

# **COUNTY GOVERNMENT AND RIGHTS OF MARGINALISED ETHNIC MINORITIES IN KENYA: EVALUATING THE POTENTIAL BENEFITS AND CHALLENGES OF DEVOLUTION**

**A dissertation submitted in partial fulfilment of the requirements of the degree LLM (Human  
Rights and Democratisation in Africa)**

**By**

**SETH MUCHUMA WEKESA**

**Student Number: 12376559**

**Prepared under the supervision of Professor Nico Steytler at the Community Law Centre,  
University of the Western Cape, South Africa.**

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## DECLARATION

I, **SETH MUCHUMA WEKESA**, Student No. **12376559** declare that the work presented in this dissertation is original. It has not been presented to any other university or institution. Where the work of other people has been used, it has been duly acknowledged.

**Signature:** .....

**Date:**.....

**Supervisor: Prof. Nico Steytler**

**Signature**.....

**Date:** .....

## DEDICATION

This work is dedicated to my beloved parents, Mary Ayeko Musee and Andrew Caleb Musee for their love beyond measure and inspiration. Love you mum and dad.

## ACKNOWLEDGEMENTS

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## ABBREVIATIONS

CGA	County Government Act.
CRA	Commission for Revenue Allocation
FPTP	First-Past-The-Post
ICJ Kenya	International Commission of Jurist, the Kenyan Chapter
IEBC	Independent Electoral and Boundaries Commission.
KANU	Kenya African National Union
NCIC	National Cohesion and Integration Commission
ODM	Orange Democratic Party
PNU	Party of National Unity
PR	Proportional Representation.
SID	Society for International Development.
TFDG	Task Force on Devolved Government
TJRC	Truth Justice and Reconciliation Commission

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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the study

Ethnicity is a key component of both politics and society because it is the easiest force around which to mobilise.<sup>1</sup> Ethnicity is a phenomenon that has lived with us since time immemorial, yet inadequate attention has been given to addressing its impact on human rights, governance and social disparities.<sup>2</sup> The assumption that ethnic minorities as citizens would effectively participate in the political process, either directly or indirectly through their elected representatives, offers a smoke screen to shield marginalisation, especially in countries such as Kenya where ethnicity is a key political factor.<sup>3</sup> Because of the difficulties of ethnic minorities to win elections due to small numbers, the decision making organs of the state are often dominated by majority ethnic groups.<sup>4</sup> Further, being an ethnic minority often translates into marginalisation at all levels of socio-economic and political arenas. Because political power is closely linked to development, areas inhabited by politically marginalised minority groups are collectively much poorer.<sup>5</sup>

The definition of minorities is problematic and complex because majorities and minorities are not born, but made according to specific institutional, political and socio-historical processes.<sup>6</sup> Similarly, what constitutes a minority is not static, but is constantly changing.<sup>7</sup> Ethnic minorities in Kenya can be approached in two ways. First, they are defined based on national demographics and second, an ethnic minority is defined using demographics within the geographical boundaries of a county.<sup>8</sup> This study focuses on the later, ethnic minorities at county level.

There is no universally accepted definition of minorities, partly because of the diverse contexts in which minorities exist globally.<sup>9</sup> In Kenya minorities have been described as religious, ethnic, racial, gender and other disparate groupings that experience disempowerment and discrimination owing to their political, economic and social positioning within Kenyan society.<sup>10</sup> According to the 2009 National Housing and Population Census Report, out of the 43 ethnic groups listed in Kenya, five communities: Kikuyu, Luhya, Kalenjin, Luo and Kamba

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<sup>1</sup> M Nassali 'Ethnic and racial minorities and movement towards political inclusion in East Africa: Cases of Kenya, Uganda and Tanzania' in H Majamba (ed) *Towards a rights-sensitive East African community: The case of ethnic and racial minorities* (2011) 1.

<sup>2</sup> Bagalaliwo's opening statement during regional workshop to discuss the concept paper on ethnic and racial minorities in East Africa, held on 30<sup>th</sup> August 2007 in Kampala, Uganda.

<sup>3</sup> Nassali (n 1 above) 4.

<sup>4</sup> G Alfredsson 'Minority rights: A summary of existing practice' in A Phillips & A Rossa (eds) *Universal minority rights* (1995) 45.

<sup>5</sup> K Kanyinga 'Governance institutions and inequality in Kenya' (2006) 5 *Society for International Development* 367.

<sup>6</sup> D Geldehuys & J Rossouw *The international protection of minority rights* (2011) 1.

<sup>7</sup> JS Solway 'Reaching the limits of universal citizenship: Minority struggles in Botswana' in B Berman, D Eyoh & W Kymkicka (eds) *Ethnicity and democracy in Africa* (2004) 137.

<sup>8</sup> S Dersso 'The socio-historical and political processes leading to the emergence and development of norms on minorities' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 43.

<sup>9</sup> MN Shaw 'The definition of minorities in international law' in Y Dinstein & M Taborj (eds) *The protection of minorities and human rights* (1992) 1.

<sup>10</sup> Task Force Report on Devolved Government 'Implementation of devolved government in Kenya' (2011) 194. This report gave recommendations on how the government should implement the constitutional provisions on devolved government.

account for over 50 per cent of the population.<sup>11</sup> The report further lists 18 other ethnic groups that have a population of less than 100,000 people. It is clear from the report that Kenya is a multi-ethnic country, where no group makes up more than one half of the total population. It then implies that all ethnic communities in Kenya are minorities.<sup>12</sup> However, some communities have been marginalised because of their small numbers and because they lack access to political power and economic resources since independence.<sup>13</sup>

One of the main challenges towards the participation of ethnic minorities in Kenya has been a lack of specific rights that protect them.<sup>14</sup> Due to this factor, it has been difficult for ethnic minorities to secure representation in decision making processes.<sup>15</sup> This has changed with the enactment of the Kenya Constitution of 2010 (the Constitution) which, through article 56, recognises the rights of minorities and marginalised groups.<sup>16</sup> In addition, the Constitution has created 47 county governments across the country, which will be the next and only level of devolved government.<sup>17</sup> Through county government, ethnic minorities in these counties may not only get an opportunity to participate in governing themselves, but also play an important role in ensuring inclusion and equitable distribution of state resources.<sup>18</sup> The core objectives of devolution include among others: to recognise the rights of communities to manage their own affairs and to further their development and to protect and promote the interests and rights of minorities and marginalised communities.<sup>19</sup>

## 1.2 Statement of the problem

The ethnic minorities in Kenya have been targets of long-standing discrimination, exclusion and sometimes violence.<sup>20</sup> Poverty within ethnic communities in Kenya has been viewed as both a cause and a manifestation of the diminished rights, opportunities and social advancement available to them.<sup>21</sup> In addition, they are poorly represented in political structures and decision-making bodies and consequently have little control over decisions that affect them.<sup>22</sup> Ethnic minorities have been neglected and discriminated against in all aspects of their lives.<sup>23</sup> They are often denied equal access to quality education and healthcare.<sup>24</sup> Their members have limited job opportunities because of their low literacy levels. When their rights are violated, recourse to institutions of justice

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<sup>11</sup> National Housing and Population Census Report (2010) 8.

<sup>12</sup> MO Makoloo 'Kenya: minorities, indigenous people and ethnic diversity' (2009) 10 *Minority Rights Group International* 8.

<sup>13</sup> As above.

<sup>14</sup> Task Force Report on Devolved Government (n 10 above) 197.

<sup>15</sup> As above.

<sup>16</sup> Y Ghai & J Cottrell *Kenya's Constitution: an instrument for change* (2011) 46-47.

<sup>17</sup> Ghai & Cottrell (n 16 above) 120.

<sup>18</sup> J Kwaka *Vetting and social audit of leaders* (2011) 236.

<sup>19</sup> Article 174 (d) & (e) Constitution.

<sup>20</sup> KA Abraham 'Kenya at 50: Unrealized rights of minorities and indigenous people' (2012) 7 *Minorities Rights Group International* 12.

<sup>21</sup> Abraham (n 20 above) 11.

<sup>22</sup> Abraham (n 20 above) 12.

<sup>23</sup> Y Ghai 'Kenya: Minorities, indigenous peoples and ethnic diversity' (2005) 29 *Minorities Rights Group International* 9.

<sup>24</sup> I Matheson 'Kenya six months on: A new beginning or business as usual?' (2009) 8 *Minorities Rights group International* 12.

is often a major challenge.<sup>25</sup> This study examines the newly created county governments under devolved government and seeks to establish their potential in creating space for political participation and protection of socio-economic rights of ethnic minorities who have suffered discrimination, exclusion and marginalisation under centralised government.

### 1.3 Research question

The move towards the protection of ethnic minorities begs the question of the relevance of the county government in addressing their concerns. Devolution seeks among others, the promotion and protection of the rights and interests of minorities and marginalised groups.<sup>26</sup> It also aspires to use devolution as a device to enhance public participation and self-governance of ethnic minority groups.<sup>27</sup> The research question that this study seeks to answer therefore is whether the constitutional provisions on a devolved system of government may enable county government to address the political and socio-economic concerns of ethnic minorities at county level. With a view to answer this question, the following questions are asked:

- Who is an ethnic minority in Kenya?
- What are the human rights concerns of ethnic minorities in Kenya?
- What are the main institutional features of a devolved system of government in Kenya?
- Can the structures, institutions, systems, functions and powers of county governments respond to the concerns of ethnic minorities?

### 1.4 Argument

The study contends that devolution through county government could provide a partial answer to the problems facing ethnic minorities in Kenya. It advances this position based on two arguments. First, the Constitution in the Fourth Schedule clearly distinguishes the functions of the county governments from those of the national government. The functions of county government are laid out in the second part of the Fourth Schedule. Looking at these functions, some of the concerns of ethnic minorities will be addressed by either national government or national institutions. Three such concerns come to mind. The right of access to education and language rights are functions of national government while the National Land Commission is mandated to protect land rights. The county government may not play any role in addressing such concerns. Second, the Constitution provides for a first-past-the-post (FPTP) electoral system for election of representatives to county assembly.<sup>28</sup> This system disadvantages ethnic minorities because of their small numbers unless they are sufficiently concentrated to constitute a dominant ethnic community.

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<sup>25</sup> Memorandum to the Committee of Experts by Minority Reforms Consortium, dated on 29 June 2009 6.

<sup>26</sup> Article 174 (e) Constitution.

<sup>27</sup> Ghai & Cottrell (n 16 above) 118.

<sup>28</sup> Article 90 (1) Constitution.

## 1.5 Literature survey

Although there is an emerging literature on devolution in Kenya, very little in the literature exists with regard to the relationship between a devolved system of government and the protection of ethnic minorities. Sungura<sup>29</sup> has discussed the various provisions of the Constitution which enable minorities and marginalised groups to access leadership positions in Kenya at both local and national levels, hence ensuring fair political representation. She argues that minority communities have been marginalised on the basis of their numerical status. She states that the new Constitution protects the rights of minorities and marginalised groups and argues for affirmative action to address the marginalisation. This study focus on whether structures, institutions, functions, powers and intergovernmental relations of county government may address the current human rights concerns of ethnic minorities.

Ohenjo<sup>30</sup> discusses the inclusion of ethnic and racial minorities in decision-making processes in Kenya. He argues that such participation strengthens and consolidates democratic participation. His work is of importance to this study because his writing touches on public participation of ethnic minorities, which is one of the issues to be examined in this study. Therefore this study builds on his work but it goes further by focussing on county government as an institution under the Constitution, an institution which has the potential to protect and promote the rights and interests of ethnic minorities in Kenya.

## 1.6 Significance of study

Only two years have passed since Kenya adopted a new Constitution. The government is in the process of implementing a devolved system of government. The county governments are expected to be operational after the 2013 general election. There is barely any academic work which comprehensively deals with the role of county government in promoting and protecting the rights and interests of ethnic minorities. This study seeks to provide an answer to the question on whether county governments can address the human rights concerns of ethnic minorities within their counties.

Moreover, discrimination and marginalisation are the key challenges faced by ethnic minorities in Kenya. These challenges are not unique to Kenyan ethnic minorities. Most ethnic minorities in almost all African countries are facing similar challenges. It is believed that important lessons can be drawn from the excellence and weakness of Kenya's devolved system of government both as an institutional arrangement for achieving democratic governance and to protect the rights of ethnic minorities.

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<sup>29</sup> B Sungura 'The rights of minority and marginalised groups in accessing leadership positions' in J Kwaka, O Okombo, & B Muluka (eds) *Challenging the rulers: a leadership model for good governance* (2011) 218.

<sup>30</sup> N Ohenjo 'Participation of minorities and indigenous peoples in political decision making in Kenya' in H Majamba (ed) *Towards a rights-sensitive East African Community: the case of ethnic and racial minorities* (2011) 156.

## 1.7 Research methodology

The study will be conducted by desktop research only. It will involve a critical analysis of provisions of the Constitution and its implementing legislation. It will also rely on all relevant literature, including journal articles, books, case law, government policy papers, newspapers, reports and other relevant materials.

## 1.8 Limitation and scope of the study

A few caveats are in order. First, as the title of this study suggests, the focus is on how county government may protect the rights and interests of marginalised ethnic minorities. Other types of minority groups such as racial, religious or linguistic minorities are not discussed in this study. This study will not discuss other marginalised groups such as women and persons with disabilities. Second, although the Constitution provides for a number of institutions through which the rights of ethnic minorities could be protected, this study has decided to focus on county government. The study makes references to other institutions including the Senate, the Commission for Revenue Allocation (CRA) and the National Lands Commission only when it is necessary to make a point relevant to the main focus of this study. As indicated earlier, the county governments will only become operational after the 2013 general election and therefore the study only analyses the Constitution and the implementing legislation to assess their adequacy before actual implementation in 2013.

## 1.9 Definitions

As certain terminologies will be frequently referred to in this study hence, it is essential to understand the perspective within which they are utilised. They include: county government, devolution and an ethnic minority.

### 1.9.1 County government

County government is an autonomous level of government created by the Constitution 2010 with clearly demarcated geographical areas over which authorities exercise full political, administrative and financial powers. The 47 counties are named in the First Schedule of the Constitution.

### 1.9.2 Devolution

Devolution refers to a transfer of political, administrative and financial powers to sub-national units with clearly demarcated geographical areas, in this case county government, for undetermined period of time through the Constitution.<sup>31</sup> The role of central government becomes limited to standard setting and monitoring once powers

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<sup>31</sup> J Manor *The political economy of democratic decentralisation* (1999) 6.

are devolved to county governments.<sup>32</sup> The county government will be accountable to the community, which has elected it.<sup>33</sup>

### 1.9.3 Ethnic minority

For purposes of this study, an ethnic minority is a group which, by reason of its numbers and political position is unable to participate in political, economic and social life in Kenya. This concept is also referred to as marginalised ethnic minorities. The concept will be discussed in greater detail in Chapter Two.

### 1.10 Overview of chapters

The study is divided into five chapters including this introductory chapter.

Chapter Two discusses the human rights and socio-economic concerns of ethnic minorities. It commences by examining the identification criteria for ethnic minorities in Kenya. Then, it explores Kenya's socio-economic and political history of ethnic minorities, with the aim of placing the history of marginalisation and exclusion into context. This is followed by a discussion of the political and socio-economic concerns of ethnic minorities.

Chapter Three discusses the structures and institutions of devolved government in Kenya. In this regard, it first examines the nature and scope of devolution in Kenya. It then explores the objectives and principles of devolution as provided for in the Constitution. It then gives an outline of the county structures, institutions and systems of the county government. Thereafter, it turns to the assignment of functions and power between the national and county governments. It also examines the relationship between county government and national government and finally looks at the role of the Senate in devolution.

Chapter Four assesses whether and how the institutional features of the devolved system of government as provided for in the Constitution and implementing legislation may assist in addressing the human rights concerns of ethnic minorities. It commences the discussion by examining the constitutional provisions in the Bill of Rights that protect the rights of ethnic minorities. This is followed by an analysis on how the human rights concerns identified in Chapter Two may be addressed by the institutions, structures, functions and powers of county government outlined in Chapter Three. In this regard, it examines adequacy or inadequacy of the provisions in the Constitution and the law as they are now in accommodating the concerns of ethnic minorities. It also examines the relevance of the Senate and the CRA in addressing the plight of ethnic minorities.

Chapter Five concludes the journey by presenting conclusions and recommendations.

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<sup>32</sup> D Rondinelli 'What is decentralisation' in J Litvack & J Seddon (eds) *Decentralisation: Briefing notes* (2006) 6.

<sup>33</sup> Manor (n 31 above) 15.

## CHAPTER TWO

### HUMAN RIGHTS CONCERNS OF ETHNIC MINORITIES IN KENYA

#### 2.1 Introduction

As earlier mentioned, ethnic minorities in Kenya have been victims of discrimination, marginalisation and exclusion.<sup>34</sup> Some have been denied legal documents such as national identification cards and passports because their nationality is questionable.<sup>35</sup> They have also lacked both financial and technical capacity to effectively engage at the various levels of decision making.<sup>36</sup> This chapter, therefore, aims to examine their human rights concerns.<sup>37</sup> This undertaking requires a clear understanding of the criteria of determining who is an ethnic minority in Kenya. To that effect, the chapter commences by examining the identification criteria of ethnic minorities in Kenya. Thereafter, attention turns to explore Kenya's socio-economic and political history of ethnic minorities with the aim of placing the history of marginalisation and exclusion into context. This is followed by an outline of the current political and social-economic problems ethnic minorities face.

#### 2.2 Identification of ethnic minorities in Kenya

There is little agreement on the definition of the terms 'ethnic group' or 'ethnic community'. Different writers from different disciplines have defined them differently.<sup>38</sup> In most cases, a group of people is considered an ethnic community if it displays cultural distinctiveness from other communities.<sup>39</sup> The elements that constitute ethnicity include language, tradition, beliefs, values, religion and history. Therefore a group of people that demonstrate cultural markers such as, language, beliefs and values, religion, or history is considered an ethnic group.<sup>40</sup>

The majority-minority distinction, be it ethnic or otherwise is mostly based on two important considerations: numerical size and political weight.<sup>41</sup> In general, a group of people which constitutes more than 50 per cent of the country's citizens is considered a majority.<sup>42</sup> The rest of the population is a considered minority groups. However, a numerically minority group might be considered a majority if it has a political dominance. The case in point is

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<sup>34</sup> Y Ghai *Political participation and minorities* (2003) 3.

<sup>35</sup> Ghai (n 23 above) 7.

<sup>36</sup> Ghai (n 23 above) 8.

<sup>37</sup> As above.

<sup>38</sup> VT Le Vine 'Conceptualizing ethnicity and ethnic conflict: A controversy revisited' (1997) 32 *Studies in Comparative International Development* 46.

<sup>39</sup> As above.

<sup>40</sup> As above.

<sup>41</sup> Although the United Nations has not adopted any single definition, the most widely accepted definition of a minority is Francesco Capotorti's definition that a minority is a group which is numerically inferior to the rest of the population of a state, in a non-dominant position, whose members, being nationals of the state possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

<sup>42</sup> S Wheatley *Democracy, minorities and international law* (2005) 19.



the status of the Afrikaner community in South Africa during apartheid.<sup>43</sup> This means that the existence of both numerical inferiority and political weakness are essential for an ethnic group to be considered a minority.<sup>44</sup>

The above still applies in a country such as Kenya, which is made up of ethnic minorities groups with no particular majority ethnic group.<sup>45</sup> In Kenya, therefore each community is considered a minority.<sup>46</sup> However, this is subject to the condition that none of the numerically smaller groups should have political dominance, nor should its values determine the values of the nation.<sup>47</sup> Five ethnic groups: Kikuyu, Luhya, Kamba, Luo and Kalenjin have dominated the Kenyan political arena.<sup>48</sup> This has led to discrimination against and marginalisation of the other communities in the country.<sup>49</sup>

However, the dynamics of power distribution can change over time and may differ in the political, economic and social spheres.<sup>50</sup> For example, numerical minorities in a dominant position might quickly become non-dominant when a regime changes and they find themselves subject to discrimination and marginalisation. For example, after the former President Daniel Moi left power in 2002, his ethnic community, the Turgen has been marginalised by the Kibaki government. Economically dominant minorities can also be politically or socially excluded.<sup>51</sup> Therefore, access to power must be assessed in a disaggregated manner to identify non-dominance and vulnerability in different spheres.<sup>52</sup>

Moreover, intra-subnational ethnic minority communities may be considered as minorities when and to the extent the sub-national government has the power to make decisions affecting such minorities.<sup>53</sup> To begin with, some members of a dominant community either nationally or in a particular county, may find themselves a minority in another county or region of the country where the minority ethnic group is dominant.<sup>54</sup> Two such examples come to mind. In Kenya, the Kikuyus living in West Pokot County where the Pokot community is the dominant ethnic group, and in Canada, the English speakers in the French speaking province of Quebec. Besides, there may be an ethnic group which is dominant neither nationally or regionally.<sup>55</sup> Such community, also referred as 'double minority', may find itself in a particular region amidst another national minority which is dominant in a particular

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<sup>43</sup> PV Ramaga 'Relativity of the minority concept' (1992) 14 *Human Rights Quarterly* 108.

<sup>44</sup> Wheatley (n 42 above) 19.

<sup>45</sup> Task Force Report on Devolved Government (n 10 above) 193.

<sup>46</sup> As above.

<sup>47</sup> As above.

<sup>48</sup> As above.

<sup>49</sup> As above.

<sup>50</sup> Minority Rights Group International *Recognizing minorities in Africa, briefing paper* (2003) 7.

<sup>51</sup> As above.

<sup>52</sup> As above.

<sup>53</sup> ZA Ayele 'Decentralisation, development and accommodation of ethnic minorities: The case of Ethiopia' unpublished PhD thesis, University of the Western Cape, (2012) 78.

<sup>54</sup> As above.

<sup>55</sup> As above.



area.<sup>56</sup> Cases in point are the Turkana living in Marsabit County in Kenya and the Cree-speakers in Quebec in Canada. These intra-regional or intra-county minorities are considered as minorities.<sup>57</sup>

Pastoralists' communities and hunters-gatherers such as the Pokot, Turkana and Maasai have identified themselves as minorities on the basis of their lifestyle. Border people such as the Somalis in Kenya claim minority status due to their questioned allegiance to national citizenship.<sup>58</sup> Yash Ghai identifies the pastoral communities, the hunters-gatherers, cross-border communities as ethnic minorities. According to Minority Rights Group International, in their report released in January 2012, ethnic minorities in Kenya include Ogiek, Elmolo, Malakpte, Sanye Waata, Terik and Yaaku and Endorois.<sup>59</sup> Other examples, according to the report, are the Nubians and the Somalis.<sup>60</sup> These two communities have been fighting for their citizenship for years. The Nubians have been fighting for citizenship recognition for decades, since settling in the country in the 1930s.<sup>61</sup>

The Constitution does not define the term 'minority'. However, Article 260 defines 'marginalised community' as: (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated socio and economic life of Kenya as a whole; (b) a traditional community that, out of need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood, based on a hunter or gatherer economy; or, (d) pastoral persons and communities, whether they are: (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole. Article 260 also defines 'marginalised group' as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in article 27(4). According to Article 27(4), the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

The above definition of marginalised community is ethnic based and one can easily pick up certain communities that would fit in the constitutional definition. The definition is based on culture or way of life of some communities in Kenya such as Maasai, Pokomo, Ogiek, Ilchamus, El Molo, Turkana, Rendile and Endorois. Some communities such as Ogiek would fit in the description of minorities, marginalised communities and marginalised group.<sup>62</sup> A group could be considered a marginalised group as well as a marginalised community while a community could be considered a marginalised community as well as a minority. It can be inferred from the

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<sup>56</sup> A Patten 'The rights of internal linguistic minorities' in A Eisenberg & J Spinner-Halev (eds) *Minorities within minorities: Equality, rights and diversity* (2004) 138.

<sup>57</sup> As above.

<sup>58</sup> Ghai (n 23 above) 4.

<sup>59</sup> Abraham (n 20 above) 6.

<sup>60</sup> Ghai (n 23 above) 10.

<sup>61</sup> As above.

<sup>62</sup> Ghai & Cottrell (n 16 above) 47.

Constitution that it is not referring to women, youth or persons with disabilities as marginalised groups. But the underlying objective of the Constitution defining them is to recognise the fact that they are marginalised and need to be assisted. This is the group of persons this study is concerned about and to what extent could devolved government provide the required assistance to these constitutionally defined entities.

## 2.3 Historical background of ethnic minorities in Kenya.

### 2.3.1 Pre-independence Kenya

In order to understand the human rights concerns of ethnic minorities in Kenya today, it is important to understand the political history of marginalisation in Kenya. The question of marginalisation and discrimination against ethnic minorities can be traced back to the colonial period.<sup>63</sup> Before the British came into Kenya, communities had their own socio-economic and political structures.<sup>64</sup> Each community had their unique ways of livelihood, which included fishing, farming, pastoralism, hunting and gathering.<sup>65</sup> When the colonial masters arrived they dismantled the traditional structures and put in place new political arrangements to serve their own interests.<sup>66</sup> One of their interests was to acquire fertile land from African communities.<sup>67</sup> They acquired the most fertile land in what was referred to as the 'white highlands', thereby developing the areas' infrastructure and social services.<sup>68</sup> Most of these areas are in Central Province, parts of Western Province and the highlands in Rift Valley Province.<sup>69</sup> The rest of the country was marginalised especially regions in the North Eastern Province where most ethnic minorities live.<sup>70</sup> The British colonial government also passed land laws that protected their land rights.<sup>71</sup> The new land laws introduced an individual land tenure system that turned once communally owned land into private property.<sup>72</sup> These colonial policies impacted negatively on Kenyan communities.<sup>73</sup> Some of the consequences were poverty, discrimination and marginalisation.<sup>74</sup>

### 2.3.2 Post-independence Kenya

Kenya became independent in 1963 on the basis of the Independent Constitution that was popularly known as the *Majimbo* Constitution.<sup>75</sup> The Constitution provided for a very elaborate scheme for the protection of minority

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<sup>63</sup> T Kibua & G Mwabu *Decentralization and devolution in Kenya: New approaches* (2008) 107.

<sup>64</sup> Y Ghai & JPWB MacAuslan *Public law and political change in Kenya* (1970) 3.

<sup>65</sup> As above.

<sup>66</sup> F Jonyo 'Ethnicity in multi-party politics', in L Chweya (ed) *Electoral politics in Kenya* (2002) 91.

<sup>67</sup> Nassali (n 1 above) 154.

<sup>68</sup> Kibua & Mwabu (n 63 above) 114.

<sup>69</sup> As above.

<sup>70</sup> Jonyo (n 66 above) 200.

<sup>71</sup> SC Wanjala 'Land ownership and use in Kenya: Past, present and future' in SC Wanjala (ed) *Essays on land law: The reform debate in Kenya* (2000) 25.

<sup>72</sup> SC Wanjala 'Essay on land law: The reform debate in Kenya' unpublished LLM thesis University of Nairobi (2004) 15.

<sup>73</sup> As above.

<sup>74</sup> Wanjala (n 72 above) 17.

<sup>75</sup> DM Muia 'Devolution of governance to districts in Kenya: A case study' in T Kibua & G Mwabu (eds) *Decentralization and devolution in Kenya: New approaches* (2008) 78.

rights.<sup>76</sup> The minorities included Europeans, Asians and indigenous small communities that were concerned about domination by larger and politically more active communities.<sup>77</sup> The *Majimbo* Constitution devolved considerable powers and functions to seven regional governments.<sup>78</sup> The regional governments were given powers to manage the affairs of communities living in their respective regions. They were supposed to address concerns of ethnic minorities at the time. However, the Kenya African National Union (KANU) government was opposed to regionalism and sabotaged the regions by refusing to release funds for operations. Consequently the devolved *Majimbo* system was never fully operationalized. Faced with these challenges, regional government failed to address the concerns of ethnic minorities.<sup>79</sup>

Another important feature in the Independent Constitution was the Bill of Rights that was aimed at protecting rights and fundamental freedoms of every Kenyan.<sup>80</sup> The Constitution prohibited discrimination on the ground of tribe or place of origin.<sup>81</sup> However, despite the provisions, 'post-independence Kenya has been characterised by ethnicity, reflecting patterns of super-dominate and subordinate ethnic relations and inequality.'<sup>82</sup> These inequalities were perpetrated by the Kenyatta government at the time by diverting resources and development programmes to his home region of central Kenya.<sup>83</sup> This excluded other regions of the county particularly semi-arid areas, which are mostly occupied by ethnic minorities from development.<sup>84</sup>

In 1978 President Daniel Moi succeeded Kenyatta as the second president of the republic.<sup>85</sup> Since he was from one of the ethnic minority tribes, members from ethnic minorities expected him to formulate policies that were more inclusive and responsive to their concerns.<sup>86</sup> But this was not to be. Instead he promoted politics of ethnicity and formulated government policies that favoured tribes that had numbers to support him politically.<sup>87</sup> This further marginalised ethnic minorities politically and economically.

In 2002 Kenyans elected President Kibaki on the promise of reforms. But nothing really changed. His economic and political policies were similar to those of previous regimes.<sup>88</sup> The changes in ethnic minority protection did

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<sup>76</sup> As above.

<sup>77</sup> A Oloo 'Devolution and democratic governance: options for Kenya' in TN Kibua & G Mwabu (eds) *Decentralisation and devolution in Kenya: New approaches* (2008) 106.

<sup>78</sup> As above.

<sup>79</sup> SK Akiraga *A democratic landmark? Character of 2002 general elections* (2003) 5.

<sup>80</sup> Oloo (n 77 above) 108.

<sup>81</sup> Section 70 Constitution 1963.

<sup>82</sup> G Mukundi 'Kenya: Constitutional, legislative and administrative provisions concerning indigenous peoples' (2009)10 *African Human Rights Journal* 78.

<sup>83</sup> BA Ogot & WR Ockienji *Decolonizing and independence in Kenya 1940-93* (1995) 10.

<sup>84</sup> Ogot & Ockienji (n 83 above) 12.

<sup>85</sup> Wanjala (n 72 above) 17.

<sup>86</sup> A Eshiwani *Tribalism and its impact on development* (1991) 34.

<sup>87</sup> C Leo 'Who benefited from the million acre scheme? Toward a class analysis of Kenya's transition to independence (1981) 15 *Canadian Journal of African Studies* 201.

<sup>88</sup> Abraham (n 20 above) 10.

not happen until after the 2007 presidential election. In 2007/2008 Kenya was gripped by weeks of post-election violence after disputed presidential election.<sup>89</sup> According to the Waki Report:<sup>90</sup>

Widespread belief that the presidency brings advantages for the President's ethnic group makes communities willing to exert violence to attain and keep power. Inequalities and economic marginalization, often viewed in ethnogeographic terms, were also very much at play in the post-election violence ...”

This saw the involvement of international community to bring peace in Kenya.<sup>91</sup> Kofi Annan, the Former UN Secretary General led a team of mediation.<sup>92</sup> The team mediated between the warring political parties, ODM and PNU. This led to the signing of a power-sharing arrangement and National Accord.<sup>93</sup> The Accord outlined four-point agenda that provided a road map for short and long term reforms to prevent future violence.<sup>94</sup> These proposed changes aimed at addressing impunity and promoting broader institutional reforms.<sup>95</sup> These included land reforms and enactment of a new Constitution.<sup>96</sup>

The four-point agenda has had remarkable impact on inter-ethnic relations in two ways.<sup>97</sup> First, the new Constitution was enacted.<sup>98</sup> It contains progressive provisions for the protection of the rights and interest of ethnic minorities including specific rights for minority and marginalised groups.<sup>99</sup> Second, two institutions were set up to address ethnic conflict and discrimination that ethnic minorities have suffered for a long time.<sup>100</sup> The first institution was the Truth, Justice and Reconciliation Commission (TJRC) under section 3 of the Truth Justice and Reconciliation Act No. 6 of 2008. TJRC role included assessing perceived economic marginalisation of ethnic minorities including historical land injustices and making recommendations on how these injustices could be addressed.<sup>101</sup> The Commission held public hearings in ethnic minority areas such as Wajir County and took testimonies from victims of historical land injustices in the area.<sup>102</sup> It is expected to make recommendations to the government in respect to all past injustices in the country.<sup>103</sup>

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<sup>89</sup> AK Sing'oei 'Minority rights, transitional Justice and lessons for Kenya' (2011) 49 *Interdisciplinary Journal of Human Rights Law* 5.

<sup>90</sup> Commission of Inquiry into Post-Election Violence, 'Report on Post-Election Violence (2008) (Waki Report) vii [www.dialoguekenya.org/docs/PEV%20Report.pdf](http://www.dialoguekenya.org/docs/PEV%20Report.pdf) (accessed 29 October 2012)

<sup>91</sup> Abraham (n 20 above) 8.

<sup>92</sup> Sing'oei (n 89 above) 6.

<sup>93</sup> As above.

<sup>94</sup> Abraham (n 20 above) 8.

<sup>95</sup> GM Musila 'Federalism and ethnicity question in Kenya: Limits, fears and prospects' in ICJ Kenya (eds) *Ethnicity, human rights and Constitutionalism in Africa* (2008) 68.

<sup>96</sup> As above.

<sup>97</sup> Abraham (n 20 above) 8.

<sup>98</sup> As above.

<sup>99</sup> Article 56 Constitution.

<sup>100</sup> Sing'oei (n 89 above) 9.

<sup>101</sup> Section 6 TJRC Act.

<sup>102</sup> Sing'oei (n 89 above) 12.

<sup>103</sup> As above.

The second institution was the National Cohesion and Integration Commission (NCIC) established under section 11 of the National Cohesion and Integration Act No. 12 of 2008. One of the functions of the Commission is to address the issue of discrimination against ethnic minorities in the public service sector.<sup>104</sup> In April 2011, the NCIC released a survey report on ethnic audit. According to the report, members from the five dominant ethnic groups: Luhya, Kikuyu, Luo, Kamba and Kalenjin occupied more than 70 per cent of all jobs in the public service.<sup>105</sup> This was a clear indication that only a small number of ethnic minorities were able to access government job opportunities.<sup>106</sup> Currently the Commission is working on a national cohesion and integration policy that is aimed at enhancing the relationship between ethnic minorities and dominant communities in counties.<sup>107</sup>

## 2.4 The human rights concerns of ethnic minorities

Ethnic minority communities in Kenya have suffered from marginalisation and economic deprivation. This has been due to lack of political participation, confiscation of their ancestral land, destruction of natural resources, denial of access to justice and discrimination. The following sections discuss these concerns.

### 2.4.1 Public participation

The active participation of ethnic minority communities in decision making forms an integral part of any democratic society.<sup>108</sup> Ghai has argued that for ethnic minorities to integrate easily in society, they should be consulted and involved in decisions that affect them directly.<sup>109</sup> This makes them feel a sense of belonging and ownership of the decisions made.<sup>110</sup> Lack of political participation and representation has been a major concern to ethnic minorities in Kenya.<sup>111</sup> Their traditional political structures were undermined by government and dominant ethnic groups.<sup>112</sup> This has forced them to put up with dominant ethnic groups within formal decision-making bodies where they have no representation.<sup>113</sup> As Ghai observes 'Without the opportunity to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social, cultural and economic context as themselves minority groups in the country have become more and more marginalised'<sup>114</sup>

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<sup>104</sup> Section 25 NCIC Act.

<sup>105</sup> National Cohesion and Integration Commission Ethnic Audit Report (2011) 65.

<sup>106</sup> As above.

<sup>107</sup> Abraham (n 20 above) 9.

<sup>108</sup> Ghai (n 34 above) 1.

<sup>109</sup> As above.

<sup>110</sup> As above.

<sup>111</sup> Abraham (n 20 above) 12.

<sup>112</sup> As above.

<sup>113</sup> AS Korir 'Customary law and conflict resolution among Kenya's pastoralists community' (2010) 10 [http://www.iwgia.org/iwgia\\_files\\_publications.../0470\\_IA\\_1\\_2\\_2010.pdf](http://www.iwgia.org/iwgia_files_publications.../0470_IA_1_2_2010.pdf) (accessed 14 September 2012).

<sup>114</sup> Ghai (n 23 above) 5.

Ethnic minorities because of their small numbers are not able to successfully win an elective office.<sup>115</sup> In addition, the government has deliberately attempted to divide them between different administrative or political entities.<sup>116</sup> This renders them numerically smaller in their respective administrative unit. Three such examples come to mind. The Ogiek are spread over five constituencies, reducing their chances of winning an elective post in all these areas.<sup>117</sup> Similarly, the administrative borders have spread the Sengwer into Marakwet, Trans-nzoia and Pokot counties, rendering them unrepresented in each.<sup>118</sup> Equally, Endorois are divided into two local counties namely Koibatek and Baringo counties. This makes them unable to make any meaningful contribution in their respective counties' political decisions because of their small numbers.<sup>119</sup>

Due to the importance of political participation to ethnic minorities, Ilchamus community was forced to seek the help of the courts of law to compel the government to address their political concerns. They brought a case before the High Court of Kenya claiming that they were unable to exercise their right to political participation.<sup>120</sup> In a landmark decision for the ethnic minorities in Kenya, the High Court held that:<sup>121</sup>

Minorities such as the Ilchamus have the right to participate and influence the formation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves. For a political system to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress and thereby lay a sure base for deliberative democracy. Only then would a nation such as ours, truly claim to be a rainbow democracy.

The decision was seen as marking a positive turn for the recognition of rights of ethnic minorities and it was hoped that the government would implement it by either creating a special constituency for the Ilchamus and other ethnic minority groups or by nominating their representatives to Parliament.<sup>122</sup> However, the government has not yet complied with the decision.<sup>123</sup>

#### 2.4.2 Equality and non-discrimination

Members from ethnic minorities have been discriminated against by government in terms of economic development and access to public services.<sup>124</sup> Members of these communities are often excluded from senior public service appointments.<sup>125</sup> According to the 2011 report of the UN Special Rapporteur on Indigenous

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<sup>115</sup> As above.

<sup>116</sup> Abraham (20 above) 3.

<sup>117</sup> As above.

<sup>118</sup> As above.

<sup>119</sup> Abraham (n 20 above) 15.

<sup>120</sup> *Ilchamus community v Electoral Commission of Kenya and Attorney General of Kenya*, Nairobi High Court Miscellaneous Civil Application NO. 305 of (2004)13.

<sup>121</sup> *Ilchamus case* (n 120 above) 19.

<sup>122</sup> Mukundi (n 82 above) 26.

<sup>123</sup> Mukundi (n 82 above) 27.

<sup>124</sup> Task Force Report on Devolved Government (n 10 above) 194.

<sup>125</sup> Report of the African Commission's Working Group on Indigenous Population 'Research and Information: Visit to Kenya' (2010) 52.

People, the most underdeveloped areas are where ethnic minorities live.<sup>126</sup> They have poor infrastructure and access to healthcare services is a major challenge.<sup>127</sup> They are also discriminated against in accessing educational facilities.<sup>128</sup> They are few primary and secondary schools in marginalised areas compared to other areas of the country.<sup>129</sup> A Task Force Report on Devolved Government noted that ethnic minorities have been neglected and treated unequally by the government, which has pursued biased development policies across the country.<sup>130</sup>

### 2.4.3 Land and resource rights

Most of the ethnic minorities in the country are indigenous people and therefore land and resource rights are at the core of their survival.<sup>131</sup> They mainly depend on land and natural resources for their basic livelihood and welfare.<sup>132</sup> However, most ethnic minorities were dispossessed of their ancestral land under colonialism and after independence.<sup>133</sup> The land was taken away illegally by either the government or powerful political individuals.<sup>134</sup> These caused bitterness among communities. They also lost their economic resources and source of livelihood bringing about poverty and marginalisation.<sup>135</sup>

Land has also been a cause of resource-based conflicts mainly due to 'politicization of land ownership and land rights, arbitrary allocation of community land, scarcity of land for pasture and crop farming , struggle to access to and use of water resources and depletion of limited water.'<sup>136</sup> For instance disputes over water have threatened the peace of some communities leading to ethnic hostilities such as the Maasai and Kikuyu conflict in 2005 over the use of the Ewaso Kedong River, resulting in the death of 16 people.<sup>137</sup>

### 2.4.4 Cultural and language rights

Culture is part and parcel of most ethnic minorities in Kenya.<sup>138</sup> It acts as a guide in their livelihood and governance as well as a strategy for survival.<sup>139</sup> They have retained strong attachment to their distinct cultures and traditions that have to be passed over to the next generation.<sup>140</sup> However, dominant communities have misunderstood and considered their unique cultures and traditions as backward and in need of being 'civilised' in

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<sup>126</sup> Report of the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in Kenya dated 26 February 2007 para 22.

<sup>127</sup> As above.

<sup>128</sup> Report of the African Commission's Working Group (n 125 above) 67.

<sup>129</sup> As above.

<sup>130</sup> Task Force Report on Devolved Government (n 10 above) 197.

<sup>131</sup> Republic of Kenya, *Report of the Commission of Inquiry into the illegal/irregular allocation of public land* (2004) (Ndung'u Report) 200.

<sup>132</sup> HWO Okoth-Ogendo *Tenants of the Crown: Evolution of agrarian and institutions in Kenya* (1991) 16-17.

<sup>133</sup> Ndung'u Report (n 131 above) 205.

<sup>134</sup> As above.

<sup>135</sup> Task Force Report Devolved Government (n 10 above) 197.

<sup>136</sup> Country Review Report of the Republic of Kenya, African Peer Review Mechanism (2006) (APRM Report) 62.

<sup>137</sup> APRM Report (n 136 above) 49.

<sup>138</sup> Report of the African Commission's Working Group (n 125 above) 65.

<sup>139</sup> As above.

<sup>140</sup> Report of the UN Special Rapporteur on indigenous peoples in Kenya (n 126 above) para 25.



modern times.<sup>141</sup> Dominant ethnic communities due to their large numbers have had their culture dominate over the culture of ethnic minorities.<sup>142</sup> Additionally, members of dominant communities held most positions in government. This has resulted in government's perception that the culture of ethnic minorities is still primitive and thus does not deserve to be promoted.<sup>143</sup> Such attitudes have dominated government policy that has promoted negative stereotypes leading to exclusion and further marginalisation.<sup>144</sup>

#### **2.4.5 Access to justice**

Ethnic minorities have faced insurmountable challenges in their effort to seek protection of their fundamental rights and freedoms in courts of law.<sup>145</sup> Poverty and limited knowledge of the law including their rights and freedoms has affected their efforts to access justice.<sup>146</sup> The cost of legal proceedings are very high and are thus out of reach for most ethnic minorities.<sup>147</sup> They are forced to rely on lawyers willing to offer legal services for free commonly known as 'pro bono basis.' Unfortunately, most pro bono briefs are allocated inadequate resources, resulting in cases taken up on such basis being inadequately prepared.<sup>148</sup> The access to courts for ethnic minorities in the North Eastern region of the country is also hampered by a limited number of courts and judicial officers.<sup>149</sup> This constitutes a serious challenge as they are habitually faced with legal wrangling as a result of land grabbing by government officials and members of dominant communities.<sup>150</sup> For this reason, they have to travel long distances that involve extra expenditure to take their cases to court.<sup>151</sup>

#### **2.5 Socio-economic conditions of ethnic minorities**

The source of livelihood of ethnic minorities was severely undermined by the absence of an adequate legal framework to protect their ancestral lands and natural resources.<sup>152</sup> Government policies also favoured the economic activities of dominant communities.<sup>153</sup> The government preferred economic activities such as mining, tourism and agriculture.<sup>154</sup> As a result, certain ethnic minorities' sources of livelihood such as pastoralism, hunting and gathering were despised, putting their future existence and developmental needs in danger.<sup>155</sup> The

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<sup>141</sup> I Brownlie *Treaties and indigenous peoples* (1992) 46.

<sup>142</sup> J Ngugi 'The decolonization-modernization interface and the plight of indigenous peoples in post-colonial development discourse in Africa' (2002) 20 *Wisconsin International Law Journal* 300.

<sup>143</sup> As above.

<sup>144</sup> Report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 126 above) para 50.

<sup>145</sup> Report of the African Commission's Working Group (n 125 above) 53.

<sup>146</sup> As above.

<sup>147</sup> As above.

<sup>148</sup> As above

<sup>149</sup> Report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 126 above) para 55-65.

<sup>150</sup> Mukundi (n 82 above) 38.

<sup>151</sup> As above.

<sup>152</sup> As above.

<sup>153</sup> Report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 126 above) para 36-41.

<sup>154</sup> Nassali (n 1 above) 9.

<sup>155</sup> Report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 126 above) para 82.



socio-economic development in places where ethnic minorities live is inhibited by a lack of proper infrastructure.<sup>156</sup> These sections discuss the socio-economic problems ethnic minorities face.

### 2.5.1 Right to development

The government of Kenya has continued with biased development policies.<sup>157</sup> Development in the country has been projected as a favour that is only extended to those communities who have the numbers to influence those in power to extend development to them in exchange for votes.<sup>158</sup> As a result of such policies, ethnic minorities are often left out of economic development because they lack the numbers that could influence political power. The most underdeveloped areas are where ethnic minorities are situated.<sup>159</sup> Often, you will hear citizens in Turkana County complaining of being treated as 'second-class citizens'.<sup>160</sup> Ethnic minorities living in arid areas are always faced with extreme starvation and instead of the government adopting long term policies to address their plight it has been focusing on short-term relief programs.<sup>161</sup>

### 2.5.2 Access to education

Education is a key component of the protection of the rights of ethnic minorities.<sup>162</sup> Issues of particular concern are access to education, the language of educational instruction and the cultural content of education.<sup>163</sup> Ethnic minorities have lacked equal access to education.<sup>164</sup> There are fewer resources for schools in areas where ethnic minority communities live, and segregation of minority children from mainstream schools.<sup>165</sup> For instance, primary schools in Ogiek and Turkana areas are dispersed, and in many cases more than 20 kilometres apart.<sup>166</sup> There are no secondary schools in Turkana County.<sup>167</sup> This means that students who qualify to enrol in secondary schools have nowhere to go. Besides, the rate of school drop-outs is quite high.<sup>168</sup>

The other challenge is the design of an education curriculum, which is the same across the country. The curriculum is not sensitive to the cultural needs of some ethnic minority communities.<sup>169</sup> Additionally, minority children are disadvantaged because they are not able to speak English or Kiswahili, which are the languages of instruction in public schools.<sup>170</sup> Most children can only speak in their mother-tongue. This makes minority

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<sup>156</sup> As above.

<sup>157</sup> As above.

<sup>158</sup> Abraham (n 20 above) 15.

<sup>159</sup> As above.

<sup>160</sup> Task Force Report Devolved Government (n 10 above) 202.

<sup>161</sup> As above.

<sup>162</sup> Sungura (n 29 above) 246.

<sup>163</sup> As above.

<sup>164</sup> As above.

<sup>165</sup> Abraham (n 20 above) 10.

<sup>166</sup> As above.

<sup>167</sup> As above.

<sup>168</sup> N Ohenjo 'Kenya's Castways: The Ogiek and national development process' (2003) 7 *Minority Group International Rights* 3.

<sup>169</sup> ILO *Handbook on combating child labour among indigenous and tribal peoples* (2006) 24.

<sup>170</sup> As above.

parents less willing to send their children to school.<sup>171</sup> Parents find little benefit in an education that does not teach traditional culture and livelihoods or which stigmatises their identity.<sup>172</sup>

### 2.5.3 Access to healthcare services

Most ethnic minorities continue to complain about their unequal access to healthcare and higher incidence of some diseases than the dominant communities.<sup>173</sup> These disparities are related to several causes. Health and sanitation conditions are often worse in the North Eastern region where ethnic minorities live.<sup>174</sup> Existing infrastructure for medical services is more limited in remote or impoverished areas.<sup>175</sup> For instance, the available public hospitals are ill-equipped, and lack drugs and medical personnel that are able to communicate in their languages.<sup>176</sup> In areas like Turkana North, there is no public hospital.<sup>177</sup>

Most health facilities are in urban areas excluding ethnic minorities in far flung regions where infrastructure is non-existent.<sup>178</sup> Since most ethnic minorities live in rural areas, they are not able to benefit from these health facilities.<sup>179</sup> Poverty has also caused inaccessibility of healthcare services since the cost of medical services is relatively high thus ethnic minorities are unable to access these services.<sup>180</sup> They also lack means of transport to enable them get to public clinics to access proper medication.<sup>181</sup>

## 2.6 Conclusion

This chapter set out to examine the political, economic and social concerns of ethnic minorities in Kenya. In so doing, it began by examining the criteria for identifying who is an ethnic minority in Kenya. It proceeded to explore Kenya's socio-economic and political history of ethnic minorities placing the history of marginalisation and exclusion into context. The chapter argued that the treatment of ethnic minorities amounts to a violation of their political and civil rights, economic, social and cultural rights and group rights such as public participation, access to education and health, language and culture, land rights, access to justice and right to development.

Against a backdrop of these human rights concerns, the next chapter will evaluate Kenya's structures, institution and systems of devolved government, and the objectives devolution has set out to achieve, among others, the promotion and protection of the rights and interests of minorities and marginalised groups. To this effect, the next chapter provide an overview of the main features of Kenya's devolved system of government. It also examines

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<sup>171</sup> Task Force Report Devolved Government (n 10 above) 203.

<sup>172</sup> As above.

<sup>173</sup> Abraham (n 20 above) 10.

<sup>174</sup> As above.

<sup>175</sup> As above.

<sup>176</sup> Mukundi (n 82 above) 46.

<sup>177</sup> As above.

<sup>178</sup> Report of the African Commission's Working Group (n 125 above) 70.

<sup>179</sup> As above.

<sup>180</sup> Sungura (n 29 above) 233.

<sup>181</sup> As above.

the objectives and principles of devolution. The overview of the devolved system is necessary as devolution aims, among other things, to address the concerns of ethnic minorities in Kenya.

## CHAPTER THREE

### STRUCTURES AND INSTITUTIONS OF DEVOLVED GOVERNMENT IN KENYA

#### 3.1 Introduction

Kenya has designed its devolved government structures with the purpose of deepening local democracy; empowering citizens; achieving social-economic development; and protecting the rights and interests of minorities and marginalized groups.<sup>182</sup> This was done based on the assumption that the rights of minorities and marginalized groups will be protected better by county government.<sup>183</sup> This is because county government is likely to enhance the extent and quality of direct and indirect participation of ethnic minorities in matters that affects them.<sup>184</sup> However it is obvious that the success of the devolved government, whether for deepening local democracy or protecting the rights of ethnic minorities, is greatly impacted on by its institutional design. Therefore, it is crucial to provide a brief overview of Kenya's devolved government system. This helps in locating the place of ethnic minorities within the system. It is also necessary to provide the objectives and principles of devolution under the Kenya Constitution 2010, since the objectives and principles of devolution are crucial in understanding the design of the devolved system. The purpose of this chapter is thus to provide an overview of the main features of Kenya's devolved system of government.

This chapter commences with an analysis of the nature and scope of devolution in Kenya. Thereafter, attention turns to assess the objectives and principles of devolution as provided for in the Kenya Constitution 2010. It then moves on to a discussion of the county structures, institutions and systems with a view to locating the place of ethnic minorities within the county government. This is followed by a discussion on the assignment of functions and powers between the national and county governments. Then the relationship between county government and national government is examined. Finally the role of the Senate in devolution is highlighted.

#### 3.2 Nature and scope of devolution in Kenya

The Kenya Constitution 2010 creates two levels of government, the national and county level. Article 1 asserts the sovereignty of the people which it says is to be "exercised at the national level and the county level" of government.<sup>185</sup> It also delegates both the legislative and executive sovereign power of the people to "parliament and the legislative assemblies in the county government" and "the national executive and the executive structures in the county government."<sup>186</sup> Article 6 makes it very clear that only two levels of government are created, namely the national and county levels whose governments "are distinct and interdependent" and who must conduct their mutual relations on the basis of consultation and cooperation.<sup>187</sup> There should be coordination between county

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<sup>182</sup> A Oloo 'Elections, representation and the new Constitution' (2011) 7 *Society for International Development* 3.

<sup>183</sup> As above.

<sup>184</sup> As above.

<sup>185</sup> Article 1 (4) Constitution.

<sup>186</sup> Article 1(3) Constitution.

<sup>187</sup> Article 6 (2) Constitution.

and national government and none is a mere agent of the other.<sup>188</sup> Article 6 establishes the 47 counties as territorial units which are named in the First Schedule of the Constitution.

Article 186 as read together with Fourth Schedule of the Constitution sets out the functions of each county. The Constitution also provides for the allocation of resources to the counties to enable them discharge their functions.<sup>189</sup> Article 209 provide for taxation powers while articles 211, 212 and 213 deals with borrowing powers. Articles 201, 202, 203 and 204 provide for the allocation of equitable shares, conditional and unconditional grants and the equalization of finances. Another important feature of devolved government is that it is entrenched in the Constitution.<sup>190</sup> This means that it cannot be amended by the national government without the involvement of the 47 counties.<sup>191</sup> The counties under this system have political, functional, administrative, financial and territorial autonomy.<sup>192</sup>

Devolution under the Constitution combines the concept of self-rule and shared rule.<sup>193</sup> The Constitution sees the concept of shared rule as being wider than participation in and influence over policy-making at the national level.<sup>194</sup> It sees institutions of shared rule as comprising two categories; namely, shared institutions; and independent institutions which render shared services and offer shared opportunities.<sup>195</sup> A thin line is drawn between these two types of institutions. Shared institutions require participation and representation of the constituent units in the decision-making institutions and processes; while independent institutions do not require representation from constituent unit governments; neither should they be instrumentalities or functionaries of the national government, but may require the participation of both levels of government in constituting them and holding them accountable.<sup>196</sup>

Whereas shared institutions are instrumentalities and functionaries of both levels of government, independent state organs which service both levels of government are not instrumentalities and functionaries of any one of the two levels of government and are independent of both.<sup>197</sup> They are state organs not within any of the two levels of government.<sup>198</sup> The shared institutions included the national executive and the national legislature in which the counties must be allowed to play a role.<sup>199</sup> The independent organs of state rendering shared services, on the other hand, include the judiciary, independent commissions; and independent offices.<sup>200</sup>

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<sup>188</sup> Ghai & Cottrell (n 16 above) 130.

<sup>189</sup> Article 203 Constitution.

<sup>190</sup> O Nyanjom 'Devolution in Kenya's new Constitution' (2011) 4 *Society for International Development* 5.

<sup>191</sup> As above.

<sup>192</sup> As above.

<sup>193</sup> Ghai & Cottrell (n 16 above) 131.

<sup>194</sup> As above.

<sup>195</sup> Ghai (n 16 above) 131.

<sup>196</sup> Nyanjom (n 190 above) 6.

<sup>197</sup> As above.

<sup>198</sup> As above.

<sup>199</sup> Ghai & Cottrell (n 16 above) 131.

<sup>200</sup> As above.

### 3.3 Objectives of devolution under the Kenya Constitution 2010

The purpose of devolution is to spread the power of the state throughout the country and reduce the centralization of power which has been the root cause of the problems majority of Kenyans are facing, including authoritarianism, marginalization of various communities, lack of accountability and poor service delivery.<sup>201</sup>

Article 174 of the Kenya Constitution 2010 clearly sets out the objectives that the Kenyan people hope to achieve through devolution. They hope to promote democratic and accountable exercise of power; foster national unity by recognizing diversity; give powers of self-governance to the people and enhance their participation in the exercise of the powers of the state and in making decisions affecting them; recognize the right of communities to manage their own affairs and to further their development; protect and promote the interests and rights of minorities and marginalized communities; promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; facilitate the decentralization of states organs, their functions and services, from the capital of Kenya; and enhance checks and balances and the separation of powers.<sup>202</sup> The following sections discuss these objectives in detail.

#### 3.3.1 Promotion of democratic governance

According to Article 174(a) of the Constitution devolution is aimed at promoting democratic governance and accountability. County governments are established to deepen local democracy in the country and act as a check and balance on the national government.<sup>203</sup> Devolution creates democratic institutions at county level, which provide space for local participation in decision making that affects them.<sup>204</sup> The division of power between national and county government should increase democracy and accountability.<sup>205</sup> There is a fine balance between the respective powers of the National Assembly, which represents the national government, and the Senate that represents the counties.<sup>206</sup> This could lead to more transparency and accountability as well as making effective the limitations of power at all levels of government and checks and balances.<sup>207</sup>

#### 3.3.2 Fostering national unity and recognizing of rights of minorities and marginalized groups

Fostering national unity and recognizing legitimate interests and rights of minorities is a major challenge.<sup>208</sup> Kenya has not been a very inclusive country.<sup>209</sup> Since independence, and even before, various communities

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<sup>201</sup> As above.

<sup>202</sup> Article 174 Constitution. The entire article lists all the nine objectives of devolution under the Constitution.

<sup>203</sup> JM Kivuva 'Restructuring the Kenyan state' (2011) 1 *Society for International Development* 17.

<sup>204</sup> Ghai & Cottrell (n 16 above) 134.

<sup>205</sup> As above.

<sup>206</sup> As above.

<sup>207</sup> Oloo (n 77 above) 113.

<sup>208</sup> D Juma 'Devolution of powers as Constitutionalism: The constitutional debate and beyond' in ICJ Kenya (eds) *Ethnicity, human rights and Constitutionalism in Africa* (2008) 40.

<sup>209</sup> Muia (n 75 above) 89.

have been discriminated against and marginalized.<sup>210</sup> The protection and promotion of the interests and rights of minorities and marginalized groups is one of the objectives of devolution.<sup>211</sup> Devolution should empower ethnic minorities in their counties by reducing their dependence on the national government.<sup>212</sup> The ethnic minorities may be able to control their source of revenue and monitor their development effectively.<sup>213</sup>

As far as national unity and recognition of diversity are concerned, there is a new dimension. Counties are new entities in the government structure. The existence of so many counties means that, in order to foster national unity, these new identities should be accommodated within the overarching identity of Kenyan citizenship.<sup>214</sup> The county governments should ensure that people from all communities and sections of the society are involved in the affairs of the county and that every citizen, all groups and communities, are treated equally.<sup>215</sup> The county government should promote respect for religious, cultural, ethnic, linguistic and other forms of diversity.<sup>216</sup>

### 3.3.3 Promotion of self-governance

Devolution is aimed at promoting self-governance to the people and enhancing their participation in making decisions that affects them.<sup>217</sup> Article 174(d) recognizes the right of communities to manage their own affairs and to further their development. It then follows that devolution enables citizens to determine or influence their policy preferences and results.<sup>218</sup> It ensures that decisions about local issues are made by local citizens through the devolved government that is closer to the people and more responsive to local needs.<sup>219</sup> Decisions are made in accordance with local developmental needs. The decisions made are more likely to reflect the demand for local services than decisions made by a distant central government.<sup>220</sup>

### 3.3.4 Facilitating the decentralization of state organs

Facilitation of decentralization of state organs, their functions and services from the capital city of Nairobi is another objective of devolution.<sup>221</sup> State organs are understood to mean ministries, state departments, public corporations, independent commissions and other national government agencies.<sup>222</sup> Decentralization is used to mean that the state organs should be relocated out of Nairobi or at least branches should be established in counties.<sup>223</sup> This decentralization is aimed at enhancing efficiency in the delivery of public services by bringing

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<sup>210</sup> Ohenjo (n 30 above) 159.

<sup>211</sup> Article 174(e) Constitution.

<sup>212</sup> Ghai & Cottrell (n 16 above) 135.

<sup>213</sup> As above.

<sup>214</sup> As above.

<sup>215</sup> Ghai & Cottrell (n 16 above) 42.

<sup>216</sup> As above.

<sup>217</sup> Article 174(c) Constitution.

<sup>218</sup> Ghai & Cottrell (n 16 above) 131.

<sup>219</sup> C Tiebout 'A pure theory of local expenditures' (1956) 64 *Journal of Political Economy* 6.

<sup>220</sup> As above.

<sup>221</sup> Article 174 (h) Constitution.

<sup>222</sup> Ghai & Cottrell (n 16 above) 136.

<sup>223</sup> As above.

service delivery closer to the people.<sup>224</sup> These will make it easier for the general public to access national government agencies and to obtain passports, identification cards, registration of births and death etc. Kenyans do not have to wait for days in Nairobi to obtain these documents or government information. In addition, national government departments and other agencies will become more aware of the problems facing the people, leading to hopefully to remedial action; greater income and expenditure in the counties; promoting their economic development and decongesting the capital city of Nairobi.<sup>225</sup>

### **3.3.5 Promotion of social and economic development.**

Devolution aims at promoting social and economic development in the county.<sup>226</sup> There is a likelihood that the transfer of power, functions and resources to counties will lead to accelerated development, as counties compete and county authorities look for opportunities to increase production, marketing and employment to secure legitimacy and popular support.<sup>227</sup>

### **3.3.6 Ensuring equitable sharing of national and local resources**

There is big disparity in development and access to state services among counties.<sup>228</sup> This is partly due to the different geographical and climatic situations, but it is also the result of political decisions which favoured some areas and disadvantaged others.<sup>229</sup> One important objective of devolution is to bring equality of opportunity and development between counties.<sup>230</sup> If there is goodwill, a centralized government is better placed for equalization than a devolved government, since there is one focal point for decisions.<sup>231</sup> In support of this position, it can be argued that in devolved government where resources of counties belong to them, rather than national government, may aggravate inequalities and make re-distribution of resources difficult. The counter argument is that a county with a constitutional status and government of its own may be able to force negotiations on more equitable distribution of resources.<sup>232</sup>

## **3.4 Principles of devolution under the Kenya Constitution 2010**

Article 175 sets out a number of principles meant to guide the operations of the devolved governments. The county governments are required to be based on democratic principles and separation of powers.<sup>233</sup> They must

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<sup>224</sup> Juma (n 208 above) 38.

<sup>225</sup> Ghai & Cottrell (n 16 above) 136.

<sup>226</sup> Article 174 (f) Constitution.

<sup>227</sup> Ghai & Cottrell (n 16 above) 136

<sup>228</sup> As above

<sup>229</sup> P Chitere & O Ileri 'District focus for rural development as decentralized planning strategy: An assessment of its implementation in Kenya' in TN Kibua & G Mwabu (eds) *Decentralisation and devolution in Kenya: New approaches* (2008) 14.

<sup>230</sup> Article 174 (g) Constitution.

<sup>231</sup> LN Oyugi 'Fiscal decentralization in Kenya: The case of local authority transfer funds' in TN Kibua & G Mwabu (eds) *Decentralisation and devolution in Kenya: New approaches* (2008) 171.

<sup>232</sup> Ghai (n 16 above) 137.

<sup>233</sup> Article 175 (a) Constitution.



be availed reliable sources of revenue to enable them to govern and deliver services effectively.<sup>234</sup> Finally, they must ensure that each of the two genders have at least a third of the members of representative bodies in the county.<sup>235</sup> The following sections look at these principles in detail.

### **3.4.1 Democratic principles and separation of powers**

According to Article 175(a) of the Constitution, county government should be based on democratic principles and separation of powers. The county government shall consist of a county assembly as the legislature and a county executive committee as the executive headed by a governor.<sup>236</sup> Both the Executive Committee and the governor are from outside the county assembly.<sup>237</sup> This means that there will be full separation between the legislature and executive at county level, just as there is at national level.<sup>238</sup> Counties will not have their own courts of law. The national court system, as set out in the Constitution will serve the entire nation.<sup>239</sup>

### **3.4.2 Reliable sources of revenue**

Article 175(b) of the Constitution requires county government to have reliable sources of revenue to enable them to govern and deliver services effectively. County government resources will come from four main sources: own source revenues; equitable share transfers; equalization fund transfer; and other conditional or unconditional grants from national government.<sup>240</sup> These sources need to be considered jointly to ensure that counties have sufficient resources to deliver effective and efficient services to the public.<sup>241</sup> The Constitution lists factors that need to be considered in sharing national revenue which include developmental and other needs of the counties, economic disparities within the counties and the need to remedy such disparities and affirmative action in respect of previously disadvantaged areas and marginalized communities.<sup>242</sup>

### **3.4.3 One-third gender representation in county assembly and county executive**

Article 175(c) of the Constitution draws specific attention to the fact of gender representation and notes that not more than two thirds of the members of any county assembly or county executive shall be of the same gender. The purpose of the provision is to provide for special seats for women that will ensure that at least one-third of county assembly members are women to represent their interests at the county level.<sup>243</sup> This probably means that for some time to come women may struggle to exceed one-third of the membership of the assemblies.<sup>244</sup>

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<sup>234</sup> Article 175 (b) Constitution.

<sup>235</sup> Article 175 (c) Constitution.

<sup>236</sup> Article 176 (1) Constitution.

<sup>237</sup> Ghai & Cottrell (n 16 above) 127.

<sup>238</sup> As above.

<sup>239</sup> As above.

<sup>240</sup> Article 203 Constitution.

<sup>241</sup> Ghai & Cottrell (n 16 above) 122.

<sup>242</sup> Article 203 Constitution.

<sup>243</sup> Oloo (n 182 above) 6.

<sup>244</sup> As above.

This also implies that women should be considered for appointments at the county level either through competitive process or by taking affirmative action.<sup>245</sup>

### 3.5 Structure of county governments under Kenya Constitution 2010

Article 176 of the Constitution provides for both a legislative and executive arm for each county, county assembly and county executive respectively.<sup>246</sup> There is no provision made for a judicial arm since the independent judiciary is one of the state organs rendering shared service to both levels of government.<sup>247</sup> The following sections examine the main institutional features of Kenya's devolved system of government.

#### 3.5.1 County assembly

The Constitution establishes a county assembly for each county.<sup>248</sup> Article 177 (1) states that county assembly will comprise the following: members who are elected, one each for every ward, by the registered voters in that ward; a number of special seat members necessary to ensure the one third gender balance; a number of members of marginalized groups including persons with disabilities and the youth to be prescribed by an Act of Parliament; and the speaker who is an ex-officio member. According to section 7(1) of the County Government Act, 2012 (CGA), the political parties shall nominate 6 members for special seats in the county assembly. While nominating them, the political parties have to consider community and cultural diversity of the county as well as ensuring adequate representation of minorities in the county to protect their rights.<sup>249</sup> The Constitution provides that the term of a county assembly is five years.<sup>250</sup>

The CGA has prescribed that the whole country be divided into 1450 county wards.<sup>251</sup> The Act further provides that each county should have a minimum of fifteen wards but this will in future be reviewed to a minimum of twenty five wards.<sup>252</sup> The Independent Electoral and Boundaries Commission (IEBC) has already distributed the 1450 wards among the counties.<sup>253</sup> Both the one third gender balance and the other marginalized group members are to be elected on the basis of political party proportional representation.<sup>254</sup>

According to Article 193 (1) of the Constitution, a person is eligible for election as a member of a county assembly if he is registered as a voter, satisfies any educational, moral and ethical requirements prescribed by the Constitution or an Act of Parliament, and is either nominated by a political party or is an independent candidate who is supported by at least five hundred registered voters in the ward concerned. The CGA has

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<sup>245</sup> As above.

<sup>246</sup> Article 176 (1) Constitution.

<sup>247</sup> Ghai & Cottrell (n 16 above) 127.

<sup>248</sup> Article 176 (1) Constitution.

<sup>249</sup> Section 7(2) CGA; Article 197 Constitution.

<sup>250</sup> Article 177(4) Constitution.

<sup>251</sup> Section 26 (1) CGA.

<sup>252</sup> Section 26 (2) CGA.

<sup>253</sup> The World Bank Report 'Special focus: Kenya's Momentous devolution' (2011) 5.

<sup>254</sup> Section 34 Election Act.

added that to qualify for election as a member of the county assembly the candidate must be a holder of a post-secondary school qualification recognized in Kenya.<sup>255</sup> The candidates will also be subject to the ethical and moral requirements of leadership and integrity under Chapter Six of the Constitution.<sup>256</sup>

Each county assembly must have a Speaker as part of its internal structures and functionaries.<sup>257</sup> Article 178 provides for a speaker for each county, elected by the members of the county assembly from among persons who are not members of the county assembly. The main function of the Speaker is to preside over the proceedings of the county assembly.<sup>258</sup> In the absence of the Speaker the members of the assembly are empowered to elect any one of the members of the assembly to discharge the functions and duties of the Speaker.<sup>259</sup>

With regard to its functions, Article 185 of the Constitution states that county assembly is the legislative authority of the county and its role includes: making laws that are necessary to the effective performance of its functions; exercising oversight over the county executive committee and other county executive organs; and receive and approve plans and policies on the management of county resources, infrastructures and institutions.<sup>260</sup> The CGA has assigned the county assembly more functions such as approving the county government budget; approving any borrowing by the county government; and approving county development planning.<sup>261</sup>

### 3.5.2 County executive

The Constitution provides that each county shall have a county executive.<sup>262</sup> It vests the county executive authority in the county executive committee which is the equivalent of the cabinet at the national level.<sup>263</sup> According to Article 179(2) of the Constitution, the executive committee consists of the county Governor and the Deputy Governor, and other members of the executive committee who shall not exceed one-third of the number of members of the county assembly, if the assembly has less than thirty members; or ten, if the assembly has thirty or more members.

The governor who is the head of the county government is to be elected directly by the registered voters in the county, together with his deputy as a running mate.<sup>264</sup> Both the governor and the deputy governor must meet all the qualifications for eligibility for election as a member of county assembly to be eligible for election as governor

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<sup>255</sup> Section 19 CGA.

<sup>256</sup> As above.

<sup>257</sup> Article 178 Constitution.

<sup>258</sup> Article 178(2) (a) Constitution

<sup>259</sup> Article 178 (2) (b) Constitution.

<sup>260</sup> Article 185 (4) Constitution.

<sup>261</sup> Section 8 (1) (c) CGA.

<sup>262</sup> Article 176 (1) Constitution.

<sup>263</sup> Article 179(1) Constitution.

<sup>264</sup> Article 180 (1) Constitution.

and deputy governor.<sup>265</sup> The governor can be removed from office by way of impeachment in terms of Article 181 if certain grounds are established.

In terms of its functions, Article 183 of the Constitution provides for executive functions of the county government which are: the implementation of county legislation; the implementation, within the county, of national legislation to the extent that the legislation so requires; management and coordination of the functions of the county administration and its departments; performance of any other functions conferred on it by the Constitution or national legislation; preparation of proposed county legislation for consideration by the county assembly; and provision of full and regular reports on matters relating to the county to the county assembly. The CGA assigns one more function to the county executive committee, which is the supervision of delivery of services in the county and all decentralized units and agencies in the county.<sup>266</sup>

### 3.5.3 County decentralized units

Article 176(2) of the Constitution permits county governments to decentralize its functions and provision of its services to ensure efficiency. The CGA provides for the decentralization of the functions and the delivery of services by the county governments to lower levels of the county but draws a distinction between urban and rural areas.<sup>267</sup> Section 48 of the Act identifies units of decentralization at county level. These are the urban areas and cities as established by the Urban Areas and Cities Act; the sub-counties which should be the equivalent of constituencies within the county established under Article 89 of the Constitution; the wards within the county established under Article 89 of the Constitution and section 26 of the CGA village units in each county determined by the county assembly of each county; and such other or further units as the county government may determine.<sup>268</sup>

Where a constituency or part of it falls under an urban area or city, the constituency or that part of it must be considered as forming part of the urban area or the city.<sup>269</sup> The legislation guides the county assembly regarding the factors to take into account when establishing village units as including population size; geographical features; community of interest, historical, economic and cultural ties; and means of communication.<sup>270</sup> The task must be accomplished through the enactment of legislation by the county assembly.<sup>271</sup> Going by the responsibilities of these units of decentralization it may be concluded that they are established for three major functions: they are units of administration, and facilitate service delivery and citizen participation.<sup>272</sup>

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<sup>265</sup> Article 180 (2) Constitution.

<sup>266</sup> Section 37(1) CGA.

<sup>267</sup> Section 48 CGA.

<sup>268</sup> As above.

<sup>269</sup> Section 48 (2) CGA.

<sup>270</sup> Section 27(6) CGA.

<sup>271</sup> Section 48(4) & 52(1) CGA.

<sup>272</sup> Task Force Report on Devolved Government (n 10 above) 37.

### 3.5.4 County decentralization to cities and urban areas

The Constitution envisages changes to the way urban areas are governed, but it does not specify them. The recently passed CGA decentralizes functions and the provision of services to urban areas and cities. However, the Act leaves the details regarding the principles of governance and management, structures and functions of such urban areas and cities to the Urban Areas and Cities Act.<sup>273</sup> This Act provides for urban areas with over 250,000 inhabitants to have corporate bodies to manage urban services.<sup>274</sup> Today, five urban areas in Kenya meet this threshold.<sup>275</sup> In other urban areas with a population under 250,000, the executive responsibilities of local authorities will pass to county governments, although a town committee will advise the county government.<sup>276</sup> In both cases county governments will be responsible for financing urban service delivery.<sup>277</sup> This Act also identifies three categories of urban areas: cities, municipalities and towns. It also sets out criteria for their classification; and establishes governance structures for each one of them.<sup>278</sup>

The Urban Areas and Cities Act emphasizes the superior position of the county government and the fact that the urban areas and cities are mere agents of the county governments under which they operate.<sup>279</sup> It prescribes that urban areas and cities must be governed and managed on the basis of the principles of recognition and respect for the constitutional status of the county government; and recognition of the principal and agency relationship between the boards of urban areas and cities and their respective county governments.<sup>280</sup> The board comprises of eleven members appointed by a county executive committee through a competitive process and approved by county assembly.<sup>281</sup> The appointment should ensure gender equity, representation of youth, persons with disabilities and marginalized groups.<sup>282</sup> The boards are under a duty to carry out such functions as may be delegated by their respective county governments.<sup>283</sup> They are also financially accountable to the county governments and they govern on behalf of the county governments.<sup>284</sup> The residents also have a right to plan strategies for engagement with the various levels and units of government, monitor the activities of elected and appointed officials and receive representations from elected and appointed officials.<sup>285</sup> In addition the board is required to publish and publicize important information for access by the residents.<sup>286</sup>

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<sup>273</sup> Section 48(1) (a) CGA; Preamble of Urban Areas and Cities Act.

<sup>274</sup> Section 12 Urban Areas and Cities Act.

<sup>275</sup> Task Force Report on Devolved Government (n 10 above) 39.

<sup>276</sup> As above.

<sup>277</sup> As above.

<sup>278</sup> Section 4 & 11 Urban Areas and Cities Act.

<sup>279</sup> Section 11(b) & 12 Urban Areas and Cities Act.

<sup>280</sup> Section 11 Urban Areas and Cities Act.

<sup>281</sup> Section 13 (1) Urban Areas and Cities Act.

<sup>282</sup> Section 13(3) Urban Areas and Cities Act.

<sup>283</sup> Task Force Report on Devolved Government (n 10 above) 40.

<sup>284</sup> Section 11 Urban Areas and Cities Act.

<sup>285</sup> Section 1 & 2 of Second Schedule of the Urban Areas and Cities Act.

<sup>286</sup> Section 24(1) Urban Areas and Cities Act.

### 3.5.5 County public service

Article 235 of the Constitution explicitly provides for the right of county governments to have their own public services, with powers to establish and abolish offices, appoint and confirm people to those offices and exercise disciplinary control over the officers within a 'framework of uniform national standards' prescribed by an Act of Parliament.<sup>287</sup> The CGA provides that a county government shall discharge its administrative functions through a county public service board.<sup>288</sup> The board is appointed by a county executive committee through a competitive process.<sup>289</sup>

There are a significant number of public servants that are currently performing devolved functions in different public sectors such as agriculture, transport, water, health and urban service delivery. They are expected to move across from national to county governments.<sup>290</sup> It is expected that the staff of the local authorities will be absorbed into the county governments.<sup>291</sup>

### 3.6 Powers and functions of county governments

The functions of the county governments are provided for in Article 186 and assigned in the Fourth Schedule of the Constitution. The county governments are responsible for a range of service delivery functions, such as agriculture, health, water and transport. Counties will coordinate county health facilities, pharmacies and ambulance services. They will also manage county roads and public road transport. In terms of education, counties will deal with pre-primary education and village polytechnics.<sup>292</sup> They will also provide water and sanitation services at county level. Counties are responsible for local planning of towns and villages. In general, the policy formulation and national standards setting functions are performed by the national government while the implementation of the policies and the standards is a function of the county governments.<sup>293</sup> However, the national government retains some important service delivery functions, including the provision of education and social welfare.<sup>294</sup> The Constitution provides for the county government to take over urban functions that were previously the responsibility of the local governments established under the Local Government Act.<sup>295</sup>

The 47 counties are expected to take over both the functions and revenue raising powers from the local authorities across the country that are currently responsible for urban service delivery and a limited range of other functions.<sup>296</sup> The county governments will also take over the service delivery responsibility currently performed by the staff of many de-concentrated line ministries in the counties including transport, housing,

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<sup>287</sup> Article 235(1) Constitution.

<sup>288</sup> Section 56 CGA.

<sup>289</sup> Section 58(2) CGA.

<sup>290</sup> World Bank Report (n 253 above) 10.

<sup>291</sup> As above.

<sup>292</sup> Item 9 of part 2 of Fourth Schedule of Constitution.

<sup>293</sup> World Bank Report (n 253 above) 14.

<sup>294</sup> As above.

<sup>295</sup> As above.

<sup>296</sup> As above.

health, agriculture, water and others.<sup>297</sup> The county governments are also expected to take over some of the functions of provincial administration such as liquor licensing and control of drugs in their respective counties.<sup>298</sup>

### 3.7 Relationship between county government and national government

Intergovernmental relations are defined as interactions between governmental units of all kinds and levels within a political system.<sup>299</sup> The foundations of the concept of co-operative government are the distinct powers and responsibilities which must be respected.<sup>300</sup> The Constitution requires the national and county governments to perform their functions and exercise their powers in a manner that respects the functional and institutional integrity of each other and respects the constitutional status and institutions of each other.<sup>301</sup> They are also required to assist, support and consult with each other and, as appropriate, implement the legislation of each other.<sup>302</sup> The Constitution also requires the two levels of government to liaise with each other for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.<sup>303</sup>

The Constitution envisages that national and county governments might set up joint committees and authorities.<sup>304</sup> This could be useful in enhancing the bargaining power of counties with the national government. It could also help both governments in dealing with an issue, a need or a resource common to a group of counties. Disputes between the national and county governments are inevitable, and Article 189(4) of the Constitution provides for alternative dispute resolutions mechanisms, including mediation, negotiation and arbitration.

### 3.8 Relations between counties

The Constitution says little about the relationship between counties, other than the desirability of cooperation and coordination. Article 189 provides for cooperative government including the setting up of joint authorities and joint committees among counties for purposes of performing certain functions and delivering certain services.<sup>305</sup> Section 118 of the CGA allows counties to enter into agreements with other counties for the purpose of effective and efficient delivery of services. In addition, section 3 of the Intergovernmental Relations Act provides for a framework for consultation and cooperation amongst counties and for mechanisms of resolving disputes between counties where they arise.<sup>306</sup>

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<sup>297</sup> As above.

<sup>298</sup> Ghai & Cottrell (n 16 above) 132.

<sup>299</sup> SP Mzungezwa 'Intergovernmental relations in local sphere of government in South Africa with specific reference to the city of Tswane Metropolitan Municipality' unpublished PhD thesis, University of Pretoria (2007) 2.

<sup>300</sup> T Layman *Intergovernmental relations and service delivery in South Africa: a ten year review* (2003) 3.

<sup>301</sup> Ghai & Cottrell (n 16 above) 94.

<sup>302</sup> As above.

<sup>303</sup> Article 189 (1) Constitution.

<sup>304</sup> Article 189 (2) Constitution.

<sup>305</sup> As above.

<sup>306</sup> Section 3 Intergovernmental Relations Act.



There is also the question of competition among counties to attract investments and other development activities.<sup>307</sup> One idea underlying this system is that the counties will compete with each other to attract business and development, create jobs and improve the living standards of their people.<sup>308</sup> This may help to attract back people originally from the county who have gone elsewhere, to Nairobi or even further, with their capital and skills.<sup>309</sup> However there are risks that come with county competition. If they decide to do so by reducing property taxes that business must pay, they may have less money to offers services to their people.<sup>310</sup> If the decide to be lax in issuing business licences or save money on refuse collection, their people will suffer.

### **3.9 The role of the Senate in devolution**

Article 93 provides for a bicameral parliament comprising the National Assembly and the Senate. The National Assembly represents the whole people generally while the Senate represents the counties and serves to protect their interests and those of their governments.<sup>311</sup> In terms of its composition, the Senate shall have a total of 67 members. First, one member will be elected by voters from each of the 47 counties.<sup>312</sup> Second, 16 women members will be nominated from party lists, and allocated to the parties in proportion to the number of seats they won in the county elections for Senate members.<sup>313</sup> These members will be additional to any women elected directly from counties. Third, one man and one woman will represent youth and one man and one woman will represent persons with disabilities, all of whom will be taken from party lists.<sup>314</sup> There are no reserved seats for minorities and marginalized communities in the Senate.

The Senate plays a critical role in the devolved system of government. Besides representing and protecting the interests of the counties and their governments, the Senate is granted power to participate in the law-making function of parliament by considering, debating and approving Bills concerning counties.<sup>315</sup> It also determines the five year formula for the allocation of revenue among the 47 counties and also exercise oversight over revenues allocated to them for expenditure.<sup>316</sup>

### **3.10 Conclusion**

The chapter has briefly described the main institutional features of the devolved system of government in Kenya by highlighting the structures, institutions, systems, functions and powers of county governments. It proceeded to examine the relationship between county and national governments, and relationship among counties. The objectives and principles of devolution were outlined. The crucial role of the Senate in devolution was also

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<sup>307</sup> Ghai & Cottrell (n 16 above) 133.

<sup>308</sup> As above.

<sup>309</sup> As above.

<sup>310</sup> As above.

<sup>311</sup> Article 96 (1) Constitution.

<sup>312</sup> Article 98 (1) (a) Constitution.

<sup>313</sup> Article 98(1) (b) Constitution.

<sup>314</sup> Article 98 (1) c&d) Constitution.

<sup>315</sup> Article 96 Constitution.

<sup>316</sup> As above.



discussed. The point to be noted is that the design of the devolved government in terms of powers and functions is crucial to the protection of rights of ethnic minorities. The county government is founded on the supreme law of the land. Additionally, the Constitution establishes the Senate whose function is to safeguard the interests of the counties in the national government.

Against the backdrop of the main institutional features of the devolved system of government that were discussed in this chapter and against the human rights concerns of ethnic minorities that were identified in chapter two, the next chapter will examine how county government, through its structures, institutions, powers, functions and intergovernmental relations could assist in the realisation of the rights of ethnic minorities, and the relevance of the Senate and the CRA in the protection of the rights and interests of ethnic minorities.

## CHAPTER FOUR

### COUNTY GOVERNMENTS AND RIGHTS OF ETHNIC MINORITIES IN KENYA

#### 4.1 Introduction

Generally, devolution is associated with the prospects of democratic self-governance, citizen participation, nation and nationhood building, equalisation and efficient and effective delivery of services.<sup>317</sup> It all begins with an assumption that devolution enables citizens to determine or influence their policy preferences and results.<sup>318</sup> It is perceived that decisions about local issues should be made by local citizens through county government which is closer to the people and more responsive to local needs.<sup>319</sup>

One of the most transformative aspects of the Constitution is the devolution of political power, responsibilities and resources in which the Kenyan people have put a lot of hope. As the discussion in the previous chapter reveals, one crucial institutional feature of the devolved government is the assignment of powers and functions between the national and county government and allocation of financial resources to the counties.<sup>320</sup> Additionally, one of the objectives of devolution is to promote and protect the interests and rights of minorities and marginalised group and give powers of self-governance to the people.<sup>321</sup> This is based on the assumption that devolution through county governments should lead to protection of minorities and marginalised groups and greater and equitable access and control of economic resources for development.<sup>322</sup> It has been argued that centralisation of political power is widely associated with political and economic marginalisation along ethnic lines in Kenya. Thus, devolving powers and resources at local level may be seen as a solution to the problem.<sup>323</sup> This is because each tribe is expected to pursue its socio-economic developments.<sup>324</sup>

However, devolution that is not well designed or properly undertaken may lead to more concentration of power among a small elite and a corresponding increased marginalisation of ethnic minorities and marginalised communities.<sup>325</sup> It could end up being a mechanism through which local elites gain power, to manipulate the masses because of less central government oversight.<sup>326</sup> Caution is therefore needed, especially in the light of the fact that the county governments created are too large to accommodate the concerns of ethnic minorities.<sup>327</sup>

It is important to note that although Article 260 of the Constitution has defined a marginalised group and a marginalised community, it neither defines the term 'minority nor does it provide a list of communities to be

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<sup>317</sup> Y Ghai 'Devolution: Restructuring the Kenyan state' (2008) 2 *Journal of Eastern African Studies* 211.

<sup>318</sup> As above.

<sup>319</sup> Tiebout (n 219 above) 416.

<sup>320</sup> Oloo (n 182 above) 5.

<sup>321</sup> Article 174 (e) Constitution.

<sup>322</sup> L Joy *Decentralization and human rights: A systematic approach* (2003) 10.

<sup>323</sup> As above.

<sup>324</sup> As above.

<sup>325</sup> JF Bayart *The state in Africa: The politics of the belly* (1993) 10.

<sup>326</sup> As above.

<sup>327</sup> As above.

considered as ethnic minorities in the country. This will pose a challenge to county government in identifying ethnic minorities that deserve minority protection.<sup>328</sup> The objective of this chapter is, therefore, to examine whether and how the structures, institutions, powers, functions and intergovernmental relations of county government discussed in the preceding chapter could assist in addressing the human rights concerns of ethnic minorities that were identified in chapter two. But before the analysis, it commences with a discussion on the constitutional provisions in the Bill of Rights that protect the rights of ethnic minorities. Then, it examines the relevance of the Senate and the Commission on Revenue Allocation (CRA) in addressing the problems of ethnic minorities and marginalised communities.

## 4.2 Constitutional protection for ethnic minorities

The Constitution 2010 is progressive in providing rights of ethnic minorities.<sup>329</sup> It guarantees civil and political rights, socio-economic rights and group rights benefits all Kenyans. These rights are not peculiar or limited to ethnic minorities. In addition, it provides specific rights that are particular and limited to ethnic minorities. With regards to general rights and fundamental freedoms, there are a number of rights that are relevant and of greater importance in accommodating and addressing concerns of ethnic minorities at county level. One of such rights is the right to equality and non-discrimination.<sup>330</sup>

The right to equality and non-discrimination is expressed in Article 27 of the Constitution. The article begins with a guarantee of equality before the law and equal protection and benefit of the law.<sup>331</sup> Article 27(4) prohibits discrimination on a comprehensive list of specified grounds including culture, language, religion, belief, conscience, dress and ethnic or social origin. The list grants substantial protection to ethnic minorities, who may benefit from protection against discrimination on grounds of ethnic origin, language and culture.<sup>332</sup> Along with the general protection from discrimination offered by Article 27, part 3 of the Bill of Rights makes particular provisions for specific vulnerable persons and groups, with the aim of ensuring greater certainty as to the application of those rights and fundamental freedoms to certain persons or groups. One of the groups protected is minorities and marginalised groups.<sup>333</sup>

Article 56 of the Constitution provides additional rights and protections for minorities and marginalised groups, as a category that potentially encompasses all those vulnerable to discrimination.<sup>334</sup> It requires the government, which includes county government to take measures including affirmative action to ensure the participation of

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<sup>328</sup> Oloo (n 182 above) 5.

<sup>329</sup> Article 56 Constitution.

<sup>330</sup> Article 27 Constitution.

<sup>331</sup> Article 27(1) Constitution.

<sup>332</sup> J Fitzgerald 'The road to equality? The right to equality in Kenya's new Constitution' (2010) 5 *Equal Right Review* 59.

<sup>333</sup> As above.

<sup>334</sup> Fitzgerald (n 332 above) 62.

these groups in governance, education and employment, to have access to water, health services and infrastructure and to develop their cultural values, languages and practices.<sup>335</sup>

The affirmative action programmes and policies will be aimed at addressing any past discrimination by state policy or practice, an experience which many ethnic minorities have gone through.<sup>336</sup> This is done by favouring ethnic minorities in a manner that will hasten their integration into main-stream society.<sup>337</sup> In my opinion, the challenge would be that though the aim of affirmative action is to foster the participation of ethnic minorities in decision making, there still exist a wide gap between policy and practice, given the current reality of life for various ethnic minorities in Kenya.

### 4.3 County government structures and ethnic minorities

The Constitution creates and assigns functions to a number of institutions at county level including the county assembly, county executive committee, county public service and county decentralised units. The membership, composition, powers and functions of these structures have been discussed in the preceding chapter and therefore these sections will evaluate how these structures could address or accommodate concerns of ethnic minorities.

#### 4.3.1 County assembly

As discussed in chapter three, the county assembly is the legislative arm of county government and a major concern is how ethnic minorities will be represented in the assembly.<sup>338</sup> This is because minority representation in the assembly is a key mechanism of fostering their political participation and ensuring local democracy.<sup>339</sup> Local democracy at county level could serve as a mechanism for ensuring county government is responsive to ethnic minorities' preferences.<sup>340</sup> Their representation could be achieved through a democratic and inclusive election process.<sup>341</sup> The choice of electoral system for electing members of county assembly is very important in providing for an avenue for representation of ethnic minorities and marginalised communities. The electoral system needs to be not only representative, but also inclusive.<sup>342</sup>

Article 90 of the Constitution provides for a FPTP electoral system. Under this system voting takes place in single-member constituencies. Voters vote for their favoured candidate and the candidate with the most votes in the constituency wins. This disadvantages ethnic minority representation because of their small numbers making

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<sup>335</sup> Article 260 Constitution defines affirmative action as any measured designed to overcome or ameliorate an inequality or the systemic denial or infringement of a right or fundamental freedom.

<sup>336</sup> Sungura (n 29 above) 218.

<sup>337</sup> As above.

<sup>338</sup> Oloo (n 182 above) 7.

<sup>339</sup> M Chege *The case of electoral system in Kenya* (2007) 18.

<sup>340</sup> Oloo (n 182 above) 7.

<sup>341</sup> As above.

<sup>342</sup> F Varennes *Towards effective political participation and representation of minorities* (1998) 7.

it statistically impossible for a minority candidate to be elected.<sup>343</sup> Most ethnic minorities are geographically concentrated.<sup>344</sup> But the IEBC did not consider ethnic minorities in the delimitation of county wards.<sup>345</sup> They noted in their report released in February 2012 that they did not resolve the issues regarding representation of ethnic minorities at county level.<sup>346</sup> This has reduced the possibility of a member from an ethnic minority to be elected from a county they share with larger communities. Moreover, neither the Constitution nor the CGA has provided for the creation of special wards for ethnic minorities in each county. Besides, it is likely that party-sponsored candidates will come from majority communities thus excluding candidates from ethnic minorities from contesting through dominant political parties. The argument raised is that candidates from majority communities are likely to appeal to the largest percentage of voters.

Generally, even though the Constitution provides for independent candidates, members of an ethnic minority who decide to run as an independent candidate have very slim chances of winning.<sup>347</sup> Oloo has observed that provision for independent candidates is unlikely to benefit ethnic minorities because current indicators suggest that party-sponsored candidates will remain dominant for the foreseeable future.<sup>348</sup>

The Constitution recognises the need for special representation of ethnic minorities in a county assembly.<sup>349</sup> The CGA provides for the six special seats in county assembly.<sup>350</sup> However, the seats will be allocated to political parties based on their performance on FPTP system. This means that dominant political parties might take most, if not all the six special seats reserved for minorities, youth and persons with disabilities.<sup>351</sup> The special seats will also be shared among minorities, youth and person with disabilities.

#### **4.3.2 County executive committee**

As mentioned in chapter three, the county executive committee is the executive organ of county government and the county governor is the chief executive.<sup>352</sup> The FPTP system still applies in electing a county governor and the candidate who receives the greatest number of votes becomes the governor.<sup>353</sup> This disadvantages ethnic minorities because of their small numbers. In terms of composition of the committee, the Constitution is silent on inclusion of members of minorities and marginalised groups in the county executive committee. However, the recently passed CGA in its section 36 obliges the county governor when nominating members of the county

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<sup>343</sup> Oloo (n 182 above) 7.

<sup>344</sup> As above.

<sup>345</sup> IEBC Report 'Revised Preliminary Report on the Proposed Boundaries of Constituencies and Wards' (2012) 27.

<sup>346</sup> As above.

<sup>347</sup> Article 85 Constitution.

<sup>348</sup> Oloo (n 182 above) 8.

<sup>349</sup> As above.

<sup>350</sup> Section 7(3) CGA.

<sup>351</sup> Article 177 (1) (c) Constitution.

<sup>352</sup> Article 179(4) Constitution.

<sup>353</sup> Article 180 (4) Constitution

executive committee to ensure that the composition of the committee reflects the community and cultural diversity of the county.<sup>354</sup>

The CGA under section 35(2) gives a county assembly a supervisory role on such appointments. It allows county assembly to reject appointments of the members of a county executive committee that did not take into account the representation of ethnic minorities, and the community and cultural diversity within the county.<sup>355</sup> I would argue that the approval of the governor's appointments by the county assembly may not fully address the requirement of a balanced county executive committee, especially in circumstances where the majority party in the county assembly is also the governor's party thus making the appointments a mere extension of party structures that does not encompass the interests of ethnic minorities.<sup>356</sup>

#### 4.3.3 County public service.

Article 235 of the Constitution does not mention inclusion of members of minorities and marginalised communities in the administrative arm of county government.<sup>357</sup> The matter was left to parliament to legislate.<sup>358</sup> Parliament passed the CGA that establishes in section 59, a county public service board whose responsibility is to appoint persons to hold office within the county.<sup>359</sup> The appointment of the members of the board is based on a competitive process.<sup>360</sup> The minimum qualification for appointment is a bachelor's degree from a recognised university and working experience of not less than five years.<sup>361</sup> Based on the low literacy levels of most ethnic minorities, a limited number of people may meet these qualifications. However, I would argue that the board is a small specialised body that will ensure competent administration and service delivery and such body requires highly skilled members to be appointed based on expertise rather than representation. Therefore competence cannot be compromised with representation of ethnic minorities in the board.

CGA has made attempts to deal with the issues of inclusion of ethnic minorities in the county public service. Section 65 requires county public service board to be guided by the requirement that at least thirty per cent of the posts at entry level are filled by candidates who are not from the dominant ethnic community in the county.<sup>362</sup> The same provision demands that criteria for appointment be based on merit.<sup>363</sup> Article 232 of Constitution also requires fair competition and merit be used as basis for appointments and promotion in the public service.<sup>364</sup> It is not clear from these provisions how the board will effectively work to ensure ethnic minorities are appointed.

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<sup>354</sup> Section 35(1) CGA.

<sup>355</sup> Section 35(2) (b) CGA.

<sup>356</sup> Task Force Report on Devolved Government (n 10 above) 70.

<sup>357</sup> Article 235 (1) Constitution.

<sup>358</sup> As above.

<sup>359</sup> Section 57 (1) CGA.

<sup>360</sup> Section 58(2) CGA.

<sup>361</sup> Section 58(3) CGA.

<sup>362</sup> Section 65(1) (e) CGA

<sup>363</sup> Section 65(1) (b) & (c) CGA.

<sup>364</sup> Article 232 (1) (g) Constitution.

#### 4.3.4 County decentralised units

Public participation of ethnic minorities in the affairs of the county is crucial in a democratic society.<sup>365</sup> Indeed, when ethnic minorities are involved in decision making and implementation of laws and policies, they are able to influence the governance of the county government in a manner that promotes the attainment of equity and inclusiveness.<sup>366</sup> The Fourth Schedule of the Constitution gives county government the competence to ensure and coordinate the participation of communities in governance at the county level.<sup>367</sup> The county government is constitutionally responsible for assisting local communities in developing capacities to increase their participation in governance at the local level.<sup>368</sup> Importantly the CGA aims to promote participation of ethnic minorities at county level. Section 97 requires county governments to promote effective participation of ethnic minority communities in public and political life.<sup>369</sup> This provision specifically obliges county government to enhance public participation of ethnic minorities.

More often than not ethnic minorities are geographically clustered and this means that decentralizing power and resources to the sub-counties and wards could empower communities at the county level.<sup>370</sup> The Constitution acknowledges this fact and provides for decentralisation of functions and provisions of services to the extent that is efficient and practicable.<sup>371</sup> This however gives discretion to county governments to determine what is efficient and practicable.<sup>372</sup> Although this needs to be done in accordance with the spirit and principles of the Constitution, the county government may interpret the provision differently in favour of the interests of dominant communities.<sup>373</sup>

The CGA provides for decentralised units at county level. Section 48 of the Act allows counties to decentralize further into sub-counties, wards and villages. The rationale for further decentralisation at the county level among others is to enhance participation of ethnic minorities and efficient administration and service delivery to them.<sup>374</sup> The creation of sub-county, wards and villages as decentralised entities could give an opportunity to ethnic minorities to engage fully in the developmental issues in their respective counties.<sup>375</sup> It could also enable them to monitor service delivery by the ward administrators effectively. The Act also provides for the establishment of the office of sub-county and ward administrators, whose responsibilities include, ensuring efficient service delivery,

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<sup>365</sup> Ghai (n 34 above) 6.

<sup>366</sup> As above.

<sup>367</sup> Item 14 of part 2 of Fourth Schedule of Constitution.

<sup>368</sup> As above.

<sup>369</sup> Section 97 (g) CGA.

<sup>370</sup> Oloo (n 182 above) 8.

<sup>371</sup> Article 176 (2) Constitution.

<sup>372</sup> Task Force Report on Devolved Government (n 10 above) 55.

<sup>373</sup> As above.

<sup>374</sup> As above.

<sup>375</sup> Abraham (n 20 above) 18.

coordinating and managing development activities to empower the community, and the coordination and facilitation of citizen participation in the development of policies and plans, and delivery of services.<sup>376</sup>

The challenge would be to ensure that decentralised units receive enough resources and technical support from the county government to enable them to perform their functions effectively.<sup>377</sup> But where county government decides to re-centralise resources at county capital, the whole purpose and principle of devolution will be lost and ethnic minorities who have suffered in the past will continue to suffer from marginalisation.<sup>378</sup> This could deny ethnic minorities the opportunities to enjoy efficient and effective delivery of service.

Another issue that is vital in strengthening public participation of ethnic minorities is access to information. Both the Constitution and the CGA allow citizens to access information held by the county government or its decentralised units.<sup>379</sup> Ethnic minorities have a right to demand information from a county government and its decentralised units.<sup>380</sup> Information is crucial in empowering and enlightening them about their rights and the role of the county government in promoting and protecting these rights.<sup>381</sup> It could help them to understand the transformed devolved system as well as new electoral systems and procedures.<sup>382</sup> It could also assist them in heightening their demands for service delivery and accountability from their local leaders at the county level.<sup>383</sup> The challenge however is that all official communications, which include reports and policies, will be made either in Swahili or English.<sup>384</sup> Considering the low literacy levels of most members of ethnic minority groups, the information may not serve the intended purpose of empowering and enlightening them.<sup>385</sup>

#### **4.4 Implementation of specific human rights concerns of ethnic minorities**

The following sections discuss whether the county government has constitutional powers and mandate to implement specific human rights concerns of ethnic minorities. These rights include: cultural and language rights, right to education, socio-economic rights, and land rights

##### **4.4.1 Cultural and language rights**

Ethnic minority communities have a solid attachment to their distinctive traditions and cultures that have to be passed over to the next generation.<sup>386</sup> The Constitution acknowledges this fact. Article 7 obliges the state to promote and protect the diversity of language of people of Kenya. The state is also obliged to promote the

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<sup>376</sup> Section 50 & 51 CGA.

<sup>377</sup> Task Force Report on Devolved Government (n 10 above) 201.

<sup>378</sup> As above.

<sup>379</sup> Article 35 Constitution; Section 96 CGA.

<sup>380</sup> Section 96 (1) CGA.

<sup>381</sup> Task Force on Devolved Government (n 10 above) 179.

<sup>382</sup> As above.

<sup>383</sup> As above.

<sup>384</sup> Section 18(4) CGA.

<sup>385</sup> Abraham (n 20 above) 23.

<sup>386</sup> Dersso (8 above) 78.



development and use of indigenous languages.<sup>387</sup> Article 11 recognises culture as the foundation of the nation and obliges the state to promote all forms of cultural expression through literature, arts, traditional celebrations and cultural heritage.<sup>388</sup> The Constitution prohibits discrimination on the basis of culture or language,<sup>389</sup> and Article 44 guarantees language and cultural rights.<sup>390</sup> It also allows the formation of cultural and linguistic associations.<sup>391</sup> The CGA states that English and Kiswahili are the official languages of communication within the county.<sup>392</sup> This is important based on the fact that there is ethnic diversity in counties, it would be very difficult to choose one of the local languages over the others. It is believed that having neutral languages such as English and Kiswahili at county level would foster unity and minimise ethnic rivalry.

The Fourth Schedule is clear that it is the national government that has the responsibility for promotion and development of local languages.<sup>393</sup> This may help in protecting indigenous languages of ethnic minorities from being dominated by languages of larger communities in a county. Turning to cultural rights, it is important to note that most counties are multi-ethnic and ethnic minorities tend to feel that their culture is under threat from that of majority communities. The Fourth Schedule of Constitution makes county government responsible for promotion and development of cultural activities. This could be considered as a positive step towards protection of culture and traditions of ethnic minorities that were initially regarded as ‘uncivilised’ and ‘backward’ by the central government. The traditional lifestyle of ethnic minorities could be protected at county level. However, culture is mainly transmitted through local languages, and the function of promoting local languages is assigned to national government.<sup>394</sup> This may pose a challenge to county government in their efforts to promote the culture of ethnic minorities when they are not responsible for promotion of their local languages.

#### 4.4.2 Right to education

Education is critical for minority groups because it is the vehicle of cultural transmission.<sup>395</sup> The Constitution responds to this by explicitly providing for the right to education under Article 43.<sup>396</sup> The provision of primary, secondary, tertiary and higher education is exclusively the responsibility of the national government.<sup>397</sup> The reason for this might be that the cost of providing education is high and most counties may not have enough resources to effectively provide it. In addition to that, my opinion would be that if education is left to county governments, county schools may discriminate against ethnic minorities by excluding them as ‘uneducable’.<sup>398</sup>

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<sup>387</sup> Article 7(3) Constitution.

<sup>388</sup> Article 11 (2) Constitution.

<sup>389</sup> Article 27 (4) Constitution.

<sup>390</sup> Article 44 Constitution

<sup>391</sup> Article 44(2) Constitution

<sup>392</sup> Section 18 (1) CGA.

<sup>393</sup> Item 5 of part 1 of Fourth Schedule of Constitution.

<sup>394</sup> Ghai & Cottrell (n 16 above) 80.

<sup>395</sup> Abraham (n 20 above) 5.

<sup>396</sup> Article 43(1) (f) Constitution.

<sup>397</sup> Item 16 of part 1 of Fourth Schedule of Constitution.

<sup>398</sup> L Yi ‘Ethnicisation through schooling: The mainstream discursive repertoires of ethnic minorities (2007) 192 *The China Quarterly* 933.

They may also exclude the culture and history of ethnic minorities from their curriculum leading to ethnic minorities feeling invisible, inferior and second-class citizens.<sup>399</sup>

The county government still have an educational role to play, although limited. According to the Fourth Schedule of the Constitution, county governments will be responsible for pre-primary education, village polytechnics, home craft centres and childcare facilities. The village polytechnics and home craft centres could be important to ethnic minorities particularly in training young people in rural areas to acquire relevant occupational and business skills such as tailoring and masonry thus lifting rural standards of living by providing services at a low cost to rural communities.

#### **4.4.3 Socio-economic rights**

Socio-economic rights are important in assisting ethnic minorities to advance their social and economic interests and improve their standards of living. Article 43 of the Constitution guarantees socio-economic rights including the right to healthcare, adequate housing, adequate food, adequate water, education and social security. It is worth noting that not all socio-economic rights provided under article 43 fall under the competence of county government. The county government has competence in provision of public healthcare services and water and sanitation services.<sup>400</sup> Other rights such as adequate housing, adequate food, social security and education will be provided by the national government.<sup>401</sup> The county government has mandate to provide only public health service such as immunization of communicable diseases but not referral health services. National referral health facilities such as national hospitals are national functions. Similarly, county government is responsible for local water and sanitation services while management of water resources including catchment areas, which in the past have been a source of conflict between ethnic minorities and dominant communities, is a function of national government.

All in all, the realisation of these rights either by national or county government depends on availability of resources thus they may not be realised immediately. The county government may not be in a position to provide public healthcare and water services to all ethnic minorities at once. The principle of progressive realisation of socio-economic rights based on available resources is an international law principle that the Constitution has incorporated to guide the government in their efforts to realise all socio-economic rights.

#### **4.4.4 Land and natural resources**

Land is important for economic development of every nation.<sup>402</sup> For ethnic minorities, land is not only a source of livelihood but also a cultural symbol. The majority of their land is communally owned.<sup>403</sup> The Constitution

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<sup>399</sup> As above.

<sup>400</sup> Item 2 of part 2 of Fourth Schedule of Constitution.

<sup>401</sup> As above.

<sup>402</sup> Ghai & Cottrell (n 16 above) 76.

<sup>403</sup> Dersso (n 8 above) 70

responded to their concerns by recognising public, community and private land ownership.<sup>404</sup> The community land is vested in and is to be held by communities identified on the basis of ethnicity or culture or similar community of interest.<sup>405</sup> Community land include land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines and ancestral lands and lands traditionally occupied by hunter-gatherer communities.<sup>406</sup> The Constitution allows county government to hold unregistered community land in trust on behalf of the community.<sup>407</sup> This is to protect interests in land of the community. The county government can only alienate the land in the interest of members of the community individually and collectively. This means that community land cannot be disposed of or used without regards to the rights of members of the community being put into consideration.<sup>408</sup> A member of the community can challenge the action of county government over the land in court if his or community interests were not considered in the disposal of community land. The county government does not have mandate to investigate historical land injustices and recommend appropriate redress, which is a major concern to ethnic minorities. This mandate has been given to National Land Commission established under article 67.<sup>409</sup> The Commission has powers to initiate investigations into historical land injustice and make recommendations for an appropriate remedy.<sup>410</sup>

#### **4.5 National institutions dealing with concerns of ethnic minorities**

The Senate and the CRA are important national institutions in addressing the concerns of ethnic minorities at county level. This section discusses their relevance.

##### **4.5.1 The Senate**

The composition and role of the Senate was discussed in chapter three. While the Senate is supposed to represent the interests of dominant communities and ethnic minorities, it may end up representing the interests of dominant community's only.<sup>411</sup> The ethnic minorities may be unrepresented based on two reasons.<sup>412</sup> The first reason is based on the choice of electoral system used in electing senators; Article 90 of the Constitution provides for a FPTP electoral system. This disadvantages minority representation in the Senate unless they are sufficiently concentrated in a county to constitute a dominant ethnic group. The second reason is premised on the composition of the Senate. The membership of the Senate, unlike the national assembly and the county assembly, only provides for special seats for women, the youth and persons with disabilities. It leaves out ethnic minorities as a special group that deserves special representation in the Senate.

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<sup>404</sup> Article 61(2) Constitution.

<sup>405</sup> Article 63(1) Constitution.

<sup>406</sup> Article 63 (2) (d) Constitution.

<sup>407</sup> Article 63(3) Constitution.

<sup>408</sup> Article 63 (4) Constitution.

<sup>409</sup> Article 67(1) Constitution.

<sup>410</sup> Article 67 (2) (e) Constitution.

<sup>411</sup> Abraham (n 20 above) 11.

<sup>412</sup> As above.

The Senate plays a role in deciding the formula of sharing resources among counties. Marginalized counties will mostly depend on resources from the national government to finance their service delivery responsibilities. A formula that does not respond to marginalized counties' needs will have a major impact on their capacity to deliver services to ethnic minorities.<sup>413</sup>

#### 4.5.2 The Commission on Revenue Allocation

The Commission on Revenue Allocation that is established by Article 215 is one of the most important institutions of shared governance that are independent in nature. It is charged with the responsibility of making recommendations about the formula to be used in sharing of revenue raised nationally between national government and county governments, and among counties.<sup>414</sup> Its independent nature enhances objectivity and transparency in its function. This creates an element of trust in the institution by the ethnic minorities that more resources would be allocated in their counties.

The Constitution has provisions that aimed at ensuring that county governments have resources to perform their functions.<sup>415</sup> Article 202 provides that revenue raised nationally shall be shared equitably among the national and county governments.<sup>416</sup> Article 203 establishes a detailed list of criteria for determining these equitable shares.<sup>417</sup> These criteria includes, the need to ensure county governments have adequate resources to perform their functions, economic disparities between counties and need to remedy them, and the need for affirmative action for disadvantages areas and groups.<sup>418</sup> The Constitution recognizes the disparities in the provisions of basic services between different counties by establishing an Equalization Fund to accelerate economic progress towards equality in marginalized areas.<sup>419</sup> The Fund is established as 0.5% of annual national revenue and it is established for twenty years from the day the Constitution was promulgated.<sup>420</sup>

In my view CRA's recommendations will take into account the economic needs of ethnic minorities and need for affirmative action for marginalized counties that have been historically neglected. This may improve public service delivery to ethnic minorities. Its role in resource allocation makes it a very important national institution in protecting socio-economic rights of ethnic minorities. However, the 2012 World Bank report has raised concerns that though marginalized counties may receive substantial extra cash relative to the cost of their current service delivery obligations, the challenge will be to manage these resources well, and to scale up service delivery with limited capacity.<sup>421</sup>

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<sup>413</sup> World Bank Report 'Devolution without disruption: Pathways to a successful new system' (2012) 81.

<sup>414</sup> Article 216 (1) Constitution.

<sup>415</sup> Fitzgerald (n 332 above) 65.

<sup>416</sup> Article 202(1) Constitution.

<sup>417</sup> Article 203(1) Constitution.

<sup>418</sup> Article 203 (1) Constitution.

<sup>419</sup> Article 204 (1) Constitution.

<sup>420</sup> Article 204 (6) Constitution.

<sup>421</sup> World Bank Report (n 413 above) 26.

## 4.6 Conclusion

This chapter has discussed whether and how county governments can serve as an effective institutional device for addressing the concerns of ethnic minorities and marginalised communities, hence the realisation of their constitutionally entrenched rights. From the discussion, the argument is that the structures, institutions, powers and functions of county government may not be sufficient to deal with all political, economic and social concerns of ethnic minorities. To be precise, the chapter has argued that county government may to some extent address the issues of public participation through the established decentralised units. It has also submitted that county government could address their cultural concerns because promotion of culture is part of its constitutional function. The county government however plays a peripheral role in matters of language and land rights as well as the provision of some socio-economic rights such as adequate housing, adequate food, social security and education.

The chapter has proceeded to argue that mechanism of ethnic minority representation appears to be structurally inadequate. This is because the choice of FPTP as the electoral system for elections may limit access to representation. It has further argued that the Senate may possibly represent the interests of the dominant community not ethnic minorities unless they are geographically concentrated to constitute a dominant ethnic group. It has been contended that the CRA has a vital role to play in addressing the socio-economic concerns of ethnic minorities through the allocation of funds to counties. The next chapter will provide a conclusion of the study.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

The objective of this study was to enquire how devolution of powers to county governments can be used as a mechanism to address concerns of ethnic minorities in Kenya. Therefore Chapter Two examined the concept of ethnic minorities and criteria used in identifying them. Chapter Three proceeded to examine the main institutional features of the devolved system of government in Kenya. It assessed the structures, institutions, functions, powers and the intergovernmental relations of county governments. It also outlined the role of the Senate in devolution. Chapter Four analysed whether and how county government through its structures, institutions, functions, powers and intergovernmental relations may assist in the realisation of the rights of ethnic minorities. This concluding chapter restates the major findings of this study and make recommendations on how ethnic minorities' interests can be better protected within county governments.

As to whether county government could protect the rights of ethnic minorities, the study has shown that structures, institutions, powers and functions of county government may provide only a partial answer to the current human rights concerns of ethnic minorities. Hence, devolution may not achieve its fifth objective as provided for under Article 174 (e) of the Constitution. This is attributable to the functions assigned to county government under the Fourth Schedule of the Constitution as well as the electoral system used for the election of county members to county assembly.

#### 5.1 Public participation

With regard to participation of ethnic minorities, the structures established under county government are inadequate to guarantee ethnic minority representation in county assembly. The structures tend to limit political space for ethnic minority participation. To begin with, the Constitution retained a FPTP system of voting in electing county members. This system disadvantages minorities because of their small numbers. Therefore it is still necessary to examine what electoral mechanisms are required to address the challenge of inadequate representation of ethnic minorities in the county assembly. To deal with this challenge, it would be advisable to adopt combined FPTP and proportional representation (PR) systems based on party lists targeting this group. This study therefore recommends the adoption of a mixed electoral system that combines both PR and FPTP to strengthen minority representation. This recommendation will however require a constitutional amendment.

This study also recommends that IEBC should review the county ward boundaries taking into account representation of ethnic minorities and marginalised communities. They should consider the geographical distribution of ethnic minorities in each county. This will be a useful way of guaranteeing minority inclusion in county assembly. Moreover, in cases where ethnic minorities are not directly elected to county assembly, this study recommends that special seats should be set aside specifically for them. This proposal will require amendment of section 7 of CGA to set aside a number of special seats for them.

Since the structures and institutions of county government as they are now have limited political participation of ethnic minorities, decentralised units such as sub-counties, wards and villages could be used to foster their participation and development at the local level. However, their participation at decentralised units need to be strengthened. They could be strengthened by county government ensuring that ethnic minorities are able to access information to enable them fully participate in developmental issues at the local level. The decentralised units should also assist them in heightening their demands for better service delivery and accountability from their local leaders. The role of civil society will be important at this stage to conduct public awareness campaigns aimed at educating ethnic minorities of their rights, and obligations of county government in the realisation of those rights.

Generally, ethnic minorities can only be said to be enjoying full participation when their voices are heard and their rights respected not only in county assembly, but also in county executive committee, county public service, county decentralised units and any other relevant areas of decision making. Their full participation does not end at having a representative in county assembly because political leaders cannot be able to advance and protect all human rights of ethnic minorities. They need support of other member from ethnic minorities holding positions outside political sphere for them to fully address their concerns. It is therefore important that ethnic minorities are fully involved in all spheres of county governance.

## **5.2 Socio-economic rights**

The Constitution recognises the importance of socio-economic rights in the lives of ethnic minorities. These rights are likely to improve their standards of living and make them live a more dignified life. The question remain: whether county government may ensure the realisation of these rights. Only the right to public healthcare and water can be realised by county government because they are mandated by the Constitution to provide these. Other socio-economic rights such as the right to social security, housing and education cannot be provided by the county government because the provision of these rights is a responsibility of the national government. Even where county governments are mandated to provide water and healthcare services this mandate relies on the availability of resources and therefore these rights can only be realised progressively. For that reason, socio-economic rights of ethnic minorities at county level remain fragile, partly because the constitutional mandate is incomplete, and partly because of their dependence on available resources.

While altering the constitutional mandate to allow for the full range of socio-economic rights to be provided to ethnic minorities at county level may be unachievable, at the very least, the CRA should allocate more financial resources to disadvantaged counties where most ethnic minorities live to enable the county government to provide access to healthcare and water services. This will go a long way to ensuring ethnic minorities enjoy efficient public services.

### **5.3 Cultural and language rights**

The Constitution acknowledges the importance of promoting culture and local languages. The attainment of cultural rights is the mandate of the county government while the promotion of language rights remains the responsibility of national government. Since cultural and language rights are intertwined and co-dependant, a situation is created where the realisation of these rights by ethnic minorities is precarious and relies on harmonisation of efforts by national and county governments. This harmonisation can be achieved through the creation of a joint committee on culture and language comprising of members from both national and county governments. The committee should be responsibility for promotion and development of local languages and cultural activities. But in absence of the joint committee, county government should carry out their mandate of promoting culture but at the same time be responsive to local languages issues.

### **5.4 Land rights**

The Constitution recognises community land and gives powers to a county government to hold land in trust for the interests of members of the community individually and collectively. The county government lacks powers to investigate and provide redress for historical land injustices, which is a major concern to ethnic minorities. Instead this function is given to the National Land Commission, a national institution. It is therefore not possible for county government to address the issue of historical land injustices perpetrated against ethnic minorities. They cannot claim restitution of lost land or equitable redress from county government.

In conclusion, although county governments may not be well placed to answer to the human rights concerns of ethnic minorities, the mere recognition of protection and promotion of their rights and interests as one of the objectives of devolution is an essential institutional principle of devolved government that seeks to build an inclusive and equity Kenyan society.

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