on National Security, Defence and Foreign Relations
Naisula Lesuuda	National Assembly	Committee on Regional Integration.

At the county assembly level, data on the leadership of county assembly committees by the youth was difficult to find. However, information relating to speakership was available for 2017. The county assemblies of Elgeyo Marakwet, Nandi, Nyamira and Wajir elected youthful speakers in 2017 (8.5%), all of whom were male. In what is emerging as a pattern of intersectional invisibility, no female youth was elected as speaker.<sup>166</sup>



166 See Youth Agenda, 'Youth electoral participation' 7. However, there were 11 youth deputy speakers elected, with two female youth being elected in Kirinyaga and Tharaka Nithi counties.

## Persons with disabilities, devolution and inclusion

It is difficult to conduct research on PWDs and their inclusion in decentralised governance because little disaggregated data exists on their representation in political and public life generally and county governance specifically. Even institutions that should have such information readily such as the Council of Governors (COG), the counties, the IEBC, the Kenya National Bureau of Statistics (KNBS), the National Council for Persons with Disabilities (NCPWD) and the universities have not done much in securing such information. The result has been less public discourse on the subject and therefore little progress in the quest to include PWDs in government.

To prevent such scenarios, the United Nations Convention on the Rights of Persons with Disabilities<sup>167</sup> requires states to collect appropriate information relating to PWDs in a participatory manner, to disaggregate such information systematically, and to disseminate it through accessible mediums.<sup>168</sup> The rationale for this is to help states and other actors to identify and address the barriers that the PWDs face;<sup>169</sup> data collection and analysis being essential measures in monitoring anti-discrimination policies and laws.<sup>170</sup> This normative framework should form the basis for collecting information on questions such as how many PWDs vie for political office, how many actually win and for what reasons, and in what areas they are likely to succeed and why. Already, there are indications that the performance of PWDs in electoral processes might be dependent on their type of disability, gender,

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167 Kenya ratified the United Nations Convention on the Rights of Persons with Disabilities on 19 May 2008.

168 United Nations Convention on the Rights of Persons with Disabilities, Article 31. See also para 71, General Comment no 6 (2018) on equality and non-discrimination, Committee on the Rights of Persons with Disabilities. CRPD/C/GC/6; also; para 95, General Comment No 5 (2017) on living independently and being included in the community, CRPD/C/GC/5.

169 United Nations Convention on the Rights of Persons with Disabilities, Article 31.

170 General Comment No 6 (2018) on equality and non-discrimination, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/6, para 71.

age, cultural background or whether they are part of a marginalised population. All such information should be collected, disaggregated and disseminated if appropriate interventions are to be made.

Some data on the participation of PWDs exists, although disparately, not systematically, and not across electoral cycles, making analysis based on trends and patterns arduous but possible. A number of useful deductions can be made from the limited information available. One, the first decade of devolution brought about noticeable progress but did not achieve the optimal representation of PWDs in national and county institutions as envisioned by the 2010 Constitution. Two, even in their marginalisation, men with disabilities outwitted their female counterparts, which brings about questions of intersectionality. Three, persons with physical disabilities did better than persons with other disabilities such as intellectual and mental both at the ballot and the nomination processes, which might be an indication of hierarchies even within PWDs. Therefore, care has to be taken to avoid homogenisation of disability since in many cases, due to intersecting discrimination, PWDs are made of multiple subgroups with varying inclusion needs.

In the past, the inclusion of PWDs was taken to mean inclusion of persons with physical disabilities, thus creating double invisibility for persons with other categories of disability.<sup>171</sup> Four, despite carrying significant promise, the nomination path did not realise its full potential partly due to the failure of political parties and the IEBC to adhere to the law. Lastly, the impact of PWDs had yet to be felt at the levels of CECM and at the leadership of county assembly committees.

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171 Double invisibility has been used by disability rights advocates to highlight the fact that certain categories of persons with disabilities such as women and children with disabilities are seen as less worthy of social investment (e.g., through education) which results in their making less progress than other persons with disabilities. See G Quinn and T Degener 'Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability' (2002) 23; See also Lucianna Thuo, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya' 2 *Strathmore Law Journal* (2016) 97 and 125.

### *Participation of PWDs through elections*

Going by available information, the representation of PWDs in both the national and county institutions remains low, generally. Additionally, men with physical disabilities dominate the list of the few elected PWDs. At the national level, only six PWDs were elected to the National Assembly (2.1%),<sup>172</sup> and only one to the Senate (2.1%) in 2013 as shown below.<sup>173</sup> This dismal performance plummeted in 2017 when only three PWDs were elected to the National Assembly (1.03%) and none to the Senate (0%). All the nine MPs elected in the two elections had physical disabilities, and only one, Rose Museu, was a woman – elected to a seat reserved for women as the Women Representative for Makueni County. At the MCA level, only nine PWDs were elected to the county assemblies nationally in 2013, representing 0.6% of the elected members.<sup>174</sup> All of them were men with physical disabilities. Even worse, none of the study counties elected a PWD in 2013. However, in 2017, matters improved in Kakamega, Mombasa and Nakuru slightly with the election of one PWD in each of the county assemblies. At the close of the devolution decade, only three PWDs had entered the combined five study assemblies through ballot, all of them men with physical disabilities, and only nine had graced Parliament, eight of whom were men with physical disabilities.

**Table 22: Persons with disabilities elected to Parliament 2013-2022**

Year/ Position	National Assembly		Senate		Total	
	No	%	No	%	No	%
2013	6 out of 290	2.1%	1 out of 47	2.1%	7 out of 337	2.4%
2017	3 out of 290	1.03%	0 out 47	0%	2 out of 337	1.5%

172 Handicap International 'Baseline survey report on participation of persons with disabilities in the electoral and political processes in Kenya' July 2017, 119.

173 Handicap International 'Baseline survey report' 119.

174 Handicap International 'Baseline survey report' 119-120.

These statistics display dismal representation of PWDs going by the 2019 census report and the 2010 Constitution. According to the 2019 census report, PWDs comprise up to 0.9million people, about 1.9% of Kenya's population, and are a significant part of the study counties specifically - being 0.6%, 5.2%, 1.6%, 3.7%, and 1.0% of the populations of the counties of Garissa, Kakamega, Mombasa, Nakuru, and Narok, respectively, as Table 23 shows.<sup>175</sup> Moreover, PWDs are poorly represented on the basis of gender since women comprise 57.1% of the total population of PWDs.<sup>176</sup> Additionally, persons with physical disabilities are more visible, while persons with other disabilities such as intellectual and mental are relegated. PWDs are even more unrepresented going by the constitutional threshold, which mandates that they shall comprise at least 5% of the elective and appointive positions in the State and public services.<sup>177</sup> The above poor record of the PWDs nationally and in all the study counties calls for some reflection regarding their levels of activity in the electoral processes. Harder questions require to be asked regarding matters such as the measures which the State, political parties and other agencies have taken to enhance PWDs' participation in electoral processes to match their population and meet the constitutional requirements.

**Table 23: The population of PWDs in the study counties<sup>178</sup>**

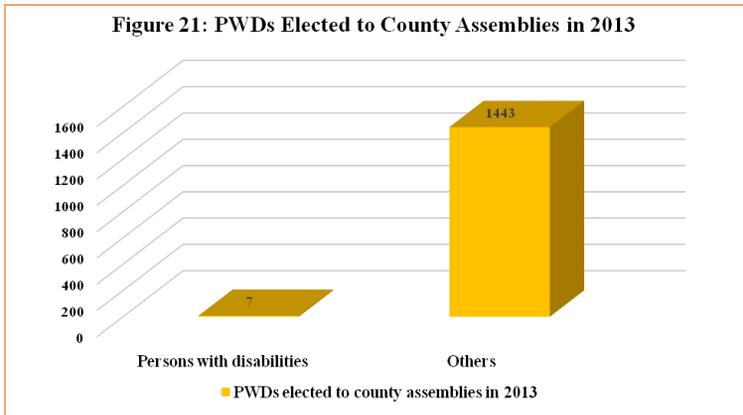
County	Disability			
	Total	Male	Female	%
Garissa	5187	2870	2316	0.6
Kakamega	47,778	20,300	27,475	5.2
Mombasa	14,226	6376	7849	1.6
Nakuru	33,899	14,480	19,412	3.7
Narok	9029	4272	4757	1.0
<b>Total in Kenya</b>	<b>916, 692</b>	<b>393,451</b>	<b>523,184</b>	<b>1.9</b>

175 Kenya National Bureau of Statistics, '2019 Kenya population and housing census: Analytical report on disability Volume XV', April 2022, 31.

176 KNBS, '2019 Kenya population and housing census,' 25.

177 Constitution of Kenya (2010), Article 54(2).

178 KNBS, '2019 Kenya population and housing census,' 31.



**Table 24: Persons with disability in the National Assembly in 2013-2017**

Name	Gender	Disability	Position	Party
Hon Mohamed Shidiye	M	Physical	Elected Member of Parliament for Lagdera Constituency	TNA
Hon Timothy Wanyonyi	M	Physical	Elected Member of Parliament for Westlands Constituency	ODM
Hon Hassan Yusuf	M	Physical	Elected Member of Parliament, Kamukunji Constituency	TNA
Hon Rose Museo	F	Physical	Elected Women Representative, Makueni County	WIPER
Hon Jared Opiyo	M	Physical	Elected Member of Parliament, Awendo Constituency	Ford-K
Hon Kubai Iringo	M	Physical	Elected Member of Parliament, Igembe Central Constituency	ODM
Hon Bishop Robert Mutemi	M	Physical	Nominated Member of Parliament	WIPER
Hon Janet Teiyan	F	Physical	Nominated Member of Parliament	TNA
Hon Isaac Mwaura	M	Albinism	Nominated Member of Parliament	ODM

Source: Handicap International 'Baseline Survey Report on Participation of Persons with Disabilities in the Electoral and Political Processes in Kenya (2017).

**Table 25: Persons with disability in the Senate 2013-2017**

Name	Gender	Disability	Position	Party
Senator Sammy Leshore	M	Physical	Samburu County	TNA
Senator Harold Kipchumba	M	Physical	Nominated Senator	ODM
Senator Linet Kemunto	F	Physical	Representing PWDs	TNA

Source: Handicap International 'Baseline Survey Report on Participation of Persons with Disabilities in the Electoral and Political Processes in Kenya (2017).

**Table 26: Persons with disabilities elected to county assemblies, 2013-2017**

County	Number Elected	Gender	Disability
Kilifi	1	Male	Physical
Kisii	1	Male	Physical
Lamu	1	Male	Physical
Migori	3	Male	Physical
Nairobi	1	Male	Physical
Siaya	1	Male	Physical
Vihiga	1	Male	Physical

**Table 27: Persons with disabilities in the study county assemblies (2013)**

County	Elected		Nominated		Total in assembly	
	No	%	No	%	No	%
Mombasa	0	0%	1 out of 15	7%	1 out of 30	3.3%
Garissa	0	0%	2 out of 18	11%	2 out of 36	5.6%
Nakuru	0	0%	2 out of 19	11%	2 out of 38	5.3%
Narok	0	0%	1 out of 17	6%	1 out of 34	2.9%
Kakamega	0	0%	1 out of 26	4%	1 out of 52	1.9%

**Table 28: Persons with disabilities in the study county assemblies (2017)**

County	Elected		Nominated		Total in assembly	
	NO.	%	NO.	%	NO.	%
Mombasa	1 out of 30	3.3%	1 out of 12	8%	2 out of 42	4.8%
Garissa	1 out of 60	1.7%	2 out of 20	10%	3 out of 80	3.8%
Nakuru	1 out of 55	2%	0 out of 23	0%	1 out of 88	1%
Narok	0 out of 30	0%	0 out of 17	0%	0 out of 47	0%
Kakamega	0 out of 30	0%	2 out of 29	13.8%	2 out of 59	3.9%

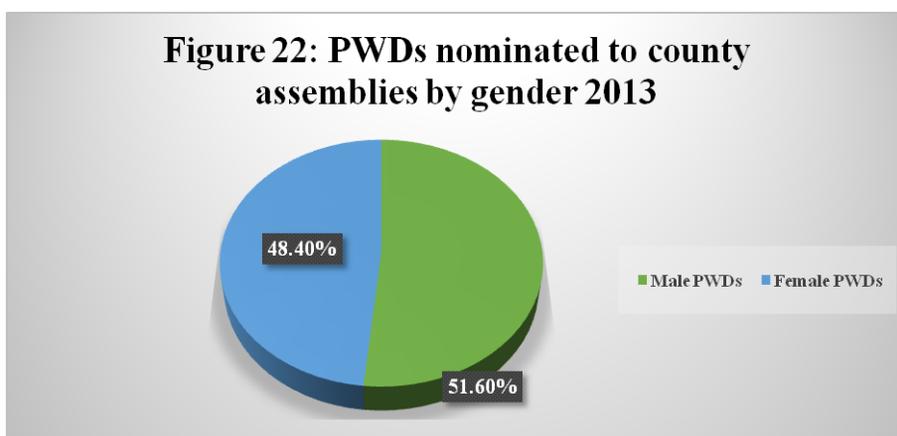
### *Participation of PWDs through the nomination process*

As is already clear, popular democratic elections have not secured sufficient representation of PWDs. No President, Deputy President, Governor or Deputy Governor with disability was elected in the first decade of devolution; some county assemblies completed entire electoral cycles without an elected PWD; so did Senate, which between 2017 and 2022 had no elected member with disability. However, both the National

Assembly and Senate had two persons nominated each in 2017 in line with the Constitution.<sup>179</sup>

The question is, has the affirmative action measure, which the 2010 Constitution articulates at Article 177(1)(c), led to any significant progress in this regard in the case of county assemblies?

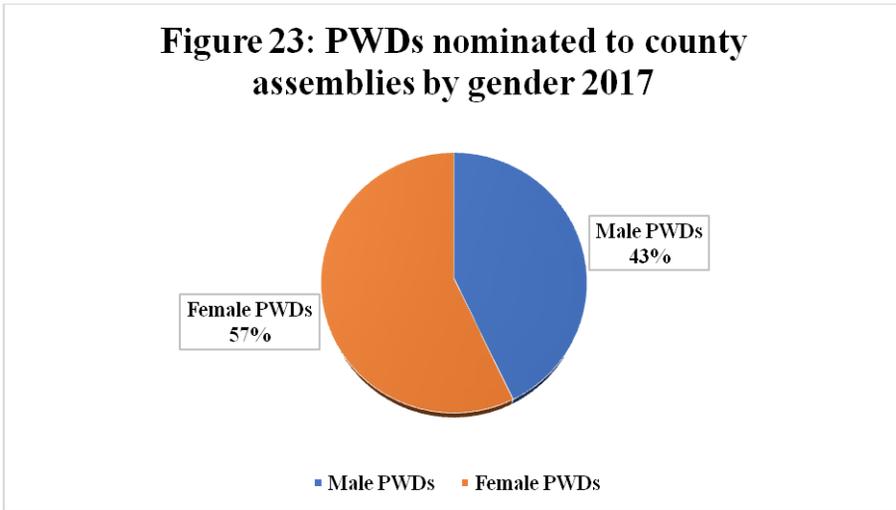
The answer is yes. 62 PWDs were nominated to county assemblies in 2013, which figure dropped to 42 in 2017.<sup>180</sup> However, women PWDs fared better in 2017, accounting for 57% of the nominees up from 48.4% as shown in figures 22 and 23.



179 Constitution of Kenya (2010), Articles 97(1)(c) and 98(1)(d). David Ole Sankok and Denitah Ghatai were nominated to the National Assembly while Isaac Mwaura and Gertrude Musuruve Inimah were nominated to the Senate. See United Disabled Persons of Kenya 'Post-audit survey level of inclusivity in the 2017 general elections' (2018) 30.

180 Westminster Foundation for Democracy 'The state of political inclusion of persons with disability (PWDs) within political parties in Kenya' (2020) 15; United Disabled Persons of Kenya 'Post-audit survey level of inclusivity in the 2017 general elections' (2018) 27.

**Figure 23: PWDs nominated to county assemblies by gender 2017**



Additionally, the case studies for this research show that there is promise in the constitutional requirement for affirmative action with respect to PWDs. Going by law, affirmative action guarantees that at least PWDs will have two representatives per county assembly. In 2017, most of the counties had at least 2 nominees in the assembly.<sup>181</sup> However, 17 counties did not comply with this requirement as no PWDs were nominated.<sup>182</sup> Second, although the practice fell short of the constitutional and statutory requirements, the nomination process proved to be the avenue for significant representation of PWDs.

In 2013, Kakamega, Mombasa and Narok each had one PWD nominated, while Garissa and Nakuru had two each as seen in Table 27. In 2017, Mombasa had one, Garissa and Kakamega had two each, while Nakuru and Narok had none. Through the ballot, three PWDs entered the combined five study assemblies in a decade; through affirmative action, PWDs occupied 12 seats in the five county assemblies during the same period.

181 Mander and Migori had three each. UDPK, 'Post-Audit survey level of inclusivity in the 2017 general elections', 27.

182 Baringo, Bungoma, Busia, Kericho, Kilifi, Kisii, Kwale, Laikipia, Makueni, Muranga, Nairobi, Nakuru, Narok, Nyeri, Taita Taveta, Turkana and West Pokot. See UDPK, 'Post-audit survey level of inclusivity in the 2017 general elections', 27.

Notwithstanding its huge promise, our case studies reveal a number of challenges in operationalising affirmative action measures. To begin with, as the case of Narok signals, there could be an understanding that just any person can represent the interests of PWDs - not necessarily PWDs themselves. On this basis, a person without disability was nominated to Narok County Assembly to represent PWDs.

The opportunity to scrutinise Narok County's nomination process judicially presented itself in *Moses Kinyamal Kipinter v Jubilee Party*<sup>183</sup> but the petition was dismissed on the basis that the petitioner could not demonstrate that the nomination process was flawed or that there was interference with the list for Narok County. Second, and as was the case with the election of PWDs through ballot, the issue of nomination of PWDs is also gendered. For instance, no woman with disability was nominated to represent the interests of PWDs in Garissa County Assembly for the first two electoral cycles. The one woman with disability who sat in the County Assembly was nominated to represent gender and ethnic minorities not PWDs.

Finally, the case studies give the impression that even the limited presence of nominated PWDs in the county assemblies was through half-hearted implementation of the law rather than the acceptance of the principle of their inclusion. As Table 28 shows, all the study county assemblies failed to meet the constitutional muster invariably. For most part, less than two MCAs with disability were nominated. Where the legal expectation was met in one cycle, the county assembly fell far short in the next as Garissa and Nakuru show. When no PWD was elected at ballot to Nakuru County Assembly in 2013, two PWDs were nominated. The fact that the relevant actors did not nominate a PWD in 2017 after one was elected at the ballot is a plausible illustration for the assertion that the affirmative action principle was yet to be internalised.

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183 Political Parties Disputes Tribunal at Nairobi Complaint No 452 of 2017.

The case of *National Gender and Equality Commission & others (NGEC) v IEBC & others*,<sup>184</sup> where the exclusion of the youth, women, ethnic minorities and PWDs from party lists for Parliament and county assemblies in 2013 was challenged demonstrated further that the constitutional dictates of non-discrimination and inclusion had not permeated the politics that characterise the nomination process in Kenya, and additionally that the IEBC had failed to carry out its supervisory role over how political parties carry out party list nominations. In this case, the High Court directed that the party list nomination process to be repeated in respect of county assemblies but found that the same could not be done for parliamentary seats since the nominees had already been gazetted and declared elected at the time of the judgement, and could only be removed through an election petition.

The case not only clarified the supervisory role of the IEBC in ensuring that the party list nomination process meets the constitutional muster but also formed the basis for the adoption of the Elections (Party Primaries and Party Lists) Regulations 2017 that were meant to guide political parties in the preparation of party lists for both the national and county legislative assemblies. The NGEC filed a similar case in 2017, *National Gender and Equality Commission (NGEC) v IEBC & 3 Others*,<sup>185</sup> although, again, the High Court could not give a remedy. This was because during the pendency of the petition, the list of nominees was gazetted, thus transmuting the dispute into an election petition which could only be determined by an election court gazetted by the Chief Justice.<sup>186</sup> The High Court therefore lacked jurisdiction under

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184 *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another*, Constitutional Petition 147 of 2013.

185 *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another*, Constitutional Petition 409 of 2017.

186 The Supreme Court had ruled in the case of *Moses Mwangi and 14 Others v IEBC and 5 Others* Supreme Court Petition 1 of 2015 that:

...It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettelement of the nominees' names by the IEBC, as an integral part of the election process. [106] The Gazette Notice in this case, signifies the completion of the "election through

Article 165 (3) of the 2010 Constitution.

A major challenge with party list nominations remains that they are used to reward party cronies who fail to secure election in first-past-the-post (FPTP) elections, thus denying representation to marginalised groups.<sup>187</sup> Without taking measures to comply with the law, political parties will continue to marginalise PWDs in the allocation of nomination slots, which, as seen above, is the marginalised group's main avenue for accessing representation. While more work will have to be done at the ballot as gains made on the nomination side are enhanced, a lot more sensitisation is needed on the importance of affirmative action measures for PWDs just as civic and judicial vigilance to ensure political parties and the IEBC safeguard the few positions that the 2010 Constitution reserves for the marginalised group.

#### *Participation of PWDs in appointive positions*

It can be generalised that PWDs fared badly with regard to participation in the county executive committees (CECs); for they were not represented in the CECs of the study counties. Yet the attempt by the Northern Nomadic Disabled Persons' Organisation (NONDO) to enforce Article 54(2) of the 2010 Constitution<sup>188</sup> against Garissa County

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nomination," and finalizes the process of constituting the Assembly in question. On the other hand, an "election by registered voters", as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates the returning officer's mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.

[107]It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been "elected" to serve as nominated members of a County Assembly.

187 Kennedy Kimanthi 'IEBC audit report reveals big flaws in nominated MCAs list' *Nation*, 22 October 2018. Antony Gitonga 'IEBC rejects nomination lists from all 79 parties' *The Standard*, August 2020.

188 Article 54(2) requires that at least 5% of all elective and appointive positions be

through litigation<sup>189</sup> failed as the High Court declined to nullify the exclusive appointments to the CEC arguing that the litigants did not demonstrate that PWDs applied for the positions and were excluded. The practice was unsatisfactory enough, clearly. But the litigation geared towards addressing the problem worsened matters as a result of the retrogressive jurisprudence that shifted the burden of demonstrating effort to the members of the marginalised group themselves.

### *Participation through leadership of legislative institutions*

The first decade of devolution rendered 15 slots for PWDs in all the study county assemblies. However, their influence in terms of the leadership of the committees of the county assemblies was insignificant, which might be illustrative of the performance of the marginalised group generally. With the exception of Garissa County, where a PWD chaired the Water Committee in 2013, no other PWD was elected to chair any committee of the study county assemblies. Only one PWD rose to the rank of Vice-Chair – as Vice-Chair, Finance Committee, Nakuru County. While many PWDs were members of county assembly committees, their absence at the helm reveals that a lot more work is needed before more substantive inclusion can be achieved.

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reserved for PWDs.

189 *Northern Nomadic Disabled Persons' Organization (NONDO) v Governor County Government of Garissa & another* [2013] eKLR.

**Table 29: Representatives of PWDs in the study county assemblies and their membership in county assembly committees 2013**

County	Representatives name	Committees	Position
Mombasa	Hudson Karuma	N/A <sup>190</sup>	N/A
Nakuru	Anne Wanjiru Maina	N/A	N/A
	Joshua Wilson Murithi	N/A	N/A
Kakamega	Roselyn Akoyi	Justice and Legal Affairs Committee	Member
Garissa	Gedi Adou Abdi	Social Services and Sports Agriculture and Livestock	Member
	Abass Abdirahmann	N/A	N/A
Narok	Violet Sikawa	N/A	N/A

**Table 30: Representatives of PWDs in the study county assemblies and their membership in county assembly committees 2017**

County	Representatives name	Committee(s)	Position
Mombasa	Ramla Said Omar	County Business Committee	Member
Nakuru	Philip Kipngetich Rotich	Finance Committee	Vice Chair
Kakamega	Roselyne Akoyi	Justice and Legal Affairs Committee	Member
	Timothy Aseka	N/A	N/A

<sup>190</sup> These persons did not chair any committee, neither did they serve as members.

## County laws and policies, devolution and inclusion

Up to this point, it is clear that women, youth and PWDs were part of the devolution decade as elected and nominated MCAs – and especially for women, as speakers, deputy speakers and committee chairs, and as governors, deputy governors, CECMs, among others. However, it is important to ask further questions. Were there gains beyond the participation levels discussed above? Did devolution result into laws and programmes meant to promote the welfare of the three marginalised groups? Our survey of the case studies showed that there were benefits beyond mere inclusion, since laws favourable to the marginalised groups were enacted and many appropriate projects launched.

### *County laws through the lenses of the marginalised groups*

As Tables 31-35 show, while the approaches differed from county to county, our case studies demonstrate that county legislation favourable to the marginalised groups tended to focus on the following main objectives: accommodating members of the marginalised groups in the leadership of the various institutions which the laws established including through special quotas; establishing special funds to support their economic welfare; incorporating affirmative action measures in county procurement procedures; enhancing maternal and antenatal healthcare; and taking special measures to accommodate PWDs.

These similarities accentuate not only that the problems are common, but also that a general consensus on the solutions is emerging. To the common problem of the absence of the members of the marginalised groups in institutions of governance, the emerging consensus is to secure their inclusion through special seats. To the common problem of the economic subordination of the marginalised, the general solution appears to be measures such as funds to support women, youth and PWDs as individuals and through their self-help

groups and special measures in the award of county government tenders. To the common challenges relating to antenatal and postnatal care, counties are agreeing on free universal healthcare and related initiatives. To the common challenges PWDs face in accessing certain places and information, the response of the counties was to facilitate special accommodation. Coming from the grassroots, such policies may continue to recommend themselves at the national level perhaps even more strongly.

**Table 31: Examples of Garissa County laws on women**

Act	Section/ Provision	Summary
Garissa County Assembly Service Act, 2014	5 (2) (f)	Provides that every member of the County Assembly shall promote gender equality and good governance.

**Table 32: Examples of Kakamega county laws on women**

Act	Section/ Provision	Summary
Kakamega County Rural Water and Sanitation Corporation Act, 2020	16(3) 6(2)	All appointments in the County Service Board shall take into account gender, equity and regional balance. Appointments to the Kakamega Rural Waters Corporation shall take into account gender, equity and regional balance.
Kakamega County Administrative Units and Boundaries Act, 2015	6(4)(5)	Established a Membership Committee where not more than 2/3 of members shall be of the same gender.
Kakamega County Alcoholic Drinks Control Act, 2014	4(i)	Provides that not more than two persons appointed in the Sub-County Committee shall be of the same gender.
Kakamega County Tourism Act 2014	13(h) 17(3)	Members nominated to the County Tourism Board shall take into account gender parity and regional balance. The appointment into the regional tribunal shall take into account regional balance and gender parity.

<b>Kakamega County Polytechnics Act, 2014</b>	21(2)	Provides that gender balance shall be considered while nominating members of the County Polytechnic Board.
<b>Kakamega County Childhood Development and Education Act, 2014</b>	9(2) 35 (3) (c)	Provides that a school or person responsible for admission shall not discriminate against any child seeking admission on any ground, including ethnicity, gender, sex, religion, race, colour or social origin, age, disability, language or culture. Provides that the County Education Board shall only register a school if the available premises and accommodation are suitable with regard to the number, age, gender, and security of the learners who are to attend the institution
<b>Kakamega County General Teaching and Referral Hospital Act, 2017</b>	15(3)	All appointments to the Hospital Board shall be competitive and shall take into account. gender equity, ethnic and regional balance in accordance with the Constitution -
<b>Kakamega County Revenue Administration and Management Act, 2017</b>	13 (3) 6 (6)	Provides that all staff appointments into the Kakamega County Revenue Agency shall take into account gender equity. In determining nomination criteria for chairperson and members of the Board of the Kakamega County Revenue Agency, gender equity shall be taken into consideration.

**Table 33: Examples of Mombasa County laws on women**

<b>Act</b>	<b>Section/ Provision</b>	<b>Summary</b>
<b>Mombasa County Local Tourism Act 2017</b>	15 (g)	The County Executive Committee Member shall promote sustainable and responsible local tourism development and the Council shall, in that respect engage local communities in planning and decision-making, empower women, children and youth, and embrace the wisdom, knowledge and values of local communities in the development of local tourism.
<b>Mombasa County Finance Act 2015</b>	N/A	Item 1892 of the Finance Bill providing for (a) For youth and women groups/small/regular/chama meetings per session - 2000 (b) For all other events and meetings per session - 5000 This information is absent in the Finance Act.

**Table 34: Examples of Nakuru County laws on women**

Act	Section/ provision	Summary
<b>Nakuru County Cooperative Revolving Development Fund Act, 2020</b>	4(e)	To attract and facilitate investment in Cooperative society's institutions that have linkages to low-income persons, community-based organisations, and women groups.

**Table 35: Examples of Narok County laws on women**

Act	Section/ Provision	Summary
Narok County Healthcare Services Improvement Fund (Amendment) Act, 2020	16(2)	Provides that at least one third of the Health Facilities Management Committee shall be of the opposite gender.
Narok County Maasai Mara Community Support Fund Act, 2014	23(h)	Provides that funds raised shall be used to support cultural activities, support to youth groups, gender groups and Persons with Disabilities
Narok County Tourism Act, 2017	13(g) 17(3)	Provides that three other members, not being public officers, shall be nominated or selected through a competitive process taking into account regional balance and gender parity and appointed by the Executive Committee Member to the Narok Tourism Board. Provides that the nomination or appointment of members of the Tribunal shall be through a competitive process taking into account regional balance and gender parity, and with the prior approval of the County Assembly.
Narok County Health Services Improvement Fund Act, 2017	12(2) 12(3)(f)	Provides that all the appointment positions shall meet 1/ 3 gender rule including

**Table 36: Examples of laws on youth in Garissa County**

Act	Section/ Provision	Summary
<b>Garissa County Appropriation Act, 2014</b>	5	This Act allocates a sum of money for salaries and expenses for salaries for education, the youth affairs, sports and polytechnic.
<b>Garissa County Development Frontier Act No 1 of 2020</b>	7(8)	This Act ensures collaboration in empowering women, youth and persons with disabilities.

**Table 37: Examples of laws on youth in Kakamega County**

Kakamega County		
<b>Kakamega County Alcoholic Drinks Control Act No 6 of 2014</b>	9(3)(i)	This Act establishes a sub-county committee which consists of three residents of the sub-county appointed by the Executive Member through a competitive process in accordance with the prescribed rules, one of whom shall be a youth provided that not more than two persons shall be of the same gender among other representatives. It also establishes the County Alcoholic Drinks Regulations Administrative Review Committee which also consists of two residents of the county appointed by the Executive Member through a competitive process in accordance with the prescribed rules, one of whom shall be a youth provided that one person shall be of the opposite gender.
<b>Kakamega County Revenue Administration Act No 1 of 2014</b>	7 <sup>th</sup> Schedule	This Act acknowledges youth groups and youth affairs in relation to education and sports responsible for the collection and transportation of solid waste and allocates a sum of money as per the groups.

**Table 38: Examples of laws on youth in Mombasa County**

<b>Mombasa County</b>		
<b>The Mombasa County Appropriation Act No 1 of 2013</b>	5	This Act allocates a sum of money for salaries and expenses of youth gender and sports including expenses of general administration and financial management services of the county, sub-county and ward administrators.
<b>The Mombasa County Liquor Licensing Act No 12 of 2014</b>	19 (2) (h)	This Act establishes the county liquor licensing review committee made up of three residents of the county appointed by the county executive committee one of them being a representative of the youth.

**Table 39: Examples of laws on youth in Nakuru County**

<b>Nakuru County</b>		
<b>Nakuru Appropriation Act No 7 of 2020</b>	4	This Act provides for a budget allocated for salaries and expenses for Department of Youth Culture Gender Sports and Social Services, including Culture and Public Amenities. (Ksh. 241,325,042)
<b>Nakuru County Cooperative Revolving Development Fund Act No 5 of 2020</b>	4 (c), 5 (c)	This Act obliges the fund to attract and facilitate investment in Cooperative societies institutions that have linkages to micro, small and medium enterprises that benefit the youth. This Act also indicates the principles that guide the Fund one of them being protection of the interests of the marginalized persons with disabilities, women and youth.
<b>Nakuru County Tourism and Marketing Act No 4 of 2020</b>	6 (h)	This Act establishes the Board of directors and incorporating two youth professionals who are qualified and experienced in matters related to tourism appointed by the County Executive Committee Member in consultation with the Governor provided that one person shall be of either gender.

**Table 40: Examples of laws on youth in Narok County**

Narok County		
Narok County Appropriation Act No 2 of 2020	3	This Act provides for a budget allocated for expenses of the Department of Education, Youth Affairs, Sports, Culture and Social services (Ksh 1,124, 039, 661)
Narok County Healthcare Services Improvement Fund (Amendment) Act No 3 of 2020	5(e), 16(1)(d) (iv)	This Act amended the original act by inserting a provision which acknowledges a youth representative. The Act also establishes the Health Facilities Management Committee in which one person among others shall be appointed by the County Executive Committee members to represent the youth.
Narok County Supplementary Appropriation Act No 2 of 2020	3	This Act provides for a budget allocated for expenses of the Department of Education, Youth Affairs, Sports, Culture and Social services. (Ksh 1, 117, 141, 469)

**Table 41: Examples of laws on marginalised groups in the study counties**

County	Act	Summary
Mombasa	Mombasa County Local Tourism Act, 2014	Section 8(2)(c)(iv); The County Executive Committee shall determine information in relation to tourism businesses and at least include providing access to persons with disabilities, children and the aged.
Nakuru	Nakuru Tourism and Marketing Act No 4 of 2020	Section 6(1)(i); The Board of directors in tourism and Marketing shall consist of a person representing the persons with disabilities appointed by the county executive committee member in consultation with the governor.
	Nakuru County Co-operative Revolving Development Fund Act No 5 of 2020	Section 5(c); The Board of the Fund shall be guided under the principle of protecting the interest of the marginalised persons with disabilities, women and the youth.
Narok	Narok County Healthcare Service Improvement Fund (amendment) Act No. 3 of 2020	Section 12A(d)(iii); The Health Management Committee shall comprise of the following members appointed by the executive committee member one being a person representing persons with disabilities.

*County programmes through the lenses of the marginalised groups*

County programmes aimed at ameliorating the situation of the marginalised groups tended to fall into five broad categories; business and investment, education and vocational training, public works, sports, and health and general welfare. Under business and investment, the idea was to empower unemployed women, youth and PWDs mainly through establishing special funds, imparting the skills in various trades and entrepreneurship, providing the requisite material assistance, and adopting affirmative action economic policies. For instance, Garissa County established a revolving fund of up to Ksh 100 million under the Department of Trade and Investment,<sup>191</sup> and used this framework to train 6000 women and youth on sustainable income generation.<sup>192</sup>

At one point, Kakamega County initiated a plan to support women and youth by distributing 300 bags of maize and 60 bags of beans to 60 vulnerable groups of women and youth county-wide in 2020-2021.<sup>193</sup> Kakamega County also supported organisations of *boda-bodas* by educating the operators on road safety, and training them on the Access to Government Procurement Opportunity (AGPO). Kakamega County additionally distributed at least 65 car wash machines, together with 1500 litres plastic water tanks for youth economic empowerment.<sup>194</sup>

Along the same lines, Mombasa County initiated an empowerment programme through livestock production to assist both women and youth to gain agricultural and entrepreneurial skills for self-employment. Additionally, Mombasa County trained and supplied the necessary inputs to 1500 women and youth county-wide under this programme.<sup>195</sup>

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191 Through the Garissa County Revolving Fund Act, 2018.

192 Garissa County Bills and Acts, *Revolving Fund Act Garissa County 2018* -<https://garissa.go.ke/download/revolving-fund-act-garissa-county-2018/> on 10 June 2022.

193 *Kakamega County annual development plan FY 2022/2023*, 102.

194 *Kakamega County annual development plan FY 2022/2023*, 100.

195 Mombasa County, *First county integrated development plan 2013-2017*, 236. See also *Mombasa County integrated development plan 2018-2022*, 49.

Further, Mombasa County reported to have established the Mombasa Business Innovation and Incubation Hub with its key outputs as training the youth on business generating skills, funding youth groups and establishing youth stop centres to harness entrepreneurship talents from the youth.<sup>196</sup>

Similarly, Nakuru County established agricultural entrepreneurial projects that included supply of piglets, chicks and potato seeds for women and youth programmes. In 2016, Nakuru County installed seven greenhouses to support youth groups and schools.<sup>197</sup> Further, according to the Nakuru County Annual Development Plan 2020/2021, the County facilitated 500 youth to participate in the National Youth Week, where they were trained on entrepreneurial and vocation skills to enable them create jobs.<sup>198</sup> Our study also shows that Narok County operationalised the AGPO programme to facilitate women, youth and PWDs to access County Government contracts, and started entrepreneurship programmes to impart business skills to members of these marginalised groups running small and medium-sized enterprises.<sup>199</sup> Besides training over 1000 PWDs on AGPO and awarding value tenders to PWDs in 2020/2021 under the foregoing programme,<sup>200</sup> Nakuru County established the Ward Disability Fund to cater for PWDs and waived the payment of business permits for the special category.<sup>201</sup> For the study counties, business and self-employment through trades were part of the overall strategy for empowerment and inclusion.

All the study counties made serious investments in vocational training, mainly targeted at the youth. The investments took the nature of establishing polytechnics and vocational training centres, and funding and subsidising the education with the objective of equipping the learners with skills in certain trades and entrepreneurship generally.

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196 *Mombasa County integrated development plan 2018-2022*, 108, 109.

197 *Nakuru County approved MTEF budget estimates FY 2017-2018*, 158.

198 *Nakuru County annual development plan 2021/2022*, 242.

199 See, for instance, *Nakuru County annual development plan 2021/2022*, 115.

200 See, also, *Nakuru County annual development plan 2019/2020*, 85.

201 *Nakuru County annual development plan 2016/2017*, 56.

As the Garissa County Annual Developmental Plans for 2014/2015 and 2016/2017 show, the development of youth polytechnics was embedded in Garissa County Strategy firmly. The same is true of Kakamega County, which went beyond the construction, rehabilitation and equipment of youth polytechnics to set aside resources for grants, benefits and subsidies for the youthful learners in areas such as dairy, aquaculture and horticulture.<sup>202</sup> In one season, Nakuru County reported having 33 functional vocational training centres and seven others awaiting opening.<sup>203</sup> Nakuru County also started digital centres that were installed with PWD-friendly programs.<sup>204</sup> In addition to operationalising youth centres,<sup>205</sup> Narok County put in place a scholarship fund for the youth in collaboration with the Kenya Commercial Bank (KCB) Foundation,<sup>206</sup> and awarded bursaries for PWDs.<sup>207</sup> Mombasa County allocated resources for rehabilitating youth polytechnics,<sup>208</sup> constructed vocational training institutions,<sup>209</sup> set up a talent academy,<sup>210</sup> started libraries (one for each ward),<sup>211</sup> established youth empowerment centres in every ward,<sup>212</sup> and instituted the Elimu Fund to offer bursaries and scholarships to needy

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202 See, *Kakamega County annual development plan 2017/2018*, 29; and *Kakamega County annual development plan 2022/2023*, 21.

203 Barut Youth Polytechnic, Chemare VTC, Cheptuech Vocational Training Centre, Dundori VTC, House of Plenty Vocational Training Centre, Kikopey Vocational Training Centre, Lion Hill Vocational Training Centre, Mirera Vocational Training Centre, Molo VTC, Muteithia VTC, Nakuru Youth Polytechnic, Rongai VTC, Saptet VTC, Subukia VTC, Wanyororo VTC, Chepkoburot AGPO (Youth) Polytechnic Kiptororo, Ndabibi Polytechnic, Menengai Polytechnic, Ogilgei Polytechnic, Mawingu Youth Polytechnic Mworoto Youth Polytechnic, Langwenda Youth Polytechnic, Sitoito Polytechnic, Rhonda Resource Centre.

204 *Nakuru County approved MTEF budget estimates FY 2017-18*, 143.

205 The other vocational training centres in Narok include; Naroko, Neiregei Enkare, Elenerai, Kapweria, Kilgoris, Olereko, and Romosha.

206 *Narok County integrated development plan for 2018-2023*, 94.

207 *Narok County integrated development plan for 2018-2023*, 94.

208 Mombasa County Government, *Second county integrated development plan (2018-2022)*, 9, 13, 100, 101, 207, 101; College and vocational training centres in Mombasa County.

209 Mombasa County, *Second County integrated development plan (2018-2022)*, 9, 13, 100.

210 Mombasa County, *Second County integrated development plan (2018-2022)*, 147.

211 County Government of Mombasa, *Annual development plan 2021/22*, 114.

212 Mombasa County, *Second county integrated development plan (2018-2022)*, 115, 117.

students.<sup>213</sup> Although the bulk of the education and vocational training programmes focused on the youth, they were relevant to women and PWDs because they also belong to that age category.

Instead of deploying heavy machinery, some study counties implemented labour-intensive public works programmes to create employment opportunities for women and youth, to spur the local economies, and for the governors and MCAs to earn the political loyalties of their constituencies. For instance, through the Roads, Public Works and Energy Department, Kakamega County allocated 350 000 000 to enhance labour-based methods in road maintenance in 2022/2023.<sup>214</sup> Such approaches were tested at the national level previously through programmes like Kazi kwa Vijana with notable success.<sup>215</sup>

To enhance sports, the study counties i) dedicated special directorates to such activities, ii) organised and supported the participation of teams in sports tournaments, iii) built sports grounds, stadia and other sports facilities, iv) purchased sports equipment, v) established special sports funds, and vi) trained sportspeople and coaches with the mind of harnessing the energies of the youth both for trade and leisure. Nakuru County's Directorate of Sports exemplified i), while Garissa County's Eid Tournament and the Inter-County Cap Tournament were typical illustrations of ii), just as the County Governor's Cup, Paralympics, Deaflympics, and the national Kenya Inter-County Sports and Cultural Association Tournaments,<sup>216</sup> which Nakuru County spearheaded.<sup>217</sup> Under iii), Kakamega County's Bukhungu Stadium, Mombasa

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213 Mombasa County, *Second county integrated development plan, (2018-2022)* 13, 101.

214 See, *Kakamega County annual development plan (CADP) for 2022/2023*, 21.

215 Ted M Odhiambo, 'Effects of government structural policies on youth employment within public sector in Kenya: A case study of Kenya youth employment programme' 2(33) *Strategic Journal of Business and Change Management* (2015) 626.

216 *Garissa County development plan 2019/2020*, 66.

217 Some study counties facilitated the participation of teams of PWDs in the annual desert wheel race in Isiolo. See *Garissa County Magazine 2022*, 63. Kakamega County supported persons with disabilities' deaf team to participate in the National Deaf Competitions in the 2021/2022 financial year. See, *Kakamega County annual development plan FY 2022/2023*, 100.

Country's Cross Country Track<sup>218</sup> and Uwanja wa Mbuzi Stadium,<sup>219</sup> and Narok County's Ole Ntimama Stadium<sup>220</sup> stand out. The study counties also purchased sports equipment for several teams and more notably PWDs as part of iv).<sup>221</sup> Nakuru County's Ward Sports Fund,<sup>222</sup> and the training of football coaches envisioned in Kakamega County's County Annual Development Plan (CADP) are good examples of v) and vi) respectively.<sup>223</sup> Counties showed an encouraging interest in sports, and it may be just a matter of time before real talents emerge from the many innovative approaches being attempted.

The study county governments also gave the health mandate noticeable attention, and introduced special programmes for the benefit of women, youth and PWDs. Even the most cursory survey of the health programmes of the study counties will reveal projects such as: public health education activities on drugs and substance abuse,<sup>224</sup> and communicable diseases like HIV/AIDS; health facilities for addressing gender-based violence (GBV) including gender desks<sup>225</sup> and rescue

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218 Mombasa County Government, *First county integrated development plan 2013-2017*, 201, See also *Mombasa County integrated development plan 2018-2022*, 49.

219 Mombasa County Government, *First county integrated development plan 2013-2017*, 201, See also *Mombasa County integrated development plan 2018-2022*, 49.

220 *Narok County integrated development plan for 2018-2023*, 93.

221 See, for instance, the *Kakamega County annual development plan FY 2022/2023*, 134.

222 Nakuru County Revenue Allocation Bill 2018, Section 16 (5) (a), *Nakuru County approved budget estimates for year 2021/2022*, 294.

223 *Kakamega County annual development plan FY 2022/2023*, 100.

224 See, for instance, *Kakamega County annual development plan FY 2017/2018*, 37.

225 Mombasa County established a gender-reporting desk to handle cases of defilement, rape and physical abuse. Maarifa Centre, 'Mombasa County opens a toll-free line and sets up a situation room for survivors for gender based violence prevention and reporting' 25 August, 2022.

centres<sup>226</sup>; health facilities for ante-natal and post-natal healthcare;<sup>227</sup> HIV/AIDS prevention and treatment measures, which extended to testing, prevention of mother to child transmission, and dispensation medication;<sup>228</sup> reproductive health interventions like cervical cancer screening;<sup>229</sup> medical insurance covers;<sup>230</sup> and drives for wheelchairs and assistive devices for PWDs.<sup>231</sup>

Of all the programmes in study counties, Kakamega County's Afya ya Mama na Mtoto Care Program (Oparanyacare) was perhaps the most innovative. Started in 2013, and supported by UNICEF,<sup>232</sup> the original

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226 Kakamega County established the Shinyalu GBV Rescue Centre complete with safe room, laboratory and clinical facilities. See, *Kakamega County annual development plan FY 2022/2023*, 100. Similarly, Nakuru County constructed a gender-based violence centre in Molo, and expanded another such centre in Gilgil. *Nakuru County annual development plan for Year 2020/2021*, 236. *Nakuru County annual development plan 2019-2020*, 167.

227 Nakuru County has facilitated free maternal healthcare, including scaling up maternal, neonatal and children health and sensitised community health volunteers on early antenatal clinic attendance. *Nakuru County annual development plan 2021/2022*, 51, 53; *Nakuru County annual development plan 2019/2022*, 133, 134; *Nakuru County annual development plan 2017/2018*, 29.

228 See, for instance, *Kakamega County annual development plan FY 2020/2021*, 108; County Annual Development Plan (CADP) Financial Year 2022/2023, 62. Mombasa County initiated a prevention of mother to child transmission programme (PMCT) to prevent transmission of HIV/AIDS from mothers to new-borns. They have facilitated the programme by testing mothers for HIV AIDS in the first antenatal clinic (ANC) visit and providing ARVs to HIV positive mothers to reduce the risk of transmission. See, also, Mombasa County Government, *First county integrated development plan 2013-2017*, 180, See also, *Mombasa County integrated development plan 2018-2022*, 47.

229 Nakuru County reported that it facilitated 20% of women in the reproductive age to get free cervical cancer screening. See, *Nakuru County annual development plan 2019-2020*, 47.

230 For instance, Narok County planned to put all PWDs under the National Hospital Insurance Fund (NHIF). *Narok County integrated development plan 2018-2023*, 151.

231 See, *Garissa County Magazine 2022*, 63; *Kakamega County annual development plan FY 2022/2023*, 99. See, also, *Nakuru County annual development plan 2020-2021*, 127. Also, Inclusivity Features 'Kakamega county disability inclusivity tracking' 4.

232 *Kakamega County annual development plan FY 2022/2023*, 60.

objective of the programme was to address the high maternal and child mortality rates in the County caused partly by lack of access to skilled antenatal and postnatal care services. Thus, the Oparanyacare package incorporated antenatal care, skilled delivery, post-natal care in County health facilities and the nutrition of the new-borns, among others. As at the time of our research, the package included a monthly grant of Ksh 2000 for every eligible woman who attended the County health facilities as advised.

According to Kakamega County records, in 2021 alone, over 45 000 mothers accessed antenatal and postnatal care services, skilled delivery and the full package of child welfare services. Among these numbers were 5085 needy mothers who were also put under a cash transfer programme to enable them meet the essential needs of their new-borns and themselves. Without rating the performance of the study counties in their delivery on the health mandate, the conclusion that formidable and sometimes innovative interventions were made for the marginalised groups (especially in Kakamega, Mombasa and Nakuru) is inevitable.

## **Conclusion**

At the close of the first decade of county governance, the question whether devolution has delivered for women, youth and PWDs can now get a general and more detailed answer. The general answer is simple, *yes devolution delivered*. The institutions of devolved governance such as the county assemblies and CECs included women, youth and PWDs, just as we hypothesised at the very beginning, although not always on point. The more detailed answer requires a bit of nuance and takes us back to the original questions, whether: i) the institutions of county governance incorporated members of the marginalised groups; ii) the counties enacted laws and policies that are responsive to the rights and welfare of the marginalised groups; and iii) the counties initiated projects that resonate with the needs of the marginalised groups.

*Whether the institutions of county governance incorporated members of the marginalised groups*

Women, youth and PWDs were all included in county assemblies and CECs although not optimally. As the above analysis showed, at 5.1% or 6.3% of the total elected members in 2013 or 6.8% in 2017, the representation of women in the county assemblies through ballot was below par going by the rate of inclusion of the youth in the same institutions, the performance of women in national legislative institutions, and the constitutional 2/3 gender threshold. Although the 2017 General Elections registered better results than the 2013 General Elections, the situation remained bad in counties like Garissa and Narok, which, due to cultural or religious challenges, ran an entire decade without an elected female MCA. Women also scored poorly in the elections for governor in 2013, winning none, but they did better in the deputy governor positions, and improved markedly in the governors' positions in 2017 when three women won governorship contests.

Women's dismal performance at the ballot triggered the gender top-up formula to bridge the huge deficits leading to a situation where women dominated the list of nominated MCAs country-wide. While this helped to meet the 2/3 gender rule, it had a number of shortfalls including strengthening the view that nominated MCAs are of a lower cadre and therefore unsuitable for leadership positions in the county assemblies. The nomination path also comes without a ward, fund or kitty, which are usually the symbols and enablers of power at those levels. These inadequacies of the offices of nominated MCAs explain the difficulty such women faced in their attempts to win subsequent electoral contests. Despite the nominated women MCAs hardly converting their advantage to victory in subsequent elections, in positions such as MP or governor, women did better where they had occupied State or public offices previously. We took this to be an illustration of the need to elect or nominate or appoint women to strategic positions with an eye on future electoral contests.

In terms of leadership of the legislative institutions, it was evident that some women MCAs chaired committees of the county assemblies with some taking charge of committees that are usually thought to be important. In rare but increasing occasions, some women were elected to the positions of speaker and deputy speaker. Women were also appointed to the CECs although many counties failed to meet the constitutional 2/3 gender rule when making such executive appointments. Contrary to the dominant view that women are usually assigned only the inferior departments like social services, we have reported instances where women CECMs were appointed to both important and inferior portfolios.

The youth (especially male youth) outperformed women in the electoral contests for the MCA positions and not more. Compared to the women, the youth performed poorer in the leadership of county assembly committees, speakership, governor and deputy governor and appointments to the CECs. However, it emerged that a number of nominated youth used the vantage-points of their positions to advance in their political carriers by winning subsequent electoral contests hence our support for affirmative action measures. Even then, our research had to reckon with absence of desegregated data on the youth, which also affected our analysis on the inclusion of PWDs.

Available information points to a poor show by PWDs in the electoral contests for the MCA seats and in all other devolved governance positions. Yet the constitutional affirmative action measures designed to include the PWDs such as the 5% rule and the few seats reserved for them in Parliament were not adhered to. We also found that there could be hierarchies even among the PWDs with men with physical disabilities outwitting women with the same disabilities and persons with other disabilities such as intellectual or mental.

Going forward, we recommend that political parties and the IEBC should adhere to the 2010 Constitution and other laws during the nomination of candidates to the various positions. Other possibilities outside the political parties should also be considered to tame the

tendency by political parties to exclude members of the marginalised groups including from their constitutionally-guaranteed positions. At the same time, vigilance on the part of the citizens is what constitutional implementation demands. Without it, the same forces that bend towards centralisation and exclusion will reign unchecked to the detriment of the marginalised groups. Vigilance during transitions caused by death, impeachment or resignations is also critical in ensuring that the hard-won gains are not lost.

Without accurate data on the performance of the marginalised groups, progress will be difficult to measure and therefore impossible to attain. It is time institutions like the IEBC, national human rights institutions, political parties, research institutions including universities kept accurate statistics on the marginalised groups. Priority should be given to the youth and PWDs whose important information remains in abeyance.

Also flowing from our findings is that the gender top-up formula applied to the counties has already proved itself. Therefore, we recommend it to Parliament as it considers the legislation envisioned under Article 100 of the 2010 Constitution.

Since judicial jurisprudence was both useful and negligent, courts may want to continue with some of the innovative interventions discussed in this study as they review certain negative jurisprudence that appears to elevate technicalities of procedure over justice.

Finally, cultural or religious dialogues are needed in areas where the gender agenda has aborted for those reasons. Such dialogues could benefit from the discussion in the conceptual chapter on how to harness culture for the good of all.

*Whether counties enacted laws and policies that are responsive to the rights and welfare of the marginalised groups*

Many county laws were enacted to cater for the rights and the welfare of the selected marginalised groups. Our study reviewed many legislations, which touched on affirmative action measures to enable the marginalised groups to be included in the various institutions established the county level; special funds meant to uplift the economic wellbeing of the marginalised; affirmative action measures in county procurement procedures; maternal and antenatal healthcare; and other special measures to ensure the accommodation of PWDs.

*Whether counties initiated projects that resonate with the needs of the marginalised groups*

County programmes related to the selected marginalised groups tended to provide business and investment opportunities, offer education and vocational training, involve them in public works, and sports, and cater for their health and general welfare.

In summation we can conclude with confidence that yes, the constitutional system of devolution has begun the arduous task of reversing the century old history of exclusion and marginalisation of women, youth and PWDs in Kenya. Vigilance, we tire not to urge, is the price of continued democratisation. Most importantly, it is critical that all sectors of society recognise that while the fate of the transformation the 2010 Constitution promises lies with these marginalised groups, the fruits of democracy, tolerance and a societal power structure that dignifies human life is beneficial to us all.

# Index

2/3 gender rule 222, 234, 246, 251,  
252, 253, 254, 255, 256, 257

2010 Constitution 12, 13, 17, 24, 40,  
50, 53, 55, 66, 67, 70, 85, 100,  
103, 105, 109, 120, 121, 122,  
123, 124, 125, 127, 129, 130,  
131, 134, 135, 136, 137, 138,  
139, 140, 141, 143, 145, 147,  
151, 181, 192, 198, 200, 210,  
211, 213, 214, 215, 216, 217,  
220, 221, 222, 223, 228, 229,  
231, 232, 247, 252, 253, 254,  
260, 278, 279, 283, 290, 292,  
296, 300

## A

Amos Wako 115

Article 10 140, 220, 232

Article 27 214, 220, 278

Article 100 13, 14, 26, 53, 65, 214,  
221, 232, 252, 254, 255

## B

Bomas 109, 113, 114, 115, 116, 118,  
146, 172, 213, 223

Bomas Draft 109, 113, 114, 115, 116,  
172, 223

British 13, 15, 16, 19, 20, 43, 50, 51,  
55, 74, 76, 81, 83, 152, 154, 157,  
169, 173, 174, 182, 185, 194

## C

Cabinet 124, 165, 197, 221, 245, 257,  
259, 270, 286, 287

CDF 102, 103, 104, 105, 107, 133,  
207, 208

CEC 128, 256, 262, 263, 301

CECM 235, 256, 279, 290

Centralisation 171

Chagga 11, 16, 19, 29, 30, 34, 38, 39,  
42, 49

Citizen 15, 21, 22, 27, 28, 29, 31, 32,  
37, 38, 43, 45, 47, 106, 107, 131,  
132, 136, 152, 153, 154, 155,  
163, 175, 181

CKRC 71, 72, 73, 81, 91, 109, 110,  
111, 112, 113, 114, 121, 129,  
172, 286

CKRC Draft 111, 112, 113

CoE 118, 119, 200, 201, 211, 213, 214

Colonial 13, 14, 33, 47, 49, 50, 51,  
55, 75, 76, 77, 78, 79, 80, 81,  
86, 153, 154, 156, 157, 159, 168,  
169, 170, 173, 174, 175, 183,  
184, 185, 186, 188, 189

Colony 15, 50, 80, 81, 82, 83, 152

Committee of Experts 118, 178,  
191, 200, 201, 210, 213, 214

Constituencies Development Fund  
102, 103, 104

Constitution of Kenya Review Act  
110, 117

Council of Governors 121, 128, 133,  
139, 140, 289

Counties 142, 238, 285, 314

County 26, 27, 54, 84, 93, 94, 104, 123, 124, 127, 128, 129, 132, 133, 134, 135, 136, 139, 140, 141, 142, 143, 144, 146, 208, 211, 215, 216, 223, 227, 228, 233, 234, 238, 239, 242, 243, 247, 249, 256, 257, 260, 261, 262, 263, 264, 266, 267, 268, 269, 271, 274, 275, 276, 277, 278, 280, 281, 283, 284, 291, 292, 293, 294, 295, 298, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316

County Assembly 128, 134, 135, 136, 223, 234, 242, 247, 271, 275, 277, 278, 280, 281, 298, 300, 304, 306

County Executive Committee 234, 261, 264, 266, 268, 269, 305, 308, 309

County Executive Committee Member 234, 305, 308

County government 127

## D

Daniel Moi 86

David Maraga 214, 252

Decentralisation i, iii, 54, 69, 72, 73, 88, 120, 162, 210

Deconcentration 72

Delegation 71

Deputy Governor 128, 134, 238, 244, 247, 256, 261, 265, 266, 268, 269, 295

Deputy President 124, 224, 240, 279, 295

Deputy Speaker 234, 245, 271, 272,

273, 279

Devolution 71, 77, 102, 103, 116, 117, 120, 121, 122, 123, 136, 141, 179, 206, 207, 209, 211, 212, 217, 219, 220, 228, 231, 245, 257, 259, 268

DFRD 98, 146

District 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 80, 82, 83, 84, 91, 95, 98, 99, 100, 112, 119, 162, 170, 173, 206

District Focus 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 98, 206

District Focus for Rural Development 59, 60, 98, 206

## E

Equalisation Fund 25, 143, 144, 150, 173, 174, 179, 190, 216, 217, 218, 220, 225, 226

## F

Federalism 73, 83

## G

Garissa 26, 34, 144, 145, 173, 217, 223, 225, 232, 233, 234, 238, 239, 248, 249, 256, 257, 261, 264, 273, 274, 275, 276, 284, 285, 292, 295, 297, 298, 301, 302, 304, 307, 310, 312, 313, 315

Ghai Draft 109

Githu Muigai 13, 26, 50, 76, 158, 214

Governance 85

Governor 26, 81, 88, 89, 128, 129, 134, 135, 136, 223, 238, 244, 247, 256, 261, 262, 263, 264, 265, 266, 268, 269, 280, 295, 301, 308, 313

## H

Harmonized Draft 109, 118, 119, 120, 213

## I

Independence 48, 51, 52, 67, 85, 86, 87, 88, 89, 90, 97, 100, 108, 127, 145, 160, 161, 162, 163, 174, 194

Independence Constitution 52, 67, 85, 86, 87, 88, 89, 90, 108, 127, 145, 160, 161, 162, 163, 174, 194

## J

Joho 300

Jomo Kenyatta 15, 86, 161, 190, 194

## K

Kakamega 26, 27, 35, 232, 233, 234, 238, 248, 249, 256, 257, 260, 261, 262, 273, 274, 276, 277, 285, 291, 292, 295, 297, 302, 304, 305, 307, 308, 310, 312, 313, 314, 315, 316

Kamba 18, 20, 42, 43

Kenyatta 15, 31, 44, 52, 74, 86, 87, 98, 106, 134, 145, 158, 161, 162,

165, 174, 176, 190, 191, 194, 206, 208, 214, 223, 257, 259, 271

Kikuyu 42, 43, 52, 87, 160, 165, 223

## L

Laboso 244, 245, 271

LATF 101, 102

Local Authorities Transfer Fund 101, 207

Local government 72, 77, 79, 80, 82, 84, 89, 92, 94, 99, 100, 122, 206

## M

Maasai 19, 21, 41, 42, 43, 44, 156, 160, 183, 198, 239, 261, 306

Majimbo 73, 83, 87, 109, 110, 161

Mamdani 15, 21, 22, 27, 28, 29, 30, 31, 32, 36, 37, 38, 41, 43, 45, 47, 48, 152, 153, 154, 155, 163, 175, 176, 181

Maraga 214, 252

Marginalisation 12, 149, 150, 155, 190, 217, 218, 225

Mazrui 15, 19, 22, 23, 157

MCA 235, 238, 239, 240, 241, 246, 277, 281, 291

MCAs 128, 133, 136, 215, 235, 248, 249, 251, 276, 277, 278, 279, 298, 300, 303, 313

Member of County Assembly 247, 280

Moi 55, 59, 65, 86, 98, 100, 101, 110, 159, 165, 175, 176, 182, 191, 194, 197, 206

Mombasa 19, 78, 79, 80, 179, 232, 233, 238, 239, 242, 243, 248, 249, 256, 266, 273, 274, 276, 277, 285, 291, 292, 295, 297, 302, 305, 308, 309, 310, 311, 312, 313, 314, 315, 316

MP 242, 243

Muigai 13, 24, 25, 26, 49, 50, 51, 52, 55, 59, 61, 76, 80, 158, 214

Mutunga 24, 26, 138, 175, 222, 254

Mwai Kibaki 27, 115, 172

## N

Nakuru 82, 232, 233, 234, 238, 243, 248, 249, 256, 257, 267, 268, 271, 273, 274, 276, 277, 278, 281, 282, 284, 285, 291, 292, 295, 297, 298, 301, 302, 306, 308, 309, 311, 312, 313, 314, 315

Nandi 31, 281, 288

Narok 144, 145, 156, 217, 232, 233, 234, 238, 239, 243, 248, 249, 250, 256, 261, 269, 270, 273, 274, 276, 284, 285, 292, 295, 297, 298, 302, 306, 309, 311, 312, 314, 315

National Assembly 88, 90, 101, 103, 104, 107, 124, 125, 126, 127, 133, 137, 138, 140, 164, 208, 212, 213, 215, 220, 221, 222, 241, 245, 246, 247, 248, 251, 253, 254, 255, 271, 272, 280, 281, 283, 286, 287, 288, 291, 293, 296

NFD 170, 173, 174, 176, 177, 178, 179, 182, 189, 219

Northern Frontier District 162, 170, 173

## O

Obama 56, 57, 58

Oginga 89, 158

Oginga Odinga 89, 158

Oparanya 26, 260, 262, 263

Oparanyacare 315, 316

## P

Parliament 13, 63, 88, 89, 95, 100, 103, 104, 111, 113, 114, 115, 118, 120, 124, 125, 126, 129, 131, 137, 139, 144, 158, 159, 163, 164, 166, 172, 181, 193, 194, 195, 197, 201, 213, 214, 220, 221, 222, 224, 225, 234, 248, 252, 253, 255, 272, 283, 284, 285, 286, 287, 288, 291, 293, 299

Portuguese 19, 21

President 25, 31, 44, 48, 52, 55, 57, 59, 60, 62, 65, 85, 86, 89, 95, 98, 106, 115, 117, 121, 122, 124, 125, 126, 131, 134, 145, 158, 162, 164, 165, 171, 172, 175, 179, 180, 181, 194, 197, 206, 208, 214, 221, 224, 240, 252, 254, 255, 257, 258, 259, 270, 279, 295

Protectorate 19, 38, 41, 75, 76, 78, 80, 82, 152

## R

Raila Odinga 117, 172

Repealed Constitution 110, 129, 165, 166, 180, 213, 285

Revised Harmonised Draft 214

**S**

Senate 87, 88, 89, 90, 105, 114, 116,  
118, 119, 121, 122, 125, 126,  
127, 129, 130, 131, 133, 135,  
136, 137, 138, 139, 140, 146,  
161, 163, 164, 175, 207, 211,  
212, 213, 214, 220, 222, 241,  
243, 248, 251, 253, 254, 272,  
281, 283, 286, 287, 288, 291,  
294, 295, 296

Sessional Paper No 10 25, 55, 56,  
57, 59, 67, 97, 150, 157, 169,  
189, 190

Somali 44, 173, 174, 176, 177, 239

Sonko 134, 244

Speaker 122, 126, 128, 130, 134, 137,  
138, 175, 207, 211, 221, 234,  
242, 245, 254, 255, 271, 272,  
273, 279

Subject 153

**U**

Uhuru Kenyatta 106, 134, 208, 214,  
257, 259, 271

**W**

Waiguru 245

Waititu 244

Wako 109, 115, 116, 119, 172

Wako Draft 109, 115, 116, 119, 172

Wambora 135, 140

**Y**

Yash Ghai 46, 48, 73, 190