

# Fragmentation in a bid to Defragment: Decentralisation as a solution to the challenge of Inclusion in the Kenyan Context

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## Abstract

*Fragmentation is a practical tool suggested in this paper to bring about societal inclusion. Indeed, this is not a novel idea. Kenya has joined the league of practitioners of decentralisation, a system of governance that involves fragmentation. One of the objectives is to achieve national unity. The evil observed today is that decentralisation has brought about broadened separation. The aim of this paper is to highlight how decentralisation as a practical mechanism ought to unite. This is a possible solution to the challenge of inclusion. The end sought is a better society where unity, peace and justice abound. The paper will tackle three spheres of inclusion: social, political and economic which are dealt with separately but in essence they are interlinked with each other. In each of these areas, the paper will illustrate how fragmentation has achieved inclusion.*

## I. Introduction

The promulgation of the Constitution of Kenya<sup>1</sup> was laden with promises of great change.<sup>2</sup> One key promise was that of decentralisation. Decentralisation would help the country accomplish much, including increased social, political and economic development with great emphasis put on the people of Kenya as the targeted subject of development.<sup>3</sup>

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<sup>1</sup> *Constitution of Kenya* (2010).

<sup>2</sup> 'The Constitution provided for, among others, enhanced checks and balances within the government, an enhanced role of Parliament and citizens, an independent judiciary, and a most progressive Bill of Rights. Notably, the Constitution provided for a major devolution—not only of resources and functions, but also creating a whole new layer of county government.' <http://www.worldbank.org/en/country/kenya/brief/kenyas-devolution> on 10 December 2015.

<sup>3</sup> The argument is made after deduction of the ill-effects of centralisation as Mutakha Kangu writes, "The centralised system (in Kenya) hindered democratic participation of the people and commu-

It could be likened to what was described by the biblical prophet Isaiah as ‘people walking in darkness will see a great light’ alluding to the coming of a Saviour.<sup>4</sup> Undeniably, Kenyans were filled with anticipation ready to welcome this revolution.<sup>5</sup> Five years have gone by and the ‘child of change’<sup>6</sup> has not yet begun to wean. It is still adjusting to its environs despite the pledges that change would happen *now*. Nonetheless, this setback does not invalidate the fact that the promise is achievable.

In order to appreciate the adoption of decentralisation in Kenya, it is important to briefly explore why this policy was advanced. During the colonial era, Kenyans were stripped of their titular<sup>7</sup> and actual<sup>8</sup> entitlement to nationality. In *Ole Njogo and others v The Attorney General & others*<sup>9</sup> the High Court of East Africa Protectorate stated that the native inhabitants of Kenya were not subjects owing allegiance to the Crown, but rather were protected foreigners who, in return for that protection, owed obedience.<sup>10</sup>

A fast-forward into the early post-colonial era: *Majimboism*<sup>11</sup> was a decentralisation model advanced in the colonial government times that saw Kenya

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nities in their own governance and development as well as their own affairs. It also encouraged inequitable development, distribution of resources, opportunities and access to services. See more in Kangu M, *Constitutional Law of Kenya on Devolution*, Strathmore University Press, Nairobi, 2015, 1.

<sup>4</sup> See here: <http://biblehub.com/isaiah/9-2.htm> on 10 December 2015.

<sup>5</sup> BBC News reports, “The large crowd gathered in Nairobi’s main Uhuru Park to watch their leader promulgate the new document, amid gun salutes and a grand parade. After Mr Kibaki signed his name, he held the document up and there was a huge cheer from the audience.” Available at <http://www.bbc.com/news/world-africa-11106558> on 26 November 2015. Similarly Daily Nation reported, “According to results from the Interim Independent Electoral Commission (IIEC), the Yes side had 4, 141, 521 votes (67 per cent) against the No camp’s 2, 054, 946 (33 per cent).” Available at <http://www.nation.co.ke/Kenya-Referendum/Kenya-gets-new-Constitution--buries-its-demons-with-vote/-/926046/971430/-/3hif4z/-/index.html> on 10 December 2015.

<sup>6</sup> The author has coined this phrase to mean Kenya’s socio-economic and political status after promulgating its Constitution.

<sup>7</sup> Being labeled a Kenyan as part of your description.

<sup>8</sup> What being Kenyan entails with regards to entitlement to: benefits and privileges.

<sup>9</sup> Civil Case No. 91 of 1912, which was filed in the High Court of East Africa Protectorate at Mombasa (reported in [1913] 5 EALR, 70-80) whereby the Maasai attempted to challenge the 1904 and 1911 land agreements.

<sup>10</sup> Truth, Justice and Reconciliation Commission, *The Final Report of the Truth, Justice & Reconciliation Commission of Kenya*, 2013, 183.

<sup>11</sup> This is derived from the Kiswahili word for counties –‘*majimbo*.’ “*Majimboism* was a key feature in the *Independence Constitution of Kenya (1963)*, which divided the country into seven provinces with each province having its own legislative and executive powers.” See more in Lumumba P, ‘Constitutions and leadership in East Africa: The crisis’ in Njogu K (ed), *Governance and development: Towards quality leadership in Kenya*, Twaweza Communications Ltd, 2007, 35.

attain her independence (in 1963) with a decentralized constitution.<sup>12</sup> However, it was short lived as the ruling party changed the Independence Constitution to have more features of a centralised unitary system.<sup>13</sup> The dissolution of decentralized system of government and the adoption of a centralised system of government was therefore not based on a legitimate process, informed by citizens' preference of one system over another. Instead, the shift was an imposition of the unitarist government which, unwilling to support majimbo, resorted to fraud and political nefariousness to subtly but effectively abrogate the independence constitution.<sup>14</sup>

In moving away from the *Majimbo* constitution, the independence government undertook various constitutional changes that had the effect of creating an 'imperial presidency' in the sense that they transferred powers away from the peripheral institutions across the country to the centre in general, but in particular to the person rather than the office of the President.<sup>15</sup> The country endured a localised colonisation under the mercy of the elite in power who sought to consolidate whatever they could grasp in terms of authority and wealth with the virus of absolute power spreading from one regime to the next.<sup>16</sup>

Kenyans validated the requisite for constitutional reform by voting in the present<sup>17</sup> Constitution during the referendum held on August 4<sup>th</sup>, 2010. The laws governing the country have been revamped so that progression can be safeguarded, preserved and guaranteed. Some of the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.<sup>18</sup>

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<sup>12</sup> Kivuva J, *Restructuring the Kenyan state: Constitutional Working Paper Series No 1*, Society for International Development, Nairobi, 2010, 17.

<sup>13</sup> Kivuva, *Restructuring the Kenyan state*, 17.

<sup>14</sup> Kivuva, *Restructuring the Kenyan state*, 17.

<sup>15</sup> Nyanjom O, *Devolution in Kenya's new Constitution: Constitution Working Paper No 4*, Society for International Development, Nairobi, 2011, 7.

<sup>16</sup> Consider for instance in the case of irregular land allocation the Truth, Justice and Reconciliation Commission reports findings of the various methods of irregular and corrupt land acquisition and allocation methods that have occurred over the three political regimes in Kenya - the Kenyatta, Moi and Kibaki regimes since independence, perpetrated mostly by government officials, and how the land-related activities have, over the years, fuelled land-related ethnic tension and strife whose roots are, in many cases, traceable to land-related injustices committed during the colonial period. See more in Truth, Justice and Reconciliation Commission, *The Final Report of the Truth, Justice & Reconciliation Commission of Kenya*, 2013, 222.

<sup>17</sup> This paper was written in the year 2015.

<sup>18</sup> Article 10 (2) (a), *Constitution of Kenya* (2010).

## II. The Definition of Decentralisation

The great philosopher Socrates once stated that the beginning of wisdom is the definition of terms.<sup>19</sup> Accordingly, decentralisation can be defined as the transfer of responsibility for planning, management and resource raising and allocation from the central government and its agencies to field units of central government ministries and agencies, subordinate units or levels of government, semi-autonomous public authorities or corporations, area-wide, regional or functional authorities, non-governmental, private or voluntary organizations.<sup>20</sup> The concept is further categorised into four areas: de-concentration, devolution, delegation and privatisation.<sup>21</sup>

De-concentration is the handing over of an amount of administrative authority or responsibility to lower levels within central government ministries and agencies.<sup>22</sup> Devolution means the creation or strengthening financially or legally of autonomous and independent sub-national units of government, the activities of which are substantially outside the direct control of the central government.<sup>23</sup> Delegation means that a sovereign authority, though retaining ultimate responsibility, creates or transfers to an agent specified functions and duties, which the agent has broad discretion to carry out.<sup>24</sup> Lastly, privatization occurs when governments divest themselves of responsibility for functions by either transferring them to voluntary organizations or allowing them to be performed by private enterprises.<sup>25</sup>

This system of fragmentation creates a portal where awareness, recognition of diversity and participation by the citizenry flow, all in a bid to strive for a better society. The underlying force is unity, which implies inclusion of the people in building their nation. In so doing, there will be defragmentation of the absolute power-driven socio-economic and political units that derail the nation's quest for togetherness. This essay thus aims at explaining how fragmentation through decentralisation can solve the challenge of inclusion in the purview of the Kenyan context.

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<sup>19</sup> See here: <http://www.goodreads.com/quotes/132404-the-beginning-of-wisdom-is-the-definition-of-terms> on 10 December 2010.

<sup>20</sup> Rondinelli D, Nellis J, Cheema G, *Decentralization in developing countries: A review of recent experience*, World Bank Staff Working Papers Number 581, The World Bank Washington, 1983, 13.

<sup>21</sup> Rondinelli D *et al*, *Decentralization in developing Countries*, 14.

<sup>22</sup> Rondinelli D *et al*, *Decentralization in developing Countries*, 14.

<sup>23</sup> Rondinelli D *et al*, *Decentralization in developing Countries*, 24.

<sup>24</sup> Rondinelli D *et al*, *Decentralization in developing Countries*, 19.

<sup>25</sup> Rondinelli D *et al*, *Decentralization in developing Countries*, 28.

### III. The Three Aspects of Inclusion Explored

#### i. Social Inclusion

The World Bank defines social inclusion as the process of improving the terms for individuals and groups to take part in society.<sup>26</sup> Therefore in order to improve the conditions of those excluded living in low-income housing, inclusive measures must go beyond the physical repair of homes which include: changes in education; changes in job opportunities; greater access to medical facilities; and better public transportation.<sup>27</sup> Social inclusion takes into account that deprivation is more than just poverty.<sup>28</sup>

There are specific aspects of social life that, in order to be geared towards inclusion of the masses, need to be fragmented. This paper will tackle education and health.

#### ii. Education

The Latin maxim *'ignorantia juris non excusa'*<sup>29</sup> connotes that being aware is an unquestionable presumption. Aristotle additionally coined a maxim *'ignorantia iuris nocet'* meaning that absence of the law is harmful. Formal education<sup>30</sup> makes the citizenry conscious of their rights and corresponding obligations and increases their participation in societal development.<sup>31</sup>

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<sup>26</sup> See here: <http://www.worldbank.org/en/topic/socialdevelopment/brief/social-inclusion> on 10 December 2015.

<sup>27</sup> Coleman L, *Social inclusion theory application*, 3-4 Available at [http://dayenu.co/wp-content/uploads/2013/09/coleman\\_laureaedythe\\_theorypaper4\\_social\\_inclusion\\_theory\\_application.pdf](http://dayenu.co/wp-content/uploads/2013/09/coleman_laureaedythe_theorypaper4_social_inclusion_theory_application.pdf) on 10 December 2015.

<sup>28</sup> Coleman L, *Social inclusion theory application*, 3-4.

<sup>29</sup> Ignorance of the law is no excuse.

<sup>30</sup> Even so, education is not restricted to the classroom. There are other avenues where education takes centre stage, for instance in civic education which has propelled awareness prior to elections. "Imparting of family values also creates a key foundation with regards to personal development. This is of essence because the teaching consists of the example of personal action in the daily life of each member which is practically demonstrated as opposed to being stated. It also trains in sociability or co-existence with the rest of the human race. Lastly, it is relevant to the question of construction of personal identity." See more Bernal A, Altarejos F, Rodriguez A, *Family as the primary educator: A sociological study*, Scepter Publishers, New York, 2008, 21-22.

<sup>31</sup> Amartya Sen writes that participation in societal development requires knowledge and basic educational skills. He goes further to give the illustration of denying the opportunity of schooling to female children (or in the wider sense any group of people), which is linked to the immediate contradiction of participatory freedom. See Sen A, *Development as freedom*, Alfred A Knopf Inc, New York, 1999, 32.

The education system in colonial Kenya told a story where negative consequences of fragmentation reigned supreme. The schools were racially stratified or three-tiered, meaning distinct and exclusive learning institutions for Europeans, Asians and Kenyans.<sup>32</sup> Thus, a prima facie bar to unity was observed. For instance, Europeans received better education and better job opportunities- white-collar jobs-, while their African counterparts, on the other hand, had to be forcibly satisfied with a poor quality of education and a restraint on employment choice, which was limited to blue collar jobs.<sup>33</sup> In the Kenya Education Report of 1964 also known as the *Ominde Report*, one of the recommendations was that the national education policy should be consciously directed towards training national unity.<sup>34</sup> This was due to the fact that Kenya had just attained independence and such an atmosphere could not support a racially segregated nation. Independence, in view of the report, signified the birth of the nation and education had the task of uniting the different racial and ethnic groups making up the nation.<sup>35</sup>

Inclusion in education is safeguarded in the Constitution. Firstly, every person has the right to education.<sup>36</sup> Secondly, the meaning of “every person” is explored. Article 53 (1) (b) provides that every child has the right to free and compulsory basic education.<sup>37</sup> Persons with disabilities are assured access to educational institutions and facilities that are integrated into society to the extent compatible with their interests.<sup>38</sup> The marginalised groups are to be provided with special opportunities in educational fields.<sup>39</sup>

Fragmentation in education is brought about when the education system is devolved. The Fourth Schedule of Constitution of Kenya<sup>40</sup> delineates the functions of the national and county government with regard to education. National

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<sup>32</sup> Eshiwani G, *Education in Kenya since independence*, East African Educational Publishers Ltd, Nairobi, 1993, 33.

<sup>33</sup> Eshiwani G, *Education in Kenya since independence*, 17-18.

<sup>34</sup> Ominde S, *Kenya Education Commission Report*, 1964, 7. Available at <http://www.scribd.com/doc/93462935/Kenya-Education-Commission-Report-1964#scribd> on 23 November 2010. This was a recommendation offered in the report as a way to solve the general problems affecting education in Kenya after post-colonial times. It meant that national values would be taught/ instilled (trained) at the classroom level in a bid to forge patriotism in the citizens from a young age.

<sup>35</sup> Sifuna D and Oanda I, *Historical and contemporary trends in the development of education in Kenya: Government policy, gender and regional dimensions*, Jomo Kenyatta Foundation, Nairobi, 2014, 232.

<sup>36</sup> Article 43(f), *Constitution of Kenya* (2010).

<sup>37</sup> *Constitution of Kenya* (2010).

<sup>38</sup> Article 54(b), *Constitution of Kenya* (2010).

<sup>39</sup> Article 55 (b), *Constitution of Kenya* (2010).

<sup>40</sup> *Constitution of Kenya* (2010).

government is responsible for setting standards, curricula, examinations and the granting of charters<sup>41</sup> and the promotion of sports and sports education.<sup>42</sup> The county government is charged with responsibility over pre-primary education, village polytechnics, home craft centres and child-care facilities.<sup>43</sup> In addition there are smaller units that govern the system. These are the National Education Board and the County Education Board. Collectively, the small units have to work in partnership.

Currently, there is a great divide between the public and private system. The divide should be appreciated as a form of decentralisation known as privatisation. Kenya has a number of private schools (primary to university level) that have increased access to education as opposed to the futility of proposing equality in standards. As a matter of fact, what is focused on is an ideal level with regard to admission, examination and open platforms in the world of sports and other co-curricular activities. Private schools provide a positive challenge to the government to step up.<sup>44</sup> In addition, private schools offer the opportunity to acquire an education suited to the specific needs of the individual, for instance Islamic schools offer madrassa classes or a unique fashion of teaching different from the usual ones.<sup>45</sup>

Once again the two must operate in tandem through a system of mutuality. This is observed especially in interschool sports competitions and drama festivals. Secondly, the uniformity in the two main national examinations<sup>46</sup> taken by both private and public students.

### iii. Health

Health status is personal to a human being. It has also fuelled the challenge of inclusion. Historically, people with contagious diseases such as leprosy were ousted from the community.<sup>47</sup> Today, the laws have tried to ensure that no one

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<sup>41</sup> Granted to universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions.

<sup>42</sup> Section 15, 16 and 17 in Part I of *Constitution of Kenya* (2010).

<sup>43</sup> Section 9 in Part II of *Constitution of Kenya* (2010).

<sup>44</sup> Sihanya B, *Devolution and education law and policy in Kenya*, 2013, 27. See here: <http://www.innovativelawyering.com/attachments/Article/19/Devolution%20and%20education%20law%20and%20policy%20in%20Kenya%20working%20draft.pdf> on 26 November 2015.

<sup>45</sup> Some secondary schools offer aviation classes.

<sup>46</sup> Kenya Certificate of Primary Education (KCPE) and Kenya Certificate of Secondary Education (KCSE).

<sup>47</sup> "Leprosy is one of the most discriminated diseases of human history. During the days when a cure

is discriminated against on the basis of their health status.<sup>48</sup> All persons are accorded the highest attainable standard of health.<sup>49</sup> Fragmentation is observed where the function of health is devolved. The national government is in charge of national referral health facilities and health policy.<sup>50</sup> On the other hand, county governments control county health services, in particular county health facilities and pharmacies, ambulance services, and the promotion of primary health care, etc.<sup>51</sup>

Needless to say the provision has some ambiguity, as noted in *Okiya Omtatah Okoiti and another v Attorney General and 6 others*.<sup>52</sup> The succinct points of the

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was yet to be found, it was feared as an incurable disease or God's punishment. For centuries, people affected by leprosy were ousted from their own hometown to be isolated in faraway villages and islands. The stigma against leprosy not only burdened the affected individuals but also their family members." See <http://www.nippon-foundation.or.jp/en/who/message/speeches/2015/9.html> on 27 November 2015.

<sup>48</sup> Similarly and more relatable to today's times is HIV status which has in some instances been a subject of discrimination. "1.6 million Kenyans are infected with HIV, the fourth highest after South Africa, Nigeria and India" See George Okore: How Kenya is Planning to Tackle HIV/AIDS" *Africa Times*, 26 November 2015 <http://africatimes.com/2015/11/26/how-kenya-is-planning-to-tackle-hiv-aids/> on 27 November 2015. Not only is it a subject of discrimination but the HIV-positive patients must also deal with stigma; Consider Jacinta Wangeci's account: she is a single mother of two who has been living with HIV for 11 years, and when it comes to taking her antiretroviral medication: She says "When you're taking these drugs, whether you have food or not you have to take them at the right time. The second challenge is that there is that stigma, where you have a visitor in your house and your time of taking the drugs has come, but you fear for that person to know whether you are HIV or not" See "Lenny Ruvaga: Updated HIV Treatment Guidelines Pose Some Challenges for Kenya" *Voice of America News*, 3 November 2015 available at <http://www.voanews.com/content/updated-hiv-treatment-guidelines-pose-some-challenges-for-kenya/3034570.html> on 27 November 2015. The penalty of discriminating against HIV positive patients has been demonstrated in the case of *V M K v C U E A* [2013] eKLR where the claimant received Ksh 6 million in damages, the learned judge's rationale, among others, was "The blatant confrontation by the Human Resource Office who told her that people with HIV status could not be employed permanently. The testing of HIV status without her consent and the disclosure of her status to third persons without her authority demonstrates the seriousness of the violations and the need to compensate the claimant for the hurt feelings and eventual loss of employment due to HIV status."

<sup>49</sup> Article 43 1(a), *Constitution of Kenya* (2010).

<sup>50</sup> Section 23 and 28, Fourth Schedule, Part I of the *Constitution of Kenya* (2010).

<sup>51</sup> Section 2, Fourth Schedule, Part II of the *Constitution of Kenya* (2010).

<sup>52</sup> [2014] eKLR. The main source of ambiguity was that the meaning of national health referral system was not substantive. The petitioners contested that the literal sense of the phrase should be coined from that given by the World Health Organisation (WHO): a health care delivery system must promote and encourage patients to access the health system through primary care at the community level and only in emergency cases should patients be allowed to access hospital care directly. And that for every referral, there must be a counter referral, and once the reason for referral has been resolved, the patient must be referred back to the originating attending healthcare provider for follow up. The petitioners thus contended that the constitution refers to primary healthcare and not to referral health facilities at county level because counties are responsible for primary health services.

ruling by Justice Isaac Lenaola suggested a plausible remedy. Primarily, there is a need to have the national facilities and county facilities defined so as to know their scope of influence.<sup>53</sup> Further, the national government should build capacity in county facilities. A case in point is that there are only two renowned national referral health facilities: Kenyatta National Hospital and Moi Teaching and Referral Hospital. There is a need to decongest the two so that healthcare is more accessible to all. Currently, many cancer patients have to wait for at least two years to receive subsidised treatment at the Kenyatta National Hospital, the only public facility in the country that provides the services.<sup>54</sup> Building capacity also includes intensifying the training of all medical attendants.

## ii. *Economic Inclusion*

In demystifying how a state comes to be Plato wrote in 'Republic':

'I think a city comes to be...because not one of us is self-sufficient, but needs many things...As they need many things, people make use of one another for various purposes. They gather many associates and helpers to live in one place and in this settlement we give the name of a city.'<sup>55</sup>

Some important concepts are useful in this discussion: firstly man has wants *in need* of satisfaction and secondly, the means to achieve these needs requires the working together of people to build a better society.<sup>56</sup>

Economic inclusion is the term used to describe policies, programmes and interventions targeted at groups of people or places, which are not able to participate in economic life either as a consumer, or producer or both.<sup>57</sup> Another angle of economic inclusion, as defined by the Office of the High Commissioner of Human Rights (OHCHR) under the United Nations, is that everyone regardless of citizenship has the right to work and governments are obliged to take

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<sup>53</sup> The judge ruled that this was a function of the national government as it involves policy making with regards to health.

<sup>54</sup> See here: <http://www.standardmedia.co.ke/health/Article/2000172242/petition-for-free-cancer-treatment-being-considered-by-mps> on 6 September 2015.

<sup>55</sup> Plato (translated by Grube G), *Plato's Republic Book II*, Hacking Publishing Company, Indiana, 1974, 39-40.

<sup>56</sup> This is further described in Plato's Republic where he writes that the first and greatest need is food to sustain life, followed by shelter and clothing. For the city to adequately provide for all these needs men must specialise in different types of labour; for instance, farmers for food, cobblers for clothing and builders for shelter. The end of their labour is to satisfy the needs of all inhabitants of the city. See more *Plato's Republic Book II*, 40.

<sup>57</sup> See here: [www.birmingham.gov.uk/economicinclusion](http://www.birmingham.gov.uk/economicinclusion) on 11 September 2015.

progressive measures to safeguard this right.<sup>58</sup>

Fragmentation is evinced in the Kenyan economical context. The subsequent steps shed more knowledge which tackle what resources, by whom they are owned, how they are used and sustained in a system of fragmentation that brings about economic inclusion.

### Step 1: Managing Resources

Management in this section means the allocation and use of resources. Land has been a subject of contention for many years. The conflict has its basis in the fact that land is a major and finite resource in Kenya.<sup>59</sup> There is therefore a need for equitable distribution.

The vesting of interest of public land, to be held in trust, has been decentralised through devolution. County governments have vested interests in land which at the effective date was unalienated government land, transferred to the State by way of sale, reversion or surrender, land which no individual or community owned and to which no heir can be established by any legal process.<sup>60</sup> On the other hand the national government has vested claims over all minerals and mineral oils, government forests, all roads and thorough-fares, all rivers, lakes and other water bodies as defined by an Act of Parliament; the territorial sea, the exclusive economic zone and the sea bed, the continental shelf, all land between the high and low water marks, any land not classified as private or community land under this Constitution and any other land declared to be public land by an Act of Parliament in force at the effective date or enacted after the effective date.<sup>61</sup> Having these respective interests, it is then their mandate to distribute the land equitably.

Allocation of resources is done following the rules of equity which means that the burden and benefits of revenue collected nationally are to be shared eq-

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<sup>58</sup> OHCHR, *The rights of non-citizens*, United Nations, New York and Geneva, 2006, 29. <http://www.ohchr.org/Documents/Publications/noncitizensen.pdf> on 27 November 2015.

<sup>59</sup> Only 20 percent of the land surface could be classified as medium to high potential land, while the remaining 80 percent is either arid or semi-arid. In the absence of any possibility of elasticity of available land to accommodate an increasing human population, the situation points to the reality of land scarcity, a challenge that is compounded by the critical nexus between land and both subsistence and economic development in the country. See Truth, Justice and Reconciliation Commission, *Final report of the Truth Justice and Reconciliation Commission of Kenya*, 2013, 165.

<sup>60</sup> Article 62 (1) read together with Article 62 (2), *Constitution of Kenya* (2010).

<sup>61</sup> Article 62 (1) read together with Article 62 (3), *Constitution of Kenya* (2010).

uitably between the national government and county governments.<sup>62</sup> Note that the word “equity” is utilised as opposed to equally. Some counties are more developed than others hence the amount of revenue required cannot be the same. For that reason, there are predetermined criteria for the division of revenue. The factors underlined are such as the economic disparity among counties, flexibility in times of emergency, creation of capacity of county governments to perform their functions.<sup>63</sup> To foster economic inclusion, the function of resource allocation is not run by the government alone since once every 5 years the senate makes determinations for the sharing of national revenue among the 47 counties<sup>64</sup> where the people’s participation is called for.<sup>65</sup> Once land has been allocated equitably it then needs to be used efficiently.

Land use needs to be productive as envisaged in John Locke’s writings whereby he defines the nature of property:

‘...every man has a property in his own person: this nobody has right to but himself. The labour of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided, and left it in, he has mixed his labour with, and joined to it something that is his own, and thereby makes it his property.’<sup>66</sup>

The use of land is managed by the National Land Commission.<sup>67</sup> Kenya was in need of a policy that would regulate the land degraded due to overpopulation, overstocking and rural-to-urban migration among others.<sup>68</sup> The National Land Policy (NLP) recognized some key anomalies that needed to be addressed such as the establishment of an appropriate framework for public participation in the development of land-use and spatial plans,<sup>69</sup> and the preparation of land use plans at national, regional and local levels on the basis of predetermined

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<sup>62</sup> Article 202 (1), *Constitution of Kenya* (2010).

<sup>63</sup> Article 203(1), *Constitution of Kenya* (2010).

<sup>64</sup> Article 217 (1), *Constitution of Kenya* (2010).

<sup>65</sup> Article 217 (2) (d), *Constitution of Kenya* (2010).

<sup>66</sup> Locke J, *Second treatise of government*, Hackett Publishing Company, Indiana, 1980, 19.

<sup>67</sup> Its establishment was recommended by the National Land Policy; see its functions on section 233-234, *Sessional Paper No. 3 of 2009*, 55.

<sup>68</sup> “Kenya has not had a single and clearly defined National Land Policy since independence (thus neglecting the land question)... This has resulted in environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict.” Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy*, ix.

<sup>69</sup> Section 104 (f), *Sessional Paper No. 3 of 2009 on National Land Policy*, 24.

goals and integrating rural and urban development.<sup>70</sup> The recommendations in the NLP, when actualised, bring about economic inclusion as people are involved in the ways their land is utilised at all levels.

It is worth noting that for economic inclusion to take place the end of the management activities discussed has to be geared towards common interest.<sup>71</sup> Contrary to aiming at common interest, evils surface such as land grabbing, which was delved into in depth by the Ndung'u Report. Its origins stem from the leading elite circumventing the laws to unjustly enrich their already-full pockets by cutting out land boundaries like a toddler cutting out a slice of birthday cake. The leaders would dish away land to people at their own personal whim whereby land was given out either as a political reward or in return for political loyalty.<sup>72</sup> All this was in total disregard of the public interest. Jean-Jacques Rousseau once found that the one who 'first put a fence around a piece of land which was bigger than what he needed, committed a robbery because he grabbed and declared as his own what used to be common property.'<sup>73</sup>

## Step 2: Promoting Participation through Incentives

The football stadiums are always packed to capacity with adrenaline-injected fans. The height of excitement is at an all time high save for a demise that might occur. But enthusiasm remains constant because the thrill of the football game remains constant. Similarly the economic sphere is in need of an incentive that remains constant.<sup>74</sup> Jomo Kenyatta once declared, 'Let all the people of our country roll up their sleeves in a spirit of self-help to create the true fruits of *uhuru*. This is what we mean by *harambee*.'<sup>75</sup> It alludes to the fact that building a better society is an obligation. The mandatee is each and every Kenyan. The actualisation must be incentivised by:

<sup>70</sup> Section 104(a), *Sessional Paper No. 3 of 2009 on National Land Policy*, 24.

<sup>71</sup> Consider Plato's writing in the Republic that the needs are satisfied for common interest. In addition John Locke gives details on the same point when he writes "...the earth, and all that is therein, is given to men for their wellbeing." See Locke J, *Second treatise of government*, 18.

<sup>72</sup> *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2003, 9.

<sup>73</sup> Oestereich J, 'Land and property rights: some remarks on basic concepts and general perspectives' 24 *Habitat International* (2000), 221-230. See here: [https://learning.uonbi.ac.ke/courses/GPR203\\_001/document/Property\\_Law\\_GPR216-September,\\_2014/Articles/land\\_and\\_property\\_rights.pdf](https://learning.uonbi.ac.ke/courses/GPR203_001/document/Property_Law_GPR216-September,_2014/Articles/land_and_property_rights.pdf) on 25 November 2015.

<sup>74</sup> The idea of constancy can be tied in with step 3 on sustainability discussed below in the paper.

<sup>75</sup> Statement of the President in *African Socialism and its application to planning in Kenya*, Sessional Paper No. 10 of 1965.

- a) Engaging the youth: They are the future. Fundamentally, man's nature seeks to self-perpetuate its species from generation to generation. The Kazi-Kwa-Vijana programme<sup>76</sup> launched in 2007 was an initiative that had its peak when it provided a platform for productivity among youth. It was aimed at the employment of youth in rural and urban areas in labour-intensive public works projects, focusing on smaller projects that can be implemented rapidly, for instance road maintenance sub-projects, small-scale water supply and sanitation, water harvesting, afforestation and waste collection.<sup>77</sup> To sustain this project the Government ensured it had economic capacity through the Youth Enterprise Development Fund. Its mission was to increase economic opportunities for, and participation by, Kenyan youth in nation building through enterprise development and strategic partnerships.<sup>78</sup>
- b) Creating access through transport and communication: Cecil Rhodes had a dream, that one day there would be a transport and communication network stretching from Cairo in Egypt streaming down south to Cape Town in South Africa. Although his driving desire was thirst for power and an insane paternalism, evinced when he averred:

'I contend that we are the first race in the world, and that the more of the world we inhabit the better it is for the human race. Just fancy those parts that are at present inhabited by the most despicable specimen of human being, what an alteration there would be in them if they were brought under Anglo-Saxon influence...if there be a God, I think that what he would like me to do is paint as much of the map of Africa British Red as possible...'<sup>79</sup>

What is of significance is that he realised that such networks enhance influence. Thus his dream to propound the British Empire would be easily applied by virtue of the network. Similarly, economic inclusion thrives where there is a gateway for the spread of influence such as trade integration, creation of awareness and the recognition of the various parts of the country.

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<sup>76</sup> Work for Youth programme.

<sup>77</sup> KaziKwaVijana: Youth Empowerment in Kenya available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAAahUKEwjf8aWV-fPHAhWpKdsKHZHCD0M&url=http%3A%2F%2Fwww.oecd.org%2Fdac%2Fpovertyreduction%2F48869464.pdf&usg=AFQjCNHxk4y7Ouudt1jQlSwCjSiSMiW3lPg&sig2=BQdu27eikI9TzpMTM7WVbQ&cad=rja> on 13 September 2015.

<sup>78</sup> See here: <http://www.youthfund.go.ke/about/> on 13 September 2015.

<sup>79</sup> Cecil Rhodes, *Confession of faith* (1887) available at <http://www.pitt.edu/~syd/rhod.html> on 26 November 2015.

### Step 3: Ensuring Sustainability (Continuation Plans)

One aspect that has been repeated is the trans-generational dimension of resources. The work of our labour will be harvested by our grandchildren and their descendants. And then again there may be nothing to harvest observing the adverse climate change that continues to threaten man's survival day by day.

In a similar vein, preventive measures are put in place in which there will be no reason to keep relighting the fire; instead, it will be a matter of keeping the flame burning. The continuity of steps 1 and 2 is safeguarded in the constitution. Sustainable development is among our national values and principles.<sup>80</sup> Furthermore, there are obligations the state has to follow with regard to conservation of the environment, to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the benefits to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity,<sup>81</sup> and the genetic resources of the communities and **encourage public participation** in the management, protection and conservation of the environment.<sup>82</sup>

The Public Trust doctrine asserts that the government has an inalienable duty to protect our common wealth i.e. air, water, wildlife, public health, etc. We all inherit and own all these together and none of us individually; the guiding factor is to ensure both inter-generational and intra-generational equity.<sup>83</sup> This also reaches to the private domain where the government limits some of the prerogatives of private property in order to protect the common wealth for present and future generations.<sup>84</sup>

The national government is charged with the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular, fishing, hunting and gathering, protection of animals and wildlife water protection, securing sufficient residual water, hydraulic engineering and the safety of dams energy policy. On the other hand, the county government has been tasked with the implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation and forestry. A system of co-operation in which policies made at one level of government are implemented by another level.

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<sup>80</sup> Article 10 (2) (d), *Constitution of Kenya* (2010).

<sup>81</sup> Article 69, *Constitution of Kenya* (2010).

<sup>82</sup> Article 69, *Constitution of Kenya* (2010).

<sup>83</sup> *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2003, 150.

<sup>84</sup> *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2003, 151.

### iii. *Political Inclusion*

With regards to the authoritative sphere of inclusion, fragmentation has been manifest through Devolution and Delegation, a key feature of the Constitution. In addition, concepts such as democracy and the resolving of conflicts that implore public participation in politics, boost the achieving of political inclusion.

## IV. Authoritative Structure

In 1967 an amendment<sup>85</sup> was made to the Independence Constitution that abolished bicameralism and made parliament unicameral in nature. This was because of the leaders, whose opinion suggested that bicameralism promoted division among Kenyans.<sup>86</sup> The reversion to bicameralism has enhanced a tool that will solve the challenge of inclusion. The first function of a bicameral parliament is to enhance the quality of representation in which the need for a second chamber is based on the desire to represent interests for certain specified groups.<sup>87</sup> Secondly, it creates an appellate hierarchy in the enactment of laws.<sup>88</sup> This means that one chamber reviews the laws and decisions of the other. A consistency in the law-making process follows in that there is a reactive-proactive system; and thirdly, it improves the stability of the constitutional structure and political systems and provides a system based on checks and balances.<sup>89</sup> The challenge facing the senate of Kenya at present is to discover ways of participating in the governing process that will justify but not jeopardize its existence.<sup>90</sup> The consequences of abolishing the recently formed Senate will prove disastrous to the nation because it will take the country ten steps back to the excessively infused power into a single unit.

There is discretion given to county governments to fragment their functions: Every county government shall decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so.<sup>91</sup> The

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<sup>85</sup> *Amendment No. 4*(Act No. 19 of 1996).

<sup>86</sup> Kirui K and Murkomen K, *The legislature: Bi-cameralism under the new Constitution*, Constitution Working Paper No. 8, Society for International Development, Nairobi, 2011, 9.

<sup>87</sup> Kirui K and Murkomen K, *The legislature*, 15.

<sup>88</sup> Kirui K and Murkomen K, *The legislature*, 16.

<sup>89</sup> Kirui K and Murkomen K, *The legislature*, 17.

<sup>90</sup> Proctor JH (Jr), "The Role of the Senate in the Kenyan Political System", Institute for Development Studies University College, Nairobi, 415.

<sup>91</sup> Article 176 (2), *Constitution of Kenya* (2010).

duality (national and county governments) poses a need for inter-governmental relations which will enhance harmonious governance. An instance is the County Intergovernmental Forum, which is to be established in every county,<sup>92</sup> responsible for coordination of intergovernmental functions.<sup>93</sup> In a similar vein, there is established a National and County Government Co-ordinating Summit which shall be the apex body for intergovernmental relations.<sup>94</sup> Its functions are for instance, consultation and co-operation between the national and county governments, the promotion of national values and principles of governance and the promotion of national cohesion and unity.<sup>95</sup>

Apart from the legislature, the national executive is mandated to assist in the realisation of harmonious governance. Accordingly, cabinet secretaries are tasked with the mandate to establish national government service delivery co-ordination units, with the approval of the President and by a notice in the Gazette.<sup>96</sup>

## V. Law Making

Devolution splits law-making power between the national and county assemblies.

Delegation is observed in the law-making function of the National Executive. The type of legislation made is termed statutory instrument(s). “Statutory instrument” means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.<sup>97</sup> The convenience is that they are more speedily created than primary legislation. Nonetheless, an Act of Parliament or legislation of a county, that confers on any state organ, state officer or person the authority to make provision having the force of law in Kenya shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and

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<sup>92</sup> Section 54 (2), *The County Government Act* (Act No. 17 of 2012).

<sup>93</sup> Section 54(4) (c), *The County Government Act* (Act No. 17 of 2012).

<sup>94</sup> Section 7(1), *Intergovernmental Relations Act* (Act No. 2 of 2012).

<sup>95</sup> Section (8) (a), (b) and (c), *Intergovernmental Relations Act* (Act No. 2 of 2012).

<sup>96</sup> Section 14 (1), *The National Government Co-Ordination Act*, (Act No. 1 of 2013).

<sup>97</sup> Section 2, *The Statutory Instruments Act* (Act No. 23 of 2013).

scope of the law that may be made, and the principles and standards applicable to the law made under the authority.<sup>98</sup>

The same is observed in the further demarcation of county governments to local authorities, which run the urban areas and cities. The governance and management of urban areas and cities shall be based on principles such as recognition of the principal and agency relationship between the boards of urban areas and cities and their respective county governments including the carrying out by a board of such functions as may be delegated by the county government.<sup>99</sup> Furthermore, it accounts for the institutionalized active participation by its residents in the management of the urban area and city affairs.<sup>100</sup> Fragmentation streams down all the way to village units which are run by village councils. This is a framework that ensures all political units are catered for thus enhancing the inclusion of (the) already-set traditional political units.

A further fragmentation is law by the people. Kenya is a democratic state; democratic as defined by Abraham Lincoln, having a government of the people, by the people, for the people. This is why some of the objectives of devolution are to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them<sup>101</sup> and to recognise the right of communities to manage their own affairs and to further their development.<sup>102</sup> In any case parliamentary law-making power emanates from the people. Presidential power emanates from the people. The sovereign power of the people precedes all authority arising from laws. Its grandeur was discussed by the now retired Justice Aaron Ringera in *Njoya and 6 others v Attorney General and another*:<sup>103</sup>

Indeed it is not expressly textualised by the Constitution and, of course, it need not be. If the makers of the Constitution were to expressly recognize the sovereignty of the people and their constituent power, they would do so only *ex abundanti cautela* (out of an excessiveness of caution). Lack of its express textualisation is not however conclusive of its want of juridical status.<sup>7</sup>

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<sup>98</sup> Article 94(6), *Constitution of Kenya* (2010).

<sup>99</sup> Section 11 (b) (i), *Urban Areas and Cities Act* (Act No. 13 of 2011).

<sup>100</sup> Section 11 (d), *Urban Areas and Cities Act* (Act No. 13 of 2011).

<sup>101</sup> Article 174 (c), *Constitution of Kenya* (2010).

<sup>102</sup> Article 174 (d), *Constitution of Kenya* (2010).

<sup>103</sup> [2008] 2 KLR.

## VI. Reconciliation and the Judicial Role

The clotting process of the wounds of Kenyans continues to be stalled and prolonged due to the outstanding levels of political impunity. It is a shame that the arbitrator may take part as an active member of the gang as pointed out by the Hon. Mr. Justice (Rtd) Aaron Ringera in a presentation, when he asserted that ‘When men and women appointed to the judiciary as judges and magistrates lose sight of these home truths, there begins the reduction of the Temple of Justice to a cave of oppression.’<sup>104</sup> Historically, far from being a bastion of liberty for the citizens against a marauding state, the judiciary came to be seen as a tool of oppression complicit in some of the egregious abuses in the country’s darkest hour.<sup>105</sup> By virtue of the Constitution of Kenya 2010 an objective to reform and determine past injustices for all times sake has been portended. The courts and tribunals are now guided by the principles in Article 159(2): timely justice for all irrespective of status that is administered without undue regard for procedural technicalities as well as the application of alternative dispute resolution mechanisms. The Civil Procedure Act dictates that courts, parties to suits as well as their advocates to assist in the realisation of the Oxygen Rule. This is the just, expeditious, proportionate and affordable resolution of civil disputes.<sup>106</sup>

The best way this has been achieved is the constitutional guarantee of independence of the Judiciary in the exercise of its authority.<sup>107</sup> This minimises the chances of being unduly swayed by the other arms of government or any person. Similarly, independence is the first value in the Bangalore Principles. It asserts that a judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.<sup>108</sup> The second value is impartiality; that a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.<sup>109</sup> It brings to view that justice must not only be done but

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<sup>104</sup> Justice Ringera, “Corruption in the Judiciary”, The World Bank, Washington DC, 25 April 2007, 6. [http://eacc.go.ke/archives/Speeches/Justice\\_Ringera\\_Presentation200407.pdf](http://eacc.go.ke/archives/Speeches/Justice_Ringera_Presentation200407.pdf) on 27 November 2015.

<sup>105</sup> Kiage P, *Essentials of Criminal Procedure*, Law Africa Publishing, Nairobi, 2010, 10.

<sup>106</sup> Section 1A, *Civil Procedure Act* (Act No. 12 of 2012).

<sup>107</sup> Article 160, *Constitution of Kenya* (2010).

<sup>108</sup> Section 1.1, *Bangalore Principles of Judicial Conduct* (2002).

<sup>109</sup> Section 2.2, *Bangalore Principles of Judicial Conduct* (2002).

should manifestly and undoubtedly be seen to be done as espoused in *R v Sussex Justices ex parte McCarthy*.<sup>110</sup>

Therefore, Kenyans must avoid conducting their lives whilst entirely focusing on the rear-view mirror. This was brought out in *Roe v Ministry of Health*<sup>111</sup> by Lord Justice Denning (Master of Rolls) when he averred that ‘we must not look at a 1947 accident with 1957 spectacles.’ The Master of Rolls was describing the unforeseeability of the future and letting bygones be. Amid the resolving of injustices it is good practice to look forward and carry on living to better the society.

## VII. Conclusion and Recommendations

This theme of the paper serves as a recommendation, that in order to realize societal inclusion, fragmentation in the form of decentralisation of some aspects of the social, political and economic spheres is a possible method, as discussed above. Once again, although the spheres were tackled separately they are interlinked therefore inclusion in one sphere leads to the same in the remaining two. Consider the subsequent suggestion; taking note of how there is interplay of the 3 spheres.

Canada has some excellent examples of ways to achieve economic inclusion that are fit for emulation. The first is the Equal Employment Opportunity programme in Vancouver whose aspiration is to recruit and retain a qualified workforce that reflects the diversity of the community, which is linked to an accessible, respectful and inclusive working environment.<sup>112</sup> The scope extends to outsiders, thus the second is the incorporation of immigrants through initiatives to improve their integration in Montréal, attained through creation of awareness of all services, projects and measures for visible minorities, organizations and employers.<sup>113</sup> Therefore, offering equal employment to all (citizens and non-citizens alike) with the aim of societal cohesion brings about an inclusive working environment that respects the social diversity of the populace, and this will inevitably have effects on its political interactions.

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<sup>110</sup> [1924] 1 KB 256.

<sup>111</sup> [1954] 2 All ER.

<sup>112</sup> See here: [vancouver.ca/your-government/diversity-in-hiring.aspx](http://vancouver.ca/your-government/diversity-in-hiring.aspx) on 11 September 2015.

<sup>113</sup> See here: [www.unesco.org/new/en/social-and-human-sciences/themes/urban-development/migrants-inclusion-in-cities/good-practices/economic-inclusion/](http://www.unesco.org/new/en/social-and-human-sciences/themes/urban-development/migrants-inclusion-in-cities/good-practices/economic-inclusion/) on 11 September 2015.

The dynasties in which Kenyans have continued to author a book of lamentations has come to an end. The way forward is through practical actions which are spread out in the laws of our land. We are afforded an avenue to come together and build our nation so that we can foster peace, liberty and unity as phrased in our national anthem. In addition, the practical action must be a realistic approach taken in problem-solving and also holistic, as discussed. It cuts across the socio-economic aspects of the person. Failure to do so will be similar to cutting off tentacle of the octopus yet it locomotes on eight.