J Osogo Ambani & Caroline Kioko (eds)

Decentralisation and inclusion in Kenya

From pre-colonial times to the first decade of devolution

CHAPTER 2

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

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'whoever controls the process of identification wields power to even determine existence.'[1]

Introduction

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

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

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

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

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

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

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

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

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

> Parliament shall enact legislation to promote the representation in Parliament of
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> a.   women;
> b.   persons with disabilities;
> c.   youth;
> d.   ethnic and other minorities, and
> e.   marginalised communities.[4]

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

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

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

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

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

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

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

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

The finesse of late colonialism

Late colonialism brought a wealth of experience to its African pursuit.[6]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Contextualising the upheaval of the colonial arrival

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Another example of 'normal ebbs and flows' is that of localised climatic disasters. The Kamba dominated the long-distance trade into the hinterland until the 1880s when they lost this dominance to Arab and Swahili traders.[23] Johann Krapf is recorded to suggest that the famine of 1836 triggered the late pre-colonial Kamba's prowess in long-distance trade.[24] As we have opined above, this long-distance trade

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

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

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

presented the opportunity that exploitative colonialism sought. Henry Mwanzi adds to this point.

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

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

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

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

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25   Mkenda, 'Building national unity in sub-Saharan Africa', Chapter II, 15-6.
26   Mamdani, *Citizen and subject*, 21.

The illegitimate contradiction of the colonial encounter, 1897-1963

As stated above, our starting point is the recognition that the imposition of the colonial power structure was not benign, did not find a blank sheet but *necessarily* had to displace the *existing occupants of social order*, and not simply the social order itself. Of those displaced, women, youth, PWDs, ethnic and religious minorities, and other marginalised communities fair the worst.

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

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

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

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

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

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

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

The displacement intent and violent nature of the initial colonial encounter may also explain the genesis, if not persistence, of another critical burden contemporary Africa bears: the normalisation of grand theft and plunder of state and public resources. Mazrui locates the problem of corruption and moralised plunder of public resources in the alien-ness of the colonial state. His description is categorical:

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

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

Explaining the tenacity of unjust power structures

Kenya's history is replete with successful repulsions of structural reform toward redressing exclusion and marginalisation. Such success cannot be understood by mere acceptance of exclusionary effects

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

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

without interrogating the structural genesis and perpetuation of the exclusionary and marginalising tendencies of the Kenyan State. In this brief section, we shall attempt to understand why such injustice has been so successful at resisting change.

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

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

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

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

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

of colonially constructed privileges – in classist, patriarchal,[35] ageist, religious or other dominations – results in the false belief that the prosperity of the unjust privileged will engender altruistic donations of developmental impetus to marginalised areas and sectors. Such views have been promoted and attempted before and only serve to perpetuate exclusion and marginalisation.

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

The other possibility is to explain the tenacity of structural injustice as mere administrative continuities. Such an approach suggests that thwarting reform efforts is not a proactive, deliberate process of securing privileged interests but the result of the sheer momentum of bureaucratic habit in the Kenyan State. However, a few occasions point

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35   As Tabitha Kanogo puts it, "By following the effects of the all-pervasive ideological shifts that colonialism produced in the lives of women, the study investigates diverse ways in which a woman's personhood was enhanced, diminished, placed in ambiguous predicaments by the consequences, intended and unintended, of colonial rule as administered by both the colonizers and the colonized" Tabitha Kanogo, *African womanhood in colonial Kenya, 1900-1950,* Ohio University Press, Athens/James Currey, Oxford/EAEP, Nairobi, 2005; See also, Brett L Shadle, 'Book review: *African womanhood in colonial Kenya, 1900-1950* by Tabitha Kanogo' 39(2) *The International Journal of African Historical Studies* (2006) 336-338.

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

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

to a differing explanation. The co-optation of reform forces throughout Kenya's history is testimony to deliberate efforts to ensure reform does not occur. We propose two illustrations; the Kenya African Democratic Union (KADU) started as a pro-devolution, pro-marginalised political party, but its stalwarts ended up as core components of Kenya's post-independence imperial presidency.[38] The other is the Maendeleo ya Wanawake Organisation (MYWO), whose paternalistic and nepotistic but philanthropic roots allowed it to be weaponised to mute women's resistance to patriarchal political exclusion in single-party Kenya.[39]

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

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

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

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

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

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

41   At the validation workshop for the fieldwork for this research, the stark differences in developmental work between Kakamega and Garissa counties, including even in the nomination and election of persons from the Article 100 list of marginalised groups, was argued as evidence of the personal agency and decisive progress

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

Mamdani warns against 'a paralysis of perspective'.[42] It is important not to downplay the concern that a focus on coloniality may obscure our sense of contemporary agency, not just to take responsibility for the injustices that persist in our society six decades after the purported end of the colony, but also our agency in forging a transformational present.[43] What should be of concern in any analysis of the construction and structure of power is 'how power is organised and how it tends to

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that a forward thinking leader can have. In this regard, Kakamega County and Governor Wycliffe Oparanya was clearly the model to be emulated. The transformative leadership of Prof Justice Willy Mutunga of the Kenyan Judiciary is another such example. Our nuanced contention here is that while examples of exemplary leadership cannot be gainsaid, their existence is insufficient to explain the phenomenon of tenacious reform clawback Kenya repeatedly witnesses, for instance, in the fight against grand corruption in the first presidential term of Mwai Kibaki. See Michela Wrong, *It's our turn to eat: The story of a Kenyan whistle-blower,* Harper Perennial, 2010.

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

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

fragment resistance in contemporary Africa', a 'dialectic of state reform and popular resistance' that is 'forged through the colonial experience'.[44]

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

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

The native question

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

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44   Mamdani, *Citizen and subject*, 3.

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

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

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

48   Mamdani, *Citizen and subject*, 3.

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

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

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

This lead to the colonialists abandoning their civilising mission and adopting a method whose chief aim was maintaining order.[51] Such order was created by further dividing the targeted societies along lines that strengthen them and instead uniting them along lines that encourage societal fissures. As a result, various native minorities were *created*[52] under disparate native elites, who would later form the basis

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

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

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

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

of post-colonial leadership, and with it, the ethnic strife and political instability that characterises much of the African post-colony.

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

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

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

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

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

54   For a description of forced sedentarisation or 'manyattazation' policy of the Shifta War 'gaf Daba' of 1963-8, all in the name of urgent post-colonial 'maendeleo', development, see Sean Bloch, 'Stasis and slums: The changing temporal, spatial, and gendered meaning of 'home' in Northeastern Kenya' 58(3) *Journal of African History*, (2017) 403-23. See also, Humphrey Sipalla, 'A human rights consistent apartheid: Constitutional design of the African state, indigenous peoples' self-determination and the 'other native' question' in Humphrey Sipalla, J Osogo Ambani (eds) *Furthering constitutions, birthing peace: Liber amicorum Yash Pal Ghai*, Strathmore University Press, Nairobi, 2021, 261.

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

It should not be surprising that custom came to be the language of force, masking the uncustomary power of Native Authorities.[56]

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

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

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

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56   Mamdani, *Citizen and subject*, 22.

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

Fictive traditions and ideologies and Africa's diminished worldview[58]

The exclusion and marginalisation of African women and youth

'In some western literature, for example, African culture is presented or misrepresented as being at odds with human rights values.'[59] Nkiru Nzegwu reminds us that the current perceptions of African culture are warped misrepresentations of western thought and,

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

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

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

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

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

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

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

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60   Nzegwu, *Family matters,* 48.

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

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

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

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

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

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

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65   Kamunyu, 'An "African" approach to gender responsiveness' 49.

66   Kamunyu, 'An "African" approach to gender responsiveness' 49.

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

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

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

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

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

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

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

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

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

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

73   Kamunyu, 'An "African" approach to gender responsiveness', 54.

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

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

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

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

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

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

also then serves to reaffirm that along with the fluidity of culture and our agency as Africans, the contrived 'despotism'[77] of our cultures is properly within our agency to reform, if not revolutionise.

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

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

The exclusion and marginalisation of African PWDs

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

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

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

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

79   Masakhwe, 'Disability discrimination,' 15.

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

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

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

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

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

81   Mamdani, *Citizen and subject,* 128.

82   Mamdani, *Citizen and subject,* 154.

83   Mamdani, *Citizen and subject,* 154.

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

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

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

The colonial policy created the

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

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

[I]n Kenya, although there have been national censuses every ten or so years, no major disability-targeted census has been carried out. There is

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85   Mkenda, 'Building national unity in sub-Saharan Africa', Chapter III, 31-2.
86   Masakhwe, 'Disability discrimination: A personal reflection', 60.
87   Masakhwe, 'Disability discrimination: A personal reflection', 60. [emphasis added]

no clear data indicating the exact number of persons with disabilities, their age, type of disability and geographical distribution.[88]

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

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

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

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

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

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

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

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

Containerisation and the invention of negative ethnicity and politics

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

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

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

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

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

our politics. 'Like the other *isms*, nationalism is as much an ideology of exclusion as it is of inclusion.'[94]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

98   Mamdani, *Citizen and subject.*

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

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

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

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

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

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

such evisceration of culture was done 'all in the name of 'maendeleo', development.[101]

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

'Grievance politics' and the 'other native' question[103]

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

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

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

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

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

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

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

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

105   Yash Pal Ghai, 'Rights, duties, responsibilities' in J Caughelin, P Lim, B Mayer-Konig (eds) *Asian values: Encounter with diversity*, Curzon Press, London, 1998, 169.

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

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

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

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

Some conceptual clarifications

Homogenising mission of the colonial state

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

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

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

109   Mamdani, *Citizen and subject*, 8.

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

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

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

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

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

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

113   Ghai, 'Ethnicity and autonomy', 2.

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

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

Bastardisation of political participation in civil society

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

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

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

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

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

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

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

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

party representing the vast constituency of about 4 million people. This was the Kenya African Union (KAU).[120]

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

The colony in the post colony

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

> [I]n a scheme published in 1949 known by its revealing title, *The Kenya Plan,* the Electors Union [the main political outfit of the white settlers] rejected African majority rule of any other form of quantitative democracy … The Electors Union demanded increased settlement by Europeans, the creation

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

of a new British dominion, autonomy in the non-native areas and the greatest possible executive control by the European community.[121]

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

By the late 1950s, it was the settlers who now championed, through the minority African communities, a radical decentralisation of the soon-to-be independent Kenya. But the allure of the central State and its overwhelming control of the societies it governed was certainly the

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

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

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

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

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

strong preference of most African communities. Here, the 'other native question' discussed above begins to present itself.

> The formation of [the Kenya National Democratic Union, KADU] doubtlessly stemmed from a distrust of KANU leadership, fears of domination by larger ethnic groups, pressure from constituencies, but it also represented the ongoing political jockeying for power. Whether KADU would be the counterweight to a party [KANU] with the program of creating a one-party state remained a question for the future…[126]

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

President Kenyatta's rule 'was a continuation of the colonial regime with Kenyatta as the new African governor and the Kikuyu as the new white elite'.[128] President Kenyatta's actions betrayed the spirit of the struggle against colonialism and the process of nation-building.[129] Away

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

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

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

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

from the swift overhaul of the decentralised Independence Constitution and related statutes, arguably the most consequential was his sudden stamping out of the national debate on the development path of the new nation, as we will discuss below.

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

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

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

Development planning and exclusion

This study contends that centralisation of development planning has irrevocable multiplier effects on exclusion and marginalisation. Centralised development planning had persisted in Kenya from

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130   Masakhwe, 'Disability discrimination: A personal reflection' 64.
131   Masakhwe, 'Disability discrimination: A personal reflection' 65.

the colonial period. This is consistent with the understanding that colonialism was an extractive enterprise. In the context of our present attempt to unpack the construction of power in Kenya and how such construction reproduces exclusion, the political posture of the post-colonial Kenyan State is of particular interest. Why, if independence was at least a reformatory, if not a revolutionary moment, did the Kenyan State largely maintain a centralised approach to development planning and implementation?[132]

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

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

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

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

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

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

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

While this highly centralised 'vertically integrated development administration and planning machinery'[138] was inherited at independence, Sessional Paper No 10 of 1965 sought to make some important changes, as we shall see below.

It is important to note that development planning for inclusion and demarginalisation requires the stability of politics. The District Focus on

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134   Mbandi and Mwenda, 'Influence of project implementation strategies by religious organizations on rural development,' 6, also citing, Dennis Rondinelli, 'Implementing decentralizing policies in Asia: A comparative analysis,' 3 *Public Administration and Development,* (1983) 181-207. [emphasis added]

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

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

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

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

Rural Development (District Focus) inaugurated the district as the locus of planning, implementation and management of rural development. This study contends that this policy contributed immensely to laying down the rudiments of success for the devolution established by the 2010 Constitution. What is noteworthy here is that it was only after President Moi had 'established a loyal civil service' that he set out to 'introduce the politics of decentralisation' in the form of District Focus.[139]

Sessional Paper No 10 of 1965 and exclusionary continuities

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

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

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

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

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

At its promulgation, while the use of the term African socialism was en vogue, a systematic declaration of its contours and public policy implications had not been attempted by any African government.[141] Its first contribution, therefore, was being the first to attempt such a systematic description in formal government policy. It lays down the policy objectives of Kenya's vision of African socialism, its priorities and development targets. It is also categorical of Kenya's 'positive non-alignment', seeking neither 'western capitalism nor eastern communism'.[142]

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

> Planning is a comprehensive exercise designed to find the best way in which the nation's limited resources – land, skilled manpower, capital and foreign exchange – can be used. […]
>
> Planning cannot be done effectively unless every important activity is accounted for and every important decision-maker involved. […]
>
> Planning will be extended to provinces, districts and municipalities, so as to ensure that in each administrative unit progress towards development is made.[143]

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

Barack Obama (Snr) is unconvinced by the Sessional Paper's focus on planning, a largely technocratic economic task, and its 'divorce from the politico-socio-cultural context', which ought not to be ignored.[145] In particular, on the core question of land tenure and management, Obama

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

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

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

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

145 Obama, 'Problems facing our socialism', 27.

is unconvinced by the Policy to prefer individual title over communal ownership.[146] He also questions whether Kenya can maintain free enterprise while ignoring the ongoing class formation and its attendant problems.

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

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

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

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146   Obama, 'Problems facing our socialism,' 28.
147   Obama, 'Problems facing our socialism,' 29.
148   Obama, 'Problems facing our socialism,' 32.

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

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

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

District Focus for Rural Development

District Focus was initiated by the Government in July 1983.[150] Coming after the upheaval of the August 1982 coup, this programme's timing indicates confidence in President Moi's Government over the consolidation of State power. More so, because District Focus can be seen as a proactive attempt to redress some of the extreme inequalities of the development choices of Sessional Paper No 10 of 1965, its initiation

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149   'Statement by the President' *Sessional Paper no 10 of 1965*. [emphasis added]
150   Rutten, 'The District Focus Policy for Rural Development in Kenya,' 154, 157.

can be seen as a subtle attempt to decentralise development policy, itself a spill over of the majimboist KADU ideals that President Moi once held.[151]

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

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

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

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

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

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

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

development and the official implementers, it is no surprise that these District Plans received a damning assessment.

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

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

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

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

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

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

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

adjustment in the early 1980s.[159] These events led to the following
paragraph in the 1982 Report of the Working Party on Government
Expenditures, which in turn became the foundational philosophy of
District Focus:

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

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

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

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

In this context, District Focus was a welcome change. It brought along a number of important advances. First, unofficials, both politicians and civil society representatives were incorporated into the DDC.[161] While District Focus did not expand resources for development, and neither was the funding of district activities relocated from the operating ministry, Authorities to Incur Expenditures (AIEs) was transferred at the beginning of the financial year to the district. This was done to unblock implementation bottlenecks. It also seems to have been a more prudent management practice compared to the *ad hoc* arrangement from Nairobi, through provincial authorities that was the norm prior to District Focus.[162] Another effect of such far-reaching changes was that District Treasuries were strengthened, with more competent staff and better coordination of Departmental Heads who were the AIEs. Such elements, we contend, were inadvertent preparation for the sudden overnight transition to the devolved government after the 2012 General Elections.

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

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161   The DDC was now composed of: District Commissioner; District Development Officer; Departmental Heads of all ministries represented in the district; Members of Parliament; District KANU executive officer (at the time Kenya was a one-party state); Chairmen of local authorities; Chairmen of the Divisional Development Committees (DvDC); Representatives of development-related parastatals; invited representatives of non-governmental organisations (NGOs) and self-help groups. Rutten, 'The District Focus Policy for Rural Development in Kenya', 158.

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

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

It is noteworthy that more recent scholars bizarrely dismiss the agency[164] of the Kenyan State in the devolution of development planning and funds direction. Jones Smith and S Karuga[165] consider donor funding to have driven, not simply facilitated, rural agricultural policy. 'Donors also invested substantially in rural infrastructure, like rural roads, storage facilities, production and marketing facilities like sugar, and coffee.'[166] In this donor prominent worldview of devolution of planning and development funding in Kenya, 'increased political patronage and self-interest of the elite seriously [eroded] interest in policy advice' is the take away from the District Focus policy intervention.[167]

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

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

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

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

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

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

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

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

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

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

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

District Focus was no democratisation policy. Instead, it was archetypal of the politics of the President Moi era, where the co-optation of dominant but excluded political and societal players was undertaken to shore up political support for the ruling Government. Indeed, such

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

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

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

an approach would not redress the long-term exclusion in question here. However, it set in motion very important progress in decentralising, if not devolving, development planning, establishing trained staff and organs at the district level. Such organisational and institutional developments surely must have contributed to the take-off of devolved government in 2012. Again, we dare say that the transition into devolved government in 2013 would have been far more difficult had the normalisation of a policy of localised planning and deliberate civil servant capacity-building, the core achievements of District Focus, lacked. Indeed, we contend, and further research ought to confirm, that the counties that have recorded exceptional growth in development change and effective localised planning and governance will also correlate with the counties that had most benefitted from the core achievements of District Focus. In this sense, it may very well be that the lagging counties are those that had little or no effective implementation. Thus, the civil service and administrative continuities they inherited are what need urgent reform – and not necessarily the choice of governor. Having said that, it is patent that the District Focus structures described above would nonetheless have been unlikely to incorporate representatives or views of women, youth, PWDs, ethnic and religious minorities, and other marginalised groups.

By way of conclusion: 'Reverse late constitutionalism'?

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

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

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

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

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

Decentralisation and inclusion in Kenya

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

What emerges clearly from the expositions in the volume are the historical struggles for decentralisation and inclusion by those on the outside, and efforts to congest more powers at the centre and to exclude the others by those on the inside. However, the clamour for decentralisation and inclusion won a major battlefront when the 2010 Constitution, which entrenches devolution as one of the overarching principles, among other transformative provisions, was promulgated.

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