TO WHAT EXTENT HAS THE CONSTITUTION 2010 PROTECTED THE RIGHTS OF THE MINORITY AND MARGINALISED COMMUNITIES.

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The marginal man has been defined as one “poised on the edge of several groups but fully accepted by none of them” (Merton, 1968:319-320).

Marginalised community means; a community that, because of its relatively small population or other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; a traditional community that, out of need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of the Kenya as a whole; an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on hunter or gatherer economy; or pastoral persons and communities, whether they are nomadic or a settled community that, because of its relative geographical isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.¹

In Kenya today there are high levels of disparity between minority and the majority of Kenyan people. This paper will not address the causes of these disparities, but the positive gains offered by the constitution of Kenya 2010.

This is the first time in the history of this country that the right of minorities and marginalized groups have been recognized and included in the supreme law of the country. The state shall have the obligations of putting in place affirmative² action programmes designed to ensure that minorities and marginalised groups; participate and are represented in governance and other spheres of life³. The state will borrow the practice in some countries like Singapore, Malaysia, India where they have in place provisions either in their constitution or electoral laws that promote representation of the historically underrepresented groups. For instance, in Palestinian Legislative Council, a number of seats are allocated to Christian minority. The Constitution has to some extent provided for protection of these groups. There are provisions providing for the representation of the marginalized groups that is; women, person with

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¹ Article 260 of the Constitution 2010
² Affirmative action “includes any measure designed to overcome or ameliorate an inequity or systematic denial or infringement of a right or fundamental freedom.” Article 260 of the Constitution.
³ Article 56 of the Constitution 2010.
disabilities, youth, ethnic and other minorities and the marginalized communities. This is a paradigm shift from the past, when such groups had no say in the governance of this great nation. These are the fruits of a two decade struggle that led to the birth of the Constitution 2010. In Kenya, your right is only guaranteed when “one of your own is in power”, this is the cancer of ethnicity that has eaten this nation right to the bone. However, we are breaking away from this bondage of ethnicity, corruption and marginalization of minority, thanks to the constitution 2010. The constitution came into place with a lot of excitement and euphoria surrounding the benefit that came with.

The bold step taken by the constitution 2010, first is recognition of the minority and marginalized communities, the problems they faced and the provision to eradicate those challenges. In a great departure from the past, all persons are equal before the law and have the right to equal protection and equal benefit of the law. The consequence of this provision is that, all Kenyans, regardless of ethnic or social origin, race or other status will be protected equally. The state and other persons shall not discriminate any person on the grounds of, ethnicity, health or other social status. In order to give full effect to the realization of the right and guaranteed under article 27, the state has the obligation of taking legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individual or groups because of past discrimination.

Prof. Kristin Henrard argued that, the right to identity of minority is central to protection of minority since it is used as the general criterion to evaluate whether and to what extent a certain system of minority protection can be considered as adequate.

Minority issue demands a double approach, namely the prohibition of discrimination and special measures to enable the members of minorities to preserve and develop their own, separate characteristics. From this point of view, I examine the existing constitutional provision to support Prof. Kristin’s argument. Article 27 of the Constitution 2010 state that: “Every person is equal before the law and has the right to equal protection and equal benefit of the law.” It goes further to state that; equality includes the full and equal enjoyment of all rights and fundamental freedoms. Constitution of Kenya 2010, has thereof met the first requirement or

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4 Article 100 of the Constitution.
5 Article 27 of the Constitution 2010.
safeguard. This is what the Prof. Kristin Henrard identifies as one of the pillars or basic principles of a “full fledge” System of Minority Protection and Substantive equality. A system of minority protection must have such provisions for it to be considered as adequate in terms of protecting minorities.

The increasing attention for special measures for members of minorities is further reflected in Article 27 of ICCPR, 1992 United Nation or Ethnic, Religious and Linguistic Minorities (UN Declaration On Minorities). In Kenya today, rules of international law, treaties or convention ratified by Kenya are part of the law of Kenya. Application is thus possible once Kenya ratifies such treaties or covenants. In fact Justice Martha Koome’s ruling on Bankruptcy Cause No.19 of 2010; Zipporah Wangui Mathara. … The judge state in obiter; “The provisions of the Constitution of Kenya 2010 were also invoked, and this ruling would not be complete without a commentary on those submissions. Principally, I agree with the counsel for the debtor that by virtue of the provisions of Article 2(6) of the constitution Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of Kenyan law. Thus the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan law.”

The constitution of Kenya 2010, support the aspect of identity of minority; they have the right to use the languages, and to participate in cultural life, of the person’s choice. This is in line with the ICCPR.

The second pillar advocated by Prof. Kristin Henrard is that, measures designed to protect and promote the separate identity of minority groups. Prof. Kristin says that, a “fully-fledge” system of minority protection consist of a conglomerate of rules mechanism enabling an effective integration of relevant population groups, while allowing them to retain their separate characteristics. Such a system is based on two pillars or basic principles according to Prof. Kristin Henrard. The double track of minority protection was expounded first by the PCIJ in the advisory opinion regarding the minority schools in Albania. The court formulates the aim of minority protection system in the league of Nations as follows:

8 International Convention on civil and political Rights
9 The Constitution of Kenya 2010, Article 2(5) and 2(6).
10 Bankruptcy cause No 19 of 2010, Zipporah Wangui Mathara (Unreported); case digest, by David Majanja (now High Court judge) on The Nairobi Monthly. Vol.1. Issue No.3/December 2010 at page 94-95
11 Article 44 of the Constitution of Kenya.
12 Namely prohibition of discrimination on one hand and measures designed to protect and promote the separate identity of minority groups on the other hand.
“Secure for certain elements incorporated in a state, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from majority, and satisfying the ensuing special needs.”

These mechanisms have been provided adequately by the Constitution of Kenya 2010. One of these mechanisms is Devolution. It is argued that Devolution presents the best opportunity for dealing with marginalization. According to one author commenting on Indian system state thus:

 Федерализм нездоров, когда требуется управлять конфликтами и удовлетворять разные интересы. Федерализм это не только эффективный инструмент для упорядочивания мира и порядка в демократии, но также эффективный инструмент для защиты демократических прав людей в процессе принятия решений на различных уровнях полity.  

It is crystal clear that the minority and marginalized have been given adequate protection. The Constitution of Kenya 2010 introduces the concept of rights based approach to development. Development is no longer a gift but a right which all citizens regardless of their status are entitled. The Constitution recognizes the fact that there are certain vulnerable members of the society who need specific attention and protection. The Constitution thus makes provisions on affirmative action to remedy the injustices meted on the marginalized groups and communities.

The Objects of devolution under Art. 174 (e) of the Constitution is to protect and promote the interests and rights of minorities and marginalised communities. Article 177 (1) (c) provides that County Assembly should consists of the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament. There is also Equalization Fund under Article 204 of the Constitution of Kenya. To that effect, Article 204 (2) obliges the National government to use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible. Under Article 204 (3) (b) the National government may use the Equalisation Fund either directly, or indirectly through conditional grants to Counties in which marginalised communities exist. Under Article 216 (4) relating to the functions of the Commission on Revenue Allocation, the Commission is required to determine, publish and regularly review a policy in which it sets out the criteria by which to identify the marginalised areas for purposes of Article 204 (2).

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It suffice to conclude that; the Constitution of Kenya 2010, has provided for protection of minority and marginalized. However, these benefits can only be reap if the Parliament enact the requisite legislation.

Reference

1. The Constitution of Kenya 2010


4. International Covenant on Civil and Political Rights (ICCPR) 1996; Article 27

5. The United Nation Declaration On Rights Of Person Belonging to National or Ethnic, Religious and linguistic Minorities (UN Declaration On Minorities).

6. The Nairobi Law Monthly; vol 1- Issue No.3/ December 2010 at page 94-95

7. Advisory Opinion Regarding Minority Schools in Albania, 6 April 1935 PCIJ, PCIJ Reports; Series A/B No 64, 1935, 17.

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