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Decentralisation and inclusion in Kenya

From pre-colonial times to the first decade of devolution

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

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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.[1]

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. Therefore, it adopted the following definition of marginalisation:

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

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. [2]

This chapter adopts the (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. [3]

As will be seen in the ensuing discussion, marginalisation in Kenya is attributed to a combination of colonial policies, post-colonial government exclusionary policies[4] 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'.[5]

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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 (CRA), '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.[6] 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.[7] 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'.[8] 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',[9] 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.[10] 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'.[11] 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.[12] Colonialism was thus a system of racial domination 'mediated through a variety of ethnically organised local powers'.[13] Local authorities were crucial in maintaining control of the natives, and native authorities were organised along ethnic (or tribal) or religious lines.[14] 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.[15]

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'.[16] 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'.[17]

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'.[18] 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.[19]

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.[20] 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,[21] 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.[22] 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.[23] Because the colonial state was organised differently in rural and urban areas, Mamdani referred to it as a 'bifurcated state'.[24] 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.[25]

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.[26] The creation of chiefs where none had previously existed also impacted the creation of territorial boundaries.[27] 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.[28]

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.[29] 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*, Ohio University Press, 1990.

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'.

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.[30] These land occupations to the detriment of indigenous populations are considered the precursor to the persistent squatter problem in the country.[31]

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.[32] This resulted in a land policy based on class rather than race.[33] 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 19th Century.[34] 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.[35]

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,* (Third edition) Simon and 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.[36] 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.[37] Odinga's opposition party, the Kenya People's Union (KPU), was banned, he was placed under house arrest.[38] 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'.[39] 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.[40] 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/*> on 27 July 2022. Githu Muigai, *Power, politics and law; Dynamics of constitutional change in Kenya, 1897 - 2022,* Kabarak University Press, 2022, 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'.

seats in the Legislative Council; their representatives were nominated by the Colonial Government.[41] 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.[42] 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.[43] 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.[44] In 1954 the Lyttleton Constitution made an attempt at reorganising the racial structure in the government. This reorganisation was through

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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,* second edition, Evans Brothers, 1972, 298.

43 Were and 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.

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.[45] 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.[46]

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 pressed for a federal constitution to counter the former's economic,

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45   Were and Wilson, *East Africa through a thousand years,* 301.

46   Were and Wilson, *East Africa through a thousand years,* 303.

political and educational dominance, which represented the dominant ethnic groups.[47] KANU made a concession to accept decentralisation to expedite the independence process, with the intention of revisiting this structure once independence was obtained.[48] However, Jomo Kenyatta disparaged calls for local government and economic redistribution as 'self-interested, ethnic-based demands',[49] calling *majimbo* unworkable and inviting opposition members to join the KANU Government to form a government 'of national unity'.[50]

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.[51] The regional governments enjoyed financial and taxation powers, which reduced their dependence on the Central Government.[52] 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   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.[53] 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.[54]

Decentralisation was eliminated with before it had a chance to become operational,[55] 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.[56] Authority over issues of education, agriculture, health, economic and social development and land was transferred to the Central Government.[57] 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' Unpublished 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   Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence, 1963-69' 9, 21; 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.[58] 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.[59]

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.[60] 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.[61] 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.[62] 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.[63] With Senate and regional governments abolished, the seeds of a highly centralised and unaccountable executive were planted.[64] 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.[65]

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,[66] 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,[67] making local authorities dependent on the Central Government and subsuming their power under provincial commissioners who directly reported to the President.[68]

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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.[69] 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.[70] 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.[71] For example, Nyanza Province had the highest absolute poverty rate at 63.1% by 2010.[72] It is asserted that the deliberate strategy of creating disparities through the distribution of public positions gave rise to the mobilisation of dissent.[73]

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,[74] repressive laws such as the Public Order Act[75] remained in place. Other

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69   FES, 'Regional disparities and marginalization in Kenya', 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', 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.[76] 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.[77] 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.[78] 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.[79] 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.[80] 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.[81] 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   Section 9(1) and 9(2), as enacted by Constitutional Amendment Act (No 6 of 1992).

77   Constitutional Amendment Act No 6 of 1992, Section 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.[82] Gangs were hired to kill and displace individuals from their areas so that KANU could be assured of victory.[83] Despite the divisive ethnic politics that characterised the 1990s, there was no actual decentralisation of power.[84]

> 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'.[85] 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.[86] 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.[87]

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.[88] 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.[89] 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.[90]

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.[91] 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.[92] To facilitate large-scale commercial agriculture, acquisition of huge land holdings was pursued. The acquisition of lands by white settles 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 and others (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.[93] 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.[94] The railway was the main determinant of which areas became White Highlands as well as the usefulness of the land.[95] Proximity to the capital and the White Highlands provided opportunities for investment and capital accumulation that other regions did not have.[96]

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.[97] 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:[98]

> 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', 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. [99]

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'.[100] 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.[101] Corruption 'percolated deep into the civil service' and affected the Judiciary, district commissioners, the prosecution, and the directorate of motor vehicles, among others.[102] Francisco described Kenya's economy as an 'economy of affection'[103] 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.*[104]

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.[105]

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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.[106] 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.[107] 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,[108] 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.[109] 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.[110]

Regional disparities

To perpetuate the economic advantage of settlers over Africans during the colonial period, laws and policies were used to prohibit

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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'.

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.[111]

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.[112] 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...[113]

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111   FES, 'Regional disparities and marginalization in Kenya', 8; Onguny and 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', 7-8.

113   Sir Geoffrey Archer, officer in charge of the NFD in 1920, cited in B Harden, *Africa: Dispatches from a fragile continent*, first edition, WW Norton and Co Inc, 1990, 193.

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.[114] These were made worse by the *Shifta* war of 1963-1967 by which the Somali community, backed by the Orma, pressed for secession from Kenya.[115] In response to this uprising, the Independence Government amended the Independence Constitution and passed legislation allowing the NFD to be ruled by decree.[116] 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.[117] 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.[118] The colonial period consequently ended with the adoption of *majimboism* and an apparent win for the ethnic groups in the margins.

The post-independence era was politically turbulent and was pre-occupied with political security and survival. This was attributed to a

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114   CRA, 'Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund'.

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.

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.[119] 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.[120] Therefore, little socio-economic development took place where there was no support for the political leadership in power.[121] 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.[122] As President Moi would say, '*siasa mbaya, maisha mbaya*'.[123] 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.[124] Chief Justice Willy Mutunga (as he was then) captured it thus in his concurring opinion *In the Matter of the Speaker of the Senate & Another*:

> [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-

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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', 7.

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.[125]

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.[126] 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.[127]

Lochery asserts that the screening was not just about demarcating between insiders and outsiders, or as Mamdani posits, 'settlers' versus 'natives',[128] 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 political legacy of colonialism' 43 *Comparative Studies in Society and History* (2001) 651-664, cited in Burbidge, *An experiment in devolution*, 55.

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.[129] 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.[130]

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.[131] 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.[132] 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[133] 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 vetting committee comprising elders, the local chief and often members

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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 Commission Human Rights (KNCHR), 'An identity crisis? A study on the issuance of national identity cards in Kenya' KNCHR, Nairobi, 2007, 16.

of the security services, a process reminiscent of the screenings carried out in 1989-90.[134] Similar discriminatory practices were carried out against Nubians, Kenyan Arabs, Maasais and Tesos.[135] 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.[136]

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.[137] 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.[138] Many minority groups and marginalised

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134   KNCHR, 'An identity crisis?A study on the issuance of national identity cards in Kenya', 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   CRA, 'Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund', 10.

communities became squatters on their own land.[139] 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.[140] 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.[141] 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.[142]

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.[143] Elections for local government representatives became meaningless due to the overreach of the President's network through the provincial administration. It was difficult to justify the existence of local authorities in light of the over-

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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.

centralisation of power and their inability to offer the services the people desired.[144] 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.[145]

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.[146] Even though the Repealed Constitution laid down criteria to guide delimitation, the requirements were not always followed, and some regions were denied effective representation.[147] 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.[148] In 1966, 41 new ones were created before going up to 188 in 1986, and they finally increased to 210 before the 1997 elections.[149] 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 Akivaga 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,* Miscellaneous 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) *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.[150]

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.[151] 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.[152] 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.[153]

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.[154] The relationship between individual citizens and ethnic communities with the elite was one of patronage, and inevitably, those in power abused it immensely.[155] 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.[156] 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.[157]

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.[158] 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 East Africa Company (IBEAC) occasioned the expansion of protestant

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156   M 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.

157   John Mutakha Kangu, *Constitutional law of Kenya on devolution,* Strathmore University Press, Nairobi, 2015, 117.

158   TJRC Report Vol II B, 38.

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.[159]

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.[160] 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 *East African Review* (2009), 3.

The Colonial Government used Christianity as a tool for cultural imperialism under the banner of 'civilizing natives'.[161] The missionary enterprise has been documented to have operated parallel to colonialism. The two were intricately linked.[162]

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.[163]

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.[164] 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'.[165]

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.[166] 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.[167]

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.[168] 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 used a different curriculum, which was defined as superior to the one used

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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 / 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.

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.[169]

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.[170] Mission schools promoted monogamy, and it often served as a requirement for enrolment,[171] 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   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.[172] 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.[173] 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.[174] 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.[175]

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, 74.

resolved by creating boundary lines dividing the country into spheres of influence of the various religions denominations, without consulting the African community.[176] 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.[177] The TJRC assessed that the regions that benefited the most from missionary investment in education were Nyanza and Central provinces.[178]

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.[179] However, where the protest would jeopardise their interests, for instance, in education, the missionaries were unwilling to side with the African population.[180] Their privileged position also allowed them to represent African interests in the Legislative Council.[181] Still, during the Mau Mau revolt, missionaries sided with the Colonial Government, thereby identifying themselves with the status quo.[182] The missionaries were often caught between colonial interests and protecting Africans.

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176   *Dictionary of Christian Biography.*

177   Zablon Nthamburi, 'The beginning and development of Christianity in Kenya: A survey' *Dictionary of Christian Biography.*

178   TJRC Report Vol II B (2013) 89.

179   Nthamburi, 'The beginning and development of Christianity in Kenya'.

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.[183] 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.[184] 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.[185]

With the introduction of the Africanisation policy, which emphasised eradicating poverty, illiteracy and ignorance through education,[186] 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 Sessional Paper No 10 of 1965 as instrumental to the development and

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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.

'the principal means of relieving the shortage of skilled manpower and equalising economic opportunities among all citizens'.[187] 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.[188]

Disparities in development resulted in perpetual poor performance in schools, poor infrastructure, and absence of Government services in some regions.[189] 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.[190]

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.[191] 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', 9.

190   FES, 'Regional disparities and marginalization in Kenya', 2.

191   Jill Ghai, Yash Ghai, Korir Sing'oei and Waikwa Wanyoike, 'Taking diversity seriously: Minorities and political participation in Kenya', Minority Rights Group International, Briefing, 28 January 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.[192]

However, one of the benefits of the Moi regime was a focus on alleviating marginalisation in education.[193] 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.[194] Universal primary education (UPE) was introduced alongside feeding programmes in semi-arid areas to attract students to school.[195] 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.[196]

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.[197] These groups will form the focus of this section of the study.

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192   FES, 'Regional disparities and marginalization in Kenya', 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.[198] 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.[199]

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.[200] 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.[201] 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 2/3 gender rule engendering double invisibility in public life for other vulnerable groups in Kenya?' *Oxford Human Rights Hub OxHRH Blog*

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.[202] Women were consigned to the domestic sphere where their rights were limited.[203] 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.[204] 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.[205]

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 post-colonial structures. Kenyan women were not passive bystanders;

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 Mbondenyi *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.

despite the attempts at control and subservience, some women were finding employment, taking up spaces, and fleeing to the missions to obtain an education.[206] 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.[207] 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.[208] 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 9th Parliament, the representation of women was at its highest, with eight out of 12 nominated members being women.[209]

With such limited recognition of the role of women in society, there was need for women to organise and amplify their voices in demanding for their rights and for social justice. This occasioned the formation

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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', 22.

209   FES, 'Regional disparities and marginalization in Kenya', 22.

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.[210] 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.[211]

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.[212] 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 1997 and 2002 created space for active participation in the constitutional

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210 Effie 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, 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.

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.[213]

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.[214] 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.[215] 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.[216]

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.[217] These reforms began with the

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', 18.

introduction of a motion for implementation by Parliament, of the Beijing Platform for Action, which flopped.[218] 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.[219]

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.[220] 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.[221]

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.[222]

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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.

The Bill was not passed.[223] 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.[224]

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.[225]

Historically, the youth were at the centre of society. In communities such as the Maasai, the Morans, responsible for making wartime decisions, were youthful.[226] 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.[227] 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.[228] It is noteworthy that the said propensity to violence can be attributed to the social-political and socio-economic upheavals of the 19th Century.[229] 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.[230] 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.[231] 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.[232] 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.[233] 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.[234] This led to an influx of young men seeking income in urban centres.[235] 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 and Charton-Bigot, *Generations past: Youth in East African history*, 14

229   Burton and Charton-Bigot, *Generations past: Youth in East African history*, 18.

230   Burton and 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.[236]

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.[237] The 2003 National Youth Policy Steering Committee reported that the youth were excluded from planning, designing and implementing programmes that affect them.[238] 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.[239] 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.[240] 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:

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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.

Discrimination occurs at multiple levels. For example, women in 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.[241]

While political parties courted the votes of these marginalised groups to win elections, pre-election promises were consistently reneged upon and historically excluded. Marginalised peoples did not have their interests represented in decision-making, and parties did not support their candidatures in elections.[242]

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.[243] 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.[244] 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', 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', 27.

making processes and economic, political and social discussions.[245] However, as this chapter has shown, the youth are yet to attain such inclusion levels.

Persons with disabilities

Persons with disabilities are part of the marginalised groups that have experienced double invisibility.[246] They are identified as having been marginalised historically and denied access to economic and political resources to better their lives.[247] 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.[248] However, it is reported that poverty and disability are fundamentally interlinked due to unequal access to education, employment, healthcare and food[249] and

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245   Muthee, 'Hitting the target', 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', 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) *Research in Comparative & International Education* (2017) 497-511, 497.

exacerbated by institutional, environmental and attitudinal barriers.[250] Poverty affects not just PWDs but also their families, especially the women who bear the greatest burden of caring for them within the family.[251]

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.[252] 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.[253] 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'.[254] 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.[255] Conversely, it was also the church that pioneered special schools for children. The Presbyterian

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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*.

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.[256] Some studies also credit civil society organisations for advancing special education in Kenya.[257] 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.[258]

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.[259] 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.[260]

While attempts were made to address the marginalisation of PWDs in the education and health sectors, their political participation needs were ignored.[261] 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,[262] and the establishment of the National Disability Development Fund (NDDF).[263] 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.[264] 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,[265] 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.[266]

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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 Disabilities Act, Section 38.

263   Persons with Disabilities 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 Disabilities, 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'.[267] 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.[268] 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.[269] District Focus gave district administrators the power to initiate and administer development projects.[270] Other measures adopted in this era include the establishment of regional development authorities (RDAs) such as the Tana and Athi River

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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 Educational 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; Lynch, *I say to you: Ethnic politics and the Kalenjin in Kenya*, 118, cited in Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Decentralization in Kenya' 1-35, 7.

270   Cheeseman, Lynch and Willis, 'Decentralization in Kenya: The governance of governors', 7.

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).[271] 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.[272]

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,[273] the Community Development Trust Fund (CDTF) that supported sustainable community-based development projects,[274] 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/ACT/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 dated 26 March 1996. This was repealed through Legal Notice No. 172, dated 20 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

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.[275] 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.[276] The CDF has since been declared unconstitutional by the Supreme Court.[277]

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 and school feeding programmes.[278] 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.

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, Judgment of the Supreme Court, 18 August 2022 eKLR.

278 Vision 2030 'Second Medium Term Plan (2013-2017)'.

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.[279]

The National Policy Framework for Nomadic Education 2010[280] 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.[281]

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[282] as well as continued centralisation efforts, most of them failed.

Despite the promises of reform by the Kibaki Government, the impact of 'elite fragmentation, political liberalisation and state

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279   Uwezo Fund official website.

280   Ministry of Education, 'Policy Framework on Nomadic Education in Kenya 2010' Ministry of Education / UNICEF.

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.

informalisation' was underestimated,[283] 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.[284]

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 and a democratisation' as it seeks to redress historical imbalances by creating distinct yet interdependent county governments with local

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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 'Decentralization in Kenya', 7.

284   Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review', 53-54.

representatives carrying out governmental functions.[285] 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.[286] 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'.[287] One of the objects of devolution is to 'foster national unity by recognising diversity',[288] and the exclusion of any group is, therefore, thought to undermine national unity.[289]

Article 174 of the 2010 Constitution sets out the objects of Kenya's devolution. According to Yash Pal Ghai and Jill Cottrell 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.[290]

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 has been hampered by inadequate implementation mechanisms, lack of incentives for implementing inclusion initiatives, assumed

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285 CoE 'Final Report' 53-54.

286 County Governance Toolkit, 'Basics of devolution'.

287 Burbidge, *An experiment in devolution,* 4.

288 Constitution of Kenya 2010, Article 174 (b).

289 John Mutakha Kangu, *Constitutional law of Kenya on devolution,* Strathmore University Press, Nairobi, 2015, 117.

290 Yash Pal Ghai and Jill Cottrell 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.

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',[291] pursuing 'ground-up democratic unity',[292] 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.[293] 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 representation of special interest groups at both levels.[294] While the National Constitutional Conference proposed electoral colleges to select members of marginalised groups who would represent their interests in

291   Burbidge, *An experiment in devolution,* 5.

292   Burbidge, *An experiment in devolution,* 8.

293   Burbidge, *An experiment in devolution,* 5.

294   Constitution of Kenya, 2010, Articles 97, 98 and 177.

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.[295]

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.[296] 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.[297]

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295 Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review', 54.

296 Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review', 54.

297 Constitution of Kenya 2010, Article 97(1)(c). This was vastly different from the provision in the Revised Harmonised Draft Constitution which had provided for a 5% affirmative action measure for persons with disabilities to be realised through designated seats, ensuring that all other marginalised groups were represented 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', 116.

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.[298] 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.[299]

The 2010 Constitution additionally provides for equality between men and women in all spheres of public life and requires that not more than 2/3 of any elective or appointive positions may be held by persons belonging to one gender.[300] Moreover, political parties are required to promote and respect gender equality and equity.[301] 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.[302] 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.[303]

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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   *Leina 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 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

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 2/3 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 2/3 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 2/3 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 2/3 gender rule (often referred to as gender top-up) and persons nominated to represent persons with disabilities and youth.[304] The nominated MCAs are elected via two sets of party lists: one for the representation of youth and persons with disabilities and another for fair gender representation.[305] Both lists alternate between male and female candidates. The number

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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.

305   At present, this is the only mechanism that exists to ensure implementation of the 2/3 gender quota.

of special interest seat nominees is eight.[306] In contrast, the number of nominees required to ensure that the 2/3 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 2/3 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.[307]

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 for the marginalised groups and areas.[308] 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

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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).

308   Constitution of Kenya (2010), Article 202.

the level generally enjoyed by the rest of the nation, so far as possible'.[309] The establishment of the Equalisation Fund is one of the strategies for strengthening the management of fiscal decentralisation.[310]

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.[311] 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.[312]

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.[313] 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.[314] The Equalisation Fund lacks a legislative framework.

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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', vii.

313   National Gender and Equality Commission, 'The Equalisation Fund: Audit of the status of water, health and road sectors in 8 marginalized counties' (2017) 18.

314   CRA, 'Policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund', vi.

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.'[315] 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.[316] The first Policy was designed to be operational for three years.[317]

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 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.[318]

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315   CRA, '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', 19.

318   CRA, 'Second policy and criteria for sharing revenue among marginalised areas', 6.

c.   Arid and Semi-Arid Lands Policy 2012[319]

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.[320]

d.   The Devolution Policy 2016[321]

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 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.[322] While the Policy is not detailed,

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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).

322   Ministry of Devolution and Planning, 'Policy on devolved system of government', 6.

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.[323]

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.[324] Despite the various attempts at legislative measures towards the implementation of the 2/3 gender rule, Parliament is yet to pass a law that effects the principle.[325] So far, the Affirmative Action principle has been violated

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323   Ministry of Devolution and Planning 'Policy on devolved system of government', 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 2/3 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*, Petition No 44 of 2012, Judgement of the High Court, 28 February 2012 eKLR which challenged elections to the Kenya Sugar Board for non-compliance with the 2/3 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 2/3 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

in Parliament and Cabinet's composition[326] 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 to ensure the hitherto marginalised groups (women, youth and PWDs) and regions are empowered, it does not entrench adequate mechanisms for achieving this.[327] Deference to Parliament to provide legislation on the inclusion of marginalised groups in Parliament has not yielded

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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 2/3 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 2/3 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 2/3 gender rule in the appointment of Cabinet secretaries but the declaration of invalidity was suspended in the run-up to the 2017 elections.

327   FES, 'Regional disparities and marginalization in Kenya', 21.

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,[328] 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.[329] However, the 2/3 gender rule was suspended in respect of the 2022 elections in the case of *Adrian Kamotho v IEBC*[330] and confirmed in *Cliff Ombeta & Another v IEBC,*[331] 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',[332] which turns inclusion into a zero-sum game where the inclusion of one group signals the concomitant loss of another.[333] For example, Gerface Ochieng asserts that the provisions on gender equity in the 2010 Constitution have entrenched reverse discrimination against men.[334] Strategic litigation to secure the inclusion

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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 realised progressively rather than immediately. The former Chief Justice Willy 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.

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' Unpublished Master of Arts in Philosophy Thesis, Kenyatta University, 2010, 125.

of PWDs in the County Executive of Garissa has also not yielded much fruit ten years on.[335]

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.[336]

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.[337] Additionally, it also means that the loyalty of 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.[338]

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

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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.

338   FES, 'Regional disparities and marginalization in Kenya', 22.

marginalised groups.[339] 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.[340]

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,*[341] 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*[342] 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'.[343] This did not stop further attempts to reintroduce the amendment.[344]

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

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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 and 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 Parliament.

were persons with a physical disability.[345] 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.[346] 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.[347]

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 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. [348]

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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 and FIDA, 'A gender analysis of the 2017 Kenya General Elections', 37-38.

348   CRA, 'Second policy and criteria for sharing revenue among marginalised areas', 25.

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.[349]

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.[350] 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.[351]

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.[352] However, the CRA clarified in the Second Policy that the use of the word 'including' meant that projects were not 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.[353]

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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.

353   CRA, 'Second policy and criteria for sharing revenue among marginalised areas', 17.

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.[354]

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.[355]

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.[356]

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

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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' 18.

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.[357]

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 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'.[358] Of the three groups, women appear to have made greater traction than the other groups in achieving inclusion, what is referred to as 'advanced

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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.

358   Burbidge, *An experiment in devolution*, 4.

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.

Decentralisation and inclusion in Kenya

This book records a year-long study conducted by researchers from Kabarak University Law School and Heinrich Boll Foundation across five counties (Mombasa, Garissa, Narok, Nakuru and Kakamega) that sought to assess the impact of the first decade of devolution on the inclusion of women, youth and persons with disabilities in governance structures in Kenya. Two variables preoccupy this entire study – decentralisation and inclusion. The book hypothesises that there is a positive relationship between decentralisation and the inclusion of the various groups; that the more we decentralise the more we include. That the converse is also true: the more we centralise the more we marginalise.

What emerges clearly from the expositions in the volume are the historical 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 battlefront when the 2010 Constitution, which entrenches devolution as one of the overarching principles, among other transformative provisions, was promulgated.

At the close of a decade after the operationalisation of devolved governments, time is ripe to evaluate the original promise of devolution to democratise and include the marginalised groups. But has devolution delivered on these fronts? This edited volume explores this and other relevant questions after a decade of devolution's career.