

DEFINING THE FACE OF KENYA: THE DYNAMICS UNDER THE 2010 CONSTITUTION FOR DIVERSITY

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TACKGROUND

The Commission finds that during the mandate period the state adopted economic and other policies that resulted in the economic marginalization of five key regions in the country: North Eastern and Upper Eastern; Coast; Nyanza; Western; and North Rift.¹

The constitution of Kenya 2010 represents the climax of a protracted period of agitation for an all-inclusive, responsive and democratic basis of governance. It constitutes a prescription for a united nation whose foundation lies in a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law'.?

While seeking to deliver an 'indivisible sovereign nation' where peace and unity reign, the constitution explicitly recognizes the ethnic, cultural, religious, wender, regional, social and political diversity of the Kenyan people. It seeks to ensure equality and fairness in these various aspects of differentiation through i number of mechanisms some of which include: recognition of diversity; entrenchment of democracy as the basis of governance; national values; a comprehensive Bill of Rights which is supposed to form an integral part of Kenya's democratic state and to act as the framework for social, economic and cultural policies; recognition of the needs of vulnerable members of the society; a representative, open and all-inclusive system of government; openness, equity and accountability in the management of public finance; establishment of an equalization fund to be used to provide basic services to marginalized areas so as to bring them to a level as close as possible to other areas; and establishment of a definite criterion for sharing national resources.

As noted above, the constitution recognizes different manifestations of diversity within the Kenyan society and lays down safeguards to ensure inclusion and participation. While all these manifestations of diversity deserve to be protected through mechanisms that promote inclusion in decision making and

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market forces and natural ones like variation in climatic conditions and endowment with natural resources. Colloquially, these disparities are generally referred to as 'historical injustices' to capture the active role that the state has played in marginalizing certain sections of the Kenyan society or the dormant posture that the state has assumed in instances when a number of natural factors and market forces have worked to the disadvantage of certain communities.

sharing of resources, one aspect that has generated a lot of controversy is the and regional diversity. The constitution requires ethnic and regional balance in political, social and economic spheres. Every public appointment now to be passed through the mangle of an arbitrary test of ethnic and regional balance. Arbitrary, because there seems to be a pervasive sense of uncertainty on what constitutes the exact basis for ethnic and regional balance under the constitution.

As its objective, this paper sets out to discuss the application of the requirement for ethnic and regional balance by arguing for the need for the adoption of a policy by the government and all stakeholders that would clearly define what this balance entails and how it is supposed to be implemented including a monitoring mechanism to ensure effectiveness. Such a policy should define what constitutes ethnic groups and regions; what constitutes a perfect balance; identify whether this is a single but composite test or two tests: ethnic and regional; the extent of its application; relationship between the test (s) in other standards for determining competence, inclusion or participation and enforcement mechanisms.

The absence of a clear policy on the implementation of ethnic and regional balance is likely to create anxiety, disquiet and discontentment among the various ethnic groups and regions that make up Kenya. Such a policy would provide a basis for objectively examining the commitment of the government towards integration of all ethnic groups and regions in the enterprise of socio political and economic development of Kenya.

1.1. Victims versus Beneficiaries Discourses on ethnic and regional marginalization in Kenya are highly emotive and in most cases degenerate into a debate between self-proclaimed victims and perceived beneficiaries. There does not seem to exist a nationwide narrative of who has been marginalized along ethnic or regional lines. In different contexts everyone is a beneficiary and a victim depending on the prism through which the analysis is made. For instance, while certain ethnic

groups like Kikuyus and Kalenjins from former Central and Rift Valley Provinces, respectively, are traditionally viewed as beneficiaries of lopsided state policies on account of their ascendancy to the presidency of the country, a number of commentators have noted instances of perception of marginalization within these communities and regions.?

The Truth, Justice and Reconciliation Commission of Kenya (TJRC) noted various instances when Kikuyus and people from the former Central Province claim to be victims of marginalization. In its final report, the Commission recorded perceptions of marginalization among residents of Nyandarua who feel left out following the murder of J.M. Kariuki, an influential political figure from the region. Further speaking of Central Province, the report noted that following the death of Kenyatta (Kikuyu) and his subsequent succession by Moi (Kalenjin), '...testimonies were received to the effect that the region's Central Province's] fortunes dwindled under President Moi, with social infrastructure being degraded and the vast majority of elites excluded at the top...' In relation to Kalenjins and the residents of Rift Valley, the report noted that ... [r]esidents

1. DIAGNOSING INEQUALITY IN KENYA The Commission finds that Kenya entered the era of independence with heightened sense of ethnicity that continued to divide rather than unite the country. However, ruling elites in independent Kenya did not have the political will or commitment to create a truly democratic and prosperous Kenya for all its citizens. The result was the worsening of ethnic relations such that by 2007 long standing grievances erupted into an unprecedented scale of violence,

According to the 2009 Census, Kenya has a population of over 38 million people. This population is geographically distributed in an uneven pattern throughout the country. The composition of the Kenyan society shows wide disparities in the economic, social and political fields. These disparities are the result of a number of factors which include deliberate skewed state actions,

Joshua Kivuva, 'The Political Dynamics of Regional Disparities and Marginalisation in Kenya' in Friedrich-Ebert-Stiftung (ed) *Regional Disparities and Marginalisation in Kenya*, Elite Prepress, 2012

See TJRC, Report of the Truth Justice and Reconciliation Commission, Vol. IIB, p. 68-69 for a discussion on the meaning and origin of this phrase. See generally, Joshua Kivuva, 'The Political Dynamics of Regional Disparities and Marginalisation in Kenya' in Friedrich-Ebert-Stiftung (ed) *Regional Disparities and Marginalisation in Kenya*, Elite Prepress, 2012 TJRC, Report of the Truth Justice and Reconciliation Commission, Vol. IV, p. 48 TJRC, Report of the Truth Justice and Reconciliation Commission, Vol. IV, p. 48.

TJRC, Report of the Truth Justice and Reconciliation Commission, Vol. IV, p.58. Kenya National Bureau of Statistics, 2009 *Population and Housing Census Results*:

<http://www.kale.or.ke/docs/PresentationbyMinisterforPlanningrevised.pdf> <accessed on 29th July, 2016 >
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of Rift Valley see themselves as the main "victims" of marginalisation and the Kibaki administration, at least as far as appointments to key positions in public service are concerned'.¹⁰

In a similar context and while discussing intra-ethnic and intra region marginalization, one author notes that:

The reality...is that when the President appoints people from his region or group, these appointments are not representative of the community or the rest as a whole. That is, not every part of the region or ethnic group is included For Kenyatta, even though the Kikuyu and Central Province in general had it majority of those in his cabinet, they were all predominantly from Kiambu, even in Kiambu, the coverage area never went beyond River Chania. Other

of Central Province were marginalised, ¹¹ The author further notes that:

Similarly, during the Moi era, although the centre of power shifted from Central to the Rift Valley Province, not every community or sub-region of the vast Valley benefited. Moi's appointments seemed to have been confined to w districts within the Rift Valley, especially from the Tugen community. There were communities in the Rift Valley and regions of the province that were marginalised as the rest of the country...A similar scenario has emerged during the Kibaki era. Although Central Province (and the wider Gikuyu, Embu and Men Association communities) seems to have benefited more, Kibaki's appointment seem to be influenced more by class and his "old school and golf buddies cul than by pure regionalism or ethnicity. Many of his appointees, especially in his first term, were the so-called "old golf buddies" of Muthaiga Club, especially from the Mount Kenya region. Others, especially within the Meru community seem to come from only one part of the wider Meru. The rest of the Meru communi claims marginalization like any other community in the country. ¹² A number of factors could be identified to rationalize the key impediment to the development of a consensus on marginalization in Kenya.

First, many do not view the state as an impartial and responsive custodian of the welfare of all communities and regions. There has not been any consistent and

concomitant effort on the part of the state to investigate and recognize the potential, special needs and plight of its people in a way that is blind to ethnicity and regional affiliation.

Second despite skewed benefits to certain sections of the Kenyan society, the impact of such benefits is diluted by widespread poverty, dilapidated standards of infrastructure, misappropriation and unequal distribution of such benefits to such an extent that development among the 'favoured' cannot be said to have Hached the optimal level.

Third, politics in Kenya is predominantly organized along ethnic lines with different ethnic groups competing against each other either individually or through transient ethnic coalitions. Thus, debates about policies and ideologies among political parties more often than not are interpreted as manifestations of ethnic agenda veiled as national causes. These parties are headed by ethnic chiefs who enjoy near absolute support from their communities and are seen as champions of ethnic causes by members of their ethnic groups.¹³ This has led to a presumption of confluence in the interest of the political figures and the ethnic groups from which they come to an extent that all their actions are seen those of their ethnic group and any attack at them is seen as an attack on the entire ethnic group. They embody the welfare and interests of their ethnic Kroups.

This tag of war between self-proclaimed victims and perceived beneficiaries was recently staged at the Senate when the house was debating a motion for the establishment of a public university in each of the 47 Counties. The body of the motion read: ¹⁴

That, aware that during the first years after independence the best equipped public schools were established in certain regions of Kenya to the exclusion of other regions, resulting in such regions having undue advantage in producing educated manpower; appreciating that the introduction of the devolved system of Government in the Constitution of Kenya, 2010, was aimed at achieving equalization of development and other opportunities, including education across the country; noting that the Government has lately embarked on establishing more public universities in the country and further concerned that the majority of the public universities are currently concentrated in a few regions of the country to the exclusion of the rest of the country; the Senate urges the Government to take urgent and immediate steps to ensure that there is equitable distribution of universities in the country and to ensure that at least one public university is established in every county in Kenya before the expiry of the term of the current

Government. The stage for the duel was set by the mover of the motion,

Senator Khalwale.

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TJRC, Report of the Truth Justice and Reconciliation Commission, Vol. IV, p. 49. Joshua Kivuva, 'The Political Dynamics of Regional Disparities and Marginalisation in Kenya' Friedrich-Ebert-Stiftung (ed) *Regional Disparities and Marginalisation in Kenya*, Elite Prepress, 2012 Joshua Kivuva, 'The Political Dynamics of Regional Disparities and Marginalisation in Kenya' in Friedrich-Ebert-Stiftung (ed) *Regional Disparities and Marginalisation in Kenya*, Elite Prepress,

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2012.

Adams Oloo 'Marginalisation and Conflict in Kenya' in Friedrich-Ebert-Stiftung (ed) *Regional Disparities and Marginalisation in Kenya*, Elite Prepress, 2012. This motion was unanimously passed on 8th May, 2013.

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The contribution by Senator Kagwe, Nyeri County, and the response Senator Machage, Migori County, as well as those of Senator Kajwang, Home Bay County, reflected the spirit of the debate.

Sen. Kagwe: Mr. Speaker, Sir, I rise to support this Motion with a proviso the language so described in the Motion because I prefer to support something from a positive perspective rather than from a negative one... let us put things in perspective because when you say that ... [universities are]... concentrated in few regions at (sic) the exclusion of others, it connotes certain negative thing Sen. Machage: Mr. Speaker, Sir, at times, it is painful to address historical injustices. At times, it is not easy for the beneficiaries to accept that that happened This House must be explicit and we must be open not because we condemn certain communities in this country, but because we condemn what happened in the contexture of history... We should accept the truth. 16

Sen. Kawang:... marginalization has been structural and deliberate... the Ramay Institute of Advanced Technology (RIAT) was born out of a deliberate effort by the people of that region (Nyanza)... [t]he Kimathi Institute of Science and Technology (KIST), Kiambu Institute of Science and Technology (KIST), the Rift Valley and Coast institutions of technology came after it. However, all those are now universities, except RIAT... This is deliberate marginalization which structural... In the Tenth Parliament, the Member for Juja Constituency ...boasted after we had gone with the President to Ruiru that he was the only Member in the country whose

constituency has five universities. He thought that he will amusing me, but this was very painful to me. This was very painful, but it is the truth... That is all in one constituency. However, in my county, there is no college or university...¹⁷ which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard

to all the circumstances, ethnic hatred is likely to be stirred up. (2) Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both. (3) In this section, "ethnic hatred" means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. The National Cohesion and Integration Act was enacted as 'an Act of Parliament to encourage national cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the National Cohesion and Integration Commission, and for connected purposes. The section cited above prohibits any act or behaviour intended to excite ethnic hatred. Enacted as a result of the ethnic violence that followed the dispute presidential election in 2007, this legislation has been (mis) used in many instances in ways whose effect has been to freeze any discussion about ethnic and regional marginalization. ¹⁹ Thus, any discussion about sensitive issues in Kenya is frowned upon as likely to incite ethnic and sectarian hatred by disturbing the prevailing (dis)order. This was seen in the ban by the Ministry of Education and the Kenya National Drama Festival of a play, 'Shackles of Doom' from being staged at the National Drama Festival, 2013 for containing '[h]ate statements targeting communities... [and] personalities.'²⁰

'Shackles of Doom', a play by Butere Girls High School, was a satirical piece that dramatically portrayed socio-economic domination in Kenya.²¹ The play's message appeared more poignant for using two extreme cases: apparent reference to Kikuyus, traditionally considered dominant and privileged and Turkana, traditionally considered extremely marginalized. The play sought to diagnose marginalization before proposing a formula for national reconciliation and healing. However, the reaction from the Ministry of Education and the

1.2 Hate Speech: Oppressors Charter for Immunity? Section 13 of the National Cohesion and Integration Act: 18

(1) A person who

(a) uses threatening, abusive or insulting words or behaviour, or displays any

written material; (b) publishes or distributes written material; (c) presents or directs the performance in public of a play; (d) distributes, shows or plays, a recording of visual images; or (e) provides, produces or directs a programme;

Hansard (Senate) 7th May 2013 p. 13. Hansard (Senate) 7th May 2013 p. 15-16. Hansard (Senate) 7th May, 2013 p. 29-30. Act No. 12 of 2008; In article 33(2), the Constitution excludes 'propaganda of war', 'incitement to violence', 'hate speech' and 'advocacy of hatred from the scope of the freedom of expression.

See the decision by the Media Complaints Commission of Kenya in *Uhuru Kenyatta v. The Star Publications Limited and Jerry Okungu*, Complaint No. 4 of 2013. *Okiya Omtatah Okiiti v. Attorney General & 2Others* [2013] KLR Shackles of Doom':

<http://www.jambonewspot.com/full-video-shackles-of-doom-as-performed-in-mombasa/> <accessed on 29th July, 2016 >; The 2013 edition of the festival was sponsored by the National Cohesion and Integration Commission with the theme: "Performance for National Healing and Reconciliation", The National Cohesion and Integration Commission, Kenya Schools and Colleges National Drama Festival 2013 Brief:

<http://198.38.90.109/~cohesion/index.php/>

media-centre/news/244-kenya-schools-and-colleges-national-drama-festival-2013 <accessed on 29th July, 2016 >
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complainant, a Presidential candidate in the 2013 elections filed a complaint with the Media Complaints Commission on account of an article appearing in the 1st Respondent's newspaper. The article, among other things, alleged that being Kikuyu and having a Kalenjin as his running mate, the complainant's success in the elections would result in 'the bulk of government appointments... [going] ... to Central and Rift Valley regions... [and] ... that Luos, Luhyas and the Coastal communities would consider seceding from Kenya. The Commission, while finding the Respondents liable on other grounds concluded that references to the various ethnic communities in Kenya... [did not amount to]... hate speech as there were neither derogatory remarks nor negative ethnic terms used.

organisers of the annual event appeared to show that they needed prescriptions for cohesion without a diagnosis. They appeared to say: the malady is too acute to be investigated and revealed to the patient! Just cure it! 22

The Ministry of Education and the Kenya National Drama Festival finally allowed the play to be shown following the public uproar that erupted and perhaps because of

an application to the High Court to either compel the government to allow the play to be staged in its original script or to suspend the Kenya Schools and Colleges Drama Festival 2013 until the application was finally determined.²³ The court declared the ban a violation of the freedom of expression protected in article 33 of the constitution. In its determination the court rightly noted that:

In this case... it is difficult to justify the disqualification... but reference to hate speech often stirs up emotional responses and may be used to limit what is otherwise legitimate expression of ideas which may result as a cover up to assail the freedom of expression protected under the Constitution. Plays are a medium of expression of ideas... Artistic expression is not merely intended to gratify the soul. It also stirs our conscience so that we can reflect on the difficult questions of the day.... I am not convinced that Kenya is such a weak

democracy whose foundation cannot withstand a play by high school student In *Chirau Ali Mwakwere v. Robert M. Mabera and 4 Others*²⁵ the High Court sought to illuminate the application of section 13 of the National Cohesion and Integration Act by stating that:

... reading and applying the plain meaning interpretation of Section 13, I do not find that this provisions simply 'criminalizes' the voicing of historical injustice Section 13 only curtails such freedom of a person who intends to stir up the hatred or having regard to all circumstances, ethnic hatred is likely to be sin It is thus not merely a question about the falsity, truth, popularity or otherwise particular information or expression. It appears to me that the statute laye emphasis on the likely effect of the objectionable information and intention of the

person delivering it rather than on the content of the objectionable expression In *Uhuru Kenyatta v The Star Publications Limited and Jerry Okungu,*" he

1.3 Political Marginalisation

when we struck a deal, that is the URP-TNA [United Republican Party The Party of National Unity] deal, we were already the winners. Politics is a game of numbers... This coming together of those two parties gave us 65% of the votes...look at the voting rationale... Kenya's voting rationale. What does a Kenyan consider before he votes? ... We tend to consider, first, where we come fromtribe... The second consideration is the closeness of where one comes from with the next community or any other community and thirdly religion... to a smart politician will analyse the voting rationale... There are two situations here... [a] realistic (one, and an)...ideal [one)... before you... arrive at the ideal you have

to take cognisance of the real situation... you have got to accept it...

...yesterday the other side... put together many Members of Parliament and small and big parties together but that was an exercise in futility because they are fully aware that we already have the numbers in terms of the voting rationale in the country ... to produce a President and also control Parliament and [the] Senate...²⁷ Judging from their relative individual populations there does not seem to be an immediate threat of one ethnic group dominating the others politically in Kenya.² According to the constitution of Kenya, to win in a Presidential

lection, a candidate must receive more than half of the votes cast and at least 15% of the votes cast in more than half the number of Counties. ²⁹ At face

See Anyang Nyong'o, We Need a Policy to Address our Ethnic Diversity in Public Sectors, 5th August, 2013: <http://www.standardmedia.co.ke/?articleID=2000090184&story>

[the-a-policy-to-address-our-ethnic-diversity-in-public-sectors&pageNo=1](#) <accessed on 11 2013 > *Okiya Omtatah Okiiti v. Attorney General & 2 Others* (2013) eKLR.

Okiya Omtatah Okiiti v. Attorney General & 2 Others (2013) eKLR *Nairobi Petition No. 6 of 2012* (Unreported); cited in

Uhuru Muigai Kenyatta v. Nairobi Na Limited (2013) KIR See the decision by the Media Complaints Commission of Kenya in *Uhuru Kenya*

Publications Limited and Jerry Okungu, Complaint No. 4 of 2013. Chirau Ali Mwakwere's Interview with Citizen TV on 'Cheche': <http://www.youtube.com/watch?v=Ib4RfnXao0> <accessed on 29th July, 2016 >

Nee Society for International Development, 'Readings on Inequality in Kenya: Sectoral Perspectives and Dynamics', 2006: Kenya National Bureau of Statistics, 2009 Population and Housing Census Results:

<http://www.knbs.or.ke/docs/PresentationbyMinisterforPlanningrevised.pdf> <accessed on 29th July, 2016 > Article 138 (4), Constitution of Kenya.

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Kenya

| 70.5

24.1

10.3

7.6

16.0

9 28

22.2

32.9

1:36,13935

1: 10,834 1:719036 1:39,554

Western

89.6

6.5

1.4

1.3

1.6

93.3

25.1

34.1

16.5

value, the provision requiring a Presidential candidate to win more than half the votes cast may appear onerous. And indeed, it may be so for candidate from small ethnic groups. However, for candidates from populous eile groups, a coalition with one or two major ethnic groups would be sufficient Ethnic groups in Kenya vary significantly in population and distribution, The requirement for at least 25% of the votes cast in more than half of the Counties does not constitute sufficient safeguard as the distribution and the delineation the boundaries of the Counties also favours certain regions and ethnic groups

The fear of ethnic domination, while underrated sometimes, has always been a significant concern for almost all ethnic groups in Kenya. At independence negotiations on the constitution had been shaped by the fear of large tribe (personified by KANU) dominating the minorities (personified by KADU). Today, however, the risk of political marginalization is no longer a problem for minority ethnic groups only. It is a worry for every politically active eine group.³² This perpetual fear of

being marginalised politically continues to drive the motor of political organization in Kenya. Ethnic groups are caught in never-ending scheme to outdo one another through multi-ethnic coalitions and mergers.³³

Rift Valley

1:36,481

1:5,788

66.4

24.7

10.4

4.5

10.5

88.3

| 18.3

33.1

17.2

43.8

TO

S

3.2

33.7

1.4 Social Marginalisation Social marginalization in Kenya has mainly occurred in relation to access to social amenities like schools, housing, healthcare, roads, electricity, sewerage and water services and social security among other social opportunities which in one way or another determine the quality of life. The table below illustrates regional inequalities in terms of home ownership, access to infrastructure, access to education and access to health.³⁴

home ownership

0.2

30.4

1:28,569

1:8,819 84.6

14.2

1.4

0.6

5.1

94.0

23.5

32.7

16.9 Nairobi North Eastern Nyanza

1:120, 823

1 : 13,551 87.3

4.4

0.1

0.6

13.2

17.8

4.5

43.8

17.8

10.4

84.7

33.2

71.4

52.0

11.8

33.7

19.3

1:5331

Eastern

85.3

9.9

1:5,760 4.1

96.9 **6.9**

23.3

30.4

11.4

1:20,715 1.51,155 1:33,446 -

Coast

1:5,883 63.8

29.5

0.3

8.1

19.3

71.0

14.4

35.7

| 16.0 Central

73.3

20.4

2.0

11.8

19.2

106.0

37.7

32.2

15.7

Primary

Secondary

Primary **Home Ownership by Region**

Access to Infrastructure Roads (Density Length/

Water (% of households with **pl**ied water in dwelling)

Access to Education

Health Facility to Population 1:7742 Provinces

Electricity (%)

Doctor Patient Ratio Owned

Access to Health Sq. Km)

Enrolment

Pupil-Teacher Rental

Rate(%) Gross

Secondary Ratio

Ratio

Kenya National Bureau of Statistics, 2009 Population and Housing Census Results available at <http://www.knbs.or.ke/docs/PresentationbyMinisterforPlanningrevised.pdf>> Dan Juma,

“Devolution of Power as Constitutionalism: The Constitutional Debate and Beyond in The Kenya Section of the International Jurists (ed), *Ethnicity, Human Rights Democracy and Constitutionalism in Africa* (2008). Philip Ochieng', Democracy Can't be Premised on Numbers Alone, *Daily Nation* (March 30th 2011 Nairobi). See Yash Pal Ghai and Jill Cotrell Ghai (eds), *Ethnicity, Nationhood and Pluralism: Kenya Perspectives*, (Colorprint 2013) Compiled from a various tables and figures appearing in a study by Society for International Development: Society for International Development, *Pulling Apart: Facts and Figures on Inequality in Kenya*, 2004; See also Central Bureau of Statistics, Ministry of Planning and National Development, *Geographic Dimensions of Wellbeing in Kenya: Where are the Poor? From Districts to Locations*, Volume I, 2003.

Table I: Illustration of regional Tagliates

Calculated as an average based on the figures for the Seven Provinces Calculated as an average based on the figures for the Eight Provinces.

16.2

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The government allowed and facilitated the exploitation of the state by individuals from certain ethnic groups and regions and did not put in place measures to ensure the equitable sharing of welfare benefits and opportunities in the country. It is this capture of the state that led to the lopsided implementation of Sessional Paper No. 10 of 1965 which was supposed to provide a platform for the application of African Socialism to economic planning in Kenya. While the Sessional Paper favoured investment in 'high potential areas',³⁸ which naturally translated to areas that had been well integrated into the white settler economy, it called for social justice, equal opportunities for all citizens, elimination of exploitation, discrimination and equitable distribution of benefits as safeguards.³⁹ These safeguards were never implemented leading to distortion in the distribution of benefits and opportunities in favour of ethnic group and individuals who had access to instruments of power.⁴⁰

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Nairobi North Nyanza Rift Western Kenya

Despite the extent of the disparities outlined in the table above, there has not been any corresponding intervention from the government to ensure that social welfare benefits accrue equitably to all. In fact in certain instances the government has been an active participant in the creation of the inequalities.

There exist wide disparities in access to and enjoyment of economic opportunities and benefits in Kenya. The distribution of these benefits and opportunities are skewed in favour of a small elitist group.

1.5 Economic Marginalisation

42.72

0.76

41.08

0.66

Valley

42.58

0.79

42.81 Eastern

26.57

1.48 According to the TJRC, the Provinces and regions that have borne the greatest effect of economic marginalization in Kenya since independence are North Eastern, Nyanza, North Rift, Coast and Western.³⁷ While the TJRC traces back the root of economic marginalization to the colonial rule which introduced the capitalist model while concentrating development activities in particular areas, mainly 'White Highlands', it also highlights the role of the post-independence

45.2

1.61

42.34

0.94

33.77

1.34 **Income Distribution by Province** Proportion (%) of 39.47 government in perpetuating inequalities.

10% of Income accruing

Proportion (%) of 1.07 total Population

Income accruing to bottom 10% of

total Population to top

Eastern

TJRC, Report of the Truth Justice and Reconciliation Commission, Vol. IIB. p.2-3.

1.6 Special Case of Minorities While narratives of ethnic marginalization in Kenya are pervasive, discussion about marginalization in Kenya cannot be complete without a mention of 'minority groups' and 'indigenous groups'. The constitution of Kenya, 2010 defines this group in the context of 'marginalised communities' thus:⁴¹

(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) a traditional community that, out of a 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 (i) 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;

Coast

Central

Provinces

Para 133 of Sessional Paper No. 10 of 1965. Para 4 and 11 of Sessional Paper No. 10 of 1965. Beverline Ongaro and Osogo Ambani, Constitutionalism as a Panacea to Ethnic Divisions in Kenya: A Post 2007 Election Crisis Perspective, in The Kenya Section of the International Jurists (ed), *Ethnicity, Human Rights Democracy and Constitutionalism in Africa* (2008). Article 260, Constitution.

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characterizes them as 'more vulnerable to injustices and violations than other elements of society'⁴⁵ and notes in its findings that:

The Commission finds that over a period of decades the state discriminated

against minority and indigenous communities, specifically those residing in North Eastern, Upper Eastern, Rift Valley and Coast provinces, through emergency laws and regulations that violated their rights to equality before the law and due process

of law. 46

According to article 100 of the constitution, marginalized communities automatically fall within the 'marginalised groups' category. Article 56 the State to put in place affirmative action programmes designed to that minorities and marginalized groups: participate and are represented governance and other spheres of life; are provided special opportunities educational and economic fields; are provided special opportunities for to employment; develop their cultural values, languages and practices, and have reasonable access to water, health services and infrastructure. The constitution defines 'marginalised group' as 'a group of people who, because of law 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).¹²

According to the constitution, ethnic and regional marginalisation may at in at least two ways. First, members of a marginalized community are by this very fact presumed to be marginalized. Second, a factual determination of the effect of discriminatory laws and practices. While these constitutional provisions may provide a framework for the protection of indigenous and minority groups they do not resolve one most single problem that continues to hinder their protection. This is the problem of identification and categorisation in Kenya There are no mechanisms or official criteria for recognizing, ascertaining the number of or monitoring or evaluating the welfare of this group, not even after the promulgation of the new constitution.

According to experts and various reports the following ethnic communities are categorized as indigenous and/or minority in Kenya: Ogiek, Borana, Gabr, Maasai, Pokot, Samburu, Awer (Boni), Sengwer, Endorois, Ilchamus, Elmolo, Munyoyaya, Waata, Somali, Yaaku, Borana, Orma, Rendille, Bajuni, Wardet, Pokomo, Burji, Sanye, Endorois, Kuria, Marakwet, Mwilwana, Kenyan Asians, Muslims, Hindus, Nubians and Turkana.⁴⁴

Writing about 'Minority Groups, Indigenous People and Gross Violation of Human Rights' the Truth Justice and Reconciliation Commission of Kenya

'THE TURNING POINT: THE ADVENT OF AN ERA OF INCLUSION? The 2007 General Elections of Kenya indisputably represents the cataclysm that

awakened the Kenyan society to the need to address ethnic animosity and sectarian rivalry.⁴⁷ While Kenya had experienced such violence in the past, the events that followed the 2007 elections were unprecedented in scope and organization. According to the Commission of Inquiry into the Post-Election Violence, one of the factors that caused or escalated the violence was 'a feeling among certain ethnic groups of historical marginalization, arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services'.⁴⁸

The 2007 election had been popularly viewed as ("Kenya against the Kikuyu" or "41 tribes against the Kikuyu")⁴⁹ with the singular aim of removing President Kibaki from power so as to facilitate the installation of a non-Kikuyu President.⁵⁰ The violence that followed which lasted for around three months led to 1,133 deaths, destruction of public and private property and displacement of approximately 350,000 people.⁵¹ These unfortunate events provided an impetus for Kenya to reflect on its destiny as a nation and ushered in a number of key reforms. The intervention of the Panel of Eminent African Personalities

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Article 260; the grounds as listed in article 27(4) are race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Report of the African Commission's Working Group on Indigenous Populations/ Communities, 2012 pg. 32: www.achpr.org/mechanisms/indigenous-populations/ <accessed on 29th July, 2016 >.

Rangal Lemeiguran and Others v. Attorney General and Others [2006]eKLR; *In the Matter of African Commission on Human and Peoples Rights v. Republic of Kenya* [2013]eKLR; See the decision of the *African Commission on Human and Peoples Rights in Centre for Minority Rights (Kenya) and Minority Rights Group (276/03)* at <<http://caselaw.ihrda.org/doc/276.03/view/>> 14/7/2013; Report of the African Commission's Working Group on Indigenous Populations/ Communities; TJRC, Report of the Truth Justice and Reconciliation Commission, Vol. IIC p. 212 and 216.

TJRC, Report of the Truth Justice and Reconciliation Commission, Vol. IIC p.209 TJRC, Report of the Truth Justice and Reconciliation Commission, Vol. IV.p45. Agreement on the Principles of Partnership of the Coalition Government: <http://www.dialoguekenya.org/> 20/7/13 <accessed on 29th July, 2016 >. Report of the Commission of Inquiry into the Post Election Violence, 2008, p. 23. Adams Oloo Marginalisation and Conflict in Kenya' in Friedrich-Ebert-Stiftung (ed) *Regional Disparities and Marginalisation in Kenya*, Elite Prepress, 2012, p. 36. Sarah Kinyanjui & Grace Maina, Ethnic conflict in Kenya: An Analysis of the Politicization of Ethnicity and the Impact of Free Markets on Ethnic Relations in The Kenya Section of the *International Jurists* (ed), *Ethnicity, Human Rights Democracy and Constitutionalism in*

Africa (2008), p.87; Miguna Miguna, *Peeling Back the Mask: A Quest for Justice in Kenya*, p. 171/172, (2012). Report of the Commission of Inquiry into the Post Election Violence, 2008.

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led to the establishment of the Kenya National Dialogue and Reconciliation Committee with the following agenda:⁵²

- Immediate Action to Stop Violence and Restore Fundamental Rights

Liberties; Immediate Measures to Address the Humanitarian Crisis, Reconciliation, Healing and Restoration; How to Overcome the Current Political Crisis; Long Term Issues and Solutions

Writing about ethnic and regional balance in the appointment of Cabinet Secretaries and Principal Secretaries, the "The Standard's" Managing Editor for Duality and Production observed that:⁵⁶

When leaders of the Maa community say they have no face in the Cabinet, they are stating a fact. When the Mijikenda express the same reservations, they base their claim on facts. When leaders of the Luhya community complain, they are raising issues that need no belabouring. Asian-Kenyans, European-Kenyans, the Ogiek, and the Kuria have not spoken about being side-lined in nominations of Cabinet secretaries. But they may have seen another face of Kenya that may be hidden to the naked eye. It is such doublespeak and double faces that cause alienation, and ethnic discordance, particularly during General Elections. It has been observed that in the appointments to cabinet under the Jubilee Government "[a]t least 11 Cabinet secretaries hail from Mt Kenya and Rift Valley... The two regions also got 16 of the 26 principal secretary appointments'.⁵⁷

Despite the express constitutional provisions requiring ethnic and regional balance a number of issues still remain unclear on the substance of this requirement and its implementation as discussed below.

Agenda 4 on the long term issues and solutions recognized that "Iploverty the inequitable distribution of resources and perceptions of historical injustice and exclusion on the part of segments of the Kenyan society constitute the underlying causes of the prevailing social tensions, instability and cycles of violence.'⁵³ The main issues for consideration under this agenda included undertaking constitutional,

legal and institutional reform; tackling poverty and inequality and combating regional development imbalances; tackling unemployment; consolidating national cohesion and unity; undertaking land reforms; and addressing transparency, accountability and immunity.

To end the on-going violence, the Kenya National Dialogue and Reconciliation process established a coalition government that included the two main protagonists, Orange Democratic Movement and the Party of National Unity through an Act Parliament that amended the constitution to introduce the offices of the Prime Minister and two deputies. 54

The climax of the reform agenda under the Kenya National Dialogue and Reconciliation process came in 2010 when Kenya promulgated a new constitution to replace the independence constitution. This new constitution has numerous provisions that expressly call for regional and ethnic balance. Having now fully come into effect with the election of the first government under the new constitution there have been some disquiet on the efficacy of a number of its provisions including those that require ethnic and regional inclusion. For instance there has been panic among certain ethnic groups who fear being left out of the new government (a Kikuyu President and a Kalenjin Deputy President).55

2.1 One Test or Two? The constitution of Kenya specifically provides for ethnic and regional diversity in the nomination of representatives to Parliament,⁵⁸ formation of political parties,⁵⁹ composition of the national executive;⁶⁰ composition of the public service;⁶¹ composition of the command of the Defence Forces;⁶² composition of the National Police Service;⁶³ and appointments to commissions and independent offices.⁶⁴ This raises the question whether the test for diversity under these provisions is a simple, unitary one or a compound one with two parts? If the test is a simple one then adherence to either ethnic or regional diversity necessarily satisfies the test: If the test is a compound one then there is a requirement for separate adherence to ethnic diversity and regional diversity.

<http://www.dialoguekenya.org/> Annotated Agenda and Timetable 19/7/2013 <accessed on 29th July, 2016 >. <http://www.dialoguekenya.org/> Annotated Agenda and Timetable <accessed on 29th July, 2016 >. The National Accord and Reconciliation Act, repealed. Oscar Obonyo, Musalia Eugene Cabinet Snub Rattles Western, *Standard* (26th May 2013, Nairobi)
Okech Kendo, Looking for Elusive Face of Kenya in the Cabinet, *Standard* (20th July, 2013,

Nairobi). Isaac Ongiri, Uhuru Ruto Hirings Miss Face of Kenya' *Daily Nation* (18 July, 2013, Nairobi). Article 90. Article 91(2)(a). Article 130(2). Article 232 Article 241(4). Article 246(4). Article 250(4). Omolo Joseph Aiki

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of an ethnic group is framed in very loose terms and does not provide clear guidance on how to specifically determine a person's ethnicity.

2.3 Where does the Balance Lie?

In other words, is ethnic balance the same as regional balance?

The constitution uses the conjunction and which signifies that the test compound one necessarily requiring both ethnic and regional diversity as we separate criteria. This conclusion is logical mainly for two reasons. First, although ethnic groups are generally located in specific geographical zones, they do not enjoy absolute homogeneity. Second, there are ethnic groups that are found in more than one region. In the first instance, applying ethnic and regional balance as a single test would disadvantage regions made up of more than one ethnic group. In the second instance, applying ethnic and regional balance a single test would either unfairly benefit ethnic groups found in more than two regions: double benefit or bring about confusion in the determination of which region the ethnic group should be considered to properly belong to 'identity crisis'.

If ethnic balance and regional balance are taken as two tests, the other question that arises is that of hierarchy. While it cannot be said that ethnic units or regions are made up of homogeneous constituencies, it would appear that people in Kenya identify more closely with their ethnic groups compared to their regional classification. As such, the ultimate goal must remain ethnic balance with regional balance only applied as a compromise and a counterbalance,

Although the constitution expressly calls for ethnic and regional diversity, it does not stipulate the magical point at which the balance should be struck. In this regard, the National Cohesion and Integration Act represents the most comprehensive policy of the government so far. Section 7 of the Act prohibits public establishments from employing more than one third of their staff from one ethnic community. This policy has been variously criticized as inappropriate for not

reflecting the true composition of the Kenyan society in terms of ethnic make-up of its population and could give room for overrepresentation of certain ethnic groups. 66

The Act though also requiring ethnic balance in relation to membership of organizations,⁶⁷ access to and distribution of public resources and property ownership,⁶⁸ management and disposal,⁶⁹ is silent on what would constitute ethnic balance in these instances.

2.4 Relationship with other Qualifying Criteria Apart from ethnic and regional balance, the constitution also has requirements for inclusion of other special-interest groups like women, youth, persons with disabilities and older members of the society among others. Additionally, being a free and democratic society, Kenya must allow room for fair competition and merit. The constitution does not indicate how the requirement for ethnic and regional balance should relate to the requirement for inclusion of other special interest groups or the place of merit and fair competition save for appointments to the Public Service.⁷⁰

2.2 What Constitutes Ethnic Group and Region? Ethnic groups and regions are the units for determining ethnic and regional balance under these two tests for inclusion in the constitution. While the constitution talks about ethnic and regional diversity, it does not provide definition of what these two entail.

Do regions refer to former Provinces, former Districts, Counties, Constituencies, sub-counties, Wards, Locations, Sub-Locations or even ethnic groups like 'Luo Nyanza' and what level of connection and interaction with region does one need to be said to be from that region?

What constitutes a person's ethnicity? What is the ethnicity of married women, adopted children and children born of interethnic marriages? And can one have more than one ethnicity for the purposes of ethnic balance?

The National Cohesion and Integration Act defines "ethnic group" as a group of persons defined by reference to colour, race, religion, or ethnic or national origins. This definition though giving indications of the attributes

National Cohesion and Integration Commission, 'Towards National Cohesion and Unity in Kenya: Ethnic Diversity and Audit of the Civil Service', Volume I, 2015; National Cohesion and Integration Commission, 'Briefs on Ethnic Diversity of Public Universities in Kenya', Volume III, 2012; National Cohesion and Integration Commission, 'Ethnic and Diversity Audit of the County Public Service', Volume 1, 2016; National Cohesion and Integration Commission, 'Ethnic Audit of Parastatals in Kenya' Volume 1, 2016; National Cohesion and Integration Commission, 'Ethnic and Diversity Audit of Commissions in Kenya' Volume 1, 2016; National

Cohesion and Integration Commission, *Ethnic and Diversity Audit of Public Universities and Constituent Colleges*, Volume 2, 2016. Section 9. Section 11. Section 12. Constitution, article 232(1).

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While an all-inclusive Public Service is certainly a national good unfortunate that article 232(1)(g) subjects fair competition and merit to the requirement for ethnic balance. Perhaps it would have been better for the constitution to require fair competition and merit as the main goal with the requirement for ethnic balance only being used as a safeguard in instant where there is exclusion or overrepresentation of an ethnic group.

employment) and (2) [prohibition against employing more than one third of a public establishment's staff from one community] of the National Cohesion and Integration Act. This is because two (2) of the current three (3) members of the Commission are Kenyans of the same ethnic background as Prof Nzomo.

The nomination of Dr. Dwasi and Ms. Violet Khadi Mavisi the second and third ranked candidates, would also be offensive of the provisions of the law aforementioned in view of the recent nominations of Mr. Paul Otiende Omollo and Ms. Sarah Serem to serve as the Chairpersons of the Commission on Administrative Justice and Commission on Salaries and Remuneration, respectively. Ms Mavisi and Ms. Serem are both from Nandi County. Consequently, Ms Winfred Osimbo Lichuma, from Kakamega County, is hereby nominated for the position of Chairperson on account of good performance,

regional and gender balance. It is the approval by the Parliament of the nomination of Ms. Lichuma that led in this suit.

1.1 The Petitioners' Case

3. COMMUNITY ADVOCACY AND AWARENESS TRUST & 8 O

ATTORNEY GENERAL⁷¹ This case dealt with the requirement for regional and ethnic balance in the composition of the National Gender and Equality Commission. Section 11 of the National Gender and Equality Commission Act states that:

In short listing, nominating or appointing persons as chairperson and members of: the Commission, the selection panel, the National Assembly and the President shall ensure that no more than two-thirds of the members are of the same gender shall observe the principle of regional and ethnic balance and shall have due regard to the principle of fair representation for persons with disabilities. Having conducted its interviews, the selection panel under the Act forwarded four names to the President for consideration for appointment to the position of Chairperson of the Commission. The names were ranked in the order of their performance in the interview. In a letter dated 19th October, 2011, the President communicated his decision to nominate Winfred Osimbo Lichuma the 6th interested party in the case as the Chairperson. According to the ranking by the selection panel, the 6th interested person had the least score among the four names forwarded to the President for consideration. The letter explained that Ms. Lichuma was nominated on account of competence and regional balance. The letter further explained that:

Although Prof. Maria Wambui Nzomo, [3rd respondent) was the top ranked performer in the interview for Chairperson of the Commission, her nomination would not conform to the requirements of Article 232 (1)(h) [representation of Kenya's diverse communities) and (i) (ii) [affording adequate and equal opportunities for appointment of the members of all ethnic groups) of the Constitution of Kenya,

The crux of the petitioners' case was that the President acted arbitrarily in designing ethnic identity and regional affiliation to the candidates forwarded to him for selection. That while purporting to be guided by the need for regional and ethnic balance, the decision of the President did not explicitly disclose the ethnic identity of all the candidates and the regions where they came from; erroneously assigned some candidates regions and ethnic identities that they had no connection with.

3.2 3rd Interested Party's Case Prof. Maria Nzomo was the 3rd Interested Party in this case. According to the results of the interviews conducted by the selection panel and forwarded to the President, she had scored the highest points. She supported the submissions made on behalf of the petitioners. In her affidavit she stated that she was shocked by the reasons given for the selection of Ms Winfred Lichuma' because at no time during the recruitment process was she asked her ethnic background or region of origin. She argued that the President had wrongly labelled her Kikuyu based on her middle name so as to disqualify her on account of the membership of Lydia Gachoya and Naomi Wangai whose names implied Kikuyu ethnic identity. She stated that though born of a Kikuyu mother, her father was a Kamba and that she was

married to a man from Western Province and ordinarily resides and votes in Nairobi. She argued that in denying her 7(1) [requirement for representation of the diversity of the people of Kenya in

[2012] KLR; see also John Musa Kilonzo & 3Others v. Registrar of Societies [2006] KLR; *The National Alliance Party and another v. The Independent Electoral and Boundaries Commission* [2013] eKLR.

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an opportunity for appointment an account of her wrongly assigned the identity, her 'internationally recognized personal and professional integrity and credibility' had been damaged.

3.3 The Respondent's **Case** The respondent made reference to article 231(1)(g) and article 250(1) the constitution and argued that in appointment and promotion in the public service, competence and merit were subject to the requirement representation of Kenya's diverse communities and representation of membe of all ethnic groups. The respondent further relied on section 7 of the National Cohesion and Integration Act which requires ethnic and regional diversity in public employment and prohibits public establishments from employing more than one third of their work force from one ethnic community.

The respondent argued that regional and ethnic balance is a police prerogative which cannot be determined by a judicial body. That once the selection panel forwards names for consideration to the President, then in about competence do not arise any more: all persons recommended by the selection panel must be taken as equally qualified for nomination.

On the question of how the President determined the ethnicity of the candidates, the respondent submitted that all the candidates submitted their National Identity Cards which identified their home districts. In respecto the 3rd interested party's claim that she was classified Kikuyu on account of her middle name, the respondent argued that she identified herself by that name in official educational documents and that in any case she had admitted that her mother was Kikuyu. She was Kikuyu and her ethnic

background was not a matter of choice for her.

1.5 2nd Interested Party's Case This was the National Cohesion and Integration Commission established under the National Cohesion and Integration Act, 2008 to 'facilitate and promote Fuality of opportunity, good relations, harmony and peaceful co-existence Between persons of the different ethnic and racial communities of Kenya, and to advise the government on all aspects thereof'.⁷²

The Commission filed submissions which though not supporting the position of any candidate in the dispute urged the court to demystify the issues of ethnicity and regional balance as anticipated under Article 232(1)(g), (h) and

of the constitution and section 7(2) of the National Cohesion and Integration Act, 2008.

The Commission argued that the laws have not clearly stipulated the guidelines for determining regional and ethnic balance thereby leaving from for subjective exercise of discretion in the selection of public officers. The Commission called the court forth to determine the following questions: How

ethnicity to be attributed to a person? How does the requirement for ethnic and regional balance relate with the requirement for equal protection and equal opportunity? In attributing ethnic affiliation, what concerns and considerations should be given? How is this to be effected going forward?

3.4 6th Interested Party's Case Among other grounds, the 6th Interested Party argued that her nomination by the President was proper because it subjected competence to integrity and suitability as authorized by the constitution. In response to the argument by the 3rd Interested Party that she had been wrongly identified as Kikuyu, the 6th Interested Party argued that being of mixed parentage, Prof. Nzomo wat entitled to claim the heritage and background of both her parents and, thus, wil a Kikuyu on account of her mother's stated ethnicity.

1.6 Court's Determination The Court dismissed the petition and declared that the decision of the President was neither discriminatory nor contrary to the provisions of the constitution. The Court also rejected the invitation by the National Cohesion and Integration Commission to set out guidelines for determining ethnic and regional affiliation in public appointments. The court threw back the challenge to the

National Cohesion and Integration Commission to take the lead in **leveloping** principles and guidelines for implementing the constitutional **requirement** for ethnic and regional balance.

While admitting that there were no 'Constitutional, legislative or policy **puidelines** on what constitutes ethnic or regional background or how ethnicity **by ethnic** affiliation of a person is to be determined the court shied away **from this** enterprise as a policy issue reserved for policymakers. The court **further** noted that at any rate none of the parties placed before it guidelines or **indicators** to guide the court in this assignment.

By way of explanation, the court made a number of important observations **which** included the following:

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First, the court made a finding that all the persons whose names were forwarded to the President for consideration were qualified, competent and suitable for nomination so that the argument that the 6th interested person was the least qualified could not stand.

Second, the court declared that although competition and merit is the basis for appointments and promotions in the public service, this criterion was subject to the requirement for representation of Kenya's diverse communities and members of all ethnic groups.

Third, that the constitution does not prohibit differentiation or classification on ethnic or regional background as long as such classification or differentiation bears a rational connection to a legitimate government purpose.

Fourth, that the determination of a person's ethnicity or region of origin for the purposes of public appointments is not to be based on the applicant's choice. It must be guided by the desire to build a diverse and inclusive nation: a public good.

Fifth, that an assessment of ethnic and regional diversity is not based on a strict mathematical table or matrix and that in any case the petitioners and the 2nd Interested Party did not demonstrate to the court the existence of any other alternative objective factors or reasons that should have guided the decision of the President.

Sixth, that in the case of mixed parentage it would not be unreasonable for the children of such a marriage to be taken to belong to the ethnic categorization of any of the parents.

Seventh, that a composite test should be adopted in determining ethnicity and regional background based on a person's substantial connection to a place or ethnic group.

Eighth, that the court in discussing these issues was not attempting to lay down guidelines for use in future but was simply highlighting the challenges in implementing the requirement for ethnic and regional diversity in public appointments.

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3.7 Analysis In this case, the court was faced with a very difficult task. There are no clear policies on the implementation of the requirement for ethnic and regional balance and as such a determination by the court ran the risk of straying into the policymaking arena. Appreciating this risk, the court appears to have settled for a very low threshold for determining the constitutionality of the President's decision by discounting its analysis to take into account the difficulty that might have faced the President in making his decision.

From the letter communicating the decision of the President, a number of issues stand out which illustrate lack of a clear understanding on the requirement for ethnic and regional balance.

First, while offering the explanation for the rejection of the 3rd, 4th and 5th Interested Parties, the letter states that their nomination would offend various legal provisions that require ethnic balance since the candidates' ethnic groups were already represented in the same commission (for the 3rd Interested Party) and two other commissions (for the 4th and 5th Interested Parties). However, the letter does not disclose the ethnicity of all the persons under consideration thus leaving room for speculation.

Second, the respondent appears to admit that the ethnicity of the candidates was determined on the basis of their names and information gathered from their national identification documents. While these may serve as useful indicia for determining ethnicity and region of origin, they cannot be conclusive. Although different ethnic groups in Kenya have specific criteria for naming their members there are instances where names are borrowed from other tribes. The use of national identification documents may also lead to arbitrariness in determining regional balance as the determination of regional balance does not appear to be based on smaller administrative units like sub-location, location, division and district which appear on National Identity documents and in any case there is no clear guidance on what constitutes a region for the purpose of regional balance.

Third, in disqualifying the 4th and the 5th Interested Parties the letter stated that

their nomination would offend the requirement for ethnic and regional balance because their regions or ethnic groups already had representation in two other commissions. This raises the question whether the test for ethnic and regional balance should be applied in a particularized way to be achieved for every public establishment or in a generalized way so that representation in one public establishment could be used to offset lack of representation in

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another. This presents opportunities for mischief where it would be possible for particular ethnic groups or regions to reserve for themselves the more lucrative and influential positions and opportunities to the exclusion of the rest.

Fourth, the 5th Interested Party was disqualified on account of coming from the same county as the chairperson of the Salaries and Remunerations Commission. Thus, her 'region' was already represented. In so doing, the President appears to take the requirement for ethnic balance and regional balance as a single test and presupposes that a person's regional identity would necessarily coincide with his ethnicity.

Finally, in conclusion, the letter communicating the decision of the President states that ... Ms. Winfred Osimbo Lichuma... [was) nominated for the position of Chairperson on account of good performance, regional and gender balance. 73 All the candidates under consideration for the position of chairperson were women. As such justifying Ms. Lichuma's nomination on account of gender balance as against fellow female candidates was ridiculous and was perhaps meant to discount any dissatisfaction with the determination of ethnic and regional balance.

4. CONCLUSION AND RECOMMENDATIONS Kenya remains a highly factious society. In a bold fashion, the constitution now seeks to institutionalize ethnic and regional balance. However, ethnic and regional balance cannot be achieved without a clear policy beyond the proclamations in the text of the constitution. This paper argues for the need to adopt a policy in this regard which must of necessity capture the following: correctly provide a diagnosis of manifestations of inequality in Kenya; identify the role of the government as a dispassionate and disinterested custodian of the welfare of all its people; identify and define all aspects of ethnic and regional balance; provide a clear guidance on what constitutes ethnic groups and regions in Kenya; set the

threshold for determining ethnic and regional balance; and establish a transparent mechanism for monitoring implementation of the constitutional requirement for ethnic and regional balance.

(Footnotes) 1 Calculated as an average based on the figures for the Seven Provinces. 2 Calculated as an average based on the figures for the Eight Provinces.