

**RIGHTS OF THE MARGINALISED COMMUNITIES: AN APPRAISAL OF THE
CONSTITUTION OF KENYA 2010**

A dissertation submitted in partial fulfillment of the bachelor of law LLB. Course

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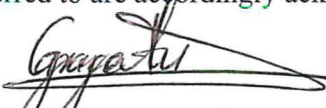
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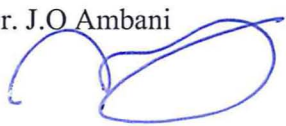
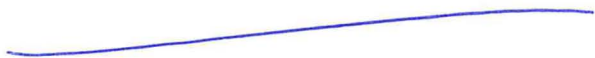
Law School

DECLARATION

I GRACE GUYATU DIIDA, student number 077609 do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signature: 
Date: 27th March 2017.

This dissertation has been submitted for examination with my approval as University Supervisor.

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DEDICATION

This work is dedicated to my family and friends for their love, support and patience.

ACKNOWLEDGEMENTS

This work would not have been possible without the aid of further persons:

Most importantly from my supervisor for the endless patience and guidance provided in the completion of this work.

ABBREVIATION

CGA	County Government Act
CKRC	Constitution of Kenya Review Commission
CRA	Commission for Revenue Allocation
CRC	Convention of the Rights of the Child
FPTP	First Past The Post
ICCPR	International Covenant on Civil and Political Rights.
ICESCR	International Covenant on Economic, Social and Cultural Rights.
IEBC	Independent Electoral and Boundaries Commission
NCIC	National Cohesion and Integration Commission
PR	Proportional Representation
TJRC	Truth Justice and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Education, Scientific and Cultural Organisation

Table of Contents

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENTS	iv
ABBREVIATION.....	v
Abstract.....	ix
CHAPTER ONE: INTRODUCTION	1
1.0 Introduction: Marginalized peoples and the criteria for self-identification	1
1.2 Main concerns of the marginalized communities	2
1.3 Constitutional protection of marginalised communities rights	3
1.4 Statement of the problem	4
1.5 Justification of the study	5
1.6 Statement of the objectives	5
1.7 Research questions	6
1.8 Hypothesis.....	6
2.0 Research methodology	6
2.1 Limitations and challenges.....	6
Chapter breakdown	7
CHAPTER 2: HISTORICAL ORIGINS OF THE MARGINALISED COMMUNITIES	8
2.1 Introduction.....	8
2.2 Pre independence Kenya	10
2.3 Post Independence Kenya	12
2.3.1 The Kenyatta years.....	12
2.3.2 The Moi era.....	13
2.3.3 The post-Moi era: the NARC dream.	14
2.4 Conclusion	16
CHAPTER THREE: ASSESSING THE PRE CONSTITUTIONAL DEMANDS OF THE MARGINALISED COMMUNITIES	18
3.0 Introduction.....	18
3.1 Land and resource rights	19
3.2 Culture and language rights	21

3.3 Legal recognition	22
3.4 Equality and non-discrimination.....	23
3.5 Electoral system.....	24
3.6 Change in the system of government.....	24
3.7 Conclusion	25
CHAPTER FOUR: THE 2010 CONSTITUTION AND THE RIGHTS OF MARGINALISED COMMUNITIES	27
4.1 Introduction.....	27
4.2 Devolution and the constitution	28
4.3 Key areas of focus in the devolved government: structural representation	29
4.3.1 The County Assembly.....	31
4.3.2 The County executive	32
4.3.3 Intergovernmental relations	33
4.4 The 2010 Constitution and marginalised communities.....	34
4.4.1 Devolution and marginalised communities.....	34
4.4.2 The County Assembly and marginalised communities.....	35
4.4.3The County Executive and the marginalised communities.....	36
4.4.4 County Public Service and marginalised communities.....	36
4.4.5 County Decentralized Units and marginalised communities	36
4.4.6 The County Government and the implementation of constitutional human rights concerns of the marginalised communities	37
4.4.7 National institutions and the rights of marginalised communities	39
4.4.8 The Senate.....	39
4.4.9 The Commission on Revenue Allocation	39
4.5The intergovernmental relationship and marginalised communities	40
4.6 Conclusion	40
CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS	42
5.0 Introduction.....	42
5.2 Restating the problem	43
5.3 Findings.....	43
5.3.1 Historical causes of marginalization	44
5.3.2 Pre Constitutional demands of marginalised communities.....	44

5.3.3 The 2010 Constitution and the rights of marginalised communities	44
5.4 Conclusion	45
5.5 Recommendations.....	46
5.6 Recommendations for further Research.....	47
BIBLIOGRAPHY	48

Abstract

The concept of marginalised groups was first formally recognized in the Constitution of Kenya 2010 (2010 Constitution). This was the first step in the recognition of these groups after a long history of discrimination and in-equal distribution of resources. This study narrows in on marginalised communities who are part of the marginalised groups.

The study first looks at the historical causes of marginalisation, tracing the beginnings of the in equal treatment to the colonial era and its subsequent propagation to the independence era, differing only slightly in the mode of governance but marked by the characteristic causes which included a system of capitalization marked by segregationist laws and populist politics.

Chapter three, against this backdrop, looked at the demands of the marginalised communities during the Constitution review process and singled out major areas for concern which included; land and resource rights, culture and language rights, legal recognition and identity and equality and non-discrimination. In a rather pragmatic approach, the marginalised communities also opted for a change in the governance system as well as the electoral system. This was aimed at increasing probability for the attainment of these rights.

Chapter four looked at the extent to which the 2010 Constitution provided for these rights. It went on further to interrogate the implementation mechanisms provided and their capacity to adequately provide for these rights.

The study then concludes in Chapter five by providing that the 2010 Constitution though having taken immense steps toward the provision of these rights still falls short due to the implementation mechanisms and more so due to the overlap of functions and a lack of express laws prioritizing marginalised communities. It then provides recommendations on the same.

CHAPTER ONE: INTRODUCTION

1.0 Introduction: Marginalized peoples and the criteria for self-identification

Research shows that the decolonization process in most African countries transferred powers to the dominant groups in the territory. Certain groups remained primarily vulnerable due to their reluctance to embrace western development paradigms that were adopted by the post-colonial state.¹ It is some of these groups who today identify as marginalized communities and demand recognition and protection of their fundamental rights in accordance with their way of life.² In Kenya as in other African countries, these communities fall within two broad categories as found by the Working Group of Experts on Indigenous peoples/ communities in Africa of the African commission on Human and People's Rights, namely the pastoralists and Hunter gathers.³ The pastoralists include the Endorois, Borana Gabra maasai, Pokot, Samburu, Turkana and Samburu and the hunter gatherers comprise the Boni, Ogiek, Sengwer or Yaaku.⁴

Participants in the round table meeting of experts on marginalized and indigenous peoples rights in Kenya, organized by the Kenya National Commission on Human Rights in collaboration with the Centre For Minority Right Development nominated the following criteria that could be used by Kenya to identify the marginalized for purposes of addressing their human rights issues: retention of traditional institutions, dependency on natural resources, suffering exclusion

¹ Brwonlie I, *Treaties and Indegenous People* ,Oxfod Univerity Press 1992, 12.

² Article 1 International Labor Organization's Indigenous and Tribal peoples convention, 1989 (169); see also Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa' (Report of African Commission's Working Group of Experts) adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session, 2005, 93.

³ Report of the African Commission's Working Group of Experts 92; see also International Work Group for Indigenous Affairs (IWGIA) *The Indigenous World* (2007) 468.

⁴ See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, R Stavenhagen, Mission to Kenya, A/HRC/4/32/Add3, 26 February 2007 (Report of the UN Special Rapporteur on Indigenous Peoples in Kenya) para 10.

discrimination from and by the mainstream system and utilizing unique means of livelihood and traditional occupation.⁵

These characteristics are similar to those proposed by the African Commission's Working Group of Experts on indigenous populations in Africa and generally reflects the criteria envisaged in ILO's Indigenous and Tribal peoples convention which emphasizes the principle of self-identification.⁶

According to the African commission, there are about 14 groups identified as marginalized communities i.e. the Ogiek, Watta, Sengwer, Yaku Maasai, Samburu Elmolo Turkana, Rendile Borana, Somali, Gabra, Pokot and Endorois.⁷ The UN special rapporteur expands this list to include the Ilchamus, Elmolo, Burji, Gaaljecel, Munyayaya, Orma, Sabaot, Sakuye and Talai.

1.2 Main concerns of the marginalized communities

Studies indicate these to be the main concerns raised by the marginalized communities prior to the promulgation of the constitution of Kenya 2010:

i. Legal recognition and identity.

The lack of legal recognition for some and the exclusion of others for their refusal to assimilate bears a certain set of ramifications such as difficulty in accessing legal documents for the Somali and Oromo⁸ as well as lack of equitable and effective political representation on matters affecting them.⁹

ii. Equality and non-discrimination

Due to their relatively inferior numbers as compared to the dominant groups in Kenya, they are scarcely able to be equitably represented in the political structures of

⁵ Report of the Round Table Meeting of Experts on Minorities and Indigenous peoples in Kenya, Kenya national commission on Human Rights and the Centre for Minority Rights Development, Nairobi, 30- 31 October 2006 (Report of the Round Table meeting).

⁶ Art 1(2) ILO's Indigenous and Tribal Peoples Convention.

⁷ African Commission, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa* (2006).

Indigenous peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa (The African Commission's work on indigenous peoples in Africa) African Commission & IWGIA (2006) 15.

⁸ Report of the UN Special Rapporteur on Indigenous Peoples in Kenya, para 21.

⁹ *Centre for Minority rights Development and Minority Rights Group International on behalf of Endorois Community v Kenya 267/2003.*

the state such as parliament, the executive and judiciary save for representation through affirmative action.¹⁰

iii. Culture and language rights

Of the common traits that the indigenous people share, the most notable is the retention of the strong sense of their distinct culture and traditions.¹¹ Given that dominant groups in Kenya occupy dominant position in leadership, the dominant cultures are then promoted whereas some indigenous cultures such as that of the Ogiek are rapidly becoming extinct.¹²

iv. Land and resource rights

Indigenous peoples in Kenya have decried the destruction of their cultures and the dispossession of their land and territories through the so called development projects such as mining, logging, oil exploration, privatization of their territories and tourism.¹³

Indeed the eruption of the post-election Violence underlies the issues as concerned the historical land injustices in Kenya among the more than 42 tribes scattered across the country.¹⁴ These injustices are aptly explained in the Kenya Draft National Land Policy.¹⁵

1.3 Constitutional protection of marginalised communities rights

The Constitution of Kenya 2010 (2010 Constitution) recognizes¹⁶ marginalized communities and provides for affirmative action strategies¹⁷ aimed at including them, it further guarantees the following rights for all in general from which the marginalized are still entitled to.

¹⁰ Report of the UN Special Rapporteur on Indigenous Peoples in Kenya paras 22 - 24.

¹¹ El Daes Study on Indigenous People and their Relationship to Land UN Doc E/CN.4/Sub.2/1999/18, 3 June 1999 para 18.

¹² Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 36.

¹³ Statement of the Loodoariak Community Land and Development Programme in Kenya at the nineteenth session of WGIP, cited in Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 20.

¹⁴ Kenya General Election 27th December 2007, The report of the commonwealth Observer Group, Commonwealth secretariat (2007) 28; Kenya's initial state report to the ACHPR pursuant to its obligations under article 62 on Human and Peoples rights para 5; Report of the UN special rapporteur on indigenous Peoples in Kenya para 21, citing the 1989 national census which omits the Ogiek, El Molo, Watta, Munyayaya, yaku and other smaller ethnic groups from the list of 42 tribes of Kenya.

¹⁵ Draft National Land Policy (2006) para 190.

¹⁶ Article 260 of the constitution of Kenya 2010 defines Marginalized communities.

Further the constitution guarantees the protection of freedom of conscience, religion, belief and opinion.¹⁸ While articulating these rights the African commission observed that this freedom has to be articulated in a way that does not violate the equal protection of the law.¹⁹

Economic rights are also provided for in the constitution as per articles 43 and 44 of the 2010 Constitution.

Political rights are also enshrined constitutionally as per article 38. It allows all parties including the marginalized communities as citizens of the country to participate in periodic elections either as candidates or voters.²⁰

The right to property, including but not limited to land and intellectual property rights²¹, is enshrined in the 2010 Constitution and further as relates to the marginalized communities articles 60 and 63 apply stating equitable access as one of the principles as concerning the usage of land as well as community land that is most easily associated with the marginalized communities.

1.4 Statement of the problem

Although the 2010 Constitution has provided means of catering to the needs of the marginalized communities, there is yet a lack of a comprehensive legislative document that goes further into the details of the implementation of the constitutional mandate. This has consequently led to a continuation of the vulnerable state of the marginalized communities, as there is a lack of sufficient implementation mechanisms through which their rights can be attained.

Further the constitutional provisions have not been thoroughly appraised in comparison to the initial demands of the marginalized as well as comparative analysis with international standards.

¹⁷ This is further explored in article 53 of the constitution of Kenya 2010.

¹⁸ Article 21, constitution of Kenya 2010.

¹⁹ Communication 48/90, 50/91 and 89/93, Amnesty International, *Comite Loosli Bachelard*, Lawyers Committee for Human Rights, Association of members of the Episcopal conference of East Africa v Sudan, thirteenth annual Activity Report of the African Commission on Human and People's Rights.

²⁰ M Mbodenyi, 'The Right to Participate in the government of One's country: An analysis of article 13 of the African charter on Human and Peoples rights in light of Kenya's 2007 election crisis (2009) African Human Rights journal.

²¹ *Anne Kukali v Mary A Ogola and another* [2010]eKLR

1.5 Justification of the study

While there is in general a wealth of information as concerns marginalized communities, their history and developmental challenges, very little information has been published to appraise the constitutional provisions as concerns the marginalized communities. This study thus seeks to bridge this gap and provide useful information as concerns the adequacy of the aforementioned constitutional provisions.

The findings of this study may be useful in the formulation of laws and policies in order to ensure that the rights of the marginalized communities are realized as per article 56 of the 2010 Constitution. The findings of the study background and literature review may also provide the necessary means of conceptualizing and formulating laws governing the marginalized communities.

This study is also in line with Kenya's vision 2030 goals, specifically the goals of access to justice and equality for all as per the social pillar of the developmental plan.²²

1.6 Statement of the objectives

The general objective of this study is to examine the adequacy of the constitutional provisions governing the rights of the marginalized communities. The specific study objectives are as follows:

1. To examine the 2010 Constitution as concerns the marginalized communities.
2. To compare the constitutional provisions with the initial demands of the marginalized communities.
3. To identify ways through which the marginalized communities can gain access to their rights through a further analysis of the implementation mechanisms set out in the Kenyan law.

²² Government of Kenya, "Kenya Vision 2030: The popular Version" (2006).

4. To provide recommendations on necessary amendments to the current legal framework as concerns the marginalized communities.

1.7 Research questions

This study will be guided by the following research questions:

1. What are the 2010 Constitutional provisions as concerns the marginalized communities?
2. Do the current 2010 Constitutional provisions match with the initial demands of the marginalized?
3. What are the historical causes of marginalization in Kenya?
4. What are the necessary amendments to the current legal framework as concerns the marginalized?

1.8 Hypothesis

This study will be guided by a null hypothesis. The hypothesis is that the initial expectations of the marginalized communities have not been adequately provided for by the 2010 Constitution.

2.0 Research methodology

This study is a qualitative research that will mainly focus on desk review. As such, the focus of the study was on the analysis of depth of the literature available rather than examining quantities so as to make inferences. The review involved an examination of various sources of information. Among others, these included books, journal articles, internet sources, newspapers and electronic media such as television. The study was solely focused on a critical examination of the available literature on the subject matter of the study

2.1 Limitations and challenges

This paper sets thematic limitations; it shall solely focus on the rights of the marginalized communities in Kenya. Also to be noted will be the rights provided as well as the corresponding

implementation mechanism and provision of a comparison with international instruments for purposes of standard setting.

The paper will also be limited geographically as it shall focus only on the marginalized communities in Kenya.

Due to time constraints the paper will focus solely on desk top research.

Chapter breakdown

Chapter one will be this proposal.

Chapter two will be the introduction to marginalized communities and will further delve into the background as to how marginalized communities came about.

Chapter three will zone in on the constitutional review process and the rights sought by the marginalized communities.

Chapter four will present an in-depth study of the 2010 Constitution as well as the various provisions and implementation mechanisms as concerns the rights of the marginalized.

Chapter five will be a conclusion and recommendations based on the analysis of the aforementioned chapters.

CHAPTER 2: HISTORICAL ORIGINS OF THE MARGINALISED COMMUNITIES

2.1 Introduction

Ethno-regional disparities in Kenya, economic inequalities¹ and marginalization can be explained from a number of perspectives: The first is a nature based explanation where the origins of regional disparities are seen as the result of the migratory patterns of the various ethnic groups and differences in economic and resource endowment of the various regions that each group settled, as well as the manner in which each group's cultural practices influenced capitalist penetration in the regions in which it settled.²

The second is a class-based explanation. A suitable instance is the distribution of the 1.2 million acres of land retrieved from the departing settlers with financial aid from the British government, the World Bank and the Colonial Development Fund. This was meant to settle families in the 1960s but ended up being transferred to wealthy Africans organised in partnerships or limited liability companies, giving rise to a new land policy in Kenya that was based on class rather than race.³

The third explanation is in terms of access to public services such as education and health care provided by the government. Access to education is of particular importance to understanding the perpetration of inequalities since independence.⁴ Education has been universally accepted as the basis for material advancement and for enhancing one's prospects in employment, job advancement, salary and even status. Therefore, those regional disparities and marginalisation in Kenyan communities that had access to schools, and those students who had access to high cost schools, had an advantage over the rest. In this regard, the education system reproduced, not altered, the economic, social and political structures inherited at independence.

¹ Kanyinga, K. "Governance Institutions and Inequality in Kenya" in SID (ed.) 2006. *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives*, Nairobi: SID

² Ogot, B. A. and William Ochieng' (eds.) 1995. *Decolonization and Independence in Kenya 1940-1993*. Nairobi: East African Education Publishers.

³ Ogot, B. A. "The Decisive Years: 1956-63", in Ogot, B. A. and William Ochieng' (eds.) 1995. *Decolonization and Independence in Kenya 1940-1993*. Nairobi: East African Education Publishers.

⁴ Cooksey, B., David Court, and Ben Makau, "Education for Self-Reliance and Harambee" in Barkan J., (ed.) 1995. *Beyond Capitalism vs. Socialism in Kenya and Tanzania*. Nairobi: EAEP

The fourth explanation of ethno-regional disparities, marginalisation and other inequalities in Kenya are related to the state, the struggles to control the state and other institutions of the state as well as the state's discriminatory and exclusionary policies that were meant to either provide advantages to certain communities and regions or to discriminate against others. This has taken a number of forms: First, political patronage and other policies pursued by successive governments in Kenya (including the colonial state) tended to provide state resources in such a skewed manner that they benefited mostly those that controlled the state and or certain regions. Second, the appointment and recruitment of state officers, which had favoured certain regions and ethnic groups since independence, gave regional disparities an ethnic basis. Third, disparities have been perpetuated by the unfair system of representation, which has seen certain areas being over-represented while others are grossly under-represented.⁵

A single question is posed in this chapter. What are the causes of marginalisation during the colonial and post-colonial era? To answer this question, this chapter is broken down into two major sections intended to answer the questions: what are the causes of marginalisation in the colonial era? Subsequently to also answer: what are the causes of marginalisation during the post-colonial era.

As concerns the colonial era, emphasis is placed on the changes caused and the governance system created. This section aims to prove that the dual form of government marked by segregative laws and practices and differing treatment between the collaborators and the non-collaborators led to a difference in resource distribution and a lack of inclusion in the laws formed. As concerns the post-independence Kenya, this chapter aims to analyse the three successive governments; the Kenyatta Government, the Moi government and the Grand Coalition government looking keenly at the motivations behind resource distribution and appointments during the era.

The chapter then concludes by showing that the causes of marginalisation are majorly cross cutting. The connecting factors being that marginalisation is as a result of unjust resource distribution and discriminatory processes that were propagated by laws such as individual titling of land, and the doctrine of terra nullius that marked the colonial regime, systems such as the

⁵ Ochieng', W. "Structural and Political Changes", in Ogot, B. A. and William Ochieng' (eds.) 1995. *Decolonization and Independence in Kenya 1940-1993*. Nairobi: East African Education Publishers.

capitalist system that reigns in both regimes and or politics such as populist political structure developed during the independence period.

2.2 Pre independence Kenya

The concept of Kenya, as we know it today, came into being in the colonial period. The various communities inhabiting this country each had their distinct ways of life, obtaining their food through fishing, hunting and gathering, raising livestock etc.⁶ There were various modes of political organization. Due to differences in cultural and socio-economic activities. Research thus shows that the now known concept of marginalized communities can be traced back to the colonial era.⁷ After the conquest and demarcation of the country, the colonial power, Britain, established infrastructures and institutions to serve its interests⁸. These structures changed the socio-cultural and political economy of Kenya.

Colonialism created a dual state in Kenya in which European settlers were provided with large fertile tracts of land while Africans were confined to reserves to be sources of cheap labour. In the segregated system, settlers were provided with the means and opportunities for accumulation, while Africans were denied the same. Segregation in the White Highlands did not just separate Europeans and Africans; Africans in the reserves were also segregated from one another, where they were treated differently, depending on their perceived level of cooperation. Those communities that cooperated with the colonial administration were treated better than those that resisted. The colonial state was also an “exclusionary” and “segregationist” one. State sanctioned segregation and exclusion, or what is referred to as the ‘bifurcated state’, was replicated in the major towns where racial segregation went hand in hand with the ethnicisation of African settlements and reserves.⁹ The imposition of colonial rule in Kenya entailed a process of Westernisation and capitalist penetration of the African economy, which saw the replacement of the African mode of production by a capitalist one and the integration of African economies into the Western capitalist system but in an exploitative and segregated manner that disadvantaged

⁶ Ghai Y and MacAuslan JPWB , *Public law and political Change in Kenya*, Oxford University Press, London1970, 3.

⁷ Kibua T and Mwabu G *Decentralisation and Devolution in Kenya: New Approaches*, University of Nairobi Press , Nairobi,2008, 107.

⁸ Jonyo F , ‘Ethnicity In Multy Party Politics’, in Chweya L (ed), *Electoral politics in Kenya*, University of Nairobi Press,2002, 91.

⁹ Maxon R, ‘Social and Cultural Changes’ in Ogot, B. A. and William Ochieng’(ed) 1995. *Decolonization and Independence in Kenya 1940-1993*. Nairobi: East African Education Publishers.

the former. Those areas of Kenya such as Central Province and Nyanza, which were penetrated earlier by capitalism and Western influences developed much earlier than those places where colonization and Westernisation did not penetrate.¹⁰

From early on the British sought to acquire land as a major commodity. The alienation of the 'White Highlands' as well as other pieces of land stemmed from the knowledge that whoever controls the land is in a good position to influence the government; further, the colonial power needed to be able to grant parcels of land to attract settlers.¹¹ Therefore, with a sense of urgency, the colonial administration moved to secure large chunks of land using various means. These included treaties of forceful conquests, such as the Maasai Agreements of 1904 and 1911.¹² The British also passed several land laws to support these acquisitions, these included the Crown Lands Ordinance of 1902 and 1915¹³. The outcome of these laws was to make all of Kenya's inhabitants tenants at the will of the Crown and therefore liable to be moved to any place at any time to further colonial interests¹⁴.

Other colonial laws such as the Vagrancy Act, Northern Frontier Province Poll Tax, and the Special Districts (Administration) Act, were equally punitive to the residents of this region. The overall legislative framework was premised on exclusionist policy and thus, explains to a large extent the region's low socio-economic development.

By the time Kenya became an independent nation state in 1963, its population's composition and the pattern of settlement had defined geographical structures. Further, land had acquired a key

¹⁰ Barkan, J., (ed.) 1995. *Beyond Capitalism vs. Socialism in Kenya and Tanzania*. Nairobi: EAEP

¹¹ Ghai and McAuslan, *Public Law and Political Change in Kenya*, 25.

¹² Recently, the Maasai have been making several demands, including that the Kenyan government should find that the Agreements were not binding on the Maasai and that they should be compensated for their losses over time. These demands were repeated during a demonstration on 13 August 2004, during which the Maasai exhorted the government not to renew the agreement, the same having expired. They presented memoranda to both the Kenyan government and the British High Commission in Nairobi. The Maasai lands in Laikipia and Naivasha are still held by descendants of the white settlers, who use the property for ranching. On 24 August 2004, a section of the Maasai community sought to present a copy of their petition to the British High Commission claiming restoration of their lands, seeing as the Agreements had expired. They were violently dispersed by the police, a number of them beaten and others were charged in court with criminal offences. See Daily Nation, 25 August 2004.

¹³ Wanjala SC, 'Land Ownership and Use in Kenya: Past Present and Future', in Wanjala SC (ed) *Essays on Land Law, the Reform Debate in Kenya*, university of Nairobi Press, 2000, 25.

¹⁴ Nassali M, 'Ethnic and Racial Minorities and movement towards Political inclusion in East Africa: cases of Kenya, Uganda and Tanzania', in Majamba H (ed) *Towards a rights sensitive East African Community: the case of Ethnic and Racial minorities*, Fountain Publishers, 2011, 154.

position in the life of the new nation. The systematic application of the colonial political and socio-economic systems had left indelible marks on the young state.

2.3 Post Independence Kenya

Independence marked a new chance for change within the country. This section looks at the cause of marginalisation within the post-colonial era and does so through an analysis of the successive governments

2.3.1 The Kenyatta years

Kenya attained independence in 1963 with Mzee Jomo Kenyatta as the Prime Minister. In 1964, Kenya became a republic with Kenyatta as the first President. His reign lasted until his demise on 22 August 1978. The main principles and strategies of Kenya's development after independence were laid down in the 1965 paper entitled *African Socialism and Its Application to Planning in Kenya*. In this document, the Kenya African National Union (KANU) government outlined its political and economic philosophies. With independence, Kenya intended to 'mobilize its resources to attain a rapid rate of economic growth for the benefit of its people'.¹⁵

Another important feature of this era was the independence constitution also known as the Majimbo constitution¹⁶. It provided for an elaborate scheme for the protection of the rights of minorities and marginalized communities¹⁷. The minorities included the Europeans, Asians and indigenous small communities concerned with domination by larger and more politically active communities¹⁸. The seven regional governments granted powers by the constitution were supposed to ensure the rights of marginalized communities¹⁹. However the KANU government sabotaged this by failure to release operationalization funds, faced with these consequences, the

¹⁵ Republic Of Kenya, Sessional Paper No. 10, *African Socialism and its Application to Planning in Kenya*, Nairobi, 1965.

¹⁶ Muia DM, 'Devolution of Governance to districts in Kenya: A case Study', in Kibua T and Mwabu G (eds) *Decentralisation and Devolution in Kenya: New Approaches*, University of Nairobi Press, 2008, 78.

¹⁷ Muia, 'Devolution of Governance to districts in Kenya: A case Study', 78.

¹⁸ Oloo A, 'Devolution and Democratic Governance: options for Kenya', in Kibua T and Mwambu G (eds) *Decentralisation and Devolution in Kenya: New Approaches*, University of Nairobi Press, 2008, 106.

¹⁹ Oloo, 'Devolution and Democratic Governance: options for Kenya', 106.

marginalized communities lost out and the functions of the majimbo constitution were not fulfilled.²⁰

It is noteworthy that Kenya had previously been administered by a centralised system of government with strong structures. Thus, when KANU won the elections in 1963 and merged with KADU in 1964, it inherited colonial structures and systems that were intact. With the dissolution of KADU, KANU sought to aggressively advance its centralisation policy.²¹ It all began by the government at the centre denying revenue and independent secretariats to regional governments as required by the independence constitution, thus frustrating attempts to make regional governments operational. Subsequently, the independent constitution was amended to consolidate political power in the presidency and dismantle regional structures. The first amendment merged the functions of head of state and head of government, vested them in the president, making him immensely powerful with control over all arms of government.

Many ethnic groups were lumped together not only on the basis of historical origins and cultural practices, but also on the basis of expediencies of British colonial administration. Some of these groups have distinct ethno-linguistic divisions that have created solid ethnic identities for sub-ethnic groups. Each of these groups inhabits a particular territory and ethnic members share a common ancestry, language and culture. Each and every part of the country is associated with a particular ethnic group. Political competition was also heightened by the fact that no single ethnic group can win on its own without forming an alliance with at least two other populous groups. This thus gave logic to inequalities in resource distribution to ethnic groups represented and those not represented in government.

2.3.2 The Moi era

President Kenyatta was succeeded by President Daniel Arap Moi, who served until 2002. While he included many representatives of these communities in his government²², their inclusion did not lead to any political, economic or social gains for the marginalised communities. Instead, their situation worsened as they slid deeper into poverty as well as social, cultural and political

²⁰ Akiraga SK, *A democratic Landmark? Character of 2002 General Elections*, University of Nairobi Press, 2003, 5.

²¹ Duchscher, Boychuk E. Judy and Cowln Leane. *The experience of marginalization in new nursing graduates*.

²² Eshiwani A, *Tribalism and its impact on Development*, University of Nairobi Press, 1991, 34.

alienation²³. By the time Daniel arap Moi ascended to power, Kenya had a strongly centralized system reminiscent of the colonial government structure, having done away with the semi-federal structure at birth. Moi inherited an all-powerful presidency when he came to power in 1978. He continued to consolidate and personalise presidential power. He began to deconstruct the Kikuyu state and to replace it with a Kalenjin alternative filling powerful positions in government that had been previously occupied by the Kikuyu with members of his Kalenjin ethnic group. He sought to dismantle the Kikuyu businesses that had thrived during Kenyatta's era. In 1982, the Moi government sponsored a constitutional amendment which made Kenya a one-party state but political pressure from dissenting politicians, human rights and church groups led to the clause's repeal in 1991, paving the way for multiparty elections in 1992. The reintroduction of multiparty elections coincided with the escalation of politically instigated ethnic violence in 1992 and 1997 elections.

2.3.3 The post-Moi era: the NARC dream.

On 30 December 2002, President Mwai Kibaki was sworn in as Kenya's third President. He came in through the National Rainbow Coalition (NARC), an arrangement that had been achieved through a pre-election pact between the National Alliance Party (NAK) and the Liberal Democratic Party (LDP).

In 2007/2008 marked the post-election violence in Kenya²⁴. According to the Commission of Inquiry into Post-election Violence, "Inequalities and ethnic marginalization often viewed in ethnographic terms were very much at play during the post-election violence"²⁵. The commission also identified four root causes of the violence.

- First is the personalisation of presidential power and the deliberate weakening of public institutions since independence.

²³Leo C, 'Who Benefitted from the million acre scheme? Toward a class analysis of Kenya's transition to independence' 15 *Canadian Journal of African Studies*, 1981, 201.

²⁴Singoei AK, 'Minority rights, transitional justice and lessons for Kenya' 49 *Interdisciplinary journal of Human Rights Law*, 2011, 5.

²⁵Commission of Inquiry into Post-election Violence, Report on Post Election Violence (2008) (Waki Report) vii www.dialoguekenya.org/docsPEV%20Report.pdf accessed 31st December 2016.

- Second is land ownership and inequalities among communities in Kenya perceived in ethnogeographic terms.
- Thirdly, the commission identified the use of political violence by leaders for political ends which has gone on without sanction for a long time, thus creating a culture of impunity.
- Lastly, the commission also identified the presence of a large number of economically poor, deprived youth who are easily mobilised to create violence.

This saw the involvement of the international communities and the signing of a power sharing agreement under the National Accord. The accord outlined a four point agenda which included land reforms and the enactment of a new constitution²⁶.

Two more institutions were set up to address the discrimination faced by the marginalized communities. These included:

1. The Truth Justice and Reconciliation Commission

This commission was formed as per section 3 of the Truth Justice and Reconciliation Act No. 6 of 2008. Its role included the assessment of perceived marginalization of communities as well as how this could be addressed²⁷.

2. National cohesion and integration Commission .

This commission was established under section 110 of the National Cohesion and Integration Act No12 of 2008. One of the functions of this commission was to address the issue of discrimination against marginalized communities especially in the public private sector²⁸. In April 2011, the commission released a report indicating the seventy percent of the jobs were taken up by the major communities in the country²⁹. A clear indication that marginalized communities did not attain economic empowerment sufficiently

²⁶Musilla GM,' Federalism and Ethnicity question in Kenya: Limits, fears and prospects', in ICJ Kenya (eds) *Ethnicity Human Rights and Constitutionalism in Africa*, International Commission of Jurists,2008,68.

²⁷ Section 6, *Truth Justice and Reconciliation Act* (Act No. 6 of 2008).

²⁸ Section 4 , *National Cohesion and integration Act* (Act No.12 of 2008).

²⁹ National Cohesion and Integration Commission Ethnic Audit Report,2011, 65.

2.4 Conclusion

The chapter above sets out the main causes of marginalization in Kenya. This can be traced back to the colonial and post-colonial state. The colonial state was marked by a dual form of government in favour of the European settlers.³⁰ Ensuring that the laws were in their favour and that resources such as land and education were easily accessible to the settlers as opposed to the African community. The introduction of a capitalist system also highly disadvantaged the communities who were unaware of and were ill equipped to compete effectively in such a system.

The post-colonial government was hoped to rid the county of the inequalities caused by the colonial state. A different form of government was espoused, however the government machinery and the bureaucratic structure did not favour resource distribution to all. The rise of a populist government was also seen in this era. Where the competition for the scarce resources encouraged the formation of alliances between tribes in order to attain electoral representation.

Changes in law also had the effect of personalizing the presidency, thus rather than institutionalizing the distribution of resources so as to promote fairness and equity, it had the effect of centralization propagated through segregationist tactics. The capitalist system as fronted by the colonial government did not end with the independence governments. Further the citizens were not equally provided with access to education in order to attain an equal competing platform. The spoils of colonialism were divided on the basis of class as opposed to distribution with the aim of righting the colonial injustice. All these culminated in the post-election violence in Kenya where historical injustices was reported as one of the aggravating factors.

The Grand Coalition government through institutions such as the Truth Justice and Reconciliation Commission as well as the National Cohesion and Integration Commission attempted to bring about some form of reconciliation. These acts though noble did not attempt to provide concrete measures through which marginalised communities would be included.

³⁰ Ogot, B. A. The Politics of Populism", in Ogot, B. A. and William Ochieng' (eds.) 1995. *Decolonization and independence in Kenya 1940-1993*. Nairobi: East African Education Publishers.

This thus forms the backdrop with which the next chapter is viewed. The next chapter will look into the demands of the marginalised as concerns the formation of the 2010 Constitution. A chance through which marginalised communities would have their voices heard.

CHAPTER THREE: ASSESSING THE PRE CONSTITUTIONAL DEMANDS OF THE MARGINALISED COMMUNITIES

3.0 Introduction

Chapter two of this thesis had the function of setting a contextual basis for this study. It looked into the historical causes of marginalisation and went on to analyze the extent of marginalisation within the colonial and the post-colonial era. The chapter concluded that the main causes of marginalisation was the unequal distribution of resources closely associated with populist politics, and a wave of westernization linked to colonization and the post-colonial mode of government.

The process of constitutional reform in Kenya¹ did not come easy,² it had its own set of challenges with proponents for³ and others against the possibility of a new constitution.⁴ The process was set to be transformative in nature and usher in a new era. One of the processes prior to the drafting of the constitution was the process of public participation. This had a function of entrenching the sovereign right of the people in impacting the laws around them, as was held in the *Timothy Njoya Case*.⁵ The marginalised communities then included themselves in the process of public participation. Section 5 of the Review Act (Cap 3A) and section 6 of the Review Act (No. 9 of 2008) ensured that the constitution making process would be as consultative as possible.⁶ It is through this process that the marginalised communities would voice their concerns.

¹Juma D, 'Pre-commitment in Contemporary Constitution Making: South African and Kenyan Case Studies', 17 *New England Journal of International & Comparative Law* (2012).

²Ghai Y and McAuslan J, *Public Law and Political Change in Kenya*, Oxford University Press, 1970. Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya Since Independence', 71 *African Affairs journal*, (1972).

³Maxon R, 'Constitution- Making in Contemporary Kenya: Lessons from the Twentieth Century', 1 *Kenya Studies Review*, (2009).

⁴Ghai y, Address to the National Constitutional Conference, Plenary Report (May 6, 2003).

⁵*Timothy Njoya & Others v CKRC and the National Constitutional Conference*, High Court Misc. Application No. 82 of 2004 (Apr. 4, 2011)

⁶The leading case on the meaning of consultation is *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities* (1986) 1 All ER 164; 'The essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice all these coupled with sufficient information and time supplied and given by the consulting to the consulted party to enable it to tender helpful advice.....

This chapter answers one question; what were the demands of the marginalised communities? Before answering this question, it begins by demonstrating the importance of these rights to the marginalised communities in a bid to explain the intention behind their request. These major areas as set out in this chapter are land and resource rights, culture and language rights, legal recognition and identity and equality and non- discrimination. These factors as set out in chapter one were the major identifying factors of marginalised communities and viewed from another angle, are also the main effects of marginalisation. To implement these changes the marginalised communities also supported a change in the system of governance and a change in the electoral system. This chapter thus argues that it is these factors that were put forth for change prior to the Constitution of Kenya 2010 (2010 Constitution) formation. The chapter then concludes by demonstrating that the above main areas for concern were not taken seriously in practice and in law prior to the formation of the 2010 Constitution and thus formed the basis for the necessity of change. The need for this change was then demonstrated through the constitutional review process.

The subsequent chapter will compare these demands to the 2010 Constitutional provisions and will go on further to look at the implementation capacity and the institutions set forth to make these rights a reality for marginalised communities.

3.1 Land and resource rights

Land in relation to marginalised communities is not only a means of economic empowerment.⁷ Access to land and resources was at the core of anti-colonial wars waged in a number of countries.⁸ It is directly linked to the community in a special way. It is linked to their identity and culture as a whole.⁹ The traditional lands of these indigenous peoples provide the

⁷Blocher J 'Building on custom: Land tenure policy and economic development in Ghana' 9 *Yale Human Rights and Development Law Journal* (2006),169; see also Maragia B 'The indigenous sustainability paradox and the quest for sustainability in post-colonial societies: is indigenous knowledge all that is needed?' 18 *Georgetown International Environmental Law Review* (2006),205.

⁸ Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, Government Printer, Nairobi, 2004, 1(Ndung'u Report).

⁹Asiema J and Situma FDP, 'Indigenous peoples and the environment: The case of the pastoral Maasai of Kenya' 5 *Colorado Journal of International Environmental Law and Policy* (1994), 150; Hitchcock R and Vinding D 'Indigenous peoples' rights in Southern Africa: An introduction' in Hitchcock R and Vinding D (eds) *Indigenous peoples rights in Southern Africa*, International Work Group for Indigenous Affairs,2004, 11.

means for their livelihood, economic sustenance, as well as their religious and cultural life.¹⁰ Indeed, most of these indigenous peoples are almost entirely dependent on the lands they occupy.¹¹ Their lifestyles and way of life are best sustained by the particular lands they inhabit, unlike most other communities who would thrive on any productive lands that they elect to occupy.¹² As such, their land and natural resources epitomize their unique culture and collective nature, and are usually their only way of survival.¹³ Prior to the constitutional review process, land titling was not communal; the focus was individual titling as prescribed during the colonial process.¹⁴

This system of land ownership did not favour such communities. They did not own individual titles. Their low literacy levels and low education levels did not allow them to advocate for such rights. The recognition of this disadvantage led to advocacy for communal land ownership.

The constitutional review process

The tides of change were first documented within the Commission of Inquiry into Post- Election Violence (Waki) Report, demonstrating the need for correcting historical land injustices.¹⁵ According to the Constitution of Kenya Review Commission (CKRC), the need for reform in the areas of land and resource rights having key regard to the historical injustices was necessary. This, as argued by marginalised communities, could be mitigated through the inclusion of community land in order to equip the marginalised communities with the necessary capacity to use and enhance their way of living.¹⁶ The same was held for other resources such as intellectual property rights as well as human resource development.¹⁷ The CKRC also recommended that a criteria should be provided for the allocation of resources to marginalised areas.

However, this paper notes that, a change in the land ownership would not be an easy task as a delicate balance between the righting of historical wrongs and the risk of harming successive title

¹⁰ Wanjala SC, 'Land ownership and use in Kenya: Past present and future' in SC Wanjala (ed) *Essays on land law: The reform debate in Kenya*, University of Nairobi Press, 2000, 27-29.

¹¹ Kymlicka W, *The rights of minority cultures*, Oxford University Press, 1995, 43.

¹² Glazier J, *Land and the uses of tradition among the Mbeere of Kenya*, University Press of America, 1985, 202.

¹³ Williams RA 'Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples' survival in the world' 39 *Duke Law Journal* (1990).

¹⁴ Lenaola I, Hadley H and Wichert T 'Land tenure in pastoral lands' in Juma C and Ojwang JB (ed) *In land we trust, environment, private property and constitutional change*, Initiative Publishers, 1996, 238. See also; *Mabo v Queensland* (No 2) (1992) 175 CLR 1(Australia), the court held that the concept of terra nullius was discriminatory and thus unacceptable.

¹⁵ Waki Commission of Inquiry into Post-Election Violence final report, 15 Oct 2008, 67.

¹⁶ The Final Report on The Constitution of Kenya Review Commission 2005. Pages 278-288.

¹⁷ The Final Report on The Constitution of Kenya Review Commission 2005. 290, 305.

holders was of concern.¹⁸ This however should not deter the process of righting wrongs to the extent possible.

3.2 Culture and language rights

In Kenya marginalised groups attain a strong attachment to their culture and language, possessing a strong requirement to pass it on to future generations.¹⁹ However, these cultures and traditions have been misunderstood and subjected to negative stereotyping by dominant groups. Given that dominant groups, due to their numerical strength, have occupied the majority of leadership positions in the State, the dominant cultures are promoted and regarded as more 'civilized'.²⁰ The argument raised that the maintenance of culture and language rights prevents people from acquiring the necessary skills and knowledge for effective participation in the mainstream economy, was debunked by The United Nations Educational, Scientific and Cultural Organisations (hereinafter UNESCO),²¹ providing that culture and language rights were important to allow for cultural diversity. This sparked an aggravation to allow for culture and language rights as beneficial not only for marginalised communities but to the nation as a whole.²² This situation was evident among the hunter-gatherer communities of Kenya, such as the Ogiek, who traditionally inhabit forests and rely on hunting, gathering wild fruits and bee-

¹⁸ Country Review Report of the Republic of Kenya, African Peer Review mechanism, May 2006 (Kenya APRM Report) 47-62. See for example, *Kemai and 9 others v AG and 3 others* Civil case No 238 of 1999 in eKLR (E&I); see also Centre for Minority Rights Development (CEMIRIDE) on behalf of the *Endorois Community v Kenya* (Communication 276/2003), (Endorois case); see also Report of the Commission of Inquiry into the illegal/irregular Allocation of Public Land, 1-22 (2004)

¹⁹ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, R Stavenhagen, Mission to Kenya, A/HRC/4/32/Add3 26 February 2007 (Stavenhagen Kenya Mission Report) para 21 citing the 1989 national census which omits the Ogiek, El Molo, Watta, Munyayaya, Yakuu and other smaller ethnic groups from the list of 42 tribes of Kenya.

²⁰ Report of the Round Table Meeting of Experts on Minorities and Indigenous Peoples in Kenya, Kenya National Commission on Human Rights and Centre for Minority Rights Development, Nairobi, 30-31 October 2006, 4 (Report of the Round Table Meeting Nairobi)

²¹ UNESCO (United Nations Educational, Scientific and Cultural Organization). (2009). *Investing in cultural diversity and intercultural dialogue*. UNESCO World report 2. Paris: UNESCO; UNESCO (United Nations Educational, Scientific and Cultural Organization). (2010a). *The central role of education in the Millennium Development Goals: MDG summit high-level roundtable, September 22, 2010, United Nations, New York*. Paris: UNESCO; UNESCO (United Nations Educational, Scientific and Cultural Organization). (2010b). *The power of culture for development*. Paris: UNESCO; UNESCO (United Nations Educational, Scientific and Cultural Organization). (2001). *UNESCO Universal declaration on cultural diversity: Adopted by the 31st session of the general conference of UNESCO in Paris, November 2, 2001*.

²² Sutherland, W. J. 'Parallel extinction risk and global distribution of languages and species' 423 *Nature* (20003) 276-279.

keeping for their survival. However, due to severe land alienation and the reduction of their traditional territories, some have resorted to small-scale farming.²³ Consequently, their cultures and traditions are rapidly becoming extinct.²⁴ This necessitated the consolidation of these rights, made possible through public participation.

The constitutional Review process

The main areas as articulated by the people of Kenya as concerns culture included:

1. On the diversity of the Kenyan people: that the state should encourage peace and co-existence among the people, taking care to recognize and view the differences as strengths rather than weaknesses.
2. As concerns languages: that the constitution should protect and recognize the multiplicity of languages in order to avoid the extinction of some languages at risk.
3. On compensation and restitution: that all the people of Kenya should have a right to organize, maintain, practice and manifest their culture identity and heritage.²⁵

3.3 Legal recognition

The acknowledgement of the specific marginalised communities as outlined in chapter one has first been an issue of contention. Some of these communities have been subsumed into the larger communities through an unofficial policy of assimilation and integration.²⁶ These include smaller pastoralist and hunter gatherer communities such as the Ogiek, El Molo, Watta, Munyayaya, Yakuu and such others who are excluded from official statistics.²⁷

²³ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa Adopted by the African Commission on Human and Peoples' Rights (African Commission) at its 28th Ordinary Session, ACHPR & IWGIA (2005) 89.

²⁴ Kimaiyo JT, *'Ogiek Land Cases and Historical Injustices 1902-2004'* 1, *Ogiek Welfare Council*, (2004) 45.

²⁵ The final Report of the Constitution of Kenya Review Commission 2005. 97, 106.

²⁶ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa Adopted by the African Commission on Human and Peoples' Rights (African Commission) at its 28th Ordinary Session, ACHPR & IWGIA (2005) 100; Report of the Round Table Meeting of Experts on Minorities and Indigenous Peoples in Kenya, Kenya National Commission on Human Rights and Centre for Minority Rights Development, Nairobi, 30-31 October 2006, 4 (Report of the Round Table Meeting Nairobi).

²⁷ Kenya General Election 27 December 2007, The Report of the Commonwealth Observer Group, Commonwealth Secretariat (2007) 28; Although there could be more than 42 ethnic communities in Kenya, officially the State claims that there are about 42 ethnic communities see Kenya's initial State Report to the ACHPR pursuant to its obligations under art 62 of the African Charter on Human and Peoples' Rights (African Charter) considered during the 41st Ordinary Session of the ACHPR in Accra, Ghana, in May 2007, para 5; see the Report of the Special

The subsequent lack of access to resources due to lack of legal recognition prompted a need for inclusion and expansion of the traditional tribes in Kenya during the 2010 constitution review process. This move aimed at stopping the injustice caused by a lack of legal recognition and thus remembering the forgotten few.

The Constitutional Review process

The CKRC in its recommendations provided for the recognition of the marginalised groups as well as their representation in all arms of government. The CKRC also went further to recommend that disadvantaged groups, to which marginalised communities form part of, should have constitutional provisions to promote the interests of these groups.

3.4 Equality and non-discrimination

Discrimination and unequal treatment takes the form of lack of access or insufficient access to basic socio-economic rights, and a poor infrastructure in their places of habitat. This is a direct result of their perceived reluctance to assimilate and adopt modernity.²⁸ Further, due to their relatively inferior numbers as compared to dominant communities, they are not, to a large extent, in a position to be equitably represented in political structures of the state, such as parliament, the executive and judiciary, save for where affirmative action measures are taken up as a means to ensure some form of equitable distribution of resources. This is what was sought in the constitutional review process. This would even out a play-ground once heavily skewed against them.

The Constitution Review Process

The marginalised communities as right-full citizens of the country should have equal rights. However due to historical injustices, affirmative action was one of the key proposed areas. This would aid in righting the wrongs and possibly averting conflict within the country.²⁹ To fully

Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, R Stavenhagen, Mission to Kenya, A/HRC/4/32/Add3 26 February 2007(Stavenhagen Kenya Mission Report) para 21 citing the 1989 national census which omits the Ogiek, El Molo, Watta, Munyayaya, Yakuu and other smaller ethnic groups from the list of 42 tribes of Kenya.

²⁸ Kenya General Election 27 December 2007, The Report of the Commonwealth Observer Group, Commonwealth Secretariat(2007).

²⁹ HRW 'Ballots to bullets, organised political violence and Kenyan crisis of governance' 20 1A *Human Rights Watch* (2008) 12-14;

utilize affirmative action, the marginalised communities sought to gain access to the following resources: access to water, education, security and food.³⁰

3.5 Electoral system

The need for changes in the electoral system is based on the history of populist politics as seen in chapter two. The inferior numbers of marginalised communities thus necessitated a need for change in the Electoral system.

The Constitution Review process

According to the Constitution Review Report the marginalised communities proposed a representative system of election so as to cater for their inferior numbers.³¹ A mixed member proportional system was also proposed within the CKRC report in order to increase the probability of electoral representation.

3.6 Change in the system of government

The centralized system of government coupled with the populist system of politics ensured that the resource distribution was not in favour of the marginalised communities. The inferior numbers of the marginalised communities often meant that they held little political power. Political power as demonstrated in the previous chapter was often proportional to the resources available. The system of governance had to change for them to attain their rights in equal measure with the rest of the country.

The Constitution Review process

The people's delegates at the National Constitutional Conference (Bomas) debated the CKRC draft. The consensus provided for three levels of government: Regional District and Locational. The Proposed New Constitution, (PNC or popularly known as the Wako draft) also provided for two levels of government namely the national and district. This proposed change in the mode of governance was fiercely backed by the marginalised communities as they hoped to gain from a governance system closer to the people. The aim of this system was to increase self-governance

³⁰ The Final Report of the Constitution of Kenya Review Commission 2005. 106.

³¹ Preliminary Report of the Committee of Experts on Constitutional Review 2009, 35.

and efficiency of resource distribution.³² This would prove useful for the marginalised communities, granting better chances of attaining their rights.

3.7 Conclusion

This chapter answered the question: what were the demands of marginalised communities? To understand what informed these requests this chapter also looked at the historical underpinnings that faced these communities resulting in their marginalisation. The main causes of concern by the marginalised communities were land and resource rights, culture and language rights, legal recognition and identity as well as equality and non-discrimination. To attain these rights, the marginalised communities used a pragmatic approach, recognizing that the system of government as it was would not suit them. A central system of government would only, as history proved, continue a political structure dependent on numbers. Numbers that these marginalised communities quite often did not have, hence the change in system of government, an option for a devolved government, was supported. Similarly to further improve their odds, these communities also opted for a change in the electoral system to make up for their inferior numbers and increase the probability of electoral representation.

This chapter argues that the identifiers of marginalised communities were also the cause of marginalisation, the causes which were inherent within the system of government. Thus to change their circumstances they had to change the system and begin anew.

The key areas outlined above would aid in reversing the process of marginalisation. Access to land would go a long way in maintaining the livelihood of these communities. This would also allow for diversity within the economic structures of the country.

An inclusion of culture and language rights would go a long way in ensuring that their way of life would not go extinct. This would also promote diversity within the country as a whole.

Legal recognition and identity would also equalize these communities, granting them identity as opposed to forcing them to identify with another tribe. This would be the first step in eliminating inequality and discrimination.

The change in governance structure and electoral laws would provide a base through which marginalised communities would have the platform through which they may attain other rights, civic and social, cultural and economic rights.

³² The Preliminary Report of the Committee of Experts on Constitutional Review 2009, 53.

The next chapter compares the constitutional provisions to the rights set out above and analyses the extent to which it conforms to the expectations of the marginalised communities.

CHAPTER FOUR: THE 2010 CONSTITUTION AND THE RIGHTS OF MARGINALISED COMMUNITIES

4.1 Introduction

Chapter three provided an analysis of the key demands of marginalised communities. These key demands can be summed up into the following: culture and language rights, legal recognition and identity, land and resource rights and equality and non-discrimination. This chapter seeks to appraise the Constitution of Kenya 2010 (hereinafter 2010 Constitution) with the backdrop of the preceding chapter, narrowing its focus to the key areas of concern raised and the implementation mechanisms intended to make them a reality.

The main question to be answered in this chapter is whether the devolved government as part of the 2010 Constitution is capable of adequately implementing the demands of marginalised communities as set out in chapter three. The change in governance structure through the devolved system of government marked a new era intended to solve the issues of marginalization¹ as power would now trickle down to the grass-root level.² However to answer the hypothesis provided above this chapter is divided into two sections.

The first section provides a short introduction into the working of the devolved government. It sets out the standing of devolution within the constitution in order to understand the weight placed on the devolved government in relation to other articles of the 2010 Constitution. It then provides a short introduction to the county executive, the county assembly as well as the inter-governmental structures between the national and county governments.

The second section of this chapter answers the hypothesis above. It provides direct links between the marginalised communities and the county executive, assembly, the senate, the national government as well as the intergovernmental structures. This section looks at implementation capacities provided by these institutions and goes further to analyse the extent to which the

¹ *John Kabui Mwai & 3 others V Kenya National Examinations Council & 2 others* [2011] eKLR, see also: Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney & another [2011]eKLR; see also; Communication 241/2001, *Purohit and Moore v Gambia*, sixteenth Annual Activity Report of the African Commission on Human and Peoples Rights (annex VII) para 61

² Besley T. and Burges R. The political economy of government Responsiveness: Theory and Evidence, 117 *quarterly Law Journal* (2001)1415-1451.

demands of marginalised communities as set out in chapter three have been catered for within the devolved government.

The chapter then concludes by proving that the 2010 Constitution, though takes a step in the right direction in the provision of rights of marginalised communities, the implementation of these rights through the devolved structure falls short of the demands of the marginalised communities. This, as argued below, is simply due to a shortage of express provisions prioritizing marginalised communities as well as the overlap of functions between national and county governments that were not adequately addressed by the inter-governmental structures.

4.2 Devolution and the constitution

Devolution as pointed out in article 174 of the 2010 Constitution is one of the remarkable changes that constitute the 2010 Constitution. Broadly speaking the objects of devolution can be summarized in the following manner: those promoting and advancing democracy and accountability³; development and service delivery⁴; equity and inclusiveness; and those limiting centralization.⁵ Its centrality to the 2010 Constitution is noted in that: it is part of the sovereign power of the people, it is considered part of the basic structure of the 2010 Constitution and that it is part of the national values and principles.

It is part of the exercise of the Sovereign power of the people as per article 1(4) and 1(3) of the 2010 Constitution. It is observed that article 1(4) of the 2010 Constitution recognized two levels of government: the county and the national government.⁶ By doing so devolution was elevated, thus becoming an essential organizational feature of the governance system.⁷

³ *Robert N Gakuru and other v The Governor of Kiambu County and others* [2014] eKLR. This case also relied heavily on the case *Doctors for life international v Speaker of the National Assembly and others* (2006) BCLR 1399

⁴ Steytler N, De Visser J and Williams R, 'Unfunded Mandates; Directing Subnational Governments' Community Law Centre, University of Western Cape 2011 www.foev-speyer.de/veranstaltungen/IACFS (Accessed: 17th September 2013). See also *Joseph and other v City of Johannesburg and others* 2010 (3) BCLR 212 (CC), *Mkontwana v Nelson Mandela Metropolitan Municipality and another* 2005 (2) BCLR 150 (CC)

⁵ Bosire CM *Devolution for Development, Conflict Resolution and limiting Central Power: An Analysis of the Constitution of Kenya 2010* (unpublished Phd Thesis, University of Western Cape, 2013). See also Baldi B *Beyond the Federal- unitary dichotomy* Working paper, Institute of Governmental Studies, University of California, Berkeley (1999)

⁶ *Institute of Social Accountability and Another v The National Assembly and others* [2015] eKLR para 122.

⁷ *Commission for the Implementation of the Constitution v Parliament of Kenya and another* [2013] eKLR.

It is part of the national values and principles of governance. Article 10 (2) of the 2010 Constitution provides for 'sharing and devolution of power'. The presence in this form allows one to institute a claim in court coupled with other constitutional provisions.⁸ Similarly where other provisions of the law are inadequate, the value propositions can be relied upon to attack their constitutionality.⁹

It is part of the basic structure of the 2010 Constitution. This would thus mean that even a parliamentary amendment could not make so much changes as to affect the basic structure of the 2010 Constitution.¹⁰ This import was noted in *Speaker of the Senate, Mutunga CJ noted that Devolution was instrumental in mobilizing support for the constitution in the referendum.*¹¹

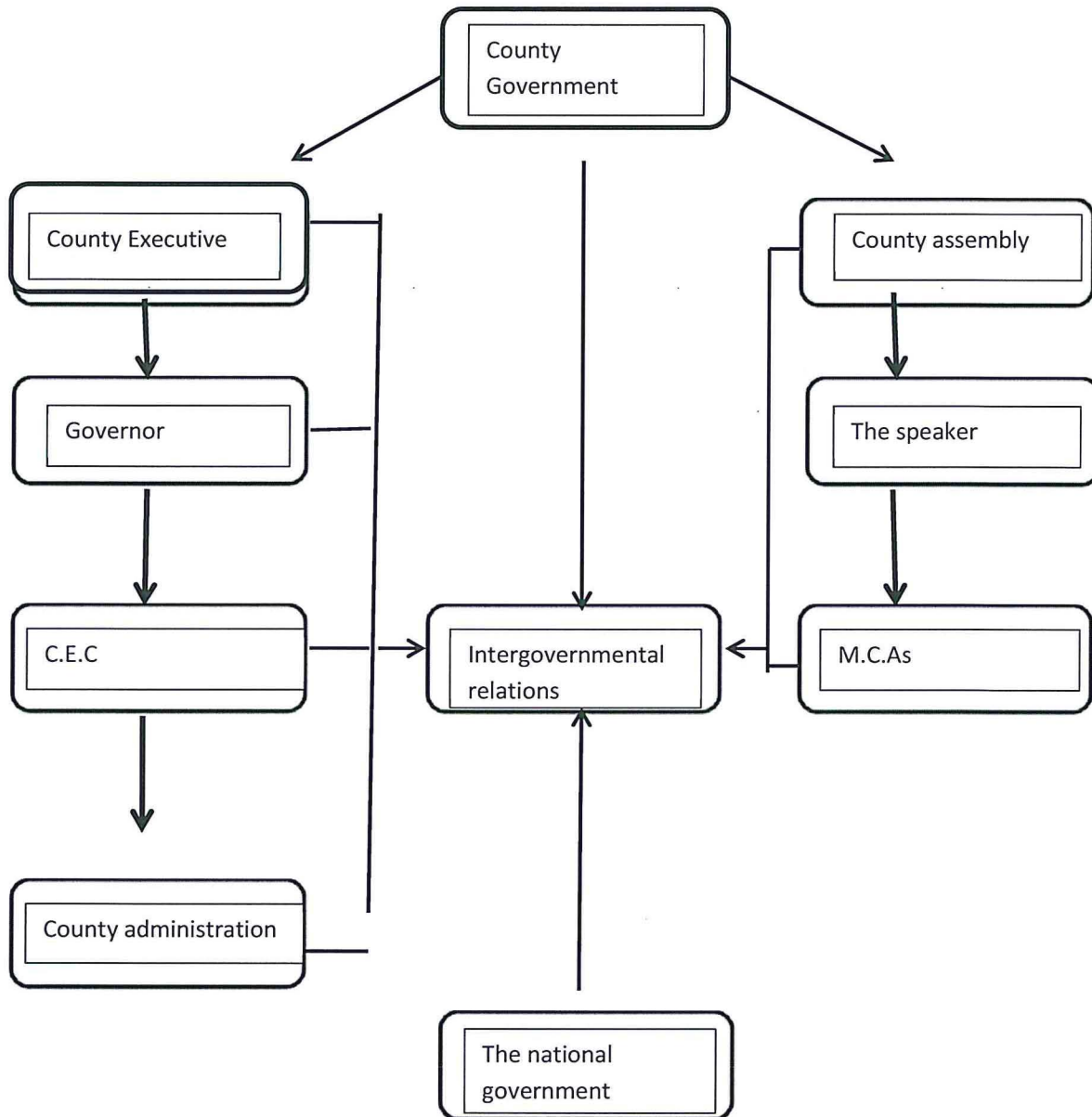
⁸ *Britannia Beach Estate (pty)ltd and other v Saldanha Municipality* 2003 (11) BCLR 1217. See also *Home affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others* 2004 (5) BCLR 445.

⁹ *Institute for Democracy in South Africa and others v African National Congress and others [2005] 5 SA 39 (WC) (IDASA) para 31-34.*

¹⁰ *Rev Timothy M Njoya and others v Attorney Genral and others* [2004] KLR 261.

¹¹ *Speaker of the Senate para 173.*

4.3 Key areas of Focus in the Devolved Government



4.3.1 The County Assembly

The main intention of this section is to provide a short introduction the County Assembly paying close attention to the most relevant sectors key to this study. The section looks at the composition of the County Assembly and narrows down to its provisions for marginalised groups.

4.3.1.2 Composition and election of the county assembly

In terms of article 177 (1) of the 2010 Constitution, the county assembly comprises four broad categories of members to represent a variety of interests in a county. These are: members elected in wards; members of marginalised groups; special seat members to ensure gender balance and the speaker. The functions of which include: legislative functions and powers¹², oversight functions and powers over the county executive,¹³ all which entail performance of these functions in a participatory manner¹⁴. This chapter will however focus on the provisions related to marginalised groups.

4.3.1.3 Provisions for members of marginalised groups

This is provided for in article 177 (1) (c) of the 2010 Constitution as backed by the case of *Commissioner for the Implementation of the Constitution v Attorney General and others*¹⁵, where the court held that the historical marginalization these groups which include: members of marginalised communities, youth and persons with disabilities required restitution.

The interpretation of the priority given to this article is founded in the case *Ben Njoroge and another v Independent Electoral Boundaries commission (IEBC) and others*¹⁶, the court held that

¹² Task Force on Devolved Government (2011) 73.

¹³ *Judicial Service Commission v Speaker of the National Assembly and 8 others* [2014] e KLR. See also : *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1998 (12) BCLR 1458.

¹⁴ *Robert N Gakuru and others v The governor of Kiambu county and others* [2014] e KLR. See also *Francis Chachu Ganya and 4 others v Attorney General and another* [2013] e KLR and *Matatiele Municipality and others v President of the Republic of South Africa and others* 2007 (1) BCLR 47

¹⁵ *Commissioner for the Implementation of the Constitution and other v Attorney General and other* [2013] e KLR.

¹⁶ *Ben Njoroge and another v Independent Electoral Boundaries Commission and others*[2013] e KLR 17

IEBC, as concerns persons living with disabilities, is bound by the priority in the party lists and cannot change that priority on grounds of diversity of disability.

By the use of the term including, this means that ‘marginalised groups’ is not limited to the communities, the youth and disabled persons. Further no express provision prioritizes any of the groups. This interpretation is reinforced by article 197 (2) (a) requiring parliament to enact legislation ensuring that cultural diversity is reflected within the county assembly and executive. Through the County Governments Act, parliament provided for six person seats representing marginalised groups.¹⁷ The nomination of which is done through section 36 of the Elections Act.¹⁸ This study notes that although the County Government Act provides for six seats, the Election Act mandates only four seats.

4.3.2 The County executive

This section provides a short introduction to the County executive and highlights the sections most relevant to the study in this chapter. The main areas of focus are the office of the governor, the County Executive members and the larger county administration.

4.3.2.1 The Governor

One set of the governors functions falls in the arena of appointment of persons to various positions and offices as well as their dismissal from such offices. He/ she appoints members of the county executive in line with the 2010 Constitutional requirements.¹⁹ According to article 183, the governor is the head of the County Executive Committee and implements county legislation, national legislation related to the county and manages and coordinates the functions of the county administration and its departments.²⁰

4.3.2.2 Executive members

The responsibilities of the county executive committees are outlined in articles 183, 185 and 187 of the 2010 Constitution. The executive develops plans and policies for the management and

¹⁷ Section 7, The County Governments Act , Act No 17 of 2012.

¹⁸ Section 36, Election Act

¹⁹ Article 179 (2) (b) of the 2010 Constitution and 30 (2) (d) of the County Government Act.

²⁰ Article 183 91) (c) of the 2010 Constitution.

exploitation of the county resources and for the development of the county infrastructure and institutions, which have to be submitted to the county assembly for approval.

4.3.2.3 The County Administration

Article 235 provides for the right of county governments to have their own public services. The main functions of the county administration is to carry out the executive functions in a more decentralized manner.²¹

4.3.3 Intergovernmental relations

The relationship between the county government and the national government may be described as distinct²² yet interdependent²³ and cooperative²⁴. This section looks at the application of the relationship as vertical and horizontal as well as the obligations between the two levels of government in a bid to understand whether the intergovernmental relationships would cater for any overlaps.

4.3.3.1 The obligation to consult

Article 6 (2) of the 2010 Constitution requires the mutual relations of the government to be based on consultation and cooperation. Article 189 (1) (b) also requires the government to consult. In financial matters the requirement on consultation is founded in article 220 (2) (c). This obliges both levels of government to invite the other to present views²⁵, having afforded reasonable time for the presentation of these views²⁶ which must be considered in good faith²⁷.

²¹ *John mining Temoi v Governor of Bungoma County and others* [2014] e KLR.

²² Article 6(2) of the Constitution of Kenya 2010. See also *premier of Western Cape v President of the republic of South Africa* 1999 (4) BCLR 382.

²³ *In the matter of the Interim Independent Electoral Commission* [2011] e KLR, 40. See also; *Speaker of the Senate and another v Attorney General and others* [2013] e KLR ; *International Legal Consultancy Group v The Senate and Another* [2014] e KLR , 67.

²⁴ Task Force on Devolved Government (2011) 157.

²⁵ *Robertson and Another v City of Cape Town* 2004 (9) 950 (c) 108.

²⁶ *Hayes and another v Minister of Housing, Planning and Administration, Western Cape and other* 1999 (4) SA 1229.

²⁷ For example Article 218 (2) (c) requires that the Division of Revenue Bill and the Allocation of Revenue Bill must be introduced in Parliament together with a summary of any significant deviation from the recommendations of the Commission on Revenue Allocation, and an explanation for each of such deviations.

4.3.3.2 The application of inter-governmental relations

Vertical intergovernmental relationships relates to the relationship between the national and county governments. The Intergovernmental Relations Act was thus enabled to provide for institutions through which such relations would be conducted.²⁸Section 7 of this Act establishes a National and County Government Coordinating Summit. Section 13 provides for the establishment of sectoral working groups and committees which bring together officials in ministries at the national and county levels. This however is a consultative body and cannot make decisions that are binding.

Horizontal intergovernmental relationship envisages cooperation between county governments. Article 217 (2) (c) of the 2010 Constitution envisages that county governments can form an organization of county governments through which they can be consulted by the Senate when determining the five year formula for sharing revenue among counties. In the same spirit, section 19 of the Intergovernmental Relations Act provides for the council of governors.

4.4 The 2010 Constitution and marginalised communities.

This section answers the hypothesis as provided for in the introduction. Whether the devolved structure adequately provides for the marginalised communities? This section starts by looking generally at devolution and marginalised communities. This is aimed at setting the tone for the subsequent sections. It then goes on to compare the county assembly and executive to the demands of the marginalised communities as well as the implementation mechanisms.*

4.4.1 Devolution and marginalised communities

Devolution is characterized by the division of powers and functions between the national and the county governments as well as the allocation of financial resources to the counties.²⁹ Additionally, one of the functions of devolution was to protect the interests of marginalised communities and grant the powers of self-governance to the people.³⁰ This is based on the assumption that devolution through county governments would lead to the protection of marginalised communities.³¹ Devolution is generally associated with democratic governance,

²⁸ Intergovernmental Relations Act 2 of 2012.

²⁹ Oloo A, 'Elections representations and the new Constitution,' *7 Society for International Development* (2011)3.

³⁰ Article 174 (e), the Constitution of Kenya 2010

³¹ Joy L, *Decentralisation and Human rights: a systematic Approach* (2003) 10.

nation building, public participation, equalization and development³². The assumption being that devolution will enable citizens to influence policies and hence the governance system outcome in order to elevate their status.³³ It is believed that devolved governments being closer to the people would ensure service delivery and the attainment of their rights.³⁴ However, research provides that without stringent oversight or expresses protective provisions in law, devolution could become a mechanism through which local elites gain power and manipulate the masses.³⁵

4.4.2 The County Assembly and marginalised communities

Through representation in the county assembly, either through election or nominations, the preferences of marginalised communities could be catered for.³⁶ The electoral system however would thus need to be inclusive rather than simply representative.³⁷ Article 90 of the 2010 Constitution provides for a First Past the Post (FPTP) electoral system. The candidate with the most votes win. This thus disadvantages marginalised communities usually characterized by a lower number of voters. Most marginalised communities are also geographically concentrated, this however was not considered in the delimitation of county wards. This was noted in the report released in 2012 February³⁸. This greatly reduces the probability of members of marginalised communities from gaining meaningful representation in the assemblies. To add onto this, neither the 2010 Constitution nor the County Government Act have provided for mandatory representation of marginalised communities in the assemblies, rather an inclusive approach is preferred, forcing competition within marginalised groups including women, youth, persons with disabilities and members of marginalised communities. The 2010 Constitution recognizes the need for special seats in the assembly³⁹. However these shall be allocated to political parties based on their performance in the FPTP system. This thus means that the dominant political parties would take the most seats and allocate them for, women, persons with disabilities and minorities. Having no guarantee for members of marginalised communities.

³² Ghai Y, 'Devolution: Restructuring the Kenyan State ' 2 *Journal of East African Studies* (2008) 211.

³³ Ghai Y, 'Devolution: Restructuring the Kenyan State ' 2 *Journal of East African Studies* (2008) 211.

³⁴ Tiebout C, 'A pure theory of local expenditures' 64 *Journal of political economy* (1956) 6.

³⁵ Bayart JF, *The State in Africa: the politics of the Belly* (1993) 10.

³⁶ Chege M, *The case of Electoral system in Kenya* (2007) 18.

³⁷ Varennes F, *Towards Effective Political Participation and representation of minorities* (1998) 7

³⁸ IEBC Report, revised preliminary report on the proposed boundaries of constituencies and Wards, (2012)

³⁹ Article 177 (1), the constitution of Kenya 2010, see also: section 7(3) of the County Government Act.

4.4.3 The County Executive and the marginalised communities

This is the executive arm of the county government for which the governor is the chief executive⁴⁰. The FPTP system still applies thus disadvantaging the marginalised communities in a bid to attain the gubernatorial seat⁴¹. With regard to the county executive committees, the 2010 Constitution is silent as to the inclusion of marginalised communities, however section 36 of the County Government Act requires the governor to make appointments reflecting the composition of the respective county. This is complemented by the supervisory powers granted to the county assembly under section 35 (2) of the County Government Act. It is however argued that this may not always be full-proof especially where the majority members of the county assembly are from the same party as the governor⁴².

4.4.4 County Public Service and marginalised communities

Section 59 of the County Government Act provides for the county public service whose function is to appoint office holders within the county government. This function is guided by section 65 of the same Act as well as article 232 (1) (g) of the 2010 Constitution that requires hiring upon merit. The same section of the County Government Act also provides that no more than thirty percent should be from the dominant community. This seems to attempt to set out a balance. However, marginalised communities, usually characterized by their low literacy levels as pointed out in chapter one, are less likely to qualify for these positions. This paper concedes that the high level of technical skill required would in most cases outweigh the need for inclusivity. A matter that can however be addressed in the future by ensuring access to education in a manner likely to include and enhance the marginalised communities. This can be done through a decisive effort to ensure that these communities are incorporated.

4.4.5 County Decentralized Units and marginalised communities

Decentralization of power and resources to the sub county and ward level would most likely favour marginalised communities. The 2010 Constitution recognizes this⁴³ and grants such function to the county governments at its discretion. This however leaves the county government

⁴⁰ Article 179 (4), the Constitution of Kenya 2010.

⁴¹ Article 180 of the constitution of Kenya 2010.

⁴² Task force Report on Devolved Government ' implementation of devolved government in Kenya (2011) 70.

⁴³ Article 176(2) of the constitution of Kenya 2010.

to decide that which is efficient and practicable, providing no guarantee that the rights of marginalised communities will not be suspended in favour of the dominant communities. This is also provided in section 48 of the County Government Act where the county government can decentralize and appoint administrators in order to ensure efficient service and resource delivery⁴⁴.

4.4.6 The County Government and the implementation of constitutional human rights concerns of the marginalised communities

The specific intent of this section is to analyze the capacity of the county government structures to implement the specific human rights concerns of the marginalised communities as outlined in chapter three as well as the 2010 Constitution.

4.4.6.1 Right to education

This is catered for in article 43 of the 2010 Constitution⁴⁵ with the provision of primary education being the responsibility of the national government⁴⁶. The county government however plays a small role in this sector, having been tasked with the provision of pre-primary education, village polytechnics and child care centers. This is outlined in the fourth schedule. The Right to education however being a progressive right proves challenging for the marginalised communities due to the difference in allocation of resources in the colonial and post-colonial era.

4.4.6.2 Culture and language rights

As noted in Chapter one, marginalised communities have a special attachment to their culture and language. The 2010 Constitution responds to this in article 7 where the promotion and protection of the diverse languages is encouraged. The state is also to promote the development and use of indigenous languages. Article 11 recognizes culture as a fundamental aspect within the nation. Similarly, article 44 allows for cultural and linguistic rights, further allowing association formation on that basis.

⁴⁴ Abraham KA, Kenya at 50: Unrealised rights of minorities and indigenous peoples' 7 *Minority rights Group International* (2012) 18.

⁴⁵ Article 43 (1) (f) of the Constitution of Kenya 2010.

⁴⁶ Item 16 of part one of the fourth schedule of the Constitution of Kenya 2010.

The fourth schedule clearly tasks the national government with the task of promoting language whereas cultural activities are placed within the ambit of the county government. Given that culture is mainly transmitted through language, the overlap in functions could result in a disadvantage to the marginalised communities⁴⁷. A joint committee, whose decisions would be binding, would thus be beneficial in ensuring that this overlap is eliminated.

4.4.6.3 Land and resource rights

According to marginalised communities land is a symbol of development as well as culture⁴⁸. The 2010 constitution recognizes this and allows for community land held for the purpose of protecting the interests of the communities. This may include marginalised communities⁴⁹. County governments however do not have the mandate to investigate historical injustices and thus provide redress on the same. This function has been granted to the National land commission⁵⁰. This thus ties the hands of the county government as to correct past injustices, it must then be capable of investigating them. A joint committee would thus be useful to redress this issue.

4.4.6.4 Socio- Economic rights

Christopher Mbazira rightly noted that, 'civil and political rights are thought to be absolute and immediate whereas economic social and cultural rights are thought to be programmatic, to be realized gradually and are therefore not real rights'.⁵¹ However Ankumah sets the record straight arguing that socio-economic rights are real and justiciable rights that need progressive realization taking into account the needs of the state.⁵² This is provided for in articles 43 and 44 of the 2010 Constitution. County Governments are then tasked with public health services and sanitation. The requirement of progressive realization of these rights would then mean that marginalised communities, without specific affirmative legislation, would lag behind other communities in the

⁴⁷ Ghai Y & J Cotrell, *Kenyas constitution an instrument for Change* (2011) 80.

⁴⁸ Dersso S, The socio-historical and political processes leading to the emergence and development of norms on minorities in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 70.

⁴⁹ Articles 61 and 63 of the constitution of Kenya 2010.

⁵⁰ Article 67 (2) (e) of the Constitution of Kenya 2010.

⁵¹ See Mbazira C 'A path to Realising economic , social and cultural rights in Africa? A critique off the new partnership for Africas Development' (2004) 4 *African Human rights Law Journal* 36. See also A Eide 'Economic Social and Cultural rights as Human rights' in E Eide, C Krausse & A Rossas (eds) *Economic Social and Cultural rights: A text book* (2010) 10; Arambulo K, 'Strengthening the supervision of the International Covenant on Economic, social and cultural rights (1999) 58.

⁵² Ankumah E, *The African commission on Human and Peoples' rights* (1996) 119.

attainment of these rights. This is due to the historical injustices where resources that would ideally be directed to them were not. This creates an uneven playing field that would require affirmative action to even out.

4.4.7 National institutions and the rights of marginalised communities

This sector is aimed at taking a closer look at the senate as well as the Commission on Revenue Allocation in their role of implementing the rights of marginalised communities.

4.4.8 The Senate

The composition of the senate as per article 98 only allows for the creation of special seats⁵³ in favour of women⁵⁴, youth and persons with disabilities.⁵⁵ This leaves no room for marginalised communities. Further the FPTP electoral system only serves to reduce the possibility of representation in the senate and participation in the key resource allocation role played by this institution.

4.4.9 The Commission on Revenue Allocation

It is established by article 215 and tasked with the responsibility of the development of a formula for revenue sharing between the county and national government. The 2010 Constitution goes further in articles 202 and 203 providing that the revenue shall be shared equitably among counties with a set criteria provided on determination of the equitable shares. The historical injustices and the disparities facing different areas is also placed into consideration in article 204, hence the development of an equalization fund in order to right those wrongs. The independence of the commission gives credence to its recommendations. However, a 2012 World Bank report raised concerns that although marginalised counties may receive more in comparison to their counterparts, the challenge remains the proper management and utilization in order to uplift the marginalised communities.⁵⁶

⁵³ *Commissioner for the Implementation of the Constitution V Attorney- General and others* [2013] e KLR

⁵⁴ *Lydia Mathia v Naisula Lesuda and another* [2013] e KLR.

⁵⁵ *Ben Njoroge and another v Independent Electoral Boundaries Commission (IEBC) and others* [2013] e KLR.

⁵⁶ World Bank Report, 'Devolution without Disruption: pathway to a successful new system' (2012) 81.

4.5 The intergovernmental relationship and marginalised communities

The county and national governments are required to conduct their functions in a manner that is consultative. This obligation is ideally used to ensure that any overlap is catered for. As concerns the needs of marginalised communities, these functions are somewhat divided between the national and county governments. The full development of these rights requiring a joint or consultative approach. This is provided for within the 2010 Constitution. However the decisions of these committees are not binding. This thus leaves marginalised communities in the same positions as before.

4.6 Conclusion

Although devolution has the capacity to address the problems of marginalisation, where devolution has taken place, problems of marginalisation have not necessarily reduced. This is because the devolved units do not necessarily conform to natural community groupings, and even if it was possible to do this, problems would still abound because certain members of the newly created unit will be dominant while others will be or will feel dominated. Thus, devolution in itself is not a complete solution to the problem of marginalisation. For devolution to resolve minority as well as marginalisation problems, it has to be accompanied by proper institutional design to ensure that proper conditions for coexistence and the participation for all is maintained. To design these proper institutions, one must understand and bear in mind the problems that devolution was meant to resolve and enshrine these institutions in law.

In 2006, Karuti Kanyinga⁵⁷ recommended the reform of the electoral system to replace the current FPTP one, which motivates individuals to mobilize along ethnic lines. To him, this can be replaced by a proportional representation system with a single national constituency. This, Kanyinga argues, would produce more stable governance institutions because the leaders would not be tied to any geographical unit, but to their political parties or their institutions.

Secondly, in deciding how county funds are to be used, how county administrators would be recruited and how county executive members are to be appointed, there is need to set aside some quota for the marginalised communities within the county.

⁵⁷ Kanyinga, K. "Governance Institutions and Inequality in Kenya" in SID (ed.) 2006. *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives*, Nairobi: SID

Thirdly as concerns the overlap of functions between the county and national governments, this chapter notes that to ensure the complete actualization of the rights of marginalised communities, the decisions of the joint committees formed should be binding. This for instance is noted in the instance of culture and language rights where the County Government plays a pivotal role in the promotion of culture but may be slightly handicapped in the promotion of language, a national function. The same can be said for the social and economic rights.

The subsequent chapter aims at the provision of Conclusions based on a comparative analysis of the current and previous chapters.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

It is clear that the problem of marginalization can be traced back to the colonial and post-colonial period. A period marked by inequitable resource allocation, westernization and populist politics. This led to the following effects: (a) historical land injustices resulting in a violation of land and resource rights, (b) a violation of culture and language rights on the road to westernization, (c) lack of legal recognition and identity as the minority marginalised communities were subsumed into the other groups in order to secure their positions in the populist political structure and (d) heavy discrimination as tribes were pitted against each other in efforts to clinch the top most political seat and gain the resources needed.

The pre constitutional era marked a new opportunity for the voiceless to attain their voices, the allowance for public participation and the development of various reports opened up a new avenue through which the marginalised communities could raise their issues and have it resolved for themselves and future generations. This process led to the referendum resulting in the promulgation of the 2010 Constitution.

The major proponents of the 2010 Constitution with regard to the marginalised communities offer two main theories as to the competence of the constitution in providing for the rights of these communities: (a) article 2(6) of the 2010 Constitution opens up the country to the international standards with regard to protection of marginalised communities, this thus serves to broaden the scope of the rights that are in essence guaranteed, (b) the concept of a devolved government was developed so as to ensure that the national cake is turned into the county cake. This would in essence increase the probability of the marginalised communities to attain their rights in totality.

The latter being the main focus of this study is brought to close scrutiny and a conclusion is founded. Though the 2010 Constitution has taken immense steps toward the improvement of the rights of the marginalised communities through the devolved government and the extensive bill of rights. The task is not yet complete. There are still areas through which the argument for absolute competence of the 2010 Constitution falls short. This is because of the difference in functions between the national and county government. The land question adequately sums up

this problem. The National Land Commission being tasked with the inquiry into historical land injustices while the County government tasked with the function of trust as concerns community lands. Without an inter-governmental team the achievement of this right would be a difficult task. Finally without express recognition of marginalised communities devolved government could lead to further marginalization within the devolved structures with the dominant groups taking precedence.

5.2 Restating the problem

The problem that impelled this study is that when viewed on face value the 2010 Constitution would seem to be the solution to an injustice as old as the country itself. However, a closer inspection in an attempt to appraise the 2010 Constitution reveals a possible paradox and portrays possible loopholes within the solution.

The paradox being that though the 2010 Constitution through the devolved government aimed to mitigate the violations of the rights of the marginalised communities, the devolved structure opened up new possibilities for the creation of further marginalization. The solution thus propagated the very same problem. The loopholes in the solutions come about due to issues such as implementation and failure to clarify the rightful bodies to carry out constitutionally mandated functions.

5.3 Findings

Challenged by the above problem, this paper set out to investigate one principal question: whether the pre constitutional demands of the marginalised communities were catered for within the 2010 Constitution. This was preceded by the hypothesis that the 2010 Constitution did not fully cater for the rights of the marginalised communities. Before answering the above question this study first provided answers to the following more specific questions (i) what were the historical causes of marginalization? (ii) what were the pre constitutional demands of the marginalised communities? (iii) how has the 2010 Constitution catered for the rights of the marginalised communities?

5.3.1 Historical causes of marginalization

The historical causes of marginalization can be traced back to the colonial and post-colonial era, with the successive regimes marked by inequitable resource allocation, populist politics and westernization. This led to some regions being more developed than others in terms of education as well as infrastructure.

5.3.2 Pre Constitutional demands of marginalised communities.

The main demands of the marginalised communities can be summed up into ; land and resource rights, culture and language rights, equality and non-discrimination as well as legal recognition and identity. Further to ensure these rights the marginalised communities also requested for a change in the governance system as well as a change in the electoral system.

5.3.3 The 2010 Constitution and the rights of marginalised communities

As found by this study, the rights of the marginalised communities have not been sufficiently catered for within the 2010 Constitution as well as the mandated implementation mechanisms and related institutions. The four major issues discussed in this study restated are:

1 Land rights

The 2010 Constitution recognizes community land and places it in the hands of the county governments to hold in trust for the community as a whole. This study admits to this being an important step in the process of recognition and uplifting the marginalised communities. However, the county government is not mandated to investigate historical injustices. This is a task for the National Land commission. A national body. This creates an issue for concern by the marginalised communities. They cannot claim redress or compensation from the county government.

2 Culture and language rights

The 2010 Constitution recognizes the importance of both culture and language within the nation. Culture being a mandate of the county government while language that of the national government. Yet the two are intertwined and inter dependent. To achieve the full realization of their rights, a harmonization must be achieved.

3 Socio-economic rights

The progressive nature of the 2010 Constitution allows for the recognition of socio economic rights. The need to access resources. This however is a national function. Socio-economic rights such as housing, sanitation, socio security and education are a national function. However due to the progressive nature of these rights, they may not be achieved at one go. For that reason the attainment of socio-economic rights for the marginalised groups remains fragile at best.

4 Public participation

With regard to public participation the institutions and mechanisms put in place are inadequate to address this issue. To begin with the First Past the Post (hereinafter FPTP) electoral system highly disadvantages marginalised communities. The special seats allocated are also awarded to the dominant parties and provide no guarantee that marginalised communities shall be catered for.

Generally, public participation does not end upon representation in the county assembly, it is further fostered and strengthened by representation in the county executive, county public service and all other relevant areas of decision making and resource allocation. This is a long term goal for all relevant county governments in order to enhance inclusivity and grant marginalised communities a voice.

5.4 Conclusion

To conclude, this chapter confirms the hypothesis that the 2010 Constitution, does not adequately provide for the rights of the marginalised communities. As a progressive document, the 2010 Constitution has provided for social, economic, cultural and civic rights. In addition to which the 2010 Constitution advocates against discrimination and pushed for affirmative action all of which could be argued to favour marginalised communities.

The implementation mechanisms within the 2010 Constitution thus brings about the challenges facing the marginalised communities. The main implementation mechanisms through devolution as carried out by the county government, the national government and select independent institutions, fail in sufficiently providing for the rights initially advocated for; culture and language rights, legal recognition and identity, land and resource rights as well as equality and non-discrimination. The marginalised communities though in a better position than they were historically have not been sufficiently afforded the rights sought out.

5.5 Recommendations

An analysis of the provisions of the 2010 Constitution as well as the implementation mechanisms provided show a lapse and in some cases an overlap of functions. Among these findings is the multiplicity and division of functions among the relevant institutions. This thus creates difficulty in operationalizing these rights. Further, the lack of express mention in favour of marginalised groups ensures a lack of sufficient affirmative action as regards this group. The resolution of these findings would thus require the implementation of the following recommendations as a necessary means of alleviating this problem.

- i. Land and resource rights: a joint commission comprising of members from the National land Commission as well as the county government should be set up in order to address the overlap into the investigation of historical land injustices thus charting a suitable plan of action into the management of the community lands as concern the marginalised communities.
- ii. Culture and language rights: this study recommends a joint committee for culture and language. Creating a one stop shop solution. In the absence of a joint committee this chapter alternatively proposes that county governments handle the issue of promotion of culture with an inclusive approach to language as well.
- iii. Access to resources : this study recommends an increase at the very least in financial resources by the County Revenue Allocation commission to the counties where most marginalised communities hail from. This will go a long way into the provision of these socio-economic rights. At the same time, as concerns decentralisation and thus the availability of resources, the prioritization of marginalised communities should be expressly taken into account by law.
- iv. Public participation: - to this extent, this study proposes a merger of electoral systems. A balance between FPTP and Proportional Representation (PR) system based on party lists targeting this group. This however would require a constitutional amendment.

- This study also proposes a review by the IEBC as concerns the county ward boundaries taking into consideration the concentration of the marginalised communities so as to increase probability of electoral representation.
- In cases where the marginalised are not directly elected, this study proposes an amendment to section 7 of the County Government Act in order to ensure availability of special seats for them.
- In the same way, public participation can also be improved by increased access to information. This can be fostered through the county decentralized units. This would thus strengthen their capacity to participate fully.

5.6 Recommendations for further Research

Due to the limited nature of this study it was not possible to delve into other areas of study that emerged in the course of research. For example future researchers could explore the relationship between marginalised communities and minority groups, further looking into the 2010 Constitutional allocation of resources to these groups. This question may find basis in international law provisions favouring minority rights as well as the constitutional provisions providing for the same minorities. It would thus be interesting to explore the balance between these competing and arguably equal rights between two similar but different groups.

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