

J Osogo Ambani & Caroline Kioko (eds)



# Decentralisation and inclusion in Kenya

From pre-colonial times to the first decade  
of devolution



# CHAPTER 1

## Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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12 Mombasa and Nakuru.

13 Garissa, Kakamega and Narok.

14 Garissa and Narok.

15 Kakamega, Mombasa and Nakuru.

16 Narok.

17 Kakamega and Nakuru.

18 Garissa and Mombasa.

# 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.



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